

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 85
3012211

BETWEEN FIRST UNION
 INCORPORATED
 Applicant

AND JACKS HARDWARE AND
 TIMBER LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Peter Cranney and Oliver Christeller, Counsel for the
 Applicant
 Richard Upton, Counsel for the Respondent

Investigation meeting: 31 May 2018 in Dunedin

Submissions received: At the investigation meeting

Determination: 7 June 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 2 June 2017, First Union Incorporated (the Union) made an application for the Authority to fix the provisions of a collective agreement under s 50J of the Employment Relations Act 2000 (the Act).

[2] Jacks Hardware and Timber Limited (Jacks) states that there are no grounds for granting the application for fixing the provisions of a collective agreement because the requirements of s 50J of the Act are not satisfied.

Background facts

[3] There is no collective agreement between the parties. On 18 October 2013, the Union initiated collective bargaining with Jacks. The first bargaining meeting took place on 31 January 2014. There were a number of bargaining meetings and on 10 November 2014, the parties participated in mediation.

[4] There remained a number of unresolved issues, including Jacks consistent, philosophical position about “entirely different remuneration systems” that the parties wanted included in the collective agreement.

[5] At that point, Jacks’ position was that it did not and would not agree to a wage clause or clauses being included in a collective agreement.

[6] On 20 February 2015, at a bargaining meeting Jacks advised First that it considered that it had:

taken this bargaining as far as it can. In accordance with s33 of the ERA, it believes that it is now able to say that there are genuine reasons, which are based on reasonable grounds not to conclude a collective. Given this Jacks Hardware & Timber believes that bargaining is able to be concluded. Accordingly, it will take no further part in bargaining for this collective, which is now at an end.

Previous litigation

[7] There was no further bargaining. On 9 March 2015, the Union made an application to the Authority that:

- (i) It issue a declaration that Jacks acted unlawfully when it purported to conclude collective bargaining on and from 20 February 2015, so that collective bargaining remained in place between the parties; and
- (ii) Under s 50C of the Act the parties be directed to undergo facilitated bargaining on the ground that Jacks’ purported ending of bargaining on 20 February 2015

was a failure to comply with the duty of good faith, which was serious and sustained, and had undermined the bargaining.

[8] On 2 June 2015, Jacks lodged an application that the matter be removed in its entirety to the Employment Court on the basis that there were important questions of law that would arise other than incidentally.

[9] That question of law arose because there was a new s 33 of the Act, enacted on 6 March 2015. Did the new s 33 apply, or the old s 33, which required the parties to conclude a collective agreement unless there was a genuine reason not to do so?

[10] The earlier section 33 did not consider a party's opposition or objection in principle to bargaining for, or being a party to, a collective agreement to be a genuine reason.

[11] On 1 July 2015, I removed that application to the Employment Court under s 178 of the Act. Chief Judge Colgan, as he then was, decided in a preliminary judgment¹, that the pre-6 March 2015 s 33(2) applied to the case.

[12] In November 2015, Chief Judge Colgan heard the substantive case, and on 17 December 2015 issued his decision². He held that Jacks' objection to the inclusion of a remuneration clause was not a genuine ground for not entering a collective agreement, and was not one based on reasonable grounds. Therefore, Jacks' unilateral declaration that it would not continue collective bargaining was a breach of its obligations of good faith in collective bargaining under ss 4 and 32 of the Act.

[13] He also decided that Jacks misled or deceived the Union between mid-December 2014 and 20 February 2015 by not meeting part of its side of a bargain struck between the parties in December 2014. It did not return to bargaining on 20 February 2015 except:

[153] ... in a very restricted, artificial and strategic way

...

Returning to bargaining could not reasonably have meant simply a further meeting at which, if there was no major concession by the Union, bargaining would cease.

¹ *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 142.

² *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 230.

[154] Jacks's breach of good faith in those circumstances was also its failure to comply with cl 15.1 of the BPA³; that is to discuss the options for resolving the parties' differences resulting from their inability to progress the bargaining. Rather, Jacks purported to declare unilaterally that bargaining had ceased and, because it considered itself free from any obligation to entering into a collective agreement in these circumstances, it was implicit in its stance that it would not engage in further collective bargaining as has subsequently proved to be the case. Adherence to good faith requirements includes adherence to the BPA's requirements to discuss resolution options with the Union at that point. Jacks did not do so.

[14] Chief Judge Colgan concluded Jacks' philosophical objections to the inclusion of remuneration elements in a collective agreement were not genuine reasons to conclude bargaining.

[15] The Chief Judge also decided the application for a reference to facilitation under s 50C:

(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

(a) that—

(i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and

(ii) the failure—

(A) was serious and sustained; and

(B) has undermined the bargaining;

(b) that—

(i) the bargaining has been unduly protracted; and

(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

...

(3) The Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator unless—

(a) circumstances relating to the bargaining have changed; or

(b) the bargaining since the previous facilitation has been protracted.

[16] In considering s 50C(1)(a)(i) of the Act, Chief Judge Colgan concluded that

[174] ... the parties had failed to conclude a collective agreement, principally because of Jacks unilateral declaration that it would not do so, which is in

³ Bargaining Process Agreement.

breach of its good faith obligations in collective bargaining under ss 4 and 32 of the Act. Was that failure either serious or sustained or has it undermined the bargaining? Both of those statutory tests are met. ...
I conclude that the grounds under s 50A(1)(a) are made out.

[175] Under s 50C(1)(b) the Court must decide both that the bargaining has been unduly protracted and that “the extensive efforts (including mediation) have failed to resolve the difficulties and have the precluded the parties from entering into a collective agreement”. That test has likewise been made out on the facts of this case.

[17] Chief Judge Colgan ordered the Authority to accept the Union’s application for facilitation.

The facilitation

[18] Member van Keulen was the Authority member who undertook the facilitation. That process began on 29 June 2016 and culminated with a recommendation made by him on 19 May 2017.

[19] By the time Member van Keulen wrote his recommendation, the parties had agreed on 12 out of the approximately 15 issues that were not agreed at the beginning of the facilitation process.

[20] The issues that remained unresolved were:

- Whether a 90-day trial period provision should be included in the collective agreement or some other document between Jacks and the individual union members who accept an offer of employment;
- The form that a wage clause, or clauses, in the agreement should take; and
- The term of the agreement.

[21] Member van Keulen issued his written recommendation after he gave the parties an oral indication. Before he issued his written recommendation the parties agreed that:

... any trial period provision should be recorded separately from the collective agreement. They also agreed it was appropriate to have a clause in the collective agreement that references the possibility of Jacks having a trial

period provision for new employees, where it will be recorded if one is put in place and that this would not be inconsistent with the collective agreement.⁴

[22] Member van Keulen recommended the wording of a trial period clause.

[23] After the Employment Court's judgment and during facilitation Jacks agreed that a wage clause would have to be included in the collective agreement. However, the form that would take remained contested:

[17] Jacks wants a wage clause that referred only to a single starting wage. First proposed that the wage clause should have three tiers. After my oral indication, First conceded that a two-tier clause would be acceptable.

[18] I have reviewed the parties' submissions and my recommendation is that the collective agreement include a two-tier wage clause as follows:

An employee who is new to the industry and possess no skill and/or experience either actual or transferable (for example, unskilled, untrained high school students or tertiary students) shall be paid no less than a minimum of [\$X] per hour.

An employee who has some industry experience and/or skill that they utilise in their role shall be paid no less than a minimum of [\$Y] per hour.

The employer will conduct a performance and wage review with all employees each calendar year in accordance with the employer's performance development review process (known as PDR).

...

[20] I am not prepared to make a recommendation on wage rates as I have insufficient information to do that and, in any event, there has not been significant bargaining over the rates for me to consider that it is necessary for me to make a recommendation.

[21] I do not rule out the possibility that I may need to make a recommendation on wage rates at a later point. For now, I urge Jacks to accept the recommended two-tier wage clause (subject to any amendments to the specific wording that might need to be negotiated) and then engage in meaningful bargaining over the two wage rates that will be set.⁵

[24] Member van Keulen did not make any recommendation on the term of the collective agreement. He did write that he found both parties' positions on term to be unsuitable. He found twelve months too short and three years too long.

[25] Jacks did not accept the Member's recommendations. Instead, it asked to return to the bargaining table so that it could discuss the wage rate, which it considered needed to be

⁴ Recommendation after facilitation, 19 May 2017, file 5546986, NZERA Christchurch, para 12.

⁵ Member van Keulen's first recommendation 15 May 2018.

discussed in the business context. It also proposed discussing the term of the inaugural collective agreement.

[26] The Union did not agree with Jacks' wish to continue with facilitated bargaining. It believed that further facilitation would not assist the parties and asked Member van Keulen to bring the facilitation to an end.

[27] On 19 May 2017, Member van Keulen issued a Member's Minute in which he agreed with First that it was appropriate to bring the facilitation to an end. He ended publication restrictions on his recommendation and empowered the parties to disclose the recommendation as they saw fit.

[28] On 2 June 2017, First lodged these proceedings. On 20 June 2017, Jacks lodged its Statement in Reply.

[29] On 10 July 2017, Neil Finn-House, Jacks Group Chief Executive Officer, emailed Shirley Walthew, First's organiser in Otago for the retail sector, who had been involved in the bargaining from the beginning. There had been a difference in the views of whether a First organiser had acted appropriately when in the store recruiting members. In addition, Mr Finn-House wrote:

The second thing you raise is that there is apparently a "major industrial dispute...". From Jack's perspective we wish to continue engaging in collective bargaining with FIRST as we attempt to resolve the collective. As you know, some of the remaining issues haven't been discussed in any meaningful way – and the in case of the "term" of the agreement not at all. I invite FIRST to continue bargaining ...

[30] On 21 July 2017, Ms Walthew replied:

We consider that your comments below as to the collective bargaining constitute further tactics by the company to delay the bargaining. The bargaining has been going on for almost four years. We met face to face, in mediation and further in facilitation. We have done everything we can to try to settle the collective agreement with the company with no outcome. If your company genuinely wanted to settle the collective agreement (as you had claimed), why don't you send us a proposal? We would consider it if one is made.

[31] On 7 August 2017, Mr Finn-House responded:

I find it a bit surprising that you are suggesting that Jacks is somehow seeking to delay the bargaining further. I believe my email makes it quite clear that we actually want to continue bargaining and I don't see how this can be construed as a delay tactic. Also, it was FIRST who brought the facilitation to an end when we wanted to continue with further discussions in that process.

Anyway, I have considered your suggestion that I should send you a 'proposal'. I take this to mean in relation to the outstanding claims and how these can be resolved. I don't believe that would be appropriate – one of the primary issues that we need to address is the wage rate. That hasn't been discussed in any meaningful way yet. It is a very complicated matter, where there are a number of considerations that need to be considered – including the background to our business, the economic position of it, our staffing costs and so on. I really think the best approach is to get back to the table so we can discuss that issue (and the other outstanding claims) further.

Ideally we would like to [do] that in the context of facilitation, with Peter Van Keulen's assistance. Of course, if you believe that we should just get back around the table without Peter (or anyone else) involved than let me know and we will consider that.

As I hope this reflects our priority is to continue discussion the proposed collective so we can actually determine once and for all whether all of the terms can be agreed. At this point we don't believe that we've done that.

[32] On 4 September 2017, Mr Finn-House wrote to Paul Watson, First's Southern Regional Secretary, that Jacks was about to begin conducting its individual pay reviews, seeking First's cooperation to allow the reviews to occur for its members. First gave its approval for this process. Therefore, some, if not all, of First's members received a pay increase in August 2017 based on their performance. Also in 2017, some of First's members were made redundant.

[33] On 18 September 2017, Mr Finn-House followed up with Ms Walthew asking why he had not received a response to his email requesting further facilitation. On 19 September, Mr Watson replied that Jacks' request had been referred to First's solicitors.

[34] I have not been made aware of any other approach by Jacks to First in relation to making a wage proposal or about the term of the collective agreement.

[35] In my absence, on 12 July 2017, Member van Keulen issued a Notice of Direction that I would hold an investigation meeting in Dunedin on 19 October 2017 into First's fixing application. He set a timetable for the lodging of witness statements.

[36] Once the witness statements were lodged First objected to the admissibility of some evidence, based on s 50F(1) of the Act. I held a case management teleconference at which both parties asked me to vacate the 19 October date on the basis that they would submit a joint application for questions of law related to the application of s 50F to be referred to the Employment Court.

[37] On 6 November 2017, I determined the application⁶, declining to refer the questions identified to the Employment Court on the basis that the questions identified were not legal questions, but rather questions about the procedure the Authority would use in relation to admissibility of evidence.

Fixing application under s 50J of the Act

[38] On 30 November 2017, I convened another case management teleconference to set a further date for the fixing application. Both parties asked me to deal with a preliminary matter on the papers. On 12 January 2018, I determined the issue of whether, in the fixing application, s 50J required the Authority to find a further breach of good faith beyond that found by the Court in its 2015 decision⁷.

[39] I found that an earlier identified breach of good faith could be sufficient to satisfy the test in s 50J(2) and was, in this case, sufficient to allow me to go on and consider whether the other tests had been made out.

[40] The date for the investigation meeting to hear the fixing application was set down and agreed to by the parties to be 24 April 2018 in Dunedin. The parties submitted updated witness statements.

[41] I met the parties in Dunedin. I note that counsel all travelled from the North Island for the fixing investigation meeting. That day Jacks made a proposal to return to facilitation⁸

⁶ [2017] NZERA Christchurch 189.

⁷ *First Union Inc. v Jacks Hardware and Timber Ltd* [2015] NZEmpC 230.

⁸ This second facilitation is not the kind of facilitation the Authority could have directed to the parties to participate in. Section 50C(3) states that the Authority must not accept a reference for facilitation in relation to bargaining for which the Authority has already acted as a facilitator unless circumstances relating to the bargaining have changed, or the bargaining since the previous facilitation has been protracted. However, this was a pragmatic move I agreed to in order to give the parties a further opportunity to agree on wage rates if that was at all possible.

undertaken by Member van Keulen. First considered that proposal and agreed to it so long as the facilitation could take place speedily and a back-up date could be set within 4-5 weeks for the fixing application to be heard if the facilitation did not result in a concluded agreement.

[42] Member van Keulen was able to make himself available to the parties at short notice. We set the date of 31 May 2018 to hear the fixing application in Dunedin if facilitation did not result in a concluded collective agreement.

Further facilitation

[43] Member van Keulen undertook further facilitation in Dunedin on 7 May. At the facilitation, Jacks accepted the 2017 recommendation for a two-tier wage clause and the trial period provision.

[44] There was no agreement reached on wage rates, although the parties both accepted that if wage rates could be agreed a short-term collective agreement would be appropriate so that further collective bargaining over wages can coincide with Jacks' annual wage reviews with employees under its PDR process.

[45] On 15 May 2018, Member van Keulen issued a further recommendation this time addressing wage rates.

[46] In its application for fixing, First had suggested a two-tier wage clause with the starting rate being "no less than a minimum of \$19 per hour". It also suggested the rate of \$22 per hour for an employee with some relevant industry experience or skill, with an employee with a relevant trade qualification receiving an additional \$1 per hour.

After the recommendation was issued

[47] On 18 May 2018, First emailed the Authority that it had considered the recommendation and accepted it.

[48] On 24 May 2018, Jacks rejected an important aspect of the recommendation. Mr Upton sent the Authority a memorandum setting out its objections.

[49] At 4.50 pm on 25 May 2018, Mr Finn-House sent Ms Walthew an email. He stated that she would already be aware that Jacks had rejected the recommended wage rate for the tier 2 employees:

Currently FIRST and Jacks are in agreement on every single term of the proposed collective, with the exception of the “tier 2” wage rate. As you appreciate, we have offered a tier 2 rate of \$17.50.

I recognise that FIRST has not accepted that rate but I am writing in the hope that you can reconsider your position. As you know, FIRST members received a wage review in July 2017 for FY18 year – so providing a rate in line with what FIRST is seeking would provide an increase on an increase. Further, an increase has not been budgeted.

We are still finalising our accounts for the 2018/19 financial year. We will be in a better position to bargain in a meaningful way about an increase to the tier 2 rate (and any other terms) once the exercise is complete.

Against that background we are hereby offering FIRST the opportunity to enter into the inaugural collective with us. That would be on the basis of the terms that have been agreed via the facilitation process, with the exception of the tier 2 rate, which would be \$17.50. That collective would be for a short term, in the first instance, and would expire on 30 June 2018.

Agreeing to a collective on these terms would mean that FIRST has a platform to recruit from – and also to bargain collectively with. Further, the wage rates would be renegotiated again very soon – as early as in June/July. During that bargaining, Jacks recognises that we will need to be mindful of the considerations that are included in the recommendations.

We believe that this approach will be far more harmonious than continuing with the fixing application.

I look forward to receiving your position on this by return. Ideally I would like to receive that before the fixing hearing which as you know is scheduled for 31 May 2018. I recognise that we may not be able to get together to physically sign the agreement before then ...

[50] On Monday, 28 May 2018, Mr Upton sent the email to Mr Cranney and Mr Christeller, asking if Mr Finn-House’s email changed anything in relation to the fixing application. On 30 May 2018, Mr Christeller responded:

the union’s position is as set out in its email to the Authority dated 18 May 2018.

The parties' evidence and submissions at the investigation meeting

[51] The evening before the investigation meeting Mr Upton sent a further witness statement for Mr Finn-House. In it, he expands on the reasons already given by Jacks for rejecting the tier 2 wage rate.

[52] The parties agreed with me that what would assist me most in deciding whether to fix the provisions of the collective agreement were legal submissions. However, I did ask some questions of Mr Finn-House who gave affirmed evidence.

[53] Counsel agreed that the only provision the parties were unable to agree on was the tier 2 wage rate. The parties have agreed on the length of the term.

The law

[54] Section 50J requires a cumulative series of tests to be met before the Authority can find that it is appropriate to fix the terms and conditions of a collective agreement⁹. The section is headed “remedy for serious and sustained breach of duty of good faith in section 4 in relation to collective bargaining.” The operative parts of the section are subsections 50J(2) and (3):

- (2) The Authority may fix the provisions of the collective agreement being bargained for if it is satisfied that—
 - (a) the grounds in subsection (3) have been made out; and
 - (b) it is appropriate, in all the circumstances, to do so.
- (3) The grounds are that—
 - (a) a breach of the duty of good faith in section 4 —
 - (i) has occurred in relation to the bargaining; and
 - (ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and
 - (b) all other reasonable alternatives for reaching agreement have been exhausted; and
 - (c) fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith.

⁹ *AFFCO New Zealand Ltd v NZ Meat Workers & Related Trades Union Inc* [2016] NZEmpC 17.

First Union's submissions

[55] Mr Cranney submitted that:

- The objects of the Act include acknowledging and addressing the inherent inequality of power in employment relationships, promoting collective bargaining, protecting the integrity of individual choice and promoting observance of the principles underlying the International Labour Organisation's Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively;
- The breach of good faith has never really been departed from because Jacks' approach has been obstructive even after the Court's decision. For example, Jacks did not accept the first recommendation after facilitation until a year after it was made. In addition, Jacks has only ever made two offers on wage rates, one in 2013, which was subsequently withdrawn, and one on 25 May 2018 after the second facilitation;
- The cost to First of trying to settle the collective agreement has been enormous;
- The statutory purpose of the Act is to de-incentivise the type of behaviour exhibited by Jacks;
- Jacks' workplace and its type of business are far less complicated than some other workplaces with which First has concluded collective agreements. Jacks should have accepted Member van Keulen's second recommendation to conclude the collective agreement; and
- Not reaching an agreement is an alternative to the Authority fixing the terms of the collective agreement, as is abandoning bargaining, meaning the employees give up their right to collectively bargain. However, neither of those are *reasonable* alternatives to the Authority fixing the terms of the agreement.

Jacks' submissions

[56] Mr Upton submitted that:

- Jacks had never rejected Member van Keulen's first recommendations of March 2017;
- The Employment Court has described the power under s 50J as the "ultimate game-breaker [for use] in exceptional circumstances" and the tests as "extraordinary";
- No application for fixing has ever succeeded, which reflects the high standard required;

- Jacks has acted in good faith since the Employment Court's decision;
- The Authority has to interpret and apply the law in a way that promotes productive employment relationships. The Authority needs to consider how granting a draconian remedy would affect the employment relationship;
- Section 50J is a remedy for "serious and sustained breach of the duty of good faith". The remedy must be specific to the breach. That is, the breach must be current and the damage it caused must exist at the time the application was made for the remedy to be granted;
- Jacks' breach, which First relies on for this application, no longer exists and there is no current damage caused by that breach. The breach was rectified by Jacks participating in the facilitation process, among other things;
- There has been no subsequent breach of good faith, and therefore, the breach relied on does not meet the threshold test set out in s 50J(3)(c). In other words, the party affected by the acknowledged breach of good faith is no longer affected by it;
- The breach must not only have been serious and sustained but must also have significantly undermined the bargaining. The test is a different and higher test than that in s 50C of the Act, because of the addition of the word "significantly";
- Whether the breach continues to be serious and sustained, and therefore a relevant breach for the purpose of this application must be assessed at the point in time the Authority considers the fixing application. The historic breach of good faith has been remedied;
- In relation to whether all other reasonable alternatives have been exhausted Jacks submits that they have not. The consideration of what is a reasonable alternative is an objective one. A reasonable alternative is for the parties to reach an agreement on the terms proposed by Jacks;
- Jacks offer is a reasonable one because First has settled another collective contract, in a comparable business, at .35 cents an hour below what Jacks is offering at tier 2;
- Fixing can only occur where it is "the only effective remedy" for the party "affected by the breach of good faith". There have already been effective remedies ordered and the parties have now engaged in meaningful bargaining since that breach and a collective agreement has been largely agreed, and remains open for acceptance. Fixing is not the only effective remedy as First can simply accept the wage rate being offered by Jacks;

- It is not appropriate for the Authority to order fixing, for several reasons, including the overall justice of the matter. Fixing is a remedy of last resort and there are alternatives to it;
- The Authority needs to consider whether it is appropriate to interfere in the bargaining process and alter the balance of bargaining between the parties and plainly advantage one party's negotiating point over the other; and
- The inability to reach an agreement may be unfortunate, but it is not unlawful. It does not make fixing appropriate or necessary.

Section 50J(3) (a) - has there been a breach of good faith in relation to bargaining that was sufficiently serious and sustained to significantly undermine bargaining?

[57] The Employment Court found that there had been a breach of good faith in the course of bargaining that was serious and sustained and undermined the bargaining.

[58] Jacks argues that breach has already been remedied by the Employment Court granting First the reference to facilitation. Jacks says that it participated in facilitation in good faith and has acted in good faith towards First ever since. Therefore, Jacks says that there is no current breach that was sustained and **significantly** undermined bargaining.

[59] I do not accept Jacks' argument that the breach of good faith has been remedied by the process of facilitation. I find there remains a current serious, sustained breach of good faith that still significantly undermines the bargaining.

[60] The Employment Court has said that the scheme of the Act is a process that may culminate in the Authority fixing the provisions of the agreement:

[41] Very generally, once parties to employment relationships are in bargaining, Parliament has sought to ensure that they will reach a collective agreement by an orderly and progressive process, decided upon by the parties themselves in the first instance, but with statutory backup mechanisms. Problems in bargaining are intended not to delay unduly or stalemate the process. The legislation provides independent facilitation mechanisms and, ultimately and in rare cases, what may be described as the game-breaker of the Employment Relations Authority fixing the provisions of a CEA.

[62] So the legislation's emphasis upon concluding collective agreements and ensuring that no party to collective bargaining can frustrate unduly that process, is clear.¹⁰

[61] In considering whether the breach of good faith has significantly undermined the bargaining I have taken into account how long overall the parties have been engaged in bargaining. In *Service and Food Workers Union Nga Ringa Tota Inc. v Sanford Ltd*¹¹, the Employment Court said:

[41] ...collective bargaining can be a fraught process which strains the good employment relations that should otherwise exist between the parties. It also contemplates that collective agreements will not only be for their stated terms but may continue for up to a year beyond their expiry to allow for their replacement by further collective bargaining. There is therefore an expectation that collective bargaining initiated shortly before the expiry of a collective agreement should usually conclude with a replacement collective agreement within that statutory life extension period of 12 months. Collective agreements are to be for a maximum of term of three years, although extendable to allow for replacement, as already noted. This, too, is a pointer to the timeframes within which bargaining should be conducted: collective bargaining should not take up more time than the statutory maximum period of the collective agreement being bargained for.

[42] The bargaining facilitation sections are therefore to be seen as part of a scheme that allows, encourages and assists collective bargaining and the timely and orderly settlement of collective agreements.

[62] The first bargaining meeting took place on 31 January 2014. This application for fixing was heard on 31 May 2018. A period of four years and four months has elapsed. Not all of that delay can be attributed to Jacks' actions, and certainly not all of it to Jacks' breach of good faith. However, it is significant that the bargaining has taken considerably more than the statutory maximum period for the collective agreement being bargained for. Bargaining would not have taken so long if Jacks had not sought to unilaterally conclude bargaining in February 2015.

[63] In my determination about whether the single breach of good faith in February 2015 could be relied as the breach of good faith necessary under s 50J(3)(a), I set out my view that if a new breach of good faith was required in order for an application for fixing to be successful:

¹⁰ *Association of University Staff v Vice Chancellor, University of Auckland* [2005] ERNZ 224, paragraphs [41] and [62].

¹¹ [2012] ERNZ 525, paragraphs [41] and [42].

... by simply refraining from causing a further breach of the duty of good faith and doing nothing else, the party already guilty of an earlier breach could continue to undermine the bargaining indefinitely, without any legislative remedy available to the other party. ...

That cannot have been Parliament's intention when it enacted s 50J.

[64] The February 2015 breach is not only serious and sustained but it has also significantly undermined the bargaining, as required under s 50J(3)(a)(ii). The breach destroyed First's trust in the bargaining process that, but for the breach, may have allowed the parties to move constructively to concluding an agreement directly between them. It resulted in no progress on bargaining for the inaugural collective agreement at least between 20 February 2015 and the start of facilitation in June 2016. That delay may or may not have suited Jacks but it significantly undermined First's ability to bargain on behalf of its members.

[65] The February 2015 breach of good faith has continued to affect the view that First has of Jacks' willingness to conclude the collective agreement, especially the wages component of that agreement.

Have all other reasonable alternatives for reaching agreement been exhausted?

[66] The parties have used direct bargaining, mediation, facilitation and been through litigation to try and reach agreement. First has considered industrial action, published an open letter and used a media strategy.

[67] The wage rates First considers optimum were set out in this application for fixing. Therefore, Jacks have had those wage rates since 2 June 2017.

[68] In July 2017, Mr Finn-House indicated that Jacks wished to continue bargaining on wages. In August 2017, Ms Walthew invited Jacks to make a wages proposal and undertook that the union would consider any such proposal. However, Jacks did not make any wages proposal.

[69] Jacks initiated a second attempt at facilitation. Despite its expressed reluctance, First accepted that it was worth attempting to settle the outstanding matters in facilitation. However, two processes of facilitation have not resulted in a concluded collective agreement.

[70] Jacks argues that a reasonable alternative to the Authority fixing the provisions of the collective agreement is for First to compromise and accept Jacks' offered tier 2 wage rate. It also argues that leaving the collective agreement un-concluded is an available alternative.

[71] In my view, there are now two possible alternatives for reaching agreement. One is for First compromising further than it has already on the contested wage rate. The other is Jacks accepting Member van Keulen's recommendation. There is not another alternative for reaching agreement, short of the Authority fixing the provisions.

[72] At the investigation meeting Mr Finn-House's evidence was that despite bargaining for over four years and having knowledge of the application for fixing for almost a year Jacks had still not done its budget for the year 1 August 2018 onwards in relation to what it could afford to pay as a tier 2 rate. That is, its current budget is what it has used to reach the offered amount and it has not done any financial projections to allow it any room to negotiate upwards from that. That means that Jacks agreeing on First's preferred rate is not actually an option open to the parties to reach agreement.

[73] The question is whether waiting in the expectation either of the parties would accept the other's stance is a reasonable alternative to fixing. The dictionary definition of the word "reasonable" is "fair and reasonable" or "based on good sense".

[74] In this case, I do not consider that simply waiting for one party to agree with the other is fair or based on good sense. The parties have used all the other reasonable alternatives to reaching agreement.

Is fixing the only effective remedy for First?

[75] First is the party that was negatively affected by the breach of good faith and the party that is the most negatively affected by a failure to agree on an inaugural collective agreement. The Authority fixing the provisions of the collective agreement is the only effective remedy for First to obtain a concluded collective agreement, given that all other reasonable alternatives have been exhausted.

Is it appropriate for the Authority to fix the provisions of the collective agreement?

[76] In asking whether it is appropriate to fix the provisions of the collective agreement, I have considered the objects of the Act, as well as the evidence and the parties' submissions.

[77] Three of the objects of the Act are particularly relevant to these proceedings. They are:

- Building productive employment relationships based on good faith;
- Addressing the inherent inequality of power in this employment relationship; and
- Promoting collective bargaining.

[78] I find Jacks to be in an inherently more powerful position than the employees represented by First.

[79] I agree with Jacks' submission that in exercising my discretion I need to consider whether this is the kind of case that makes it appropriate for the Authority to alter the balance of bargaining to plainly advantage one party's negotiating stance over another. In doing so, I recognise that this is an inaugural collective agreement in a workplace that has not previously had one.

[80] In light of the history of this collective bargaining, I do not consider that fixing the provisions of the collective agreement will worsen the employment relationship between First and Jacks.

Conclusion

[81] In all the circumstances of the case, I consider this to be the kind of rare case that the Act contemplates requiring the Authority to employ the game-breaker of fixing the provisions of the collective agreement.

[82] All of the tests in s 50J(3) have been made out. It is appropriate that the Authority fix the provisions of the collective agreement.

Next steps

[83] At the investigation meeting, the parties indicated their preference, if fixing was to occur, would be for it to happen relatively quickly to allow the term of the agreement to be a short one, as the parties have agreed.

[84] I can move quickly to fix the provisions of the collective agreement. As I discussed with the parties at the end of the investigation meeting, I wished to provide an opportunity for them to provide any further information they consider will assist me to fairly fix the provisions of the agreement.

[85] I understand Mr Upton provided the Authority with some documents from Jacks this morning. I have not been shown those documents yet because I assume they are to assist me in the fixing exercise. My investigation into First's application under s 50J ended on 31 May 2018.

[86] First has until 4 pm on Tuesday, 12 June 2018 to produce any further information it considers will assist me.

[87] The parties should also co-operate on producing a Word document containing the provisions that they currently agree on. That document should also be produced by 4 pm on Tuesday, 12 June 2018.

Costs

[88] Costs are reserved until the conclusion of these proceedings. I encourage the parties to agree costs between them, if that is possible.

Christine Hickey
Member of the Employment Relations Authority