IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 381
3042094

	BETWEEN	LAKES DISTRICT HEALTH BOARD Applicant
	AND	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES Respondent

Member of Authority:	Christine Hickey
Representatives:	Blair Scotland, counsel for applicant Bill Manning, counsel for respondent
Investigation Meeting:	12 November 2018 in Rotorua and by telephone on 19 November 2018
Submissions Received:	12 November 2018 at the investigation meeting from Applicant 12 November 2018 at the investigation meeting from Respondent
Date of Determination:	30 November 2018

DETERMINATION OF THE AUTHORITY

A. The Authority does not accept the reference for facilitation under sections 50C(b), (c) or (d) of the Employment Relations Act 2000.

B. The Authority recommends the parties continue to bargain and if necessary seek further assistance from the mediation service.

Employment Relationship Problem

[1] On 11 October 2018, Lakes District Health Board (LDHB) lodged a Statement of Problem requesting the Authority refer it and the respondent, the Association of Professionals and Executive Employees (APEX) to facilitated bargaining.

[2] APEX lodged its Statement in Reply on 23 October 2018 opposing a reference to facilitation.

[3] LDHB asked the Authority to deal with the application urgently. Urgency was granted. The Authority held a telephone case management conference on 29 October 2018.

[4] The parties agreed that the investigation meeting would proceed on 12 November 2018 in Rotorua. The parties lodged affidavits and supporting documents in advance of the investigation meeting.

[5] However, on the day of the investigation meeting Gregory Vandergoot, LDHB's Chief Operating Officer who had lodged an affidavit and a witness statement in reply, was sick and unable to attend the investigation meeting.

[6] At the investigation meeting I heard evidence from Luke Coxon, an advocate representing APEX. I also heard affirmed evidence from Hannes Schoeman for the LDHB.

[7] I heard submissions from Mr Manning and Mr Scotland. I asked Mr Scotland to let the Authority know when Mr Vandergoot would be well and able to participate in a teleconference.

[8] I continued the investigation meeting by telephone on 19 November 2018. I heard affirmed evidence from Mr Vandergoot, who was also questioned by counsel. I heard further oral submissions from counsel.

The legal framework and issues

[9] Sections 50B to 50I of the Act provide for a process through which parties are able to obtain facilitation by the Authority to assist in concluding a collective agreement.

[10] Facilitation is reserved for situations where there are serious bargaining difficulties. The statutory framework sets a high threshold for granting an application for reference to facilitated bargaining.

[11] The LDHB considers that ss 50C(1)(b), (c) and (d) apply to its bargaining with APEX and therefore the Authority should refer the bargaining to facilitation.

The background facts to this application

[12] Rotorua Hospital employs twelve anaesthetic technicians (ATs). The ATs were formerly members of the PSA and were covered by the District Health Boards/PSA Allied, Public Health & Technical Multi-Employer Collective Agreement (MECA), which expired on 31 October 2017.

[13] The twelve Rotorua hospital-based ATs are not members of the PSA. On 4 September 2017, by a notice signed by APEX's lead advocate, Luke Coxon, APEX initiated bargaining with the LDHB for a Single Employer Collective Agreement (SECA). On behalf of the ATs APEX seeks to achieve a more favourable SECA than the PSA's MECA for ATs with other DHBs.

[14] On 31 October 2017, the LDHB and APEX reached agreement on a Bargaining Process Agreement, which they signed on 2 November 2017.

[15] The first bargaining meeting took place on 6 November 2017. Further bargaining meetings were held on 7 November 2017 and 28 February 2018.

[16] At the bargaining meeting on 28 February 2018, the parties had reached agreement, tentatively, on all matters except for remuneration, both on the amounts and the structure of remuneration. The entire agreement is subject to final settlement.

[17] Because of the fact that only remuneration remained to be agreed, the parties agreed to adjourn the bargaining to wait for the conclusion of bargaining between the DHBs and the New Zealand Nurses Organisation, which was ongoing at the time.

[18] On 1 August 2018, Mr Coxon sent an email to the LDHB suggesting that the parties schedule another day for bargaining. He stated that APEX's purpose was "to bargain with the prospective of finalising a settlement offer to take out to the members". He suggested a number of dates during August. LDHB replied that it would get back to him on dates. LDHB suggested 12 September 2018.

[19] On 10 August 2018 Mr Coxon agreed to continue bargaining on 12 September 2018:

> I think we will need the whole day. Now the Nurses have settled we are in a good position to finalise a settlement based on their settlement parameters – but this could take a while.

[20] At the bargaining on 12 September 2018 the parties were unable to agree on pay progression. LDHB told APEX that it was not yet in a position to offer a pay increase and that its financial parameters had not shifted from before the nurses' MECA had settled. APEX informed the LDHB that it expected a 15 per cent pay increase. It also informed the DHB that, in light of no offer being made by it, APEX intended to ballot its members about strike action.

[21] After the bargaining meeting ended, Jeshel Forrester, of LDHB emailed APEX a summary of the meeting and where the parties had reached agreement, noting that there was no agreement on remuneration. Mr Forrester also wrote that there were two other areas that the parties continued to work on, one of which would be outside of the SECA.

[22] On 25 September 2018, APEX sent a strike notice to the LDHB. The strike was to be:

> From 0700 on Wednesday 10th October 2018 to 0700 on Thursday 11th October 2018, there will be a complete withdrawal of labour by APEX members who are Anaesthetic Technicians …

[23] On 3 October 2018, APEX sent a second strike notice to LDHB. The nature of the strike was:

> From 0700 on Thursday 18th October 2018 to 0700 on Friday 19th October 2018, there will be a complete withdrawal of labour by APEX members who are Anaesthetic Technicians at Lakes DHB.

[24] Mediation was arranged for the parties in Hamilton to take place on 8 October 2018. On about 4 October 2018, the parties held a discussion by teleconference to try and reach a settlement without the need for the mediation.

[25] During this call, LDHB alleges that Mr Coxon said that there "was more industrial action in the wings".

[26] After mediation the position was that LDHB had put forward its first, and, to date, only offer on pay.

[27] The LDHB says that it advised APEX that it intended to treat its employees fairly, transparently and consistently, regardless of which union they belonged to. LDHB says it also conveyed to APEX that the offer it made stretched its funding to the limit.

[28] LDHB also says its offer is consistent with the offer made ATs represented by the PSA and that it is also consistent with the offer accepted by the nurses.

[29] APEX rejected LDHB's offer. Instead, it has requested a higher upfront, or "front loaded" 15 per cent pay increase for its members. LDHB advised APEX that its request was unaffordable.

[30] On 8 October 2018, LDHB sought APEX's agreement to make a joint application to the Authority for facilitation.

[31] On 9 October 2018 APEX declined to make a joint application for facilitation stating:

> … [we] do not believe we are at the stage where facilitation would be appropriate or necessary.
>
> In good faith we would be willing to lift the strike notice for tomorrow, if the DHB is agreeable in principle to the following counter offer. We would allow you five days to seek confirmation of the settlement.

[32] On the same day, Mr Schoeman wrote to Mr Coxon that LDHB had considered APEX's offer and had it costed. However, "It is completely outside of affordable parameters for the DHB".

[33] Instead, Mr Schoeman requested that APEX put the LDHB offer to its members. He also requested that APEX lift the strike notices while the members considered the offer.

[34] Also on 9 October 2018, APEX issued a press release that stated that mediation had failed to reach a settlement and that an offer subsequently made by the union was rejected by LDHB.

[35] It stated that the strike the following day was set to proceed and would be followed by further action on Thursday 18 October 2018.

The strikes

[36] In advance of the strikes the parties entered into agreements for the provision of life preserving services for both periods of industrial action, as required under Schedule 1B of the Act.

[37] On 10 October 2018 APEX's members began their first strike action which lasted for 24 hours. On 18 October 2018 APEX's members began their second strike action which lasted for 24 hours.

[38] Under the agreement for the provision of life preserving services during each strike APEX provided two ATs on-call.

After the strikes

[39] On 25 October 2018, Mr Coxon emailed Mr Schoeman:

> In accordance with sections 34 and 32(1)(e) of the Employment Relations Act.
>
> 1. The FTE of our Anaesthetic technician members and what salary step they are on. Please put this in a table form with the name of the AT, FTE and salary step.
>
> 2. The DHB's costings for the DHB offer of settlement presented … on Oct 8th.
>
> 3. The DHB's costings for … APEX's counter offer sent to the DHB on October 9 and referred to in your emailed response on Oct 9.
>
> This information is required with urgency, your assistance in supplying is appreciated.

[40] On the same day, by reply email, Mr Schoeman attached the FTE and salary step information for each of the APEX member ATs. However, he declined to reveal the costing information requested by Mr Coxon at points 2 and 3 of his email, "as it is confidential to the employer."

[41] On 26 October, Mr Coxon replied by email that the information was relevant to bargaining and that he could not:

> … see how the DHB can justify non-disclosure based on confidentiality. The whole basis of the DHB's offers and the decline of our offer, has been the "costing' and the view that our offer is "unaffordable to the DHB". Such information would allow us to understand the basis of the DHB's position and could assist the parties to reach an agreement in bargaining.
>
> To not disclose is a breach of section 34 and 32(1)(e) of the Act and the requirement to act in good faith.
>
> I request that the DHB reconsider this decision and provide the information requested.

[42] On 26 October 2018, Mr Schoeman emailed Mr Coxon in reply:

> The DHB is not withholding information. Fact is that you are in possession of exactly the same information as the DHB, so there is nothing that prevents you from using that same available information to do your own costing.
>
> The DHB was very clear that the offer that we made previously, that was then rejected by the members, is our maximum. As you will recall, the members are asking for 15% frontloaded in year one. That was rejected by the employer as it is clearly not affordable with salary cost movement of 15% in the first 12 months.

[43] As far as I know, that was the last written communication between the parties that could amount to bargaining.

The investigation meeting

[44] The parties agree that LDHB has settlement parameters imposed on it by the Ministry of Health's annualised on-going costs of settlement. Usually the nurses' MECA sets the general parameters. The parties also agree that the significant sticking point in the bargaining is remuneration.

[45] Mr Schoeman agreed with Mr Coxon's evidence that there are national difficulties in recruiting ATs.

[46] Mr Coxon says that there are 57 vacancies for ATs in DHBs across the country.

[47] Mr Schoeman agreed that the LDHB is advertising for a new FTE anaesthetic technician position and so far, after two rounds of advertising, has not been able to appoint anyone to the position.

[48] Under questioning from Mr Manning, Mr Schoeman said that he would never agree to release the exact financial parameters binding the LDHB that made its offer

the best it can make. He disagreed with Mr Manning that LDHB was using the "take it, or leave it" bargaining tactic. He agreed that LDHB had only made one offer on remuneration.

[49] He said that LDHB was acting in good faith and that because it did not agree to release information about its financial constraints APEX would just have to accept that the offer really was the LDHB's best.

Object of the Act

[50] Section 3 of the Act sets out the objects of the Act, they include:

> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
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> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
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> **(ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and**
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> **(iii) by promoting collective bargaining; and**
>
> (iv) by protecting the integrity of individual choice; and
>
> (v) **by promoting mediation as the primary problem-solving mechanism** other than for enforcing employment standards; and
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> **(vi) by reducing the need for judicial intervention; and**
>
> …
>
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

(emphasis added)

Section 50C of the Act

[51] I need to consider the s 50C tests in light of the objects in s 3 above, particularly those I have highlighted.

[52] The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds in s 50C exist:

…

(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:

(c) That —

(i) In the course of bargaining there has been 1 or more strikes or lockouts; and

(ii) The strikes or lockouts have been protracted or acrimonious:

(d) That—

(i) In the course of bargaining a party has proposed a strike or lockout; and

(ii) The strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

[53] For the purposes of subsection (1)(d)(ii), s 50C(2) provides that a strike or lockout is likely to affect the public interest substantially if—

(a) The strike or lockout is likely to endanger the life, safety, or health of persons; or

(b) The strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be wide-spread, long-term, or irreversible.

Process of facilitation

[54] Section 50E of the Act sets out the process to be followed in facilitation. Bargaining can continue during facilitation, subject to the process determined by the Authority. Facilitation does not diminish a union's right to strike.

[55] However, facilitation takes a significant amount of control over the bargaining out of the parties' hands. Section 50E grants the member of the Authority carrying out the facilitation the ability to determine the process. The provision of facilitation may not be challenged or called into question in any proceedings on the ground that its nature and content was inappropriate or that the manner in which it was provided was inappropriate.

Section 50A – the purpose of facilitating collective bargaining

[56] Section 50A(1) of the Act provides that:

> (1) The purpose **of sections 50B to 50I is** to provide a process that enables 1 or more parties to collective bargaining who are having **serious difficulties** in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.
>
> (2) …
>
> (emphasis added)

Section 50C (1)(b): has the bargaining been unduly protracted and have extensive efforts failed to resolve the difficulties?

[57] This is the subsection under which most references to facilitation have been considered and accepted in the Authority and in the Employment Court.

[58] There are two limbs to this test, both of which must be satisfied before a reference for facilitation could be accepted.

[59] Whether the tests are met is dependent on the facts of each case.

Has the bargaining been unduly protracted?

[60] The meaning of "unduly protracted" has been considered a number of times in the Authority and the Employment Court.

[61] In the Employment Court case of *McCain Foods (NZ) Limited v Service and Food Workers Union Nga Ringa Tota Inc.*[1], Chief Judge Colgan stated:

> … the legislation requires a combination of temporal and activity elements. There must have been unduly protracted bargaining (the temporal element) …[2]

[62] In the same case, the Chief Judge pointed out that protracted bargaining does not constitute a ground for reference to facilitated bargaining, unless it is "unduly" protracted.

[63] In this case, APEX initiated bargaining on 4 September 2017. After the Bargaining Process Agreement was signed on 2 November 2017 bargaining meetings took place on 6 and 7 November 2017. The next bargaining meeting was on 28 February 2018.

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[1] [2009] ERNZ 28
[2] Note 2, at [68].

[64] On that day the parties decided to adjourn any further bargaining. That is because both parties acknowledged that the nurses' MECA settlement would set the parameters for how the Ministry of Health, on behalf of the government, would fund pay increases in the health sector as a whole.

[65] In effect, by mutual agreement bargaining was in abeyance for 5-6 months while the parties waited for the nurses' MECA to be settled.

[66] Once the nurses' settlement was reached APEX sought to re-start bargaining.

[67] The next bargaining meeting was on 12 September 2018. That was the fourth day of bargaining meetings.

[68] After that, one day of mediation took place on 8 October 2018 and there were strikes on 10 and 18 October. The parties also sent each other a handful of emails.

[69] It is now 14 months since the initiation of bargaining. However, in reality the bargaining has not been underway all that time. There was a period from 28 February until 12 September 2018 when the parties were not bargaining, by mutual agreement. They were waiting for an event beyond their control. Effectively, bargaining took place only between 4 September 2017, when bargaining was initiated and 28 February 2018 when it was put into abeyance, and 10 August and 26 October 2018. Therefore, I do not consider that the bargaining has been *unduly* protracted.

Have extensive efforts failed to resolve the parties' [serious] difficulties?

Extensive efforts?

[70] I have not found the first limb of the test to be met. However, even if I had I would not have found that the second limb of the test had been met.

[71] The second limb of the test means that there must have been *extensive* bargaining efforts that had failed to resolve the difficulties that preclude the parties from entering into a collective agreement.

[72] In *McCain* Chief Judge Colgan decided that "extensive" implies the efforts had to have had a:

> ...wide scope, [been] far-reaching or comprehensive, covering a large area or time range of activities.[3]

[73] In addition, Chief Judge Colgan stated that parties to bargaining must have used mediation assistance to be considered to have made extensive efforts.[4]

[74] At the investigation meeting, Mr Scotland put it to Mr Coxon that given the parties had reached a stalemate, APEX's only recourse would be to further strike action.

[75] While agreeing that future strike action remained as a possibility if APEX's members decided it was necessary Mr Coxon said that all that was required was for the parties to get back to bargaining.

[76] In this case, there have been five days of bargaining meetings. There have also been a limited number of emails that also constitute bargaining efforts.

[77] In all the circumstances, although there has been one day of mediation, so that one of the constituent factors of extensive efforts may said to have been met, I do not consider five days of bargaining and a few emails to constitute *extensive* efforts.

Are there serious difficulties?

[78] In *McCain*, Chief Judge Colgan held that s 50C(b)(i) had to be interpreted by considering the part of the Act as a whole.[5] He held that s 50A(1) of the Act meant that Parliament meant to permit facilitation only in cases where the parties have "serious difficulties." Therefore, the word "serious" must be read into the s 50(1)(b)(ii) test despite it referring simply to "difficulties."[6]

[79] The parties have firmly held opposing views about what the structure of the remuneration package should be, and the matter is important to both parties. However, I do not consider the word "serious" in this context relates to how seriously or genuinely the parties hold their views on the correct remuneration package. Instead, the word refers to significant hurdles having to be overcome to reach agreement.

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[3] Note 2, at [65].
[4] Note 2, at [68].
[5] Note 2, at [61].
[6] Note 2, at [61].

Such a hurdle may exist in the LDHB's refusal to release any financial information, beyond that is publically available, on why it considers that its offer is the best it can make. However, there still remains a remedy available short of facilitation for the release of that information to an independent reviewer under s 34 of the Act.

[80] In addition, at the investigation meeting Mr Schoeman told me that the low pay proposed by APEX for those on the lower steps of the scale created difficulties for the LDHB in that those figures would not allow them to be competitive when recruiting ATs with lower levels of experience than those currently employed. Both the LDHB and APEX share a concern about the existing shortage of ATs nationwide and the difficulty in recruiting suitably qualified ATs in Rotorua in particular.

[81] Clearly, prior to the investigation meeting into this application the LDHB had not communicated all its concerns about APEX's offer to APEX. There may be other issues and aspects of the respective offers that the parties can fruitfully discuss in bargaining that may move them closer to understanding and closer to an agreement on the remuneration structure and amount.

[82] I do not consider the parties are at a stalemate that cannot be resolved. Their difficulties in bargaining are not serious difficulties that require facilitation as the next step.

[83] I dismiss the application for a reference to facilitation under s 50C(1)(b).

Section 50C(1)(c): in the course of bargaining have there been one or more strikes and have the strikes been protracted or acrimonious?

Have there been one or more strikes?

[84] The clear answer to this first limb of the test is "yes". There have been two strikes.

Have the strikes been protracted?

[85] Strikes vary in length. For example, DHB-employed midwives are currently striking for two-hour periods twice a day on consecutive days for two weeks. ATs in other DHBs have been on strike for 24-hour periods.

[86] Although it is not generally the case in the health sector, it is possible for strikes to continue for days or even weeks or months.

[87] Each strike was for a period of 24 hours. The strikes took place on Wednesday, 10 October from 0700 ending at 0700, Thursday, 11 October, and on Thursday, 18 October from 0700 ending at 0700, Friday, 19 October 2018. The DHB's elective surgeries are booked between Monday and Friday, between the hours of 8am and 5pm.

[88] The 24-hour period meant of the strike that the biggest effect was on elective surgeries planned for 8 am to 5 pm. However, there was also a potential effect on urgent surgical procedures. The point of a strike is to inconvenience the employer to put pressure on it to change its stance during bargaining.

[89] In all the circumstances, and when considered against the effective period of bargaining of approximately eight months I do not consider the strikes to have been protracted.

Or, have the strikes been acrimonious?

[90] The evidence shows that the parties acted co-operatively and were able to reach an agreement for the provision of life preserving services for each strike without requiring the assistance of their mutually-appointed adjudicator.

[91] Because of the first strike, a total of 11 patients' elective surgeries scheduled for that day were deferred to a later date. That had a "knock on" effect on the surgeries of a further 13 patients that had to be deferred to later dates.

[92] During the first strike, the on-call ATs responded to three requests for life preserving services, two caesarean sections and one other obstetric case. However, their services were not required.

[93] Because of the second strike, on 18 October 2018, 6 elective surgeries set for that day were deferred, causing the surgeries of a further 7 patients to be moved to later dates.

[94] During the second strike, the on-call ATs responded to two requests for the provision of life preserving services. One request was for a caesarean section, and the

other request was for an emergency department case in which a patient with a neck injury was being brought into hospital by paramedics. However, in neither case was surgery required so the on-call ATs did not need to provide life preserving services.

[95] The strikes have not been acrimonious.

[96] I dismiss the application for reference to facilitation under s 50C(1)(c).

Section 50C(1)(d): in the course of bargaining has APEX proposed a strike and if that strike were to occur, would it be likely to affect the public interest substantially?

Has APEX proposed a strike?

[97] Mr Schoeman and Mr Vandergoot say that during a teleconference between the parties on about 4 October 2018 Mr Coxon said that there was "more industrial action in the wings". By that, the LDHB submits that there is another strike or strikes proposed by APEX.

[98] Mr Coxon says that he does not remember saying that there was "more industrial action "in the wings". His evidence is that the members have not instructed APEX to arrange another strike. APEX submits that means that no strike is proposed.

[99] APEX submits that this limb of the test requires something different to strikes having already occurred in the past.

[100] According to the Concise Oxford Dictionary to "propose" means to put something forward as a plan, or to intend to do something. Therefore, something that is proposed may occur in the future. For a strike to have been "proposed" APEX must have put forward a plan about a strike that it planned or intended would take place. There would need to be some specificity in the proposal, such as when it was planned to take place. At the very least, APEX's members must have directed it to undertake further strike action, which they have not.

[101] APEX submits that the Act provides the balance between the LDHB's desire and responsibility to protect patient health and safety and a unions' right to strike by the requirements, under Schedule 1B, for the parties to reach agreement on life preserving services.

[102] Therefore, APEX submits that it would be wrong to allow s 50C to act as a device to subvert that legislative balance.

[103] In relation to the desirability or otherwise of a union's right to strike during collective bargaining Judge Perkins of the Employment Court has given the issue very recent consideration. In *Secretary for Justice v New Zealand Public Service Association*[7] he wrote:

> [23] … The whole purpose of the strike action … is to cause … inconvenience and it is a valid bargaining tool where carried out in accordance with statutory requirements.
>
> [24] The rights to strike and lockout, so long as they meet the requirements of the statutory provisions, are well enshrined in employment law and protected by the provisions of the Act. The rights to strike and lockout are part of ensuring a balance to the relative negotiating positions of the parties in industrial bargaining. Any step to reduce their effectiveness is not to be taken unless there are sound principled reasons for doing so.

[104] APEX has the right to propose and undertake further strike action in the future. Even if Mr Coxon did say that further industrial action was "in the wings" that does not go so far as APEX having proposed by putting forward a plan of a strike occurring in the future.

[105] Since Apex has not proposed a strike, although it remains entitled to do so in the future, I do not need to go on to consider the second limb of this test.

[106] I agree with APEX's submission that a reference to facilitation cannot be made under this sub-section because APEX has not proposed a strike.

[107] I dismiss the application for a reference to facilitation under s 50C(1)(d) of the Act.

Conclusion

[108] I have not found that any of the grounds for reference to facilitation have been made out. Therefore, I do not accept a reference to Authority-led facilitation.

[109] When I cross-check that result in the light of the object of the Act set out at s 3, I consider the result to be the correct one at this point in the bargaining. It retains

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[7] [2018] NZEmpC 129.

bargaining power in the hands of the parties, reduces “judicial” intervention and it promotes collective bargaining.

[110] I recommend the parties continue bargaining in good faith, including by utilising mediation as necessary. I also recommend them to provide further relevant financial and budget information to each other directly, or via an independent reviewer under s 34 of the Act.

Christine Hickey
Member of the Employment Relations Authority