

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 404
3268579

BETWEEN UNITE UNION
INCORPORATED
Applicant

AND EMPLOYER ASSOCIATIONS
Respondent

Member of Authority: Marija Urlich

Representatives: John Crocker and Lauren McGee, advocates for Unite Union
Tim Blake, counsel for Hospitality NZ
Andrew Caisley, counsel for Retail NZ Inc
Simon Martin, counsel for Clubs New Zealand Inc
Aynaz Nowparvar, counsel for Restaurant Association of
New Zealand;
Mauro Barsi, counsel for the EMA

Investigation Meeting: 29 April 2024 by audio-visual link

Further information received: 3 May 2024

Determination: 8 July 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns matters regarding fair pay agreements. Fair pay agreements were established under the Fair Pay Agreements Act 2022 (the FPAA). The FPAA was repealed on 20 December 2023 by s 5 of the Fair Pay Agreements Act Repeal Act 2023 (the Repeal Act).

[2] Prior to the repealing of the FPAA on 1 December 2022 Unite applied to initiate bargaining for a proposed fair pay agreement for the hospitality industry. The application

triggered preliminary requirements under the FPAA for initiating bargaining and forming bargaining sides including that on 29 May 2023 public notice of approval of the application to initiate bargaining for a proposed hospitality FPA was issued and employee and employer bargaining sides were formed and notified.¹ Additional unions and employers joined the respective bargaining sides. Within the FPAA proscribed timeframe, the employer bargaining side had not agreed an inter-party side agreement or appointed a lead advocate.

[3] On 12 December 2023 Unite, on behalf of the employee bargaining side, lodged an application in the Authority to fix terms of a fair pay agreement for the hospitality industry on the following grounds:

- (i) the employer bargaining side had not agreed an inter-party side agreement or appointed a lead advocate;
- (ii) this failure breached the FPAA and made it impossible to negotiate a proposed hospitality FPA in good faith as required by the FPAA;
- (iii) these failures were grounds for the Authority to fix the terms of a proposed hospitality FPA; and
- (iv) it was reasonable for the Authority to fix the terms of a proposed hospitality FPA because under the circumstances all reasonable alternatives to reaching agreement had been exhausted.

[4] On 5 January 2024 the employer associations which formed the employer bargaining side (the employer associations) for a proposed hospitality FPA lodged a statement in reply:

- (i) the employer associations had acted in good faith as required by the FPAA;
- (ii) they had not acted in a way that undermined the bargaining process;
- (iii) the parties had not exhausted all reasonable alternatives; and
- (iv) given the repeal of the FPAA, the Authority was not able to fix terms of a proposed FPA.

[5] A jurisdictional issue arises – can the Authority fix the terms of a fair pay agreement for the hospitality industry? This is the issue before the Authority for determination.

¹ Listed in Schedule A.

The Authority's investigation

[6] A case management conference was held with the parties' representatives on 15 February 2024 at which directions were made by consent for the filing of submissions in respect of the identified jurisdiction issue. Directions dated that day, and the notice of investigation meeting were served on all the parties including the union and employer associations which made up the respective bargaining sides. Not all those unions and employer associations have participated in this investigation.² I am satisfied they have had a fair opportunity to do so.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all information and submissions received.

Issues

[8] The issue requiring investigation and determination is:

- (i) whether the Authority has jurisdiction to fix the terms of a proposed fair pay agreement for the hospitality industry?

The parties' positions

[9] Unite submits:

- (i) s 33(1)(c) of the Legislation Act 2019 provides the repeal of legislation does not affect the completion of proceedings commenced or in progress;
- (ii) s 9 of the Legislation Act 2019 allows legislation to provide otherwise;
- (iii) the repealing legislation does not exercise the s 9 option to extinguish existing proceedings; and

² Raise the Bar Hospitality Union Incorporated withdrew as an applicant in these proceedings by way of memorandum filed 29 April 2024.

- (iv) given this legislative framework, the effect of s 33(1)(c) of the Legislation Act is to extend the jurisdiction of the Authority under the Fair Pay Amendments Act until all outstanding matters are resolved.

[10] Hospitality New Zealand submits:

- (i) the application is not within the scope of s 33(1)(c) of the Legislation Act 2019 because the section is about process only and does not give or resurrect substantive remedies;
- (ii) the application is contrary to what Parliament intended which was to stop the fair pay agreement system completely;
- (iii) the application is contrary to the context of the legislation given there are no transitional provisions in the repeal Act and the FPA framework to support, monitor and enforce an FPA has been repealed;
- (iv) the application is about policy not fairness;
- (v) the respondents are not acting in bad faith and did not undermine the bargaining process; and
- (vi) even if the applicant established the Authority had jurisdiction to deal with the fixing application, the s 234 criteria cannot be met because the bargaining has stalled not because the parties cannot agree but because the FPAA has been repealed.

[11] Retail New Zealand Inc and Clubs New Zealand Inc jointly submit:

- (i) a hospitality FPA cannot exist in the absence of the FPA framework;
- (ii) the Authority does not have jurisdiction under s 161 of the Employment Relations Act 2000;
- (iii) the Legislation Act 2019 prevents the application continuing; and
- (iv) the application is premature and/or invalid.

[12] The Restaurant Association of New Zealand submits:

- (i) Parliament's intention to repeal the FPA legislative scheme in its entirety before any FPA could be finalised is clear and effect must be given to that intention;

- (ii) if the fixing application were to be considered by the Authority it is unlikely to succeed because none of the limited circumstances set out in the FPAA can be met given where the bargaining was at and the application was premature.

[13] For completeness, the EMA's position is the submissions made by the other employer parties reflect its views.

Discussion

[14] As the parties' submissions highlight the FPAA established a comprehensive framework to support parties to initiate, bargain, conclude and enforce FPAs. Parliament has repealed that legislative framework and provided no transitional arrangements for FPA related matters including bargaining for a proposed FPA or associated proceedings extant at date of repeal. What then is the status of the fixing application for the proposed hospitality FPA?

A proceeding commenced – s 33(1)(c) Legislation Act 2019

[15] Unite submits the completion of the fixing application is preserved because it is a proceeding commenced or in progress within the meaning of s 33(3)(c) of the Legislation Act 2019:

- 33 Effect of repeal or amendment on existing rights and proceedings
 - (1) The repeal or amendment of legislation does not affect—
 - (a) the completion of a matter or thing that relates to an existing right, interest, title, immunity, duty, status, or capacity (a **legal position**); or
 - (b) the commencing of a proceeding that relates to an existing legal position; or
 - (c) the completion of a proceeding commenced or in progress under the legislation.
 - (2) Repealed or amended legislation continues to have effect for the purposes stated in subsection (1) as if the legislation had not been repealed or amended.

[16] On its face s 33(1)(c) suggests the fixing application for the proposed hospitality FPA is preserved because the proceeding was commenced prior to the repeal of the FPAA. The Authority has been referred to one judgment which considers s 33(1)(c).³

[17] In *Southern Cross* the High Court considered an amendment to the Resource Management Act 1991 and its impact on a pending appeal judgment of the Environment Court in light of s 33(1)(c):

[94] There is an initial question whether this issue is governed by s 33 or by its predecessor, s 18 of the Interpretation Act 1999. That question arises because s 33 itself did not come into force until 28 October 2021, after the Environment Court heard the Protection Society's appeal. On the same date, s 18 of the Interpretation Act was repealed. Counsel did not address me on this. All assumed that s 33 governs. I consider their assumption is correct. This is because:

- (a) Whether the repeal of s 18 of the Interpretation Act affected the completion of the appeal is governed by s 33.
- (b) A repeal will affect the completion of an appeal (or other proceeding), unless one of s 33(1)(a)-(c) applies. Section 33(1)(a) and (b) do not apply, as the appeal did not relate to an existing legal position. Section 33(1)(c) does not apply, because the appeal was under the RMA, not under s 18 of the Interpretation Act.

[95] Section 33 therefore governs whether the amendments to the RMA made by the Enabling Housing Amendment Act affected the completion of the appeal. Mr Casey submitted that although in general the amendment of legislation does not affect proceedings in progress, that general rule did not apply where there was no right or other legal interest involved. He relied on the Court of Appeal's decision in *Foodstuffs (Auckland) Ltd v Commerce Commission*.

[96] The short answer to Mr Casey's submission is that *Foodstuffs* was a decision under s 18 of the Interpretation Act. Section 18 did not contain an equivalent to s 33(1)(c). Section 33(1)(c) applies here: the appeal was a proceeding commenced under the RMA, and so the amendments to the RMA made by the Enabling Housing Amendment Act did not affect the completion of the appeal.

[97] Section 33(1)(c), however, does not apply to legislation if the legislation provides otherwise or if the context of the legislation requires a different interpretation.

[18] Section 33(1)(c) should be interpreted as providing the repeal of an enactment will generally not affect the completion of any existing proceedings and the nature of the proceedings will be irrelevant subject to the legislative context.

³ *Southern Cross Healthcare v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948.

[19] Section 9 of the Legislation Act provides some or all of Part 2, which includes s 33, may be displaced by the context of the subject legislation:

9 Application of this Part

(1) A provision of this Part applies to legislation that is part of the laws of New Zealand unless—

- (a) the legislation provides otherwise; or
- (b) the context of the legislation requires a different interpretation.

(2) The provisions of this Part also apply to the interpretation of this Act.

[20] There can be no doubt the Repeal Act means bargaining for fair pay agreements ceased on the date it came into force because from that date there was no legislative mechanism to bring any fair pay agreement into effect.⁴ This is relevant context for the jurisdictional question before the Authority because unlike the proceeding in *Southern Cross* which could be completed without reference to the amendment, the fixing application cannot stand alone from the framework of the repealed FPAA. Rather it sits within a now repealed legislative framework designed to support fair pay agreements.

[21] The fixing application requires two broad assessments by the Authority. The first is a threshold assessment as to whether one or more of the grounds exist to decide to fix the terms of a proposed agreement.⁵ This requires a factual inquiry and then consideration of the reasonableness or otherwise of actions (or omissions) within the statutory context of the FPAA. For example, the threshold assessment of “reasonable alternatives” would require consideration of the parties’ use of (or attempts to use) systems and processes within the FPAA framework such as bargaining, bargaining support services, mediation and resolution of disputes short of fixing by determination of the Authority. Those systems and processes are no longer available to the parties within the FPAA framework since the Repeal Act. The threshold assessment cannot be undertaken by the Authority.

⁴ Fair Pay Agreements Act Repeal Bill, Explanatory note.

⁵ Fair Pay Agreements Act 2022, s 234.

[22] The second assessment, if the threshold hurdle was cleared, would involve a consideration of whether the Authority could issue a determination fixing a proposed hospitality FPA within the context of a repealed FPAA. Unite submits that because Parliament did not expressly extinguish existing proceedings, including the fixing application, the Authority can continue to determine the application.

[23] The investigation process for such a determination would unlikely be straightforward and may require the Authority to draw on resources now no longer available since the Repeal Act.⁶ In addition, and significantly the mechanism for creation of a fair pay agreement, the next step following a fixing determination, is no longer available since repeal.⁷

[24] Mr Crocker accepted during submissions that if the Authority fixed the terms of a proposed hospitality FPA by issuing a determination that determination would have no practical expression. This recognises the fundamental difficulty faced by the application which seeks to draw the determination fixing strand from the FPAA framework with which it is inexorably entwined and highlights the lack of remedy available to the applicant unions following the Repeal Act because the FPAA has been repealed in totality. The context of the legislation, including the repeal of key mechanisms bookending the fixing application – those which buttressed fair pay bargaining and those which manifested the outcome of that bargaining be it by determination or otherwise - requires an interpretation that the proceeding cannot continue for want of jurisdiction.

Outcome

[25] For the above reasons the Authority does not have jurisdiction to fix a proposed hospitality fair pay agreement.

⁶ Fair Pay Agreements Act 2022, s123, s 236.

⁷ Fair Pay Agreement Act 2022, Part 8, subpart 5.

Costs

[26] The Authority's discretion regarding costs is generally to be exercised on a presumption that matters involving fixing are not subject to a daily tariff and that parties bear their own costs.⁸

Marija Urlich
Member of the Employment Relations Authority

⁸ Practice direction of the Employment Relations Authority February 2024.

Schedule A

Employee Organisations:

Unite Union Incorporated

E Tū Incorporated

Raise The Bar Hospitality Union Incorporated

Employer Organisations:

Hospitality New Zealand Incorporated

Restaurant Association of New Zealand

Employers and Manufacturers Association (Northern) Incorporated

Holiday Accommodation Parks Association of New Zealand Incorporated

Retail New Zealand Incorporated

Clubs New Zealand Incorporated

Tourism Industry Aotearoa Incorporated

New Zealand Motion Picture Exhibitor's Association

New Zealand Security Association Incorporated