IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 237
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 Richard Upton, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	8 April 2019 from the Applicant 15 April 2019 from the Respondent
Date of Determination:	18 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] These proceedings have had a long and tortuous path beginning on 18 October 2013 when First Union Inc. (the union) initiated bargaining for a collective agreement with Jacks Hardware and Timber Limited (Jacks). Jacks operates two Mitre 10 stores, one in Dunedin and one in Mosgiel. The bargaining relates to an inaugural collective agreement for retail non-management staff in both stores.

[2] This application relates to the investigation meeting set down on 23 and 24 June 2019 to fix the provisions of the collective agreement. Once the fixing process is complete there will be a concluded inaugural collective agreement between the union and Jacks.[1]

[3] Jacks has applied to the Authority to refer a question of law to the Employment Court and to delay the fixing investigation until it receives the Court's opinion on that question. The question Jacks poses is:

> In circumstances where the Authority will fix the terms of a collective pursuant to section 50J of the Act, do terms of an agreement that have been agreed between the parties during and/or outside of facilitation process [sic] remain binding on the parties for the purposes of fixing?

[4] The union opposes the referral of the question to the Court. In addition to its other objections to the referral, it characterises Jacks' application as:

> an abuse of process in that it seeks to relitigate matters that were determined by the Employment Court but not appealed.

Relevant history of the proceedings

[5] The history of the collective bargaining culminating in these proceedings is set out comprehensively in the most recent Employment Court case.[2] I will not repeat the entire summary of the history contained in the judgment.[3] However, it is important to understand that since 1 July 2015[4] there have been four Employment Relations Authority determinations,[5] two recommendations of the Authority after two facilitation processes and six Employment Court judgments.[6]

[6] On 2 June 2017, the union made an application to the Authority for an order fixing the provisions of the collective agreement. The union's position then was that the parties had reached agreement on all of the provisions of the collective agreement except for the

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[1] Section 50J of the Act.
[2] [2019] NZEmpC 20.
[3] Note 2, [3] to [42].
[4] 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.
[5] [2015] NZERA Christchurch 87, [2017] NZERA Christchurch 189, [2018] NZERA Christchurch 85 and [2018] NZERA Christchurch 90.
[6] [2015] NZEmpC142, [2015] NZEmpC 230, [2018] NZEmpC 87, [2018] NZEmpC 93, [2018] NZEmpC 94 and [2019] NZEmpC 20.

amount/s of wages and the term of the agreement. The union attached a draft collective agreement:

> containing a wage clause as drafted by the Authority in facilitation, but including rates of pay for tier one and two employees as sought by the union. The claimed wage rate for tier one was no less than a minimum of $19 per hour and tier two was a minimum of $22 per hour, rising by an additional $1 per hour if the employee held a relevant trade qualification. This draft contained a proposed term of twelve months.[7]

[7] Jacks opposed that application.

[8] There was delay in the proceedings caused by a number of things, including an unsuccessful application by Jacks' for a referral of a question of law to the Court, an application by Jacks for the Authority to determine whether a new breach of the duty of good faith was required in which Jacks was unsuccessful, and a last minute request by Jacks to go back to facilitation necessitating an investigation meeting, for which the union's lawyers and the Authority member had travelled to Dunedin, to be adjourned as soon as it had started.

[9] On 7 June 2018, a little over a year after the application, the Authority determined that it should fix the provisions of the collective agreement.[8]

[10] Jacks challenged that determination and applied for the fixing proceedings to be stayed. On 18 August 2018, Judge Smith stayed the Authority's proceedings to allow Jacks' challenge to be dealt with. On 28 February 2019, the Employment Court dismissed Jacks' challenge and upheld the Authority's determination that fixing was the next step.[9] Therefore, the Court lifted its stay on the Authority's proceedings.

[11] I note that Jacks has not appealed the Court's judgment, so must be taken to agree with its conclusion that the correct next, and final, stage of the proceedings is for the Authority to fix the provisions of the collective agreement.

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[7] Note 2, [26].
[8] [2018] NZERA Christchurch 90. The Employment Court stayed the Authority's proceedings.
[9] Note 2.

Timetabled dates for the fixing investigation

[12] On 8 March 2019, I held a case management teleconference to set the dates for the fixing investigation meeting and to timetable the exchange of evidence in advance of that meeting. The dates for the investigation meeting are 23 and 24 June 2019 in Dunedin.

[13] I made the following further directions:

> [3] The applicant is to lodge and serve amended statements of evidence and documents by no later than 4 pm on Friday 26 April 2019. The documents will include an updated draft collective employment agreement that contains the terms and conditions the applicant submits should be fixed by the Authority.
> [4] The respondent is to lodge and serve amended statements of evidence and documents by no later than 4 pm on Friday 24 May 2019.

Jacks' application to remove the proceedings to the Employment Court

[14] On 25 March 2019, Jacks lodged an application for removal of part of the matter to the Employment Court under s 178 of the Act. It wanted the Court to determine the same question of law it now seeks to have referred to the Court under s 177. I held a case management conference call on 3 April 2019, at which it was agreed that Jacks would withdraw the application and make a further application for removal of a question of law under s 177 of the Act.

The application for removal of a question of law under s 177

[15] Jacks made this application on 4 April 2019. On 4 April 2019, the union lodged a notice of opposition to the referral of the question of law to the Court.

[16] The parties agreed that I could deal with this matter on the papers. To that end Jacks lodged submissions in support of its application on 8 April 2019 and the union lodged its submissions in opposition on 15 April 2019.

[17] Given the timeframe for the fixing investigation, I have agreed to treat this matter with urgency.

Jacks' submissions

[18] Jacks alleges that the union is reviewing the tier one wage rate, the tier two wage rate, the term of the collective and "the other provisions" and may want all of the provisions of the collective agreement to be investigated and fixed by the Authority.

[19] Jacks submits that:

> the Authority can only fix terms of a collective agreement that the parties have been unable to reach agreement about which need to be revisited due to a material change of circumstances.

[20] Mr Upton submits that the question of law is important and has implications beyond the parties involved in this litigation. He also submits, correctly, that the question has not been dealt with by the employment institutions previously.

[21] Jacks says that the answer to the question will have "a fundamental bearing on the outcome of the investigation into what terms are fixed pursuant to s 50J." Jacks emphasises that there is no right to challenge a determination fixing the provisions of a collective agreement, therefore, it submits the question it has identified has an enhanced importance.

The union's view

[22] I briefly outline the views expressed in the notice of opposition and the submissions. The union has significant concern about any further delay in these proceedings.

[23] In support of its claim that Jacks' current application is an abuse of process it refers to the Employment Court's finding that Jacks' original breach of good faith continued[10] after the first facilitation was ordered by the Employment Court in 2015. It relies on the conclusions set out by Judge Smith in the 2019 judgment, that Jacks:

- engaged in delaying tactics contrary to good faith, including a 14 month delay in responding to the Authority's first recommendation;
- refused to deal further with the union about wage rates unless that occurred in a facilitated meeting, knowing that further facilitation was not available unless the

[10] Note 2, at [58].

Authority determined the circumstances had changed or bargaining had been protracted since the first facilitation. That involved delay while such a meeting was organised;

- unsuccessfully sought to adjourn an investigation meeting scheduled to fix the provisions because its timing was said to clash with Jacks' annual budgeting, and claimed until that task was completed Jacks would not be able to complete its evidence;
- engaged in a pattern of behaviour to delay and frustrate bargaining; and
- did so in a sufficiently serious and sustained manner to warrant the granting of fixing.

[24] Essentially, the union argues that this application is simply another delaying tactic and has been brought in continuing breach of Jacks' duty of good faith.

[25] It also says that the question of law does not arise in this case.

[26] On 17 April 2019, Mr Cranney clarified that the only amendments the union will make to the draft collective agreement attached to the fixing application on 2 June 2017 are changes to the wage rates sought, the term of the agreement and to delete the now inoperative 90-day trial period clause.[11] There are no other proposed changes to the previous draft collective agreement.

[27] The union submits that in February 2019 when the Employment Court dismissed Jacks' challenge, the Authority's second recommendation was out of date because the proposed term was no longer possible. Also, by now the recommended rate of $16.75 per hour for tier one is below the current minimum wage rate of $17.70 per hour. In addition, the inclusion of a 90-day trial period has been subject to legislative change making such a trial no longer legal. Therefore, these changes are necessary and do not give rise to a question of law.

Discussion

[28] Under s 177 of the Act, when a question of law arises during an investigation the Authority may refer that question to the Court for its opinion and delay the investigation until

[11] As at 6 May 2019 only businesses with fewer than 20 employees will be able to use the 90-day trial period set out in the current ss 67A and 67B of the Act. Since Jacks has far in excess of 20 employees and the investigation meeting will occur after 6 May 2019 it is clear the 90-day trial period provision as previously drafted can no longer be part of a collective agreement between the parties.

it receives the Court's opinion. Therefore, the Authority has discretion over whether to refer a question of law to the Court.

[29] The legislative provisions Jacks relies upon to assert that the union is bound by provisions of the collective it previously agreed with Jacks are ss 50G and 157 of the Act. It also relies on Judge Smith's February 2019 judgment.

[30] Section 3 of the Act is also relevant to these, and all, proceedings. It contains the object of the Act and establishes that Parliament intended the Authority to:

- promote good faith behaviour between parties to employment relationships;
- acknowledge and address the inherent inequality of power in employment relationships;
- promote collective bargaining; and
- reduce the need for judicial intervention.

[31] In exercising my discretion on whether to refer the question of law to the Court, I am guided by the object of the Act, and the role of the Authority to promote the duty of good faith in employment relationships and to act in equity and good conscience.[12]

[32] The question of law has been posed during the beginning stages of the Authority's process. However, I do not consider it to have "arisen" during the investigation as s 177 requires it to have done. It is a hypothetical question as the union only seeks to change the provisions of the earlier draft collective agreement that require change simply because of the effluxion of time, which was caused by Jacks' unsuccessful challenge. It is not a question of law that relates to these proceedings. There is no need for the Authority to seek the Court's opinion on the question posed by Jacks.

[33] Indeed in its application Jacks agrees that the issues that remain unresolved, such as the wages rates and the term of the agreement, remain to be fixed.

[34] The union is not seeking to re-litigate many or all of the provisions of the collective agreement, which is what Jacks apparently feared when it lodged this application.

[12] Section 157 of the Act.

[35] The referral of a question of law about the meaning of s 50G is unnecessary. Section 50G unambiguously states that any proposals or positions reached in facilitation cannot be binding on a party after facilitation, unless the parties have agreed otherwise.

[36] The parties have not agreed to be bound by proposals made or positions reached in facilitation. Therefore, in relation to provisions not agreed between the parties prior to facilitation, and not agreed during facilitation, the union is entitled to advance claims on those issues that are different from the claims it sought to get agreement to in facilitation, or even in its 2 June 2017 application. I can treat the further draft collective agreement I have directed to be supplied as an amended application, which I intend to do.

[37] I agree with the union that Judge Smith's judgment that fixing is the next step in these proceedings does not support Jacks' application. Any further delay in fixing the provisions of the collective agreement would be inequitable.

Conclusion on application

[38] The application to refer a question of law to the Employment Court is dismissed. The investigation meeting will take place on 13 and 14 June 2019 in Dunedin. The timetable that has already been set remains in place.

Costs

[39] The union has indicated that it seeks costs in relation to this application. Costs are reserved. Costs for all matters will be dealt with after the provisions of the collective agreement have been fixed.

Christine Hickey
Member of the Employment Relations Authority