IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 90
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:	On the papers
Determination:	15 June 2018

DETERMINATION OF THE AUTHORITY

A. Under s 178 of the Employment Relations Act 2000 The Authority removes Jacks Hardware and Timber Limited's application for a stay of proceedings to the Employment Court.

Employment relationship problem

Relevant recent background

[1] On Thursday, 7 June 2018, I issued my determination under s 50J that grants First Union the remedy it sought for the Authority to fix the provisions of the collective agreement.[1]

Investigation meeting on the s 50J application for fixing

[2] At the end of the investigation meeting in Dunedin on 31 May 2018, I timetabled the provision of further evidence to assist me to fix the outstanding provision of the collective agreement, if I decided that fixing was appropriate. I am certain the parties understood that was to be documentary evidence.

[3] I have not received any detailed financial information from Jacks. Mr Finn-House's letter to Ms Walthew, dated 25 May 2018, stated that Jacks was still finalising its accounts for the 2018/2019 financial year. His witness statement, dated 17 April 2018, paragraph [27] refers to 110 unique pay rates that Jacks has with its approximately 180 staff. In his paragraph 51, he refers to the setting of a wage rate being a very complicated matter, with a number of considerations that would need to be taken into account:

> … including the background to our business, the economic position of it, our staffing costs and so on.

[4] Mr Finn-House's supplementary brief of evidence, which I received on the morning of 31 May, did not contain any new evidence, except to say that Jacks had not budgeted for a $19 wage rate.

[5] At the investigation meeting, I asked Mr Finn-House how long Jacks would need to create and/or collate any further evidence it wished me to consider. Mr Finn-House and Mr Upton told me that it could do so within a couple of days. I gave Jacks until the end of the day on Wednesday, 6 June 2018 to provide any documents relating to Jacks' accounts, its staffing costs, and any other information it considered relevant, to assist me in the event that I

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found that the Authority needed to fix the provisions of the collective agreement. I expected written financial information.

What evidence has been supplied after the 31 May investigation meeting?

[6] On Wednesday, 6 June 2018 Mr Upton sent the Authority Officer an email stating that the additional information I had requested by the end of the day was:

> … currently with my client for review. I hope to file it in accordance with the directions given but it may be first thing tomorrow as I understand that the relevant people at my client's end are currently in meetings. Apologies for the potential delay.

[7] I did not read Mr Upton's memorandum of 7 June 2018 before I finalised my determination, as I understood that would contain information that related to actually fixing the tier 2 wage rate.

[8] However, when I read the memorandum, I discovered it did not contain any financial information from Jacks. Instead, it contained more submissions about why fixing was not appropriate and a submission that another in-person investigation meeting was necessary before a tier 2 wage rate could be fixed.

[9] Mr Upton submitted that the issue of the wage rate "is a complicated and scientific exercise". Mr Upton referred to possible expert evidence being needed and possible third party evidence, from business groups and, presumably from other employers. Jacks wishes to "provide greater detail in its wage costs and the implications of various increases."

[10] Before responding to Jacks' request for another investigation meeting, I waited to hear from First on its view and to see what further evidence they supplied.

[11] I received First's evidence on 11 June 2018, as agreed. Mr Cranney noted that the 7 June memorandum "differs in content from what was agreed and directed to be filed". He attached an affidavit from Natalia Williams, First's Secretary of the Retail and Finance Division.

[12] Ms Williams sets out new and relevant information about First's current collective bargaining with Bunnings, including the wage rates offered by Bunnings. Ms Williams also outlines other provisions, such as leave provisions, in the Bunnings collective agreement that are more favourable to First's members than those agreed by Jacks so far.

[13] On 13 June, Mr Cranney responded that First considered any further evidence I required to fix the tier two wage rate, or that the parties wished to submit, should be dealt with on the papers. He submitted that the Authority had no obligation to hear evidence in person.

[14] Mr Cranney submitted that I already had significant and sufficient relevant information before me to allow me to establish the facts relevant to fixing the provision of the collective agreement. Mr Cranney submitted that to the extent that Jacks did not provide further information to me, as had been discussed and agreed on 31 May 2018:

> … the respondent is responsible for this omission and should not be granted an additional hearing to provide information it agreed to provide but failed to do so.
>
> If the Authority is minded to receive further information from the respondent that, should be provided now. The respondent has had almost five years to prepare it.

[15] Mr Cranney submitted that First then needed an opportunity to respond and that the issue of whether any final submissions are to be made could then be addressed in a phone conference.

Application for a stay of the Authority's proceedings

[16] On 13 June 2018, Mr Upton filed an application for an urgent stay of the fixing process/determination, pending the outcome of Jacks' (then intended) de novo challenge to the Employment Court. Among the reasons for applying for a stay of the remedy of fixing is that the challenge would be rendered nugatory if the provisions of the collective agreement were fixed.

[17] Mr Upton conceded that First's members are entitled to the fruits of the fixing determination of 8 June 2018 but that, ultimately, if fixing is granted, it relates to one wage clause only. He submits that is a matter that could, if necessary, be addressed through an order for back pay.

[18] Before I could issue my response to the stay application, on 14 June 2018, Mr Upton informed the Authority that Jacks had filed its de novo challenge with the Employment Court that morning. Jacks has sought that its challenge be dealt with urgently. I understand there is a case management teleconference with a judge set down for next week.

Removal of the stay application to the Employment Court?

[19] Under s 179 of the Act, a party to a matter who is dissatisfied with a written determination of the Authority may elect to have the matter heard by the Employment Court. Jacks has exercised that right by filing a de novo challenge to my determination [2018] NZERA Christchurch 85.

[20] However, s 180 of the Act establishes that electing to file a challenge in the Court does not operate as a stay of proceedings in the Authority unless the Court or the Authority so orders.

[21] Under s 178 of the Employment Relations Act 2000 (the Act), the Authority has the power to order the removal of a matter, or any part of it, to the Court to hear and determine the matter without the Authority investigating it.

[22] The determination under challenge is the first that has found the Authority may fix the provisions of a collective agreement. It is as matter of significant importance to the parties. I anticipate it will also be of some public interest.

[23] In hearing and deciding on Jacks' challenge the Court will be considering anew the provisions of s 50J of the Act. The application for the stay is intended to stop the Authority from going on to fix the provisions of the collective agreement before the Court hears Jacks' challenge.

[24] I consider it more appropriate for the Court to consider and decide on the application for a stay, given that it will go on to determine First's s 50J application.

[25] Under s 178 of the Act, I order the removal of the application for a stay to the Employment Court on the grounds that the Court already has before it proceedings which are between the same parties and which involve the same or similar issues.

My availability to hear from the parties and fix the provisions of the collective agreement

[26] In the meantime, the Authority's proceedings are not stayed. I consider it would be beneficial to hear from the parties again, and any relevant witnesses they wished to bring, to assist me to fairly fix the tier 2 wage rate.

[27] I can offer dates in late July, if the proceedings are not stayed.

[28] I have set out my intended process for fixing the provisions of the collective agreement in a Members' Minute, which has been sent to the parties along with this determination. I have instructed the Authority Officer to convene a teleconference to set dates with the parties as soon as possible.

Christine Hickey
Member of the Employment Relations Authority