IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 530
3124454

	BETWEEN	REUNITED EMPLOYEES ASSOCIATION INCORPORATED Applicant
	AND	NELMAC LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Anjela Sharma, counsel for the Applicant Nick Mason and Sarah Thompson, counsel for the Respondent
Investigation Meeting:	27 May 2021, 20 September 2021 and 21 September 2021
Submissions Received:	4 June 2021 and 21 September 2021 from the Applicant 11 June 2021 and 21 September 2021 from the Respondent
Date of Determination:	26 November 2021

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nelmac Limited is a council-controlled trading organisation that provides environmental management services in the areas of recreation, conservation and three waters. It currently partners with Nelson City Council, Tasman District Council and Marlborough District Council.

[2] Reunited Employees Association Incorporated (REA) is a union whose members are employees of Nelmac.

[3] REA says that historically it had a robust but productive relationship with Nelson City Council and then Nelmac, particularly when it came to bargaining over the terms of any collective agreement. However from 2017 the relationship became fractious and problematic as the then lead negotiators for Nelmac were not "inclined" towards REA. REA says this led to unnecessary involvement of lawyers for Nelmac and an almost complete end to any direct communication with management at Nelmac about operations and how that informed the implementation of any collective agreement, which in turn impacted on bargaining. REA says as a result bargaining and discussions about employment related issues have been, and continue to be, extremely challenging for REA resulting in serious injustice to its members.

[4] REA says this plays out in two areas, implementation of and compliance with some of the terms of the previous collective agreements between it and Nelmac and a complete breakdown in current bargaining for renewal of the current collective agreement. REA says Nelmac's actions amount to breaches of good faith and it has lodged claims in the Authority based on these allegations.

[5] Nelmac denies the allegations levelled at it by REA about its relationship with REA and its own behaviour. Nelmac also says it has not breached the collective agreement and whilst collective bargaining for the new collective agreement has been difficult, progress was being made until REA raised a new claim for pay increases at the last minute. Essentially it blames REA for any impasse and says bargaining has now broken down because of REA's actions.

Matters in dispute and the Authority's investigation of those matters

[6] In April 2021 REA lodged a claim in the Authority alleging that Nelmac had breached the duty of good faith in relation to bargaining taking place at that time and alleging that Nelmac had breached the current collective agreement. In relation to breaches of good faith in bargaining REA sought penalties and that the Authority fix the terms of the collective agreement. In relation to alleged breaches of the collective agreement REA sought compliance orders and penalties.

[7] Nelmac responded to REA's claim by denying the alleged breaches of good faith and the alleged breaches of the collective agreement. In relation to bargaining Nelmac applied for a reference to facilitation.

[8] When dealing with REA's claim and Nelmac's application I decided I would first deal with evidence about the bargaining for the renewal of the current collective agreement so that I could resolve:

(a) The allegation of breaches of good faith by Nelmac in relation to bargaining.

(b) The applications for the Authority to impose penalties and fix the terms of the collective agreement if there had been a breach of good faith.

(c) The application for a reference to facilitation.

[9] At the conclusion of the investigation meeting on 27 May 2021 I gave an oral indication that I would not make an order for the Authority to fix the terms of the collective agreement as the evidence did not indicate that the parties had exhausted all other avenues for reaching agreement, primarily because they had not been to facilitation.[1]

[10] Then, in a determination dated 3 June 2021 I made a reference to facilitation.[2]

[11] At that time the question of whether Nelmac had breached the duty of good faith in bargaining remained unresolved by me and I received written submissions from counsel on this on 4 June 2021 for the applicant and 11 June 2021 for the respondent.

[12] Before I had started my determination on this aspect of REA's claim both parties applied to the Authority for fixing:

(a) REA's application for fixing was premised on the allegations of breach of good faith I had already investigated and a further breach of good faith relating to an allegation that Nelmac continued to deny an agreement previously reached in bargaining for pay increases; it being alleged that these breaches had prevented a new collective agreement from being finalised, including in facilitation.

(b) Nelmac's application for fixing was premised on two allegations of breach of good faith by REA: that it had refused to acknowledge the agreement reached in facilitation; and its continued approach to collective bargaining being

[1] Section 50J of the Employment Relations Act 2000.
[2] *Reunited Employees Association Incorporated v Nelmac Limited* [2021] NZERA 241.

> unnecessarily aggressive, refusing to acknowledge Nelmac's representative in relation to the post facilitation process for producing an agreed collective agreement for ratification and threatening and then raising claims in the Authority without any substance. Nelmac also alleged that these breaches had prevented a new collective agreement from being finalised.

[13] Initially I directed that the applications for fixing be dealt with in two stages. First an investigation into whether the grounds for fixing set out in s 50J of the Employment Relations Act 2000 (the Act) had been made out. This would include a determination of the earlier claim by REA as it pertained to allegations of breach of good faith relating to bargaining and additional evidence about the further allegations of good faith in bargaining made by both parties. And second, if the grounds had been made out, then a further investigation into the terms to be fixed by me.

[14] The first investigation meeting was to be held on 26 August 2021. Unfortunately this investigation meeting was cancelled due to COVID-19 alert level 4 restrictions. As a result I directed that both stages of the application be investigated in one meeting to save time if I did find there was a breach of good faith that warranted fixing.

[15] So, it is the claims of breach of good faith in bargaining made by each party against the other and the applications for fixing, including the terms to be fixed, that I have now investigated that this determination resolves. I did this by receiving written evidence and documents, holding investigation meetings on 27 May 2021 and 20 and 21 September 2021 and assessing the oral and written submissions of counsel.

[16] I received written witness statements from Kathleen Drummond and John Drummond for REA and Marianne Wilkinson, Lindsay Coll, Abby Kuyk, Michael Orchard and Mark Jowsey for Nelmac. In my investigation meetings, under oath or affirmation, each witness confirmed their statement and gave further oral evidence in answer to questions from me and counsel. Counsel then provided oral and written submissions.

[17] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

The events

The current collective agreement

[18] The current collective agreement between these parties covers the period 1 July 2019 to 31 August 2020 (the CA) but it remains in force pursuant to s 53 of the Act and the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020.

Bargaining commences

[19] The bargaining between the parties for the renewal of the CA commenced with pre-bargaining discussions in June and July 2020. Despite a fractious initial exchange the notice of commencement of bargaining was served and negotiation over a code of good faith for bargaining was completed.

[20] The first meeting was held on 23 July 2020. At this meeting both parties tabled their claims, with REA's bargaining being led by John Drummond, secretary and Kathleen Drummond, assistant secretary. Nelmac's team was initially led by RKM,[3] with Lindsay Coll, CFO for Nelmac, and Marianne Wilkinson, Nelmac's bargaining agent.

[21] The second meeting was held on 3 August 2020. Mr and Mrs Drummond say RKM was aggressive towards their team members, that he used a laptop throughout the meeting contrary to accepted practice, he refused to listen to the REA claims and was generally obstructive. I accept that RKM was aggressive towards the REA team but not threatening, rather it was a combative approach in which he challenged positions forcefully. I accept he also became frustrated with the speed at which the meeting was moving and this was reflected in his demeanour and attitude towards Mr and Mrs Drummond. I also find that despite RKM's approach the meeting was able to proceed with both sides discussing the claims.

[22] After the second meeting the bargaining team for Nelmac reflected on its approach to the bargaining and decided that Mr Coll would lead the bargaining rather than RKM.

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[3] This member of the Nelmac bargaining team did not give evidence in my investigation – either in writing or orally at the investigation meetings. As he did not have an opportunity to respond to allegations REA makes against him I consider it appropriate not to identify him and will refer to him as RKM.

REA's claims for wage and allowance increases

[23] In the third meeting on 10 August 2020, there was discussion on REA's claim for increased wage rates and allowances – for these claims REA was essentially seeking parity with the rates in the collective agreement Nelmac had with another union, Amalgamated Workers Union NZ (AWUNZ).

[24] The extent of REA's wage and allowance claim subsequently became a contentious issue and remains problematic. The REA wage and allowance claims cover three parts:

(a) An increase to the Wage and Grading criteria – the CA has 5 wage grades, with grades 1 and 2 having two wage steps and grades 3, 4 and 5 having a band with bottom and top wage rates. REA sought increases to the rates for the wage steps and the bands to align the grades with those in the AWUNZ collective agreement.

(b) An increase to all members wages of 75c per hour.

(c) An increase to the rates of allowances to align them with the AWUNZ collective agreement.

[25] The reason these claims became contentious and problematic is that Mr Coll and Ms Wilkinson say only the Wage and Grading criteria claim and the allowances claim were tabled and then discussed in the 10 August 2020 meeting.

[26] It is clear that REA's claim for the Wage and Grading criteria to be increased and the claim for allowance rates to be increased were tabled and discussed. Mr Coll had some concerns about simply aligning the Wage and Grading criteria and the allowances with AWUNZ as they were not identical sets of grades, the AWUNZ grades being set and calculated differently from the REA grades. And because the allowances needed to be aligned overall with any shift in grades. So Mr Coll advised he would take the claims away and reflect on them and set out a response based on any budgetary constraints and ensuring REA members were not disadvantaged overall compared to AWUNZ members.

[27] Through the next two meetings on 11 and 14 August 2020 there were discussions around these claims and others.

[28] Mr and Mrs Drummond say that in these meetings REA was presented with a "take it or leave it" offer on the wage and allowances claims (and other claims) and when it did not simply accept the offer Nelmac walked out of the 14 August 2020 meeting.

[29] The evidence from Nelmac is contrary to this. Mr Coll and Ms Wilkinson both say that in the two meetings they attempted to work through REA's claims but ended up in a position where all that was happening was REA was seeking to "cherry pick" the best parts of their own claim, the AWUNZ terms and any counter offers being made by Nelmac – with Nelmac having presented four options particularly in relation to the wage and allowances claims - rather than looking at and considering the claims as a package.

[30] I accept Nelmac's evidence on this point. Nelmac presented four packages providing different options in terms of progressing the bargaining and did not do so on a take it or leave it basis. And I find that REA did try to cherry pick the best parts of the Nelmac offers, their own claims and terms that would provide parity with the AWUNZ collective agreement.

[31] Ms Wilkinson then became frustrated with Mr and Mrs Drummond as they would not consider some aspects of Nelmac's claims or counter claims because they believed the claims were not tabled properly.

[32] All of this culminated in Ms Wilkinson and Mr Coll bringing the 14 August meeting to an end. However, they did not simply walk out rather they explained that they felt the bargaining was not being productive, particularly as the REA team seemed to be focussed on process requirements and that is why they brought the meeting to an end.

[33] In the 14 August 2020 meeting the parties agreed to the next meeting taking place on 20 August 2020. However, Nelmac was unable to confirm their attendance for that date and did not book a meeting room or confirm the time and place of the meeting with REA. REA however believed the meeting was going ahead and turned up for a meeting on 20 August.

[34] The next meeting was then held on 10 September 2020. Mr and Mrs Drummond say this was another meeting in which RKM was aggressive and yelled at them. I accept again that RKM may have been aggressive in his approach, probably out of frustration, but I am not satisfied that was threatening and I am not satisfied that RKM's attitude had a negative impact overall.

[35] Whilst the 10 September 2020 meeting together with the next meeting on 11 September 2020 were difficult, I accept the evidence of Mr Coll that progress was made on many of the claims. Mr Coll describes this as bridging the gap between the REA approach of trying to pick all of the best bits of the claims and the Nelmac options. In the end, Mr Coll believed the parties had the basis for an agreement as one of its options had been sufficiently refined to represent a suitable compromise on the claims. Nelmac had made concessions on the allowance rates and the banding sought such that it was prepared to offer parity with the rates in the AWUNZ collective agreement with some exceptions. REA was considering this offer but was unable to decide in the meeting on 11 September.

[36] I find this was the position at the end of the meeting on 11 September 2020 – REA were considering what Nelmac believed to be a suitable compromise on the claims and was a basis on which a new CA could be settled.

[37] The parties then met again on 14 September 2020. Mr Coll and Ms Wilkinson expected that REA would be in a position to confirm acceptance of the last offer or if there was to be any further negotiations that would reflect minor amendments.

[38] However on 14 September 2020 Mr and Mrs Drummond presented various counter offers, seeking significant improvements on the Nelmac offer. The key part of REA's position was the claim for a 75c increase to all members hourly wage rate – a claim Mr Coll and Ms Wilkinson say had not been tabled before.

[39] So, at the end of the 14 September 2020 meeting Nelmac believed REA had back-tracked from an almost agreed position, with only a few matters to be settled which they believe they had accounted for with their last offer. In the 14 September meeting REA had tabled a counter offer that Nelmac believed amounted to further "cherry picking" and adding new claims in, particularly the claim for an across the board wage increase which had not previously been raised.

[40] In contrast, REA believed Nelmac was being unreasonable and was manoeuvring it into a "take it or leave it" ultimatum position which failed to include previously agreed claims and therefore was an inferior and unacceptable offer. It also believed Nelmac was using bargaining tactics that amounted to a breach of good faith, which included walking out of the 14 August 2020 meeting.

[41] In the evening of 14 September 2020, REA sent an email to Nelmac advising it that REA would lodge an application with the Authority for it to fix the terms of the collective agreement on the basis of Nelmac's breaches of good faith in bargaining.

[42] On 15 September 2020, Ms Wilkinson sent REA a "final offer" from Nelmac. In her letter Ms Wilkinson stated:

> The Union has claimed parity with the AWUNZ collective agreement. Nelmac has agreed to this in entirety, with the exception of agreeing to maintain service-based steps in grades 1 and 2.

[43] Ms Wilkinson's letter then set out two tables, one with the proposed Wage and Grading criteria rates and the other with the proposed rates for allowances (matching the AWUNZ rates). Ms Wilkinson's letter then recorded the following:

> We have agreed to meet with the union post ratification to discuss progression for members and Nelmac commits to conducting an annual grade and remuneration review for people covered by the collective agreement and backdate any grade changes and pay increases to 1 September 2020.
>
> We note that at our last meeting you tabled a brand new claim for an across the board wage increase. This had not been discussed in the seven previous bargaining sessions, or included in any of your claims correspondence, so meets the definition of a "new claim". It is therefore a breach of Section 4(a)(ii) and (iii) of the Code of Good Faith in Collective Bargaining and is not accepted.

[44] In her letter Ms Wilkinson also denied the alleged breaches of good faith and advised that REA's repeated threats to lodge claims in the Authority during the bargaining process was difficult to reconcile and if the offer was not accepted then it would apply to the Authority for a reference to facilitation.

[45] My finding in respect of the REA claim for a 75c per hour wage increase for all of its members is that this claim was not raised initially nor was it bargained for in any of the meetings – it was therefore a new claim raised by REA on 14 September 2020. This is because:

(a) REA's own claims document does not list it as a claim presented in the first meeting.

(b) There is one reference to a 75c increase in a REA working document that Mrs Drummond says was prepared for the 10 August 2020 meeting. However the evidence about whether this was actually expressed as a claim in that meeting is inconclusive. Mrs Drummond says she read from her notes so must have stated it; Mr Coll and Ms Wilkinson say this is not the case and had it been raised they would have noted it and responded to it.

(c) The 75c claim is not referenced in any other REA documents which purport to be a record of matters discussed and/or agreed in bargaining meetings. There is no mention of the claim in any of the correspondence around bargaining, except for Ms Wilkinson's letter of 15 September 2020 and this refers to it as a new claim, which is consistent with Nelmac's evidence.

(d) Nelmac's evidence about bargaining and its offers is contrary to the 75c claim having been raised, bargained and agreed or rejected in bargaining. Nelmac's offers were structured around a budget for Wage and Grading criteria rates and allowance rates and some individual adjustments to wage rates outside of bargaining – Nelmac having committed to negotiating individual adjustments once the new CA was agreed and the adjusted Wage and Grading criteria rates were in place. This evidence is credible and overall makes sense; it hangs together as a basis for explaining Nelmac's view that the 75c claim was not raised. In fact, Nelmac had flagged this general approach in its own claims when it stated that the amount of any wage adjustment (if there was to be one) would depend on other components of the "package".

(e) The only contemporaneous documents that show any discussion of the 75c claim in bargaining are a REA document outlining its response to the 11 September 2020 Nelmac offer that it used to table its position in the 14 September 2020 meeting, and Ms Wilkinson's 15 September 2020 letter. Both documents indicate the claim was raised in the 14 September 2020 meeting and all of the witness evidence supports this. However the REA document does not provide any indication that the 75c claim had been raised previously and in contrast Ms Wilkinson's letter categorically states Nelmac's view that the 75c claim was a new claim.

Facilitation and the agreement reached

[46] Nelmac's offer, set out in Ms Wilkinson's letter of 15 September 2020 was not negotiated further and REA lodged its claim (see paragraph [6]) in the Authority. As I have already outlined I then referred the parties to facilitation.

[47] The parties attended facilitation on 21 and 22 June 2021. As a result of facilitation the parties reached an agreement on the outstanding bargaining claims. This agreement was recorded in a minute of the facilitator dated 23 June 2021 (the Minute).

[48] On the wage and allowance claims the Minute records the following agreement:

> (b) **Wages**
>
> From 1 September 2020 a 0.50 cent increase shall be applied to all paid rates (backdated);
>
> From 1 September 2021 a 0.50 cent increase shall be applied to all rates.
>
> ***Clause 15*** – the following new printed rates schedule will apply from the applicable dates:
>
> [Table setting out Wage Grading criteria rates - omitted]
>
> (c) **Allowances**
>
> A 4% increase will be applied to all printed allowances effective from the date of ratification of the collective agreement.

Post facilitation actions

[49] The parties also agreed that Ms Wilkinson would produce a draft of the agreed terms for the new CA and then Mr Drummond and Ms Wilkinson would meet on Monday 28 June 2021 to confirm the agreed terms of settlement, including previously agreed terms and those agreed in facilitation, had been recorded correctly and that the draft of the new CA that she had produced could proceed to be put to REA members for ratification.

[50] So, on Friday 25 June 2021, Ms Wilkinson sent an email to Mr Drummond with an updated terms of settlement letter and a draft of the new CA. In her email Ms Wilkinson stated that these documents were forwarded to Mr Drummond for *our Monday catch-up*.

[51] Mrs Drummond responded to this email by sending a letter and attachments to Mr Coll on Sunday 27 June 2021. In her letter of 27 June 2021, Mrs Drummond referred to Ms Wilkinson's email of 25 June 2021 and stated:

> 1. Marianne Wilkinson's email Friday 25 June 2021 ….
>
> (a) Did you instruct [Ms Wilkinson] to prepare and send the documents?
>
> (b) When Member Campbell looked at [Ms Wilkinson's] computer and started to ask her to write the report, I said no! and organised for [Mr Drummond] to meet with [Ms Wilkinson] on Monday 28th. Reason being since 2017 the union has found her to be lacking in integrity and credibility.
>
> (c) [Ms Wilkinson] continues to ignore procedural requirements and has breached the agreement reached during facilitated bargaining when she emailed terms of settlement dated 28 June 2021, for a meeting on Monday for the purpose of collectively preparing the collective agreement and terms.
>
> (d) [Ms Wilkinson] blatantly breached the confidentiality of our positions by emailing a copy of her prepared document to Abby Kyuk. [sic]
>
> (e) [Ms Wilkinson] assumes she has the authority to produce terms of settlement for the union to take to a meeting for ratification. We advise [Ms Wilkinson] that the union presents terms for a settlement not a preconceived position with no options.
>
> 2. There will be no meeting with [Ms Wilkinson] on Monday, 28 June 2021 at 2pm.
>
> 3. REA in the interests of reaching a settlement request that you and Mark Jowsey meet with both [Mr Drummond] and myself on the above date and time to the "Terms of Settlement". ….

[52] The reference in Mrs Drummond's letter to "Terms of Settlement" was to an attached document produced by REA setting out the terms of settlement. Mrs Drummond had also attached a draft of the new CA with terms reflecting the Terms of Settlement.

[53] The terms of settlement and draft of the new CA that REA produced did not reflect the agreement as set out in the Minute. One key difference was that REA had changed the allowances in the CA to match allowances in the AWUNZ collective agreement and then added 4%. An example is the confined spaces allowance. The allowance rate in the CA was $3.65 for every 15 minutes and the agreed increased rate (an additional 4%) would be $3.80, both of which were recorded in the draft of the new CA Ms Wilkinson produced. However

the draft produced by REA had the rate as $3.70 for every 15 minutes (aligning the rate with the AWUNZ collective agreement) and the increased rate at $3.85.

[54] Mr Coll responded to Mrs Drummond's letter and attachments on Monday 28 June 2021 in an email advising Mrs Drummond that Nelmac intended to honour the agreement reached in facilitation including that Mr Drummond and Ms Wilkinson would meet that afternoon to discuss the terms of settlement and the draft of the new CA produced by Nelmac which included a 4% increase in allowances on the existing rates.

[55] Mr Drummond responded to Mr Coll in an email of 28 June 2021 stating that Nelmac had agreed that increases to allowances would be based on the AWUNZ rates. He queried if Nelmac were now denying that agreement. Mr Drummond concluded by saying he was not prepared to meet with Ms Wilkinson and argue points that had been agreed.

[56] Mr Coll then responded to Mr Drummond later on 28 June 2021. He advised Mr Drummond that he was referring to discussions prior to facilitation (regarding a claim that allowances be aligned with AWUNZ rates) and the discussion in facilitation focussed on an increasing allowances by increasing the existing REA rates, not aligning the rates to AWUNZ. And this was what was agreed and recorded in the Minute – a 4% increase to all existing REA rates.

[57] Mrs Drummond then responded with the last piece of correspondence in the exchange. Mrs Drummond stated that the AWUNZ rates remained relevant as they had been discussed in prior bargaining and therefore, she asserted, these were the rates that existed. She concluded that Mr Drummond was not prepared to meet with Ms Wilkinson and Ms Wilkinson had revoked the agreement by her precipitous action of sending the terms of settlement on Friday 25 June 2021.

[58] After this exchange, the parties did not meet to discuss the terms of settlement and a draft of the new CA based on the agreement reached in facilitation. REA simply proceeded by putting the terms of settlement and the draft of the new CA it had produced after facilitation to its members for ratification on 2 July 2021.

[59] On 6 July 2021 Mrs Drummond sent an email to Lindsay Coll attaching documents described as the ratified terms of settlement and a new CA reflecting the terms of settlement.

[60] The ratified terms of settlement had two key differences to the agreement reached in facilitation. The allowance rates had been set to match the rates in the AWUNZ collective agreement and not the rates set out in the CA and the 4% increase was applied to those AWUNZ rates. And, the terms of settlement recorded that the members would not accept the 50c increase to wage rates for the period 1 September 2020 – 31 August 2021 but rather the members would accept a 75c increase for that period.

[61] Nelmac did not accept the draft "ratified" CA and both parties then lodged applications for fixing.

Has Nelmac breached the duty of good faith?

[62] REA claims that Nelmac breached the duty of good faith through its conduct during bargaining. REA complains that Nelmac walked out of meetings, did not turn up for one scheduled meeting, continually presented new offers and did so on a "take it or leave it basis" and failed to bargain at all, terminating negotiations and resorting to emailing a final offer.

[63] REA also claims that Nelmac agreed to a 75c increase to all wages and then reneged on that agreement. It says Nelmac's subsequent actions in not honouring the 75c wage increase, from 14 September 2020 when it claimed the wage increase was a new claim, throughout its evidence in my investigation, and in facilitation is a breach of good faith.

Did Nelmac act as alleged?

[64] Having reviewed all of the evidence I accept that during bargaining Nelmac, particularly RKM in the early meetings, took an aggressive and combative approach with REA at times but overall this did not impact on the progress of bargaining. This behaviour was not frequent and when it occurred it was actually an expression of frustration at the REA approach to bargaining and was not in any way an attempt to bully or coerce REA into accepting positions or an attempt to mislead or confuse REA so this it might not understand the claims or be able to respond.

[65] I also conclude that Nelmac did not walk out of meetings as such; that is it did not abruptly leave any meetings without explanation in some sort of tactical approach to bargaining or in an effort to coerce or influence REA. It did end one meeting because it

believed progress was not being made and there was no benefit in continuing on that day and I accept that as being a logical and acceptable response to what was occurring in that meeting.

[66] I find that Nelmac did fail to attend one meeting on 20 August 2020 but that was a misunderstanding about the scheduling of that meeting and Nelmac apologised for non-attendance at the meeting.

[67] Further, I do not accept that Nelmac put offers on a "take it or leave it basis" which might be seen as a breach of good faith. It expressed offers in an acceptable way such as final offer or a total offer.

[68] The allegation that Nelmac had agreed to a 75c wage increase for all REA members but then subsequently reneged on that is based on evidence from REA that the 75c wage increase was raised as a claim along with increases to the Wage and Grading criteria rates and the rates for allowances. Mr and Mrs Drummond's evidence is that despite raising the wage increase this was never negotiated as Nelmac refused to engage on it. However they say the wage increase was agreed because Nelmac agreed to give REA parity with the AWUNZ collective agreement – AWUNZ members having received an across the board 75c increase to their wages.

[69] My conclusion on the claim for a 75c wage increase is that it was a new claim raised by REA on 14 September 2020. On this basis it was never part of any claim that Nelmac could have agreed to when it agreed to REA having parity with the AWUNZ collective agreement. What Nelmac agreed to is set out clearly in Ms Wilkinson's letter of 15 September 2020 – parity with the Wage and Grading criteria rates with some exceptions and with the rates for allowances. And that letter also clearly records that Nelmac does not accept the claim for a 75c wage increase.

Conclusion on breach of good faith by Nelmac

[70] I find that Nelmac's conduct during bargaining was not a breach of the duty of good faith but rather was the type of behaviour or conduct referred to in *Kaikorai Service Centre*

Ltd v First Union Inc where the Court stated the duty of good faith does not require parties to be courteous nor does it require polite language or the avoidance of a combative style.[4]

[71] As Nelmac did not agree to a 75c wage increase there is no basis for the second limb of REA's claim relating to breach of good faith.

[72] Overall, my conclusion is Nelmac has not breached the duty of good faith as alleged.

Has REA breached the duty of good faith?

[73] In its application to have the terms of the CA fixed, Nelmac claims that REA has breached the duty of good faith by its post facilitation conduct:

(a) Refusing to acknowledge the agreement reached in facilitation and putting an amended CA that did not reflect the agreement to its members for ratification.

(b) Its continued approach to collective bargaining being unnecessarily aggressive, including refusing to acknowledge Nelmac's representative in relation to the post facilitation process for producing an agreed collective agreement for ratification and threatening and raising claims in the Authority without any substance.

Did REA act as alleged?

[74] In its communications with Nelmac after the facilitation and its interactions with its members, REA refused to acknowledge the agreement reached in facilitation in two ways:

(a) Continuing to seek a 75c wage increase despite agreeing to a 50c wage increase in facilitation.

(b) Asserting that the printed rates for allowances, that should be increased by 4% (in line with the agreement reached in facilitation), were the rates for allowances recorded in the AWUNZ collective agreement.

[75] Whilst REA asserted (and continues to assert) that it had an agreement on the 75c wage increase and that the printed rates for allowances were the rates in the AWUNZ

[4] *Kaikorai Service Centre Ltd v First Union Inc* [2018] ERNZ 533.

collective agreement – both positions based on the assertion that Nelmac had agreed to parity with the AWUNZ collective agreement – I do not accept REA's position. The simple point is the agreement reached in facilitation was not based on parity with the AWUNZ collective agreement and did not include these two terms as expressed by REA.

[76] First, as already outlined Nelmac had only agreed parity with the AWUNZ collective agreement for Wage and Grading criteria rates and the rates for allowances; there was no agreement on a 75c wage increase. And, the 75c wage increase was introduced as a new claim by REA and had been rejected by Nelmac. Nelmac's position on wage increases prior to facilitation was that REA would get increases to the Wage and Grading criteria rates to largely align those rates with the rates in the AWUNZ collective agreement. There was no commitment to wage increases other than those on the bottom of the band who would get an increase because of the increase in the band and a commitment to the annual review of each employees wage rate (to be conducted outside of the bargaining for the new CA).

[77] Second, on the allowance rates, bargaining over parity with AWUNZ was abandoned in facilitation in favour of bargaining over a percentage increase to the REA rates – Nelmac only wanting to give a small percentage increase to reflect the cost it had budgeted for allowance increases.

[78] It appears therefore that the agreement reached in facilitation was a compromise by Nelmac accepting an across the board wage increase but not at the rate sought by REA, and then offsetting the lower increase by providing a higher percentage increase to the REA allowance rates than it had budgeted for (rather than giving parity with AWUNZ rates). The deal was a 4% increase to the allowance rates recorded in the CA (so the existing REA allowances) which would put REA allowance rates ahead of AWUNZ allowance rates and a 50c wage increase.

[79] For completeness, I record my finding that this is the agreement set out in the Minute. And therefore it follows that REA's insistence that the new CA should have the allowance rates set at the AWUNZ rates plus 4% and that there should be a 75c increase to wages, because Nelmac had previously accepted it could have parity with the AWUNZ collective agreement is contrary to what was agreed.

[80] So, REA did refuse to acknowledge the agreement reached in facilitation. In the course of doing this, in an attempt to justify its position regarding the agreement reached in facilitation, REA accused Nelmac and specifically Ms Wilkinson of acting without authority, ignoring process and breaching confidentiality. And then REA refused to meet with Ms Wilkinson post facilitation.

Is this conduct a breach of good faith by REA?

[81] The duty of good faith is set out in s 4 of the Act and was summarised by the Court in *Kaikorai*:[5]

> Parties in an employment relationship must deal with each other in good faith. That means they must not mislead or deceive each other or engage in conduct, directly or indirectly, that is likely to mislead or deceive each other. The duty is wider in scope than the implied mutual obligations of trust and confidence. It requires the parties to be active and constructive in establishing and maintaining a productive relationship in which they are among other things, responsive and communicative.

[82] So, the obligation is not to mislead or deceive each other and to be active and constructive in maintaining a relationship in which each is responsive and communicative. As expressed in *Kaikorai* this is something more than simply taking a combative style or not being courteous.

[83] In this regard REA's actions potentially touch on both aspects of good faith: not being misleading and deceptive; and being active and constructive in maintaining a relationship that is responsive and communicative.

[84] Turning first to REA's positioning in respect of the agreement reached in facilitation and what it then said the new CA terms should be, in some circumstances this positioning might be acceptable. In *Toll New Zealand Consolidated Limited v Rail & Maritime Union Inc* the Court stated: [6]

> … Unless there is evidence of bad faith, we cannot see that there is an absence of good faith in a party adhering to a genuinely held belief as to the correctness of its position when the matter was clearly arguable one way or the other.

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[5] *Kaikorai Service Centre Ltd v First Union Inc*, above n 4 at [62].
[6] *Toll New Zealand Consolidated Limited v Rail & Maritime Union Inc* [2004] 1 ERNZ 392 at [81].

[85] Then in *Auckland District Health Board v New Zealand Resident Doctors' Assn Inc* the Court stated:[7]

> One of the key aspects of that duty set out in s 4(1)(b) is not to mislead or deceive. Making an assertion of fact in the course of bargaining which cannot be supported or substantiated, would be misleading or deceptive.

[86] So something more than just maintaining a position is required – it must be a position that is not arguable or cannot be substantiated. In this case, REA's position post facilitation, in terms of what it said the agreement was and what the terms of the new CA should be was not arguable and could not be substantiated, particularly in relation to the 75c wage increase. Nelmac was not misled or deceived but the behaviour was misleading and it does evidence bad faith.

[87] Turning to the second aspect of REA's conduct, refusing to acknowledge Nelmac's representative is not a breach of duty of good faith per se.[8] And, as I have already indicated in regard to Nelmac's conduct, if this is nothing more than a robust combative approach to bargaining it is not a breach of the duty of good faith. This is where the emphasis on being active and constructive and responsive and communicative come into play. In *Jacks Hardware and Timber Ltd v First Union Inc*, the Court stated:[9]

> [58] In any event, had it been necessary to do so, I would have found that Jacks Hardware breached the duty of good faith after facilitation was ordered. The duty in s 4(1A) requires the parties to an employment relationship be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative. The company was not bound to conclude a collective agreement, but the duty of good faith prevents behaviour designed to frustrate bargaining.

[88] So it is behaviour that is not constructive and does not contribute to a relationship which is responsive and communicative with the overall effect of frustrating bargaining. In relation to bargaining it is more than bad behaviour or tactics, it is positioning or actions that frustrate the process and impede bargaining taking place effectively.

[89] I find that that is what REA's actions did. By rejecting the draft CA provided by Nelmac which reflected the agreement reached in facilitation, by refusing to meet with

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[7] *Auckland District Health Board v New Zealand Resident Doctors' Assn Inc* [2010] ERNZ 358.
[8] *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd* (2008) 6 NZELR 14 (EmpC).
[9] *Jacks Hardware and Timber Ltd v First Union Inc* [2018] NZEmpC 94.

Ms Wilkinson and making allegations about acting without authority and not being trustworthy, by asserting the agreement had been revoked and by presenting a draft CA for ratification which contained different terms to the agreement without Nelmac's consent, REA did more than just adopt a robust approach to bargaining. It was not constructive, it did not enable a relationship that was responsive and communicative and overall it frustrated the bargaining process.

[90] In conclusion, REA's position in respect of the agreement reached at facilitation and what the terms of the new CA should include after facilitation was not arguable and could not be substantiated; it was misleading and deceptive. And then in trying to assert its view of the agreement reached in facilitation REA's conduct was not active and constructive and its input into the relationship was not responsive or communicative. This behaviour frustrated the bargaining.

[91] In my view, this post facilitation conduct was indicative of REA's overall behaviour in bargaining. On my review of the events that took place during bargaining, it appears that REA continually revisited what occurred in bargaining or had been agreed. Sometimes this took the form of distortion, blatantly denying things had occurred when they had or asserting things had occurred when the evidence shows they did not. Other times it took the form of simply misremembering or misreporting what had been discussed. Then, in order to substantiate its weak position, or reopen bargaining on an already agreed claim or simply in an attempt to obfuscate or hide its improper actions REA would go on the offensive, accusing Nelmac of improper conduct or not following procedure or some other allegation (in the case of Ms Wilkinson, acting without authority and therefore being untrustworthy). This behaviour was both misleading and deceptive and it was not constructive nor did it form part of a responsive and communicative relationship. It had the overall and continued effect of frustrating bargaining.

[92] I have no doubt that REA's post facilitation conduct was a breach of the duty of good faith.

Penalty

[93] Whilst it is arguable that the requirements for a penalty to be imposed for the breach of good faith as set out in s 4A of the Act and discussed by the Court in *Pact Group (A*

Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc and anor have been met, I do not consider it appropriate to impose a penalty against REA.[10]

[94] I have come to this conclusion after considering the circumstances of the breach of good faith by REA against the factors in s 133A of the Act.

[95] The objective of the Act is to promote productive employment relationships and a focus of this objective is to promote collective bargaining. Imposing penalties in these circumstances moves the focus away from resolving any impasse in bargaining and trying to restore a productive relationship; imposing penalties may have a chilling effect on parties to collective bargaining, hampering their approach to bargaining.

[96] Whilst REA's breach of good faith is problematic because it undermined bargaining, that can be remedied by Authority intervention through facilitation and/or fixing. And this is what the Act provides and arguably promotes as resolution rather than the penalties. Parties should be encouraged to explore resolution of any impasses in bargaining through facilitation or fixing rather than seeking penalties as this addresses the loss suffered or damage caused by the breach of good faith.

[97] In this case, fixing the terms of the new CA, which I address below, is a more effective and complete remedy than imposing a penalty. It addresses the immediate and ongoing concern in that a new CA is put in place. It also means the parties can move on from the break down in bargaining and try and restore their relationship – having to pay a penalty in these circumstances is likely to impede that.

Fixing

[98] Fixing is provided for by s 50J of the Act, with s 50J(3) specifying the grounds that must be made out before the Authority can fix the terms of a collective agreement. The issues that need to be addressed based on s 50J(3) are: [11]

(a) Has there been a breach of the duty of good faith by one party?

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[10] *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc and anor* [2014] NZEmpC 119.
[11] See also *Jacks Hardware and Timber Ltd v First Union Inc*, above n 9.

(b) If there has been a breach was it sufficiently serious and sustained as to significantly undermine the bargaining?

(c) Have all other reasonable alternatives for reaching agreement been exhausted?

(d) Is fixing the provisions of the collective agreement the only effective remedy?

[99] In terms of the grounds set out in s 50J(3) of the Act I note that both parties submit that the grounds have been met.

Has there been a breach of duty of good faith?

[100] I have already decided that REA has breached the duty of good faith.

Was the breach of good faith sufficiently serious and sustained as to undermine bargaining?

[101] In *Jacks Hardware*, the Court considered the issue of whether the breach of good faith was sufficiently serious and sustained to undermine bargaining and summarised the requirement as follows:[12]

> [66] When read as a whole, s 50J(3)(a)(ii) means that before an order can be made the Authority must be satisfied a breach has occurred that is adequate or important enough to warrant that step meaning it is more than a trivial, negligible or transient breach, and that it has carried on for enough time to undermine the bargaining. What moderates the application of the section is that it requires a link between the breach and undermining the bargaining, which has to have been "significantly undermined". Those words indicate that the Authority must be satisfied the impact on the bargaining was such that it was noticeably undermined.

[102] REA's breach of good faith is sufficient (in that it is important or adequate enough) to warrant fixing being imposed. The breach is more than a trivial one and it has sufficiently undermined the bargaining.

Have all other alternatives for reaching an agreement been exhausted?

[103] There is a protracted history of bargaining between these parties, not just in this round of bargaining but also in earlier rounds of bargaining. That history shows the parties have tried all methods of engaging in bargaining, face to face meetings, through the exchange of correspondence, mediation, facilitation and intervention by the Authority.

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[12] *Jacks Hardware and Timber Ltd v First Union Inc*, above n 9 at [66].

[104] In this current bargaining round, having reached an agreement in facilitation to then have that fall down indicates quite clearly to me that all avenues have now been exhausted. Facilitation is not granted easily but when parties are ordered to participate in facilitation the success rate is high. In fact I am only aware of one facilitated bargaining process in the Authority that did not resolve the issues and result in a collective agreement being agreed – that was the facilitation between Jacks Hardware and Timber Ltd and First Union Inc, which led to the only case to date where terms of the collective agreement have been fixed by the Authority. [13]

Is fixing the provision the only effective remedy?

[105] The Court summarised the issue of whether fixing is the only effective remedy in *Jacks Hardware*:[14]

> [91] Section 50J(3)(c) requires fixing to be "the only effective remedy", available to the party affected by the breach. This part of the test in s 50J is the end of a cumulative process. Once those obstacles have been negotiated the Authority needed to be able to reach a conclusion that the only effective remedy was to fix the collective agreement. The emphasis in the section is on "effective remedy" not any remedy. The test cannot require an applicant in the union's position to establish a breach of the duty of good faith that satisfies the cumulative steps in s 50J(3)(a)-(b) and then to explore options, no matter how remote or unlikely they are to produce agreement, before fixing can occur. In a sense, having worked through s 50J(3)(a)-(b) inclusive, satisfying s 50J(3)(c) may be self-evident.
>
> [92] All of the processes provided by the Act to assist the union and Jacks Hardware in negotiating, and settling a collective agreement, have been used unsuccessfully. There are no other effective remedies available to the union.
>
> [93] Section 50J(3)(c) was satisfied. The only effective remedy available to the union in the face of the breach of the duty of good faith by Jacks Hardware was to apply to the Authority for it to fix the provisions of the collective agreement.

[106] The position between REA and Nelmac has reached the same point that was evident in Jacks Hardware; all the processes available to assist the parties have now been used unsuccessfully. And as a result being satisfied that fixing is the only effective remedy is self-evident. I accept that fixing is now the only effective remedy, this is particularly so given my

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[13] *Jacks Hardware and Timber Ltd v First Union Inc* [2019] NZERA 374.
[14] *Jacks Hardware and Timber Ltd v First Union Inc*, above n 9 at [91] – [93].

findings on the nature of the breach of good faith by REA and that despite an agreement being reached in facilitation the new CA has not been finalised.

The terms of the new CA

[107] The parties' respective positions on fixing are straightforward:

(a) REA says I should fix the terms of the new CA in line with the "ratified" CA. That is the draft CA it produced based on what it said was agreed in facilitation and then with the 75c wage increase for the period of 1 September 2020 until 31 August 2021 that its members said they would accept in the ratification meeting on 2 July 2021.

(b) Nelmac says I should fix the terms of the new CA in line with the draft CA Ms Wilkinson produced after the facilitation, which reflects the agreement reached in facilitation.

[108] Neither party advanced their stated position with evidence to support the terms for the new CA other than evidence of what they say was agreed. So in relation to wage increases there was no evidence led by REA of market rates of wages for similar employees or even the AWUNZ employee wage rates to support the position that a 75c wage increase for the year ending 31 August 2021 and a 50c increase for the year ending 31 August 2022 were justified or appropriate. Similarly there was no evidence of inflation rates, cost of living analysis or living wage comparisons to justify the wage increases sought. Equally, Nelmac did not produce any financial information to show the wage increases sought by it were within budget and an alternative rate was unsustainable.

[109] The end result is I have no basis to fix the provision for the CA other than the two draft CAs which are advanced as reflecting the agreement between the parties. So I am left with a simple decision when it comes to fixing; what was agreed in facilitation and should this be altered in some way to reflect an alleged prior agreement (as asserted by REA)?

[110] My conclusion is that the draft CA produced by Ms Wilkinson reflects what was agreed in facilitation and it need not be altered to reflect a 75c wage increase as this was not agreed either prior to facilitation, in facilitation or after it.

[111] I fix the terms of the new CA as the terms set out in the Nelmac draft of the new CA sent to REA by Ms Wilkinson on 25 June 2021 with the following changes:

(a) The reference to Marina Workers in clause 5 is deleted.

(b) The tool allowance, at clause 30, which is effective from the date of this determination is 50c per hour.

(c) The increase in all allowance rates recorded in the draft as effective from the date of ratification shall be effective from the date of this determination.

Orders

[112] REA has breached the duty of good faith in its post facilitation conduct toward Nelmac.

[113] The grounds for fixing set out in s 50J(3) of the Act have been made out and I fix the terms of the collective agreement between Nelmac and REA in accordance with the collective agreement attached at Appendix 1.

Costs

[114] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[115] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority