IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 11
WRC 54/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	THE NEW ZEALAND PUBLIC SERVICE ASSOCIATION INC Plaintiff
AND	SECRETARY FOR JUSTICE Defendant

Hearing: 11 and 12 February 2010
(Heard at Wellington)

Appearances: Peter Cranney and Fleur Fitzsimons, Counsel for Plaintiff
A G Sherriff, Counsel for Defendant

Judgment: 25 February 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

Introduction

[1] This case, removed to this Court from the Employment Relations Authority and which must be decided promptly, deals with the entitlement of the defendant as employer to determine unilaterally that bargaining for a collective agreement is at an end. This is not a question which has arisen before.

[2] Decision of the case has important implications. If, in law, the parties are no longer bargaining, the legality of any strike action must be in question. So, too, will the employment status of PSA members and, in particular, whether the terms and conditions of their employment are governed by an expired collective agreement that is nevertheless continuing in force statutorily or, alternatively, whether they are

deemed to be on individual agreements based on the expired collective. If bargaining has ended, can the parties still have recourse to the statutory mechanisms for progressing stalled bargaining including mediation assistance, facilitation of the bargaining process by the Employment Relations Authority or, ultimately, the fixing of terms and conditions of employment by the Authority? And finally, what are the consequences of an end to bargaining if, as both parties want, there is to be a collective agreement?

[3] So the implications of the defendant's contention that bargaining has concluded are significant, both for these parties and generally if such a status can be established by employers or unions in collective bargaining.

[4] The remedies sought by the plaintiff are as follows.

[5] First, it seeks a declaration (in reality a reasoned declaratory resolution of an employment relationship problem) that the defendant is obliged to conclude collective agreements with the union in the collective bargainings that the latter initiated.

[6] The second relief sought is a declaration that the defendant's conclusion and announcement last December that collective bargaining with the plaintiff has ceased, is unlawful. A subset of this remedy is the plaintiff's claim that the defendant is not entitled to say that the plaintiff has refused unreasonably to agree with it that collective bargaining has concluded.

[7] Third, the plaintiff seeks declarations that the defendant has breached ss 4, 32 and 33 of the Act.

[8] Penultimately, the union seeks a declaration that the employer is obliged to continue to bargain collectively with it pursuant to ss 4, 32 and 33 of the Act.

[9] Finally, the plaintiff seeks orders for compliance requiring the defendant to continue to bargain collectively in accordance with ss 4, 32 and 33 of the Act.

[10] The defendant, for her part, has not only defended the proceedings brought by the plaintiff but also seeks particular remedies. These include a declaration that the defendant has complied with her statutory obligations and those under the bargaining process arrangements (BPAs), and that she was therefore entitled in law to conclude and announce that bargaining had ended: a declaration that the plaintiff is withholding unreasonably its consent to the conclusion of bargaining in terms of the BPAs; and a compliance order requiring the plaintiff to agree with the defendant that collective bargaining has ended for each of the intended collective agreements.

Relevant facts

[11] In May 2009 the union served notice initiating collective bargaining for two separate collective agreements with the defendant. Bargaining has taken place on a number of occasions over the following months and although some issues have been agreed, remuneration (both a system for its payment and increases) has been a barrier to settlement of collective agreements. The defendant says that it cannot afford to pay the claims for increased remuneration of PSA members employed by it, and wishes to retain the individualised performance pay system that has been in place for several years for Ministry employees. The union is seeking both increased remuneration and a new collective pay system for its members.

[12] The following is a summary of the history of bargaining from its initiation to the defendant's unilateral declaration of its cessation in mid December 2009. There are two separate collective agreements being bargained for covering different employees within the Ministry although there is a significant degree of overlap between the two sets of negotiations.

[13] The parties have met in bargaining on four occasions (two separate negotiations) over six days. The parties have had further meetings with the assistance of the mediator on one occasion for each of the separate bargainings and on two occasions for the joint bargainings, being on a total of four occasions over four days. There have also been other meetings and telephone discussions which, by the defendant's undisputed account, total 10 miscellaneous meetings and seven telephone calls between the parties' representatives, on a total of 15 occasions.

Since 14 October intermittent and short notice strike action by PSA members in courts has disrupted their operations.

[14] As Mr Cranney submitted, and as this Court is aware from its knowledge and experience of collective bargaining generally, many such negotiations in collective bargaining involve more meetings and other communications and more frequent and disruptive strike action, all over a longer period of time, than in this case. It may be, although I do not know, that the frequency and duration of bargaining in this case is at the lengthy end of the spectrum for the core public service but when compared to other negotiations for collective bargaining generally, it is certainly not of excessive or even unusual proportions.

[15] The defendant has reached the stage where she says that nothing further will be gained by meeting in bargaining while the current stalemate exists, and has announced, both to the union and its affected members, and publicly, that she regards bargaining as being at an end. The defendant does so in reliance on clauses in the parties' BPAs (although called by them "agreements") that are required by the statute to have been and were entered into by the parties after the initiation of bargaining and which, together with relevant requirements of the Employment Relations Act 2000 (the Act), govern the conduct of the collective bargaining. Independently of the BPAs' provisions, the defendant relies on the statute and on common law to legitimise her stance.

The BPAs

[16] These are materially identical for the two separate bargainings. Relevant clauses of these arrangements, which must nevertheless be read both as a whole and in light of the statute, include:

> **JOINT COMMITMENTS**
> Both parties see collective bargaining as falling within the wider context of our relationship which is based on the parties' commitment to;
>
> - Building trust, transparency and openness between the parties
> - Promoting and enhancing staff participation and commitment to Ministry goals
> - Improving communication between the parties

- Providing a mechanism for examining and changing organisational culture
- Providing additional focus for improving productivity and the effectiveness and efficiency of service delivery.

Bargaining also takes place within the context of the third Partnership for Quality Agreement (PfQ3) which commits the parties to meeting the objectives of the Employment Relations Act (ERA) 2000 through the promotion of collective bargaining and union representation. It involves active participation and dialogue between the Ministry, managers and the PSA to:

- enable workers to collectively participate in decisions in their workplaces through the PSA;
- provide for common ownership of plans, issues and problems and to generate solutions taking an interest based or problem solving approach.

The parties support the spirit and intent of the good faith bargaining principles of the Employment Relations Act 2000 (ERA). The parties are committed to a "no surprises" and interest based approach to the bargaining process.

Where one party believes there has been a breach of good faith in relation to collective bargaining, that party shall, as soon as practicable, indicate its concerns to the party (through the lead advocate) allegedly responsible for the breach to enable an explanation to be provided and, if necessary, remedial action to be taken.

…

All individuals involved in the bargaining shall be bound by this agreement.

…

13. Bargaining

To promote orderly bargaining, the guidelines set out below should be followed in the course of the bargaining:

- The parties will adhere to any agreed process for the conduct of the bargaining.
- The parties must consider and respond to proposals made by each other.
- The parties must provide to each other, on request, and in a timely manner, information in accordance with sections 32([e]) and 34 of the Employment Relations Act 2000 that is reasonably necessary to support or substantiate proposals or responses made for the purposes of bargaining.
- The parties will consider the other's proposals for a reasonable period. Where a proposal is not accepted, the party not accepting the proposal will offer an explanation for that non-acceptance.
- Where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give

further consideration to their respective interests in light of any alternative options put forward.

- The parties should attempt to reach an agreed settlement of any differences arising from the bargaining. To assist with this the parties should not behave in ways that undermine the bargaining for the collective agreement.

16. Timeframe for the Bargaining

Both parties have committed to progressing the bargaining as quickly as possible with due regard to process.

22. Process to Apply in Event of Disagreement or Impasse

If disagreement or impasse is reached in the course of bargaining the parties will discuss ways to address this, including:

a) Consideration of the extent to which setting aside the point of disagreement or impasse could still leave the parties with an overall settlement agreement sufficient to meet their joint interests; and/or

b) Requesting a meeting of the Chief Executive of the Ministry and the PSA Secretariat to assist in resolving the disagreement or impasse, noting that such meetings would not constitute a breach of good faith.

c) If bargaining ceases to make progress, or if there is no agreement in terms of a. and b. above then the parties will, prior to any industrial action by either party, attend mediation providing that the mediation can occur within a reasonable timeframe. The parties will agree on the mediation service and mediator to be used.

23. Completion of Bargaining

The parties are committed to the settlement and ratification of collective agreements and will make every effort to conclude bargaining through ratification by PSA members.

In the unlikely event that the processes outlined in section [22],[1] above, do not resolve any impasse and the parties cannot agree on settlement, bargaining may also be concluded:

a) When the parties have considered all available options to assist in concluding a collective agreement and one party advises the other that they consider bargaining has concluded and the other party agrees; or

b) Where the parties agree that there is a genuine reason, based on reasonable grounds, not to conclude a collective agreement settlement.

In the case of a) and b), above, agreement will not be unreasonably withheld where the provisions of Section [22][2] of this agreement have been met.

[1] It is common ground that although the BPAs refer to s "21", this is an error and should read "22".
[2] See footnote 1.

The statutory good faith code

[17] Promulgated under s 35 of the Act, this both guides parties in bargaining and the Court in determining disputed questions about it. Relevant clauses of the code are as follows:

> 1.1 The purpose of this generic code is to give guidance to employers and unions ("the parties") on their duty to act in good faith when bargaining for a collective agreement or variation to a collective agreement under the Employment Relations Act 2000 ("the Act").
>
> 1.5 Bargaining for a collective agreement (including a multi-party agreement) means all the interactions between the parties that relate to the bargaining. This includes negotiations and communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining. Bargaining also includes interactions about a bargaining process agreement.
>
> 2.2 The parties should consider the following matters which may, where relevant and practicable, in whole or in part, make up any such arrangement;
>
> …
>
> l. When the parties consider that negotiation on any matter has been completed, and how that will be recorded
>
> …
>
> p. Any process to apply if there is disagreement or areas of disagreement
>
> …
>
> 2.3 The parties will adhere to any agreed process for the conduct of the bargaining.
>
> 3.9 The parties must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.
>
> 3.14 Where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give further consideration to their respective positions in the light of any alternative options put forward.
>
> 3.15 However, the parties are not required to continue to meet each other about proposals that have been considered and responded to.
>
> 3.16 Even though the parties have come to a standstill or reached a deadlock about a matter, they must continue to meet, consider and respond to each other's proposals on other matters.
>
> 3.17 The parties should attempt to settle any differences arising from the collective bargaining. To assist this, the parties should not behave in ways that undermine the bargaining for the collective agreement.

4.1 Where the parties are experiencing difficulties in concluding a collective agreement they may agree to seek the assistance of a mediator. This could be a mediator provided by the Department of Labour's mediation services. Parties should note that for strikes and lockouts in essential industries there are specific requirements in relation to the use of mediation services.

Relevant statutory provisions

[18] Collective bargaining is an activity governed by a statutory process that is both prescriptive and, in other respects, at the same time facilitative. One example of the prescriptive/facilitative nature of the statute is the BPA that the parties to collective bargaining must conclude after the bargaining is initiated. The requirement to have a BPA with specified contents is an example of the prescriptive elements of the statutory scheme, whilst the freedom allowed to the parties to fashion their own arrangements in a BPA is an example of the statutory encouragement of self-management.

[19] The object of the Act set out in s 3 includes the building of productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship by, among other things, promoting collective bargaining (s 3(a)(iii)) and by promoting mediation as the primary problem-solving mechanism (s 3(a)(v)).

[20] Section 4 requires parties in collective bargaining to deal with each other in good faith including, but not limited to, not misleading or deceiving or conducting themselves in a manner that is likely to mislead or deceive the other, whether directly or indirectly. Section 4(1A)(b) requires parties in collective bargaining to be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

[21] Another object under s 31(d) of the Part is "to promote orderly collective bargaining".

[22] The first substantive section of the Act really in issue in this case is s 32. It provides materially:

32 Good faith in bargaining for collective agreement

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:

(a) 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; and

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

(c) the union and employer must consider and respond to proposals made by each other; and

(ca) 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 doing the things specified in paragraphs (b) and (c)) about any other matters on which they have not reached agreement; and

(d) the union and the employer—

(i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and

(ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and

(iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and

(e) the union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

(2) Subsection (1)(b) does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to.

(3) The matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith include—

(a) the provisions of a code of good faith that are relevant to the circumstances of the union and the employer; and

(b) the provisions of any agreement about good faith entered into by the union and the employer; and

(c) the proportion of the employer's employees who are members of the union and to whom the bargaining relates; and

(d) any other matter considered relevant, including background circumstances and the circumstances of the union and the employer.

(4) For the purposes of subsection (3)(d), circumstances, in relation to a union and an employer, include—

(a) the operational environment of the union and the employer; and
(b) the resources available to the union and the employer.

(5) This section does not limit the application of the duty of good faith in section 4 in relation to bargaining for a collective agreement.

[23] Section 33 is also pertinent:

> **33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to**
>
> (1) The duty of good faith in section 4 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.
>
> (2) For the purposes of subsection (1), genuine reason does not include—
> (a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or
> (b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.

[24] The legislative scheme for bargaining encourages its continuation, even in difficult circumstances, and emphasises that in all but exceptional circumstances, collective bargaining should result in the settlement of a collective agreement between the parties.

[25] Other sections of the Act address specifically how problems in collective bargaining may be dealt with. These include, first in escalating order of seriousness, seeking the assistance of a mediator under Part 10 of the Act. In practice, as in this case, parties may also involve a privately retained mediator instead of one provided by the Department of Labour. Although not in this case because the mediator chosen by the parties has not been engaged by the Chief Executive of the Department of Labour to provide mediation services, but in others, parties may elect to confer on the mediator the power to decide the matters in dispute between them under s 150.

[26] Since 2004, the legislation has also provided additional statutory mechanisms for resolving serious difficulties in concluding a collective agreement by what is called facilitated bargaining in ss 50A-50I of the Act. There are statutory criteria that must be met before a member of the Employment Relations Authority can

facilitate the parties' bargaining. In this case, and for reasons best known to them, neither party has invoked the bargaining facilitation regime.

[27] Finally, in the most serious of cases (as defined by a very high qualifying threshold), the Act provides for the Authority to fix the provisions of a collective agreement, in effect a binding arbitration. There is no suggestion in this case that the qualifying circumstances for such draconian intervention in the bargaining have been met.

Is "bargaining" continuing even now?

[28] Although the defendant announced in early December 2009 her conclusion that bargaining had ceased, both by unilateral proclamation to this effect and by asserting the plaintiff's unreasonable refusal to agree to end the bargaining, the plaintiff says that bargaining has nevertheless continued including as recently as a week before the hearing in this Court. If that is so, it may be difficult to reconcile the defendant's participation in such bargaining with her assertion that it ended two months beforehand and, even more strongly, it may indicate that the plaintiff has not refused unreasonably to agree with the defendant that bargaining is at an end.

[29] Unlike the statutory restrictions on disclosure of communications in and surrounding other mediations,[3] what goes on at mediator-assisted bargaining, and in mediation about collective bargaining, is not privileged or confidential. Indeed, such information may be essential to determine proceedings such as these about the parties' conduct in bargaining and their good faith.

[30] As already noted, the parties have used the services of a private mediator, Geoff Sharp. Whether they were mediations about bargaining, or bargaining with the assistance of the mediator, there were four separate occasions in the latter half of 2009 when Mr Sharp met with and assisted the parties.

[31] The defendant's announcement of the end of collective bargaining was made on or before 10 December 2009. This proceeding, in essence challenging the

[3] Employment Relations Act 2000, s 148.

validity of that assertion, was issued and came before the Court for a preliminary directions hearing before Christmas 2009. There were a number of interlocutory and other preparatory steps to which the parties had to attend during January and early February 2010. These proceedings, the questions at issue in them and, therefore, the defendant's announced and publicised conclusion that, as a matter of law, bargaining had ceased, must have been very much part of the parties' thinking throughout that period.

[32] I deal with the parties' interactions after the 10 December announcement by the defendant of the end of bargaining. There was a further short meeting on 28 January between the leading negotiators for the parties following a telephone call from Richard Wagstaff, the National Secretary of the PSA, to Christine Stevenson, the Acting Deputy Secretary for Justice. At the 28 January meeting the parties' representatives discussed the PSA's proposed pay system that was one of barriers to settlement of the bargaining and the nature, effect and operation of which was a matter of disagreement between the parties.

[33] The evidence then diverges as to what the parties now consider was the nature of their discussions and, therefore, whether these amounted to bargaining or a continuation of the previous bargaining. In the resolution of those conflicts of evidence I have found useful the e-mails that passed between the parties relating to these meetings and, in particular, the mediator's reporting e-mail following the meeting on 4 February which, although the mediator did not give evidence, is nevertheless an account from an independent and knowledgeable participant.

[34] At the end of the meeting on 28 January the parties agreed that they would meet again on 4 or 5 February in the presence of and with the assistance of the mediator.

[35] During the first week of February, also, the PSA continued to conduct meetings with affected members including seeking further mandates to continue with the bargaining. These were obtained after explanations and rejections of the Ministry's last position in the bargaining. Significantly, union members authorised the union to suspend strike action as may be necessary to facilitate a return to

bargaining if what was described as "meaningful progress" was assessed as likely to occur.

[36] The communications between the parties' representatives leading up to the January and February 2010 meetings include the following indicative elements.

[37] The plaintiff's bargaining representatives considered that the meetings, and particularly that arranged for 4 February, were to continue bargaining. E-mails to a member of the defendant's bargaining team, Peter Lafferty, contained phrases such as "informal mediated bargaining" and "PSA agrees to suspend industrial action where we proceed to full and meaningful bargaining." Indeed, an e-mail from Mr Lafferty to PSA negotiator Jim Jones on 1 February referred to the defendant's confirmation of "mediated bargaining" and sought confirmation "that, in line with previous mediated bargaining, industrial action will be suspended while bargaining takes place." On 2 February, also, Ms Stevenson e-mailed Mr Jones about a "mediated bargaining meeting on Thursday" saying, in relation to whether strike action would be suspended, "I was under the impression that our agreement was to meet in mediation on Thursday to progress bargaining …". It must be said, of course, that Ms Stevenson's e-mail noted expressly that the Ministry still took the view that bargaining had ended.

[38] At the meeting of 4 February and after it became clear that the parties were still disagreeing on the fundamental issues, the mediator adopted a tactic that might best be described as taking both parties outside their comfort zones. Each was asked to accept that the other's preferred pay system was to be applied and then to suggest modifications to it that might go some way to meeting its or her objections. I infer that this was, among other things, to assist in identifying common ground, to better understand the other's position, and to identify where there might be areas of compromise. To their credit, and despite their discomfort, the parties adopted the mediator's stratagem and eventually agreed to adjourn their meeting to further consider the other's position and, without making any commitment to a compromise, to consider whether this might be achieved. In the case of the Ministry's negotiators, they wished understandably to investigate costs implications including with the State Services Commission.

[39] There was a discussion about adjourning this proceeding but that was not agreed to, regrettably I have to say apparently on the basis of erroneous information about when an alternative hearing might be able to be provided. The evidence is that the defendant's representatives appear to have relied on advice that this could not be until August 2010. It is very unlikely that this would have come from the Court because even an ordinary two-day fixture can be accommodated long before then and this is a case which has warranted and been allocated a priority fixture in any event. That erroneous position is nevertheless immaterial to the determination of this case.

[40] The mediator's subsequent e-mail to the parties on which I rely particularly in determining the nature of the meeting and the discussions on 4 February, included the following. It recorded that the PSA's Mr Wagstaff had analysed the parties' common ground in their respective bargaining positions. It described the exercise just outlined and then summarised the PSA's points about the Ministry's pay system that the employer wishes to retain but the union wishes to change. The mediator continued:

> I confirm that you wish to reflect (and as necessary do more work on) these ideas in order to determine whether they might form the seed of a discussion going forward. That will take time and I await with real interest your advice whether we can develop either idea in order to break the impasse that presently exists.
>
> We also agreed that even if it did, there are a number of "secondary issues" that need further discussion (productivity, etc) and we should not lose sight of those – however I think we would all agree that if we can get some level of agreement on a pay system going forward, those secondary issues will be a lot easier.
>
> Please pass this note on to your team and feel free to indicate whether, in your view, I have got the flavour of the meeting correct in this note or whether I have got something not quite right.

[41] There is no suggestion that either party has contradicted the mediator's summary as he invited them to do. Mr Wagstaff's evidence was that in the last day or so before the hearing the mediator sent him a text message inquiring how work was progressing.

[42] "Bargaining" is broadly defined in s 5:

> **bargaining**, in relation to bargaining for a collective agreement,—
> (a) means all the interactions between the parties to the bargaining that relate to the bargaining; and
> (b) includes—
> (i) negotiations that relate to the bargaining; and
> (ii) communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining

[43] The leading case determining what is "bargaining" is the judgment of the Court of Appeal in *Christchurch City Council v Southern Local Government Officers Union Inc*.[4] Although that case dealt with whether communications from an employer to employees represented by a union in collective bargaining amounted to the conducting of that bargaining with the individuals rather than their union, the judgment nevertheless contains observations about the nature of collective bargaining between an employer and a union. The Court of Appeal held that the word "bargain" in s 32(1)(d)(ii) means to "negotiate", a narrower concept than the s 5 definition applicable to collective bargaining between employers and unions. The Court concluded that the Employment Court in the *Christchurch City Council* case wrongly applied paragraph (b)(ii) of the s 5 definition to communications between the employer and individual employees, overlooking that the s 5 definition is concerned only with communications between or on behalf of the parties to the collective bargaining.

[44] It follows that whether interactions between employers and unions after the initiation of bargaining under s 42 amount to "bargaining", is to be determined by reference to the s 5 definition of that word.

[45] I conclude that what occurred between the parties as recently as 4 February, and in many respects what led up to the interactions in that meeting, together were "bargaining" in relation to bargaining for a collective agreement. In particular, these included "interactions between the parties to the bargaining that relate[d] to the bargaining", "negotiations that relate[d] to the bargaining", and "communications or correspondence (between or on behalf of the parties before, during or after negotiations) that relate[d] to the bargaining."

[4] [2007] ERNZ 37 (CA).

[46] It follows that, perhaps for understandable employment relations reasons, bargaining has continued between the parties despite the defendant's purported declaration of its cessation in mid December 2009.

Cessation of collective bargaining

[47] The scheme of the Act is essentially that collective bargaining ceases in two ways. The first is upon settlement of a collective agreement that is subsequently ratified. The other way in which bargaining ceases, although it is not so expressed in the legislation, is when a settlement cannot be reached because one or more of the parties has a genuine reason or reasons, based on reasonable grounds, not to conclude a collective agreement.

[48] I do not accept Mr Sherriff's proposition that the issue of unilateral cessation is governed by common law which would allow a party to contractual negotiations to declare unilaterally that party's conclusion that the bargaining is at an end and would not compel further bargaining in the circumstances. That is because Parliament has modified the common law position on contract negotiations to take account of the particular position of collective bargaining in employment relations in New Zealand.

[49] The statutory scheme is that collective bargaining should ordinarily conclude upon the settlement and subsequent ratification of a collective agreement but accepts that in certain circumstances this will not be able to be achieved so that parties do not have to continue to bargain ad nauseam when either or both have a genuine reason to not enter into a collective agreement.

[50] I should note, also and perhaps obviously, that parties to collective bargaining may of course agree to its cessation other than by their entry into a collective agreement but that is not the position here.

Cessation of collective bargaining and the BPAs

[51] The parties' BPAs (referred to by them as agreements) also deal with the question whether and, if so, in what circumstances, one or both of the parties are

entitled to treat collective bargaining as having ceased. This is dealt with at clause 23 of the arrangements as already set out. But before clause 23 becomes operative, the following words "In the unlikely event that the processes outlined in section [22], above, do not resolve any impasse and the parties cannot agree on settlement …" mean that, in the event of a disagreement or impasse in bargaining, the parties must discuss ways to address this. Three of the ways of doing so are set out but I do not read these to be an exhaustive definition of the manner in which this can be done.

[52] Significantly in this case, one of those mechanisms for log unjamming is set out in clause 22(b). Although this states "Requesting a meeting of the Chief Executive of the Ministry and the PSA Secretariat …", I infer that the parties meant more than simply making a request for a meeting. To be an effective circuit-breaker, this must mean the holding of such a meeting and not simply a request for it.

[53] The PSA "Secretariat" is defined by the union's rules as being its two General Secretaries together. I also interpret the BPAs' reference to the "Chief Executive of the Ministry" as being that office holder in person and not, for example, her delegate in bargaining.

[54] Although the evidence establishes that there have been informal meetings involving some of these participants in different combinations, there has not yet been a meeting convened for the purpose of breaking the impasse in bargaining between the Chief Executive herself and the PSA's two General Secretaries together as the BPAs contemplate.

[55] These requirements are not simply ones of form which can be said to be destined to achieve no more than previous meetings or communications between some of the same participants in different combinations. Such a top level meeting is intended by the BPAs to highlight the importance of the personal attributes that the Chief Executive and the General Secretaries together would bring to such a meeting and emphasises the importance of their attempting to make progress where others have been unsuccessful previously in the bargaining. The PSA complains about the Chief Executive's apparent refusal to become involved in any element of the collective bargaining to date. Although, absent any agreed requirement for her to do

so, this would be a matter for decision by the Chief Executive alone, I would observe that doing so even now would mark for her employees, even symbolically, the Chief Executive's commitment to attempt to find a resolution to the current stalemate. But what is relevant in law is the BPAs' agreed strategy of holding such a meeting in the event of an impasse. The Chief Executive should, as a matter of good faith and compliance with the BPAs, now meet with the PSA's Secretariat.

[56] It will only be that if such a meeting or meetings and/or the other strategies contemplated by clause 22 of the BPAs are unavailing, that the defendant is entitled to have recourse to clause 23 of the BPAs.

[57] As does the statute, the clause contemplates that an impasse not able to be resolved by the clause 22 processes will be an "unlikely event". In the absence of settlement of a collective agreement, clause 23 contemplates that "bargaining may … be concluded" in either of two circumstances. The first is when the parties have considered all available options to assist in concluding a collective agreement, that one advises the other that the one considers bargaining has concluded and the other agrees. The second and alternative circumstance in which bargaining can be said to be concluded after unsuccessful recourse to the clause 22 mechanisms is that the parties agree that there is a genuine reason, based on reasonable grounds, not to conclude a collective agreement settlement.

[58] Clause 23 adds, in respect to both of the alternatives just set out, that, where the provisions in clause 22 have been satisfied, agreement will not be withheld unreasonably.

[59] I conclude, for reasons set out previously, that the parties have not considered all options available to assist in concluding a collective agreement so that bargaining cannot be regarded as having been concluded under the clause 23(a) test. It follows, under that test, that the union's agreement to that proposition has not been withheld unreasonably.

[60] As to whether the clause 23(b) test is satisfied in practice, I conclude, for the same reasons, that the PSA has not withheld unreasonably its agreement to the

employer's proposition that there is a genuine reason, based on reasonable grounds, not to conclude a collective agreement settlement. Bargaining cannot be said to have concluded pursuant to the BPAs.

Decision – Statutory compliance

[61] I deal first with the defendant's contention that she is entitled to regard and declare collective bargaining at an end because the statutory test, in effect for doing so, in s 33(1), has been satisfied. What a party in the position of the defendant must establish is that she has a genuine reason, based on reasonable grounds, not to conclude a collective agreement. The defendant has concluded in this case that the parties' bargaining is deadlocked. That is not the same thing as determining not to enter a collective agreement. Indeed, the defendant has throughout expressed the strong view that she wishes to conclude a collective agreement with the plaintiff. That is the defendant's preferred, indeed strongly preferred, means of settling terms and conditions of employment with the substantial number of her employees that are members of the PSA.

[62] So while I accept that the defendant's conclusion that the bargaining is deadlocked is genuine, that does not satisfy the test under s 33(1) for not concluding a collective agreement as the statute otherwise requires.

[63] Alternatively, if the defendant's case is that she has a genuine reason not to conclude a collective agreement, I am not satisfied that this is reached on reasonable grounds in all the particular circumstances of this case.

[64] The union has not withheld unreasonably its agreement with the defendant's position that there is a genuine reason, based on reasonable grounds, not to conclude a collective agreement settlement. That is because it is reasonable for the union to conclude at this stage that although currently deadlocked, the bargaining is not in such a state that, as Mr Sherriff submitted, it would be futile to attempt to continue to bargain ad infinitum.

[65] That is for a number of reasons including the unexceptional duration and intensity of the bargaining to date and the preparedness of the parties to continue to meet with the assistance of a mediator to try to explore options and compromises to achieve the strongly held mutual goal of a collective agreement. A cessation of bargaining other than by concluding a collective agreement has significant ramifications for the parties and the union members in particular. These include what were described in evidence as the four "interests" that were taken into account by the defendant when she decided to treat bargaining as at an end and would flow as matters of important factual and legal consequence from that decision if it were correct.

Comment

[66] The statute provides mechanisms for the resolution of impasses, the application of which in any particular case affects the question whether a party or parties may conclude bargaining without entering into a collective agreement. Although I accept that the extraordinary tests for fixing bargaining under s 50J cannot be said in this case to exist currently, the position would not necessarily be the same if either or both parties sought facilitated bargaining under s 50C. Without determining the question because that might have to be done by the Authority, at least one of the several alternative tests for facilitated bargaining would appear on its face to have been met in this case.

[67] Although I accept the defendant's case that the parties have committed themselves to a prompt conclusion of their bargaining (as set out in clauses 12 and 16 of the BPAs), I am not satisfied that the history of the bargaining and its current state mean that a prompt conclusion cannot still be reached.

[68] Without descending to a qualitative analysis of the parties' positions in bargaining, the position has now been reached where there must be real and significant compromise on the part of each to reinvigorate bargaining and allow the settlement of a collective agreement for ratification. That is not unusual and is indeed the stock standard way in which such disputes are resolved as they invariably are, and collective agreements settled and ratified.

Result

[69] The plaintiff's case succeeds and the defendant's fails. Because the parties' avowed objective is to settle and have ratified collective agreements in and following collective bargaining, I consider that this aspiration is most likely to be achieved if the remedies to which the plaintiff is entitled are declaratory and facilitative rather than coercive. It is important that the parties now get back into bargaining without the distraction of this litigation. I therefore propose to simply declare at this stage that collective bargaining has not concluded. I reserve leave to the plaintiff to seek further remedies as claimed should this not prove sufficient. Costs are also reserved.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Thursday 25 February 2010