IN THE EMPLOYMENT COURT
WELLINGTON

WC 5/09
WRC 41/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MCCAIN FOODS (NZ) LIMITED Plaintiff
AND	SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INCORPORATED Defendant

Hearing: 18 March 2009
(Heard at Napier)

Appearances: Rob Towner, Counsel for Plaintiff
Peter Cranney and Anthea Hughes, Counsel for Defendant

Judgment: 8 April 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issue in this case is whether collective bargaining between the parties should be facilitated statutorily by the Employment Relations Authority. In a determination issued by the Authority on 15 December 2008 (WA 168/08), it concluded that the union ("the SFWU") had established the statutory grounds for facilitation under s50C(1)(b)(i) and (ii) of the Employment Relations Act 2000 ("the Act").

[2] McCain Foods (NZ) Limited ("McCain") has challenged that determination by hearing de novo. This is the first case in which the bargaining facilitation provisions introduced into the principal Act in 2004 have been interpreted and applied by this Court.

Background

[3] The following are the relevant facts. It is unnecessary and would indeed be inappropriate for the Court to determine the merits of the parties' proposals and responses in bargaining. It is the process of bargaining rather than its content with which this case is concerned although it is necessary to consider more than process to detect whether there are difficulties in the bargaining, what they are, and how they might be dealt with.

[4] McCain operates or has operated three vegetable processing plants in New Zealand. One is in Timaru, another was formerly in Feilding but most of its operations have now been transferred to the plant at Hastings with which this case is concerned. Although the McCain plants are managed and operated independently of each other, the union has been party to a series of collective agreements with the same company covering its members at the Timaru and Feilding plants. The union has, however, never previously negotiated a collective agreement with McCain covering its members at the Hastings plant. McCain employs about 150 people at its Hastings plant although not all would be eligible for, or wish to enlist in, union membership.

[5] Union coverage of employees at McCain's Hastings plant has varied over the period of bargaining that began in early June 2006 and has not yet concluded almost 2 years later. Union "density" is currently at a low level. Employees who joined the union immediately before or at the early stages of bargaining have either ceased to be members or have not been replaced by union members when they left work. The union attributes this situation to McCain's antagonism to trade unions, citing allegations of preparedness by the company to favour non-union employees with greater and more frequent remuneration increases and a dispute about access to the plant by union delegates. That dispute concluded with a judgment of this Court in 2008, *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2008] ERNZ 260. McCain denies having an anti-union bias and points to its collective agreements with the SFWU and other unions.

[6] For whatever reason, there is clearly an unusually high level of disagreement between the company and the union but it is unnecessary to determine the details of this and to attribute responsibility for the purposes of this case.

[7] What is apparent, however, is the frustration of individual employee union members and the union in being unable to settle collective bargaining and to be part of a collective agreement. That dissatisfaction has driven them and the union to conclude that they will not make progress in bargaining with McCain without the facilitative assistance of a member of the Employment Relations Authority and the recommendations under s50H that the independent Authority is empowered to make to the parties.

[8] By June 2006, membership of the union at the Hastings plant stood at about 53 and, on 7 June, the union initiated bargaining for a collective agreement covering union members at the Hastings plant. The formal documentation initiating bargaining was accompanied by the union's proposed bargaining process agreement under s32 of the Act. On 7 July 2006, the union asked for the company's response to the bargaining it had initiated and sought to make arrangements to begin the bargaining. Messages left with the company's then plant manager who, it seems to be common ground, did not look kindly on the union or unions generally, remained unanswered.

[9] By a further letter sent on 14 July 2006, the union advised McCain that it did not object to the company implementing wage reviews for union employees while collective bargaining was under way. This was in an attempt to ensure that the wage rates of union members did not fall behind those of equivalent employees who were not unionists because the company was then implementing employee wage reviews. However, increases as a result of wage reviews for union members were postponed for a period while non-members were favoured. By 17 August union membership had decreased from about 53 to around 30. A significant reason for this reduction was that employees had left the union in the hope of receiving wage reviews and increased money.

[10] McCain did eventually respond to the notice initiating bargaining in mid to late July 2006, indicating that it would be represented in the bargaining by an advocate, Paul Weaver.

[11] There were bargaining meetings between the parties on 26 July and 18 August 2006 at which the draft bargaining process agreement was discussed. Bargaining resumed on 24 August 2006 and there was a substantial measure of informal agreement about the content of the bargaining process agreement. This was left to the company to finalise because it had presented an amended draft to the union on 24 August 2006. In the event, the bargaining process agreement was not signed off until 16 April 2008.

[12] At the bargaining meeting on 24 August 2006, the union presented and explained its claims. Company representatives received these but did not respond. This meeting occupied less than a full day.

[13] There was a further bargaining meeting on 13 September 2006 at which Mr Weaver, on behalf of the company, advised the union that it would prefer not to have a collective agreement because of what he described as the company's *"culture"*. Its fall-back position at that time was that if there was to be a collective agreement, it would need to be based on the company's form of individual agreements with non-union employees. A bargaining process agreement was further discussed but not agreed to.

[14] The union was concerned about the significantly lower rates of pay for employees at the Hastings plant as compared to McCain's plant in Timaru. In bargaining, McCain offered wage rates beginning at the statutory minimum of $10.25 per hour and going up to $12.50 per hour. It said that these would be base rates able to be increased in individual cases by performance reviews. The union was concerned that these rates were less than the actual hourly rates of most of its employees. McCain refused to bargain using its Timaru plant collective agreement as a template. Some detail about wage rate classifications was reached. This meeting lasted less than a full day.

[15] There was a further part-day bargaining meeting on 2 November 2006. The company was not prepared to increase its monetary offer and no further progress was made although a further draft collective agreement was proffered by the company and rejected by the union.

[16] The next meeting was on 22 March 2007. It too occupied less than a full day, about 3 hours. By that time it was clear that the statutory minimum hourly wage was to increase to $11.25 on 1 April. Accordingly the company presented the union with a revised offer, its fifth. This was in the form of a draft collective agreement. The union's position was that wage rates were still too low and the proposed collective rates would not have produced a wage increase for the majority of its members. The union did not respond to the company's new offer.

[17] At this time the union considered bargaining to have *"stalled"*. The union turned its attention to an attempt to recruit more members at McCain's Hastings plant. This led to the dispute about access to the plant by union delegates not employed by McCain but by its competitor Heinz Wattie's Ltd. As already noted, the union was successful in this case in the Employment Relations Authority in December 2007 and again when this Court dismissed McCain's challenge on 23 June 2008.

[18] There was a further bargaining meeting on 15 April 2008, albeit in the midst of the access dispute. It too lasted more than half but less than a full day. Bargaining on this occasion was facilitated by a statutory mediator. Remuneration was again the sticking point, the company wishing to have a performance based remuneration increase system outside the collective agreement. By this time the union had adjusted its claim for increased remuneration to 5 percent. As already mentioned, the bargaining process agreement was finally signed off on 16 April 2008. It was agreed that a further revised draft collective agreement would be prepared by McCain and sent to the union.

[19] There was a further bargaining meeting on 2 May 2008, again with the assistance of the mediator. McCain signalled that it was not prepared for wage rates to be bargained collectively and that there would be a performance pay system which

might provide for increases in the following month. The company declined the union's proposal to include performance criteria in the collective agreement. The company subsequently presented the sixth version of its proposed terms of settlement and suggested that union members meet to ratify an agreement. The union bargaining team did not agree, so that what was voted on and rejected by members at a meeting on 13 May 2008 was not ratification of an agreement reached, but rejection of the company's proposals.

[20] There was a further bargaining (half-day) meeting with the mediator present on 16 July 2008. The union confirmed its members' rejection of the company's draft collective agreement version 6. The company reiterated what it described as its *"best offer"*. Effectively this still excluded wage increases from coverage by the collective agreement.

[21] The union's view continued to be that an impasse had been reached. Nevertheless, on 21 July 2008 the union attempted to persuade the company's advocate, Mr Weaver, to meet for bargaining with the mediator present. Mr Weaver's response on 22 July 2008 was to advise that he thought that the parties had exhausted the negotiation and mediation process and the company declined to meet for bargaining without further proposals from the SFWU. Mr Weaver left open the possibility that if the union made a further offer this would be taken by him to the company for consideration.

[22] There was a further bargaining meeting (less than 5 hours) on 27 February 2009, again with the assistance of the mediator. Agreement was reached on some issues for a collective agreement but not on others including, importantly for the union, wage increases and performance reviews. This further bargaining post-dates the Authority's determination so that the Court must consider whether the position between the parties in bargaining has so changed that the essential issues are not what they were when the Authority considered that a referral to facilitation was appropriate. It is true that the parties came significantly closer to settlement on a number of outstanding issues when bargaining in the shadows of both the Authority's determination and this upcoming case in the Court. Some progress was even made in bargaining on the most difficult issue, the performance related

remuneration system. But although the range and number of issues upon which there is both no agreement and no real prospect of agreement has narrowed and reduced, the core stumbling blocks between the parties remain.

[23] There was an emphasis in the company's case on evidence about events which had occurred since the Authority's determination and, in particular, during and following the February 2009 resumed bargaining. Each party has made some concessions to its position but, as at the date of the recent hearing at least, my assessment of the position is that there is still a stalemate in respect of the important remuneration provisions of a collective agreement. This issue has bedevilled the negotiations from the outset. It is central, both philosophically and practically, to both parties in the negotiations. In my assessment there is no current prospect of a resolution of differences by continued bargaining between the parties, even with the assistance of the mediator.

[24] The union has ruled out strike action because of the relatively few members it has at the plant as a proportion of the total workforce and what it considers to be the easy availability of replacement labour to the company.

[25] McCain's preference is not to have a collective agreement or, alternatively, if it is to have one, that such should be based on its own form of individual agreements. Reasons underlying this "cultural" preference are said by the company to include that there has never been a collective agreement at its Hastings plant, that there is not a strong union presence among employees there, that the company treats its employees well, and that the company does not consider that it will be in the interests of it or of its staff members to be bound to a collective agreement. That said, the company acknowledges its obligation in law to enter into bargaining with the union. The company asserts a lack of interest among employees to have a collective agreement although it says it is not opposed in principle to having a collective agreement with the union.

[26] Although the company's principal negotiator, Mr Weaver, referred in evidence to other collective bargainings in which he has been involved or of which he is aware, with similar or longer delays between initiation and settlement, such

information of itself is of some but limited value. That is because of the particular circumstances of each bargaining example that is, even if not unique as all will be almost inevitably, nevertheless highly individual. In the instances cited by Mr Weaver, only one of the parties has tested whether the bargaining may be unduly protracted by seeking a reference to facilitation. Ironically, in that case, there was a referral to facilitation. No doubt all parties to the examples provided, being aware of the law, will have at least considered this statutory procedure, but it would be unsafe to go further and speculate why none bar one has elected to use it. Until this case was determined in the Employment Relations Authority, that body approached those questions conservatively, erring on the side of non-intervention in many cases referred to it. The Authority's approach to applications will no doubt have been considered by parties evaluating whether to expend time and resources on a reference to facilitated bargaining. I am not assisted greatly by comparative references to other negotiations in other industries between different unions and employers and covering different sorts of employees.

The Employment Relations Authority's determination

[27] It concluded, when it investigated the problem, that there were serious difficulties between the parties in concluding a collective agreement. It described the situation as being an impasse and recorded that the employer had put its *"best offer"* forward which had been rejected by union members. It concluded that there had been no further attempts to negotiate because of the stalemate and there was no foreseeable likelihood of progress in the bargaining.

[28] Turning to whether negotiations had been unduly protracted, the Authority considered that the mere lapse of time did not necessarily indicate undue protraction because a number of delays had been explained and were unrelated to the bargaining. The Authority considered, however, that the length of time when compared to the number of meetings held and the period after which negotiations had become stalled, were relevant factors. It concluded that negotiations had become unduly protracted.

[29] Turning to the question of what efforts had been made by the parties that had failed to resolve the difficulties, the Authority noted that there had been at least

seven meetings for negotiation purposes including four at which a mediator from the Department of Labour had tried to assist the parties. The Authority Member reiterated his conclusion of an impasse.

[30] The Authority decided that the union had made out the statutory grounds for facilitated bargaining and directed *"that the negotiations for a collective agreement between the Service and Food Workers Union Nga Ringa Tota Inc and McCain Foods Limited be facilitated in the Employment Relations Authority."*

The legislative scheme and purpose

[31] This case requires an interpretation of new legislation. The Court is required to determine the meaning of the legislative text in light of the legislative purpose[1]. There are a number of indicia within the Act relevant to its broad purposes and to its particular intentions for bargaining, collective bargaining, and their products, collective agreements.

[32] Collective bargaining can be and is usually initiated by unions. As this Court has found on a number of occasions[2], the Act favours collective bargaining and collective agreements over individual employment agreements in relevant circumstances. Indeed, the legislation now requires that collective bargaining is to lead to collective agreements unless there is a genuine reason, based on reasonable grounds, not to[3]. To achieve this objective, the Act provides a number of mechanisms to enable bargaining to progress to settlement. The facilitated bargaining regime at issue in this case is one of these schemes.

[33] On the other hand, the Act recognises that parties to collective bargaining (unions and employers) should reach their own solutions and settle their own agreements without interference or even assistance from outside agencies. The Authority and the Court have no role in setting terms and conditions of employment.

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[1] Section 5(1) of the Interpretation Act 1999.
[2] *Toll NZ Consolidated Ltd v Rail & Maritime Union Inc* [2004] 1 ERNZ 392; *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] ERNZ 224; both followed in *Service & Food Workers Union Nga Ringa Tota v Auckland District Health Board* [2007] ERNZ 553.
[3] Section 33 of theAct.

[34] There must, therefore, be a tipping point at which it can be said that parties themselves are unable to settle a collective agreement, in which case a range of measures, beginning with the benign and concluding with the arguably draconian, come into play. The application in this case may be said to be for benign as opposed to draconian intervention.

[35] The sections of the Act relevant to the interpretation of s50C include the following: Section 3 provides that the object of the Act is *"to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship … by acknowledging and addressing the inherent inequality of power in employment relationships; and … by promoting collective bargaining; and … by reducing the need for judicial intervention …"*.

[36] Section 4 provides that parties to employment relationships are to deal with each other in good faith. Those relationships include a union and an employer (s4(2)(b)) and the circumstances in which good faith dealings must take place include bargaining for a collective agreement: (s4(4)(a)). Manifestation of that dealing includes a requirement to be both *"active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; …"*: s4(1A)(b).

[37] Section 31 sets out the object of Part 5 of the Act (*"Collective bargaining"*) in which s50A to s50I fall. The object of the Part includes: *"to provide that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to;"* (s31(aa)) and *"…to promote orderly collective bargaining; …"* (s31(d)).

[38] Section 32 requires union and employer parties bargaining for a collective agreement to do *"at least"* a number of things including:

- *" the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining,*

that sets out a process for conducting the bargaining in an effective and efficient manner;" (s32(1)(a)) and

- *" the union and the employer must meet each other, from time to time, for the purposes of the bargaining;"* (s32(1)(b)) and

- *"… even though the union and the employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including* [meeting each other from time to time for the purposes of the bargaining and considering and responding to proposals made by each other]) *about any other matters on which they have not reached agreement;"* (s32(1)(ca)) and

- *" the union and the employer … must not undermine or do anything that is likely to undermine the bargaining …"*: (s32(1)(d)(iii))

[39] The requirement in s32(1)(b) to meet from time to time for the purposes of the bargaining does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to: s32(2).

[40] Section 32(3) sets out a number of considerations that are relevant to whether the foregoing good faith behaviours have taken place. These include the provisions of a relevant code of good faith, provisions of any agreement about good faith entered into between particular parties, the proportion of the employer's employees who are members of the union and to whom bargaining relates, and any other relevant matters including *"the circumstances of the union and the employer."* These immediately aforementioned circumstances are further defined in s32(4) as including the operational environment of the union and the employer, and the resources available to those parties.

[41] Section 33 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to do so. Subsection (2) defines the phrase "*genuine reason"* as excluding opposition or objection in principle to bargaining for, or being

a party to, a collective agreement or disagreement about including in a collective agreement a bargaining fee clause under Part 6B of the Act.

[42] The current operative code of good faith promulgated under s35 of the Act, to which the Court may have regard pursuant to s39, includes the following relevant requirements. Consideration should be given to the contents of a bargaining process arrangement including: *"The proposed timeframe for the bargaining process …"*: clause 2.2.i. In this case no such timeframe was agreed to, or recorded as recommended under the code. Nor were the details of when bargaining would take place – the spaces for these details in what was described by one witness as a *"bog standard"* bargaining process arrangement were left blank. The code recommends that the issue be addressed in the bargaining process arrangement clause 2.2.g

[43] After setting out the statutory requirement to conclude a collective agreement unless there is a genuine reason not to based on reasonable grounds, clause 3.3 of the code provides: *"The parties should, therefore, at all stages in the bargaining, act in a way that will assist in concluding a collective agreement."*

[44] Section 5 (*"Facilitation"*) of the code provides that *"Where there are serious difficulties in concluding a collective agreement"*, a party may apply to the Authority for facilitation as has occurred in this case. I note that the test of *"serious difficulties"* is arguably more stringent than the s50B(1) test of *"difficulties"*, although the former follows the wording of the object section s50A(1). I return to this apparent anomaly later in my analysis of the law.

[45] The foregoing are all statutory background considerations. I turn now to the particular provisions in s50A to s50C of the Act inserted by s14 of the Employment Relations Amendment Act (No 2) 2004.

[46] Section 50A is a *"purpose"* section providing materially that the following new sections set out a process enabling a party or parties to collective bargaining who are having *"serious difficulties in concluding a collective agreement"* to seek the assistance of the Employment Relations Authority in resolving the difficulties. As just noted, although the purpose section, (50A(1)) refers to *"serious difficulties"*,

the operative section (50B(1)) refers only to *"difficulties"* in concluding the collective agreement. It is unclear from the statutory words alone which standard Parliament intended to apply. It will be necessary to decide this issue later in this judgment.

[47] Section 50C sets out the grounds on which the Authority may accept a reference under s50B. There are a number of alternative grounds. I refer to all of them because they are all relevant to whether there is to be facilitated bargaining. The first are that a party has failed to comply with the duty of good faith in s4 and the failure was serious and sustained and the failure has undermined the bargaining. The foregoing are all cumulative requirements under s50C(1)(a).

[48] Pertinently for this case, the next alternative, under s50C(1)(b), is that the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. The foregoing are likewise cumulative requirements of this first alternative.

[49] The second alternative, under s50C(1)(c), is that in the course of the bargaining there has been one or more strikes or lockouts and these have been protracted or acrimonious.

[50] The third alternative, under s50C(1)(d), is that in the course of bargaining a party has proposed a strike or lockout and, if it were to occur, such strike or lockout would be likely to affect the public interest substantially. Section 50C(2) defines when the public interest is likely to be affected substantially.

[51] As just noted, the grounds contended for by the union are under s50C(1)(b). The union satisfied the Authority that the bargaining had been unduly protracted and extensive efforts (including mediation) had failed to resolve the serious difficulties that had precluded the parties from entering into a collective agreement.

[52] This was the first reference for bargaining facilitation so that the requirement under s50C(3) relating to the necessity for changed circumstances, before there can be a second or subsequent reference, is not applicable.

[53] What did Parliament intend the statutory tests relevant to this case to mean in practice?

[54] First, under s50C(1)(b)(i) bargaining must have been not merely protracted but *"unduly protracted"*. There must have been efforts to resolve the difficulties that have precluded the parties from entering into a collective agreement, which efforts have failed. Under subparagraph (ii) the efforts (including mediation) that have failed to resolve the difficulties must be *"extensive efforts"*.

[55] The case turns on whether bargaining has been unduly protracted and whether extensive efforts have been made but have failed to resolve the difficulties.

***"Serious difficulties"* or *"difficulties"*?**

[56] As already noted, s50A and s50B appear to use two different standards of difficulty in concluding a collective agreement as a prerequisite to a reference to facilitation. Other relevant content of the statute does not determine the conflict although the other grounds under s50C(1) tend to indicate a requirement for "*serious difficulties*".

[57] In these circumstances I have considered parliamentary background material. As is very often, perhaps even inevitably, the case in this Court's experience, relevant legislative background materials do not provide a sure answer to what was intended. Starting with the most recent and therefore reliable indicator of Parliament's intention, the report of the Select Committee (The Transport and Industrial Relations Committee) on the Employment Relations Law Reform Bill, it was noted:

> *The majority also recommends an amendment to new section 50C(c), as inserted by clause 15, to clarify that facilitation is available where protracted or acrimonious strikes or lockouts occur in the course of*

bargaining. Facilitation should only be used for serious and significant disputes.

[58] The report of the Department of Labour of 22 July 2004, summarising the submissions made to the Select Committee, noted at pp46-47:

> *3* *If the Authority is satisfied that one or more of the grounds for facilitation exist, it must accept the reference. There is no residual discretion.*
>
> *4* *It is expected that all other options for dealing with the issue will have been exhausted before the parties apply for facilitation. In cases where facilitation is available, however, mediation may no longer be effective.*
>
> *5* *It may be necessary for facilitation to occur to prevent a breakdown in the bargaining process.*
>
> …
>
> *7 - 11* *The policy intent underlying the introduction of facilitation was to provide additional assistance for parties who experience serious difficulties in concluding a collective agreement. The entry criteria for facilitation are designed to reflect this intent.*
>
> *The entry threshold is set at a level that will preserve the incentives for parties to settle their dispute, exclude parties who merely wished to use the process to stop strikes or lockouts or further delay bargaining, and ensure that facilitation would only be used for serious and significant disputes.*

[59] Although the Department of Labour's report then addressed facilitation in circumstances where strikes and lockouts had occurred and there were and are several circumstances which may qualify for facilitation, its remarks about the threshold may apply equally to those other circumstances.

[60] Moving back in time, the explanatory note that accompanied the Employment Relations Law Reform Bill when it was introduced to the House provided the following explanation of what were to become sections 50A-50I:

> *To overcome impasses in collective bargaining and facilitate settlement wherever possible, the Bill also enables the Employment Relations Authority to provide assistance to the parties in certain circumstances and make non-binding recommendations for the settlement of matters in dispute between them.*

[61] Interpreting the part of the Act as a whole and reinforced by the background legislative material, I determine that Parliament intended to permit referrals to facilitation in circumstances where parties have *"serious difficulties"* in concluding a collective agreement. Section 50A, although expressed as being a purpose section, sets the standard and the reference to *"difficulties"* in s50B must be read as serious difficulties in concluding a collective agreement consistently with s50A. I conclude this part of the judgment by noting that, in any event, the union did not argue for the lower standard, submitting that its case meets adequately the higher threshold of *"serious difficulties"*.

Other relevant statutory provisions

[62] What is "*unduly protracted"* bargaining? The statute gives no explicit assistance. When determining what is meant by "*unduly protracted"* under s50C(b)(i), the Act's provisions for the duration of a collective agreement are pertinent. The legislation contemplates that collective agreements must be for a specified term and a 3-year maximum term is provided for in the Act (s52(3)(c)). There is a statutory mechanism by which the term of a collective agreement can be extended effectively during a period of subsequent bargaining between the same parties[4]. Where further bargaining begins before the expiry of the term of a collective agreement and is for the purpose of replacing the collective agreement, the expired collective agreement is deemed to continue to operate as such for a further year while bargaining continues. Thereafter, a collective agreement ceases to have effect and employees previously covered who are still in employment are presumed to be on individual agreements the terms of which reflect the expired collective agreement in relevant respects (s61(2)). It is relevant (but certainly not determinative) that Parliament has said that collective agreements may be for up to 3 years' duration and has inferred that up to a year may be necessary for the renegotiation of these.

[4] Section 53.

[63] Although the term of a collective agreement does not of course determine a reasonable period of time to bargain for it, collective bargaining that is stalled after 34 months, when compared to the maximum term of any agreement (36 months), may be seen to be unduly protracted. As the Employment Relations Authority concluded, however, other considerations affect the question of the passing of time. If, as here, it is shown that there have been real attempts to bargain and settle, albeit that the parties' strongly held positions have precluded settlement, the bargaining may also be said in that sense to have been unduly protracted.

[64] "Protracted" bargaining is allowed for by the legislation although this cannot constitute a ground for a reference to facilitated bargaining. Undue protraction (the statutory test) is excessive or disproportionate protraction as opposed to reasonable or expected or common protraction.

[65] Similarly, the *"efforts"* required by s50C(1)(b)(ii) that have failed to resolve the difficulties and have precluded the parties from entering into a collective agreement, must meet the qualification of having been *"extensive"*. This implies having a wide scope, being far-reaching or comprehensive, covering a large area or time range of activities.

[66] The reference to mediation as part of the extensive efforts to resolve the difficulties referred to in s50C(1)(b)(ii) refers to the mediation services conducted under ss144 to 154 of the Act. In relation to collective bargaining in particular, this is dealt with by s144(2)(e) that provides expressly that mediation services may include "*services that assist persons to resolve any problem with the fixing of new terms and conditions of employment.*"

[67] I find that the participation by a mediator in no fewer than four (of the ten) bargaining meetings held between these parties goes significantly towards constituting *"extensive efforts"* under s50C(1)(b)(ii).

[68] So the legislation requires a combination of temporal and activity elements. There must have been unduly protracted bargaining (the temporal element) and

extensive efforts must have been made in the bargaining (the "activity" requirement) that have, nevertheless, failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. One constituent of those extensive efforts must have been mediation assistance. All elements of the tests must have occurred before the grounds under s50C(1)(b) for a reference to facilitation are established.

Outcome of challenge

[69] McCain acknowledges that it is bound to bargain with the union for a collective agreement. But the law requires more than a commitment to bargaining. It says that there is to be a collective agreement as a result of the bargaining. There are indications that the company's fall-back position is that any collective agreement should be in the form of a mirror image of, or at least correspond with, its individual employment agreements with non-union staff performing the same sorts of work as the union members. Although I hold significant doubts as to whether at least the former could really be said to be a collective agreement, it is unnecessary in this proceeding to decide the point and I do not do so. What is for decision is whether the statutory tests for a reference to facilitated bargaining have been met.

[70] I am satisfied that the bargaining over the last 34 months has not only been protracted but it has been unduly protracted in all the circumstances. I am further satisfied that extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. It follows that the Authority may, and in my conclusion should, accept a reference for facilitation of the bargaining in respect of those issues that the parties have not yet settled between them.

[71] McCain's challenge to the determination of the Employment Relations Authority fails and is dismissed. The union has established grounds on which the Authority should accept its reference for facilitated bargaining. That facilitation should begin as soon as possible. To this end a copy of this judgment is to be sent to the Chief of the Employment Relations Authority to enable facilitated bargaining to be arranged.

[72] I note that the Employment Relations Authority reserved costs on the union's application to it. All questions of costs should now be dealt with by this Court. If either party seeks an order, application should be made by memorandum filed and served within 1 month of this judgment with the respondent to it having a further 2 weeks to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 2.30 pm on 8th April 2009