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PROHIBITING PUBLICATION OF CERTAIN  
INFORMATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 374  
3012211

BETWEEN FIRST UNION INCORPORATED  
Applicant

AND JACKS HARDWARE AND TIMBER  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Peter Cranney and Grace Liu, counsel for the Applicant  
Paul Wicks QC and Richard Upton, counsel for the  
Respondent

Investigation Meeting: 13 and 14 June 2019

Submissions Received: 14 and 18 June 2019 from the Applicant  
14 and 18 June 2019 from the Respondent

Date of Determination: 24 June 2019

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] This determination deals with an application made by First Union Incorporated (the Union) on 2 June 2017 that the Authority fix the provisions of a collective agreement being bargained for between the parties.

[2] This is the first time since s 50J was inserted in the Employment Relations Act 2000 (the Act) on 1 December 2004 that the Authority has been required to fix the provisions of a collective agreement. The Authority accepted the Union's application for fixing on 7 June 2018. That fixing is the appropriate approach was confirmed in the Employment Court judgment of Judge Smith in March 2019, in *Jacks Hardware and Timber Limited v First Union Incorporated*,<sup>1</sup> which upheld the Authority's determination.

## **Non-publication and confidentiality**

[3] On the second day of the investigation meeting I heard evidence on Jacks Hardware and Timber Limited's (Jacks) financial position, including relevant profit and loss figures and budgets, including wages figures and projections. That evidence is commercially sensitive and I restricted copies of the financial documentation to the Authority, counsel and the parties. Members of the public were excluded from this part of the investigation meeting at Jacks' request.

[4] I have not referred to any specific figures in making this determination, although I have taken them into account. Under clause 10 of Schedule 2 of the Act I prohibit from publication any specific figures or graphs or tables provided by Jacks for the purposes of these proceedings.

## **The fixing application**

[5] Jacks operates a Mitre 10 Mega store in Dunedin, and a smaller Mitre 10 store in Mosgiel. On 18 October 2013 the Union initiated bargaining for an inaugural collective agreement for retail non-management staff in both stores.

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<sup>1</sup> [2019] NZEmpC 20.

[6] After extensive bargaining, two Authority recommendations arising out of facilitated bargaining and litigation, the parties have agreed to all but three provisions of the collective agreement.

[7] I have been asked to fix three provisions:

- a. a trial period;
- b. the term of the agreement; and
- c. remuneration.

*Clause 7 - trial period provision*

[8] Since 6 May 2019, 90-day trial periods cannot be used by employers with 20 or more staff. Jacks employs between 180 and 200 staff. Therefore, both parties agree that clause 7, which they had agreed would be included in the draft collective agreement must be deleted.

*Clause 4 - term of the agreement*

[9] The Union asks that the term of the agreement should be from the date of this determination until 31 August 2020.

[10] By contrast Jacks asks the Authority to set the term of the agreement from the date of fixing until 30 June 2020.

*Clause 21 - Remuneration*

[11] The Union asks that the Tier 1 rate be fixed at no less than a minimum of \$21.50 per hour until 1 September 2019 and then \$22.50 per hour from 1 September 2019.

[12] Jacks asks that the Tier 1 rate be fixed at 25 cents above the minimum wage, being a minimum of \$17.95 per hour until 1 April 2020, when it should increase to 25 cents per hour above the statutory minimum wage rate as at that date.

[13] The Union asks the Authority to fix the Tier 2 rate at no less than a minimum of \$23.00 per hour until 1 September 2019 and then \$24.00 per hour from 1 September 2019.

[14] Jacks asks that the Tier 2 rate be fixed at a minimum of \$1.00 about the minimum wage, being \$18.70 currently, until 1 April 2020 when it will increase to be \$1.00 per hour more than the statutory minimum wage as at that date.

[15] The Union asks the additional trade qualification rate<sup>2</sup> be fixed at an additional payment of \$3.00 per hour until 1 September 2019 and then \$4.00 per hour from 1 September 2019.

[16] Jacks does not consider the additional trade qualification rate of \$1.00 per hour should increase.

### **How should the Authority fix the provisions of a collective agreement?**

[17] In fixing provisions, the Authority must act in a principled manner and determine the terms rationally, reasonably and in a manner that is supported by relevant evidence. Section 50J of the Act does not outline any process for the Authority to follow. It does not list any factors to consider. Instead, the Authority must act in line with the relevant general principles that can be gleaned from the Act.

[18] The Authority must comply with s 157(2) of the Act by acting in line with natural justice, aiming to promote good faith behaviour, supporting successful employment relationships and generally furthering objects of the Act.

[19] The object of the Act is set out in s 3, of which four aspects 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;
- Promoting collective bargaining; and
- Promoting observance of the principles underlying the International Labour Organisation Convention 87 of Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively.

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<sup>2</sup> Earlier proposed to be an additional \$1 per hour.

[20] In addition s 157(3) provides the Authority must act in equity and good conscience and may not do anything inconsistent with the Act.

[21] It is the Authority's duty to promote collective bargaining. It has attempted to do that throughout these proceedings. In addressing the inherent inequality of power in these proceedings, I bear in mind that Jacks has to date been able to avoid being a party to the collective agreement.

## **Wages**

[22] This determination marks the end of bargaining that was initiated by the Union on 13 October 2013. Since 1 July 2015<sup>3</sup> the proceedings associated with the bargaining have resulted in seven Employment Relations Authority determinations,<sup>4</sup> two recommendations of the Authority after two facilitation processes and six Employment Court judgments.<sup>5</sup>

[23] The Union says that Jacks has deliberately stalled the bargaining, which has led to this process. Therefore, the wage rates set should be fixed at figures that compensate the workers for significant delay.

[24] Jacks submits that the Authority cannot use the wage rates to punish it. The remedy for the breakdown of the bargaining is the fixing process itself.

[25] I agree that it would be inappropriate to set artificially high wage rates as a punishment. However, I consider that it is reasonable to take into account the period of time since a collective agreement could have been agreed to consider what wage rates could have been by now.

[26] Setting wage rates, without the parties' agreement, is not a straightforward matter. The history of this bargaining, evidence of market comparisons given by both parties, the

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<sup>3</sup> When the Authority, in determination [2015] NZERA Christchurch 87, removed the initial proceedings to the Employment Court under s 178 of the Employment Relations Act 2000.

<sup>4</sup> [2015] NZERA Christchurch 87, [2017] NZERA Christchurch 189, [2018] NZERA Christchurch 85, [2018] NZERA Christchurch 90 and [2019] NZERA 237 and this determination.

<sup>5</sup> [2015] NZEmpC142, [2015] NZEmpC 230, [2018] NZEmpC 87, [2018] NZEmpC 93, [2018] NZEmpC 94 and [2019] NZEmpC 20.

overall national upward pressure on wages, Jacks' financial information as well as the rates currently paid to the lowest paid of Jacks' staff form the evidence I need to take into account and consider.

[27] Martin Dippie, the managing director of Jacks, is the co-owner of the company with his wife. Effectively, his evidence and that of Neil Finn-House, Jacks' CEO, is that Jacks cannot afford to pay the level of increased wages the Union seeks. In addition, Jacks believes that its staff are happy with their remuneration and the performance development review process (PDR) that Jacks undertakes in August-September of every year. That wage review, based on individual performance, is conducted once Jacks' end of year financial results are finalised. Jacks intends to continue using its PDR process for all staff, including Union members, once the collective agreement is in place.

[28] Currently, Jacks pays 10 staff at its lowest rate of \$17.95, which is the Tier 1 rate it proposes. It pays 34 staff its second lowest rate of \$18.70, which is the Tier 2 rate it proposes. Essentially, Jacks wants to maintain the status quo and for this fixing to endorse its current practice.

[29] However, the point of collective bargaining is to challenge the status quo especially in relation to the relative inequality of bargaining power between the employer and individual employees. The purpose of a Union and a collective agreement is to give more power to employees to influence their pay and conditions.

### **Market rates of pay – use of comparators**

[30] The Union says that what other employers in the same or similar industries are paying their workers is relevant to fixing the wage rates in this case. Jacks agrees that market relativity is important. However, the parties disagree on which entities are the best market comparators.

### *Retail NZ*

[31] Greg Harford, Retail NZ's interim Chief Executive, gave evidence for Jacks. Every year Retail NZ surveys retailers throughout the country and produces a wages guide. The 2019 guide is not yet complete but Mr Harford provided interim up-to-date data.

[32] His evidence was that the current national average rate for entry level sales across all parts of the retail sector is \$18.22. The average hourly rate for entry level sales in the rest of the South Island, excluding Christchurch, (ROSI) is \$18.25 per hour. The national average for entry level sales in the hardware, building and garden supplies area is \$18.65 per hour.

[33] For intermediate level sales the national average is \$19.85 per hour with the ROSI average being \$19.40 and the national average for intermediate level sales in the hardware, building and garden supplies area being \$20.75 per hour.

[34] Mr Harford's view is that both Tier 1 and Tier 2 roles in the collective agreement fall within Retail NZ's definition of entry level sales. He conceded that larger retail operations are typically the ones that pay higher wages. While rightly conceding that there are some employers that pay more than the average and median rates identified by Retail NZ, in his view any minimum level of wages above \$18.70 per hour for Tier 2 roles would be generous for roles of that kind in Otago.

### *Bunnings*

[35] Bunnings is a major operator in the hardware retail sector in NZ and is the main direct competitor with Mitre 10 stores. The Union achieved a collective agreement with Bunnings some years ago. In the latest collective agreement, ratified in September 2018, Bunnings agreed to the following minimum rates, applicable from 1 September 2018:

- Band 1- for all sales staff, nightfill staff and point of sale cashiers who have not completed Bunnings competency criteria - \$20.55.
- Band 2 – sales expert, service desk, price checker, special orders, rep support, trade desk, reception, DIY instructor, receiving, clerical, driving (including dedicated

forklift driver<sup>6</sup>), gate keeper, security, meet and greet, activities, and training team members - \$21.55.

- Band 3 – Sales qualified, qualified driver crane/Hiab, Forklift coaches, distribution centre. A sales qualified team member has a relevant trade qualification as a builder, cabinet maker, carpenter, electrician, flooring installer, horticulturalist, landscape gardener, painter, plasterer, plumber or tiler. The team member frequently uses this extensive knowledge in the performance of their duties and in providing advanced technical advice to team members and customers - \$24.55.

[36] From 1 September 2019 the rates increase by 2.5% to:

- Band 1 - \$21.06
- Band 2 - \$22.09
- Band 3 - \$25.16

[37] Bunnings' collective agreement also includes a performance based salary review to be held in 2019. The Union says that Bunnings is the most appropriate comparator for the Authority to consider in fixing wage rates.

[38] The Union says that in addition to superior wage rates the Bunnings agreement contains other superior provisions, in relation to redundancy and leave in particular. That contrasts with the agreed provisions of the Jacks collective agreement which are statutory minimum conditions.

[39] Jacks acknowledges that Bunnings is its main competitor. However, despite Jacks having about 42% and Bunnings having around 50% of the local hardware business, Jacks strongly disagrees that Bunnings is an appropriate business to compare it with. Jacks says Bunnings operates on a larger scale than its locally owned business. That is because NZ Bunnings' stores are a division of the Australian Bunnings, which is owned by the Australian Wesfarmers Group. Jacks also says it has a higher service model than Bunnings has.

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<sup>6</sup> All forklift drivers are paid at no less than Band 2.

### *Invercargill Mitre 10*

[40] Natalia Williams, the Union's retail and finance sector secretary, gave evidence about Mitre 10 Mega store in Invercargill, with which the Union has a collective agreement. From 31 July 2019 Invercargill's Mitre 10 will pay a minimum of \$18.25 per hour for employees with previous work experience and knowledge, rising to \$19.25 per hour from 31 July 2020 for such employees.

[41] The Union considers the Invercargill Mitre 10 wages to be too low. It points out that, like Bunnings, the collective agreement contains superior provisions to those in the Jacks collective agreement. These conditions include overtime payments and superior leave provisions.

[42] Jacks considers the Invercargill Mitre 10 business is a fair comparator in that the cost of living in both cities is comparable. Jacks notes that the Invercargill business uses youth rates for two tiers of wages below its minimum adult rate. Jacks has no intention to use youth rates.

### *Greymouth Mitre 10*

[43] The Union has also provided details of the newly ratified Mitre 10 Mega Greymouth collective agreement under which new entrant sales employees and new entrant checkout operators are paid \$18.20 per hour.

[44] The Union says that the Greymouth collective agreement also contains superior terms and conditions to those in the proposed Jacks agreement, such as greater bereavement leave, redundancy pay, and the provision of long service leave.

[45] Jacks argues the equivalent of the Tier 2 rate in the Greymouth agreement is between \$18.40 and \$18.50 per hour. The amount it offers is above that and is a fair rate.

### *Foodstuffs*

[46] Ms Williams asserts that the Foodstuffs model, under which Pak n Save and New World supermarkets are run, is comparable to how Mitre 10 operates. That is because both

have owner-operated stores under the umbrella of a co-operative. Jacks is a member of the Mitre 10 co-operative.

[47] The Union has been able to achieve varied rates of pay at Foodstuffs supermarkets. Most Foodstuffs collective agreements have a pay scale of at least four steps (starting rate, 3 month rate, 6 months rate, 1 year rate, and a supervisor rate) and rates for employees with special skills, such as bakers and butchers. The best rates achieved to date for workers with a minimum of 1 year's experience are in two New World supermarkets in Auckland, being very close to or just above the living wage.

[48] Jacks does not agree that the Foodstuffs model is relevant as it is in a different industry and the cost of living for its staff in Auckland is much higher than the cost of living in Dunedin and Mosgiel.

#### **Overall pressure in the economy to increase wages**

[49] The Union argues that there is an overall pressure on employers to lift wages. The government's stated aim is to increase the minimum wage to \$20 per hour by 1 April 2021, with an indicative minimum rate of \$18.90 from 1 April 2020.

[50] In addition the living wage movement is gaining traction. The current living wage is \$20.55 per hour, increasing to \$21.15 per hour from 1 September 2019. The Union is bargaining for the living wage in all its collective agreements.

[51] Jacks agrees there is an overall national move to increase wages and it is aware that the minimum wage will rise to \$20 per hour on 1 April 2021. However, in relation to the living wage, evidence for Jacks is that imposing the living wage as the minimum wage rate will impact on its' ability to continue to pay above minimum wage rates for its other employees. It also says that the living wage is the hourly rate that is needed to support a household of 2 adults and 2 children on 1.5 incomes. However, its employees are from a diverse range of ages and family situations. Often those on the lowest wage rates are not supporting others. Mr Finn-House considers that applying the living wage concept to school and tertiary students is misusing the living wage concept.

### **Maintaining internal parity**

[52] Jacks wants to ensure that staff currently paid above its two lowest hourly rates retain parity or relativity above whatever rates are set for Tier 1 and Tier 2 minimum rates.<sup>7</sup> Jacks initial evidence for these proceedings was that its wages bill could increase by as much as 25%.

[53] After the provision of requested detailed financial information from Jacks at the investigation meeting the impact became clearer, but Jacks maintains the Union's rates would still be unaffordable.

[54] It is important to Jacks to maintain its ability to recognise individual performance through its PDR process and the 70 different wage rates that it currently pays, all of which are above the statutory minimum wage. Jacks says that if the minimum wage rates for the two tiers are set at a figure above what it proposes its ability to continue to review performance and wages through the PDR will be compromised.

[55] Jacks foresees itself having to either increase its revenue or reduce costs if the Union's demands become the fixed wage rates. It suggests it would either have to reduce staff hours, make some positions redundant or close the Mosgiel store.

### **Why should the Union be able to claim higher rates than it was prepared to settle for in 2017 and 2018?**

[56] Jacks says that if the Union was willing to accept the Authority's May 2018 recommendation of a Tier 1 rate of 25 cents above the then applicable minimum wage, being a starting rate of \$16.75, and a Tier 2 rate of \$19 per hour, it is unreasonable for the Union to now seek higher minimum rates for both tiers.

[57] The Union says that it was prepared to accept the Authority's recommended minimum rates for Tier 1 and Tier 2 in May 2018 because it also accepted the proposed term of the inaugural collective agreement should be only until 30 June 2018, allowing the parties to "bargain meaningfully over rates to apply from July 2018."<sup>8</sup>

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<sup>7</sup> There are 112 such staff currently paid rates above the two lowest hourly rates.

<sup>8</sup> Recommendation of the Authority, NZERA Christchurch, 15 May 2018, at [30].

[58] Had those rates been accepted by Jacks a further collective agreement would have been concluded by now that would have seen “a suitable increase from future bargaining [would have brought] increases to a reasonable number of Union members.”<sup>9</sup>

[59] That is, if Jacks had accepted the Authority’s recommendation, as the Union did, the fixing exercise would not have been necessary and from about July 2018 Union members would have been on rates that were more than 25 cents per hour over the minimum wage in Tier 1 and on a rate greater than \$19.00 per hour in Tier 2.

[60] The Union is not bound by the positions it agreed to during facilitation and is not bound by the amounts it asked for in its application for fixing in June 2017.

[61] The Union argues that the Authority needs to keep in mind that the Union members have been waiting for five years and eight months to conclude bargaining that includes meaningful wage rates. During that time other employers with whom the Union has collective agreements, such as Bunnings, have agreed to increasingly higher rates of pay in their collective agreements with the Union.

## **Analysis**

### *Wages*

[62] If Tier 1 and Tier 2 rates are set at the rates Jacks’ proposes nothing will change for at least 44 of their lowest paid staff. That would defeat the purpose of the collective bargaining, which is to increase wages for the Union’s members. Jacks’ rates remain out of step with the upward market pressure on wages.

[63] I consider the rates the Union claims are too high when I compare them with Retail NZ’s figures and the rates paid by the two other Mitre 10 franchises in the South Island for which we have detailed information. However, in all the circumstances I consider the Mitre 10 wages in Invercargill and Greymouth to be less compelling models than Jacks asserts. That is because they are in smaller centres and the Union’s members in those stores receive

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<sup>9</sup> Note 9, at [25].

other benefits that have monetary value to them. I consider Bunnings rates should be influential in setting what Jacks' lowest two rates should be.

[64] Having weighed all the evidence and considered the arguments of the parties, I conclude that the Tier 1 rate should be \$19.00 per hour, and the Tier 2 rate should be \$21.00 per hour. The additional trade qualified rate should be \$2.00 per hour.

[65] Standing back, the following "counter factual" scenario supports my conclusion. If Jacks and the Union had agreed on all provisions of a collective agreement, say, in 2015 and again in 2017 it is likely that there would have been negotiated increases above the minimum Jacks now pays. In addition there would have been further bargaining this year.

[66] I acknowledge there is an element of crystal ball gazing in this exercise. However, if such bargaining and agreement had happened it is reasonable to conclude that the Tier 1 rate could be \$19.00 per hour by now, and the Tier 2 rate could be \$21.00 per hour.

[67] In addition, it is reasonable to assume that the additional trade qualification rate would be up to \$2.00 per hour by now.

[68] Those are the rates I fix. That will potentially see pay increases for about 140 of Jacks' current employees. I do not consider it reasonable to raise those rates again on 1 September 2019 as the Union claims. Any further increases will be a matter for the next bargaining round.

### **The term**

[69] Jacks' PDR process is the reason it seeks the term of the collective agreement to be until June 2020. It wants bargaining to have concluded resulting in a new collective agreement, resulting in certainty for its wages budget before beginning the 2020 PDR process.

[70] The Union submits that its members require as much certainty as possible before having to re-enter bargaining. The bargaining to date has been long, costly and unfruitful and it does not have sufficient faith that a shorter term would be of any benefit to its members. In addition, the term sought by the Union would allow the Bunnings collective agreement

negotiations to likely have been concluded, allowing the Union to refer to the rates agreed to in that agreement in bargaining with Jacks.

[71] I agree with the Union that its members will be best served by a slightly longer term than that sought by Jacks. In addition, the term is not likely to significantly disadvantage Jacks.

[72] This term, only two months longer than Jacks sought, does not stop it going ahead with its PDR process in 2020.

[73] I fix the term of the inaugural collective agreement to operate from the date of this determination until 31 August 2020.

## **Conclusion**

[74] Clause 7, Trial Period, is to be deleted.

[75] The wording for clause 4, 'Term of Agreement', is fixed as:

The term of this collective will be for a period commencing on 24 June 2019 and expiring on 31 August 2020.

[76] Clause 21, 'Remuneration', is fixed as:

An employee who is new to the industry and possesses no skill and/or experience either actual or transferable (for example, unskilled, untrained high school students or tertiary students) shall be paid not less than a minimum of \$19.00 per hour. The minimum shall continue to be \$1.30 above the applicable minimum wage at all times until the end of the term of this agreement.

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 \$21.00 per hour. An employee with a relevant trade qualification shall receive an additional \$2.00 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.)

## **Costs**

[77] The Union has been successful in its application for fixing. The parties should seek to agree costs between them. The fixing investigation meeting took 1.5 days. That would usually see a payment of a tariff payment of \$6,250. However, there may be other costs the Union seeks to recover.

[78] If the parties cannot agree on costs the Union may make an application for costs within 28 days of the determination. Jacks should reply in writing within a further 14 days after that.

Christine Hickey  
Member of the Employment Relations Authority