IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 521
3216239

	BETWEEN	NEW ZEALAND PROFESSIONAL DRIVERS & TRANSPORT EMPLOYEES ASSOCIATION INC. Applicant
	AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED Respondent
Member of Authority:	Jeremy Lynch	
Representatives:	Tim Oldfield, counsel for the Applicant Andrew Caisley, counsel for the Respondent	
Investigation Meeting:	11 June 2024 by AVL	
Submissions and other information received:	At the investigation meeting and on 14 June 2024 from the Respondent	
Determination:	29 August 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Transportation Auckland Corporation Limited (TACL) provides public bus transport services across the Auckland region. It is part of the NZ Bus group of companies, which is the largest provider of urban public transport services across New Zealand.

[2] The New Zealand Professional Drivers & Transport Employees Association Incorporated (PDU) is a trade union registered under Part 4 of the Employment Relations Act 2000 (the Act).

[3] TACL employs members of PDU as bus ‘operators’.

[4] PDU initiated bargaining for a new collective agreement with TACL on 15 October 2018. However, by 16 January 2021 the parties had still not been able to conclude a collective agreement, and TACL locked out members of PDU.

[5] Although not clear how many PDU members remain in employment with TACL, the parties still have not concluded a collective agreement.

[6] PDU says the lockout of its members by TACL was unlawful because TACL failed to give not less than 24 hours' notice of the lockout, failed to specify the period of notice of the lockout, and failed to specify the date and time on which the lockout would begin. PDU says this is a breach of s 94 of the Act.

[7] In addition, PDU brings an application under s 50J of the Act, that the Authority fix the provisions of the collective agreement being bargained for.

[8] TACL denies that its lockout was unlawful, and opposes PDU's application for the fixing of the terms of a collective agreement.

The Authority's investigation

[9] Extensive affidavit evidence was lodged by PDU, including an affidavit, and affidavit in reply from Brian Webb, the Secretary of PDU.

[10] For TACL, an affidavit was filed by Nicky Harrison, the Human Resources Director of Go Bus Holdings Limited, a subsidiary withing the Kinetic group of companies, which also is the ultimate shareholder of TACL. Ms Harrison has been involved in this employment relationship problem since 2022.

[11] An investigation meeting to hear submissions was held on 11 June 2024. The parties' representatives filed written submissions prior to the meeting and provided oral submissions at the meeting.

[12] As permitted by s 174E of the Act, this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

The issues

[13] The issues for investigation and determination are:

(a) whether the locking out of PDU's members by TACL on 16 January 2021 was unlawful?

(b) Whether the grounds in s 50J(3) of the Act have been made out?

(c) If so, whether under s 50J(2)(b) of the Act, it is appropriate in all the circumstances for the Authority to fix the terms of the collective agreement being bargained for?

Background

[14] The Kinetic Group is a global public transport provider, which operates bus and rail public transport services throughout Australia and New Zealand. In March 2022, Kinetic acquired the NZ Bus group of companies. The NZ Bus group has contracts with various Regional Authorities to provide bus public transport services in Auckland, Wellington, and Tauranga.

[15] In Auckland, bus transport services are provided through TACL, an operating company owned by the NZ Bus group. Ms Harrison's affidavit sets out that TACL usually employs between 750 to 950 employees as bus operators, and at the time of lodging her affidavit, it employed in excess of 900 operators.

[16] The vast majority of TACL's operators are members of either the Tramways Union, or First Union. Ms Harrison's affidavit sets out that there are a small number of operators who are not members of a union and are employed on individual employment agreements (IEAs).

[17] In 2007 a small group broke away from the Tramways Union and formed the PDU.

[18] It is not clear how many PDU members remain employed by TACL, although witnesses from both parties appear to agree that it is a small number of only eight to ten employees. As Ms Harrison deposes, the PDU represents less than one per cent of operators employed by TACL.

[19] Since 2015, TACL has entered into a number of collective agreements with the Tramways Union and First Union (the combined union collective agreements). However, TACL has only ever had one collective agreement with PDU, which was for the period 8 November 2015 to 3 November 2018.

[20] On 15 October 2018, PDU initiated bargaining for a multi-employer collective agreement including TACL as a party. Bargaining meetings occurred in 2018 and 2019.

[21] By agreement, TACL's bargaining with PDU was paused while TACL bargained for a new combined union collective agreement. The combined union negotiations did not settle until the middle of 2020, after which time, negotiations between PDU and TACL resumed. Bargaining meetings occurred from September 2020. Mr Webb deposes that "bargaining continued approximately weekly during the period from the end of September 2020 through to 16 December 2020".

[22] As a result of its bargaining for the combined union collective agreement, TACL secured a number of key concessions about the timing of rest and meal breaks for operators. In addition, in return for a higher rate of pay, the combined union collective agreement provides greater flexibility in terms of rostering provisions for TACL.

[23] As a result of bargaining with employees on IEAs, TACL says that all of the operators it employs are now on substantially the same terms and conditions of employment, save for the approximately eight to ten employees who are members of the PDU.

[24] To date, a significant area of disagreement between the parties is around the timing of rest and meal breaks, as well as rostering flexibility. PDU has continuously sought for TACL to agree to operate a separate rostering system for its members, as well as a separate system for rest and meal breaks.

[25] TACL says that it wants a new collective agreement with PDU that provides for the same rostering and rest and meal break rules as other operators. TACL says it can only run one rostering system, so it needs to build rosters according to a single set of rostering rules and parameters.

[26] In addition, TACL says that because all operators undertake essentially the same job, it is fair that they all be paid under the same remuneration framework. It does not consider it should offer better pay and conditions to one per cent of its operators who are members of one union, and not pay the same to the other 99 per cent of its workforce who are members of different unions or on IEAs.

[27] TACL says that it signalled the possibility of a lockout of PDU members, writing to the union in January 2021:

> … we are considering all options provided for in the legislation for bringing negotiations to a swift conclusion as early as possible. One of those options is employer-initiated industrial action (i.e. a lock-out).

[28] On 14 January 2021 TACL advised PDU's secretary, Mr Webb, that PDU members would be locked out. TACL's notice was sent to the email address *brianawebb@xtra.co.nz*.

[29] On 16 January 2021 TACL locked out PDU's members, and the lockout remains in place.

[30] Notices were also sent to the individual operators, who according to company records, were members of PDU.

[31] TACL acknowledges that its records were inaccurate, the effect of which was that four operators who were not PDU members, were served with lockout notices in error.

[32] Following the lockout Mr Webb made an application for mediation assistance. The parties attended mediation on 29 January 2021. TACL says that at this mediation "… significant progress [was] made and the parties came close to reaching a deal". Mediation was adjourned, and the mediator followed up with the parties the following week. TACL wrote to PDU on 23 February 2021. In this email TACL sets out that:

> Unfortunately, the Union rejected the 29 January 2021 offer [made at mediation]. Nevertheless, the company said it would leave the offer on the table for a period, in the hope that wisdom would prevail.
>
> Another three weeks has now lapsed, and the union has not accepted the 29 January 2021 offer, or made any counter-proposal.
>
> The purpose of this email is to advise you and your members that, with effect from 3pm Friday 26 February 2021, the Company will be withdrawing the 29 January 2021 offer … If the offer has not been accepted prior to that time then it will automatically lapse and no longer be capable of acceptance. Furthermore, no new offer with full backpay will be made by the company.

[33] TACL says it did not receive any response to this email.

[34] On 26 February 2021, TACL wrote to PDU and its members, confirming that its 29 January 2021 offer (which included backpay) was now withdrawn.

[35] TACL says it did not receive a response to this email, and many months elapsed before there was any further communication from PDU.

[36] By late August 2021, TACL says it had heard nothing further from PDU. There had been no new request to continue bargaining, nor had there been any proposal from PDU for any matter relating to bargaining.

[37] On 25 August 2021 TACL wrote to PDU and its members, asking whether the union had abandoned its negotiations and whether the members had effectively resigned.

[38] The following day, on 26 August 2021, PDU responded. Ms Harrison says TACL did not understand PDU's response, and despite writing seeking clarification, it was not able to understand PDU's position.

[39] The parties were not in communication with each other for some months until 8 November 2021 when TACL received an email from one of PDU's members, advising that a new lead advocate had been appointed to take over the bargaining. The email advised TACL that the new lead advocate would contact TACL to continue the negotiations. However, TACL says it did not hear anything from the new lead advocate.

[40] On 17 December 2021 PDU received a further email from the same member, advising there had been a further change and that it now had an Auckland barrister taking over the lead advocate role. However, TACL says it did not hear anything from the barrister.

[41] No communications were exchanged between the parties in January, February or March of 2022.

[42] In April 2022, PDU lodged an application in the Authority for facilitated bargaining, together with a memorandum seeking urgency.

[43] TACL filed a notice of opposition to the application for urgency, noting that PDU had taken no active steps whatsoever to progress bargaining for more than 12 months. In those circumstances, TACL said it seemed inappropriate for PDU to be seeking urgency.

[44] On 20 April 2022 the Authority declined urgency.

[45] In communication with the Authority around the facilitated bargaining process, PDU confirmed that it had nine remaining members who were locked out.

[46] On 17 May 2022 the parties attended mediation at the direction of the Authority.

[47] On 2 June 2022 the Authority accepted the reference for facilitation. The parties attended bargaining meetings facilitated by the Authority on 20, 21, and 22 July 2022. The Authority did not formally conclude its facilitation process until October 2022. No further communication was received by TACL from PDU for the remainder of 2022.

[48] By the beginning of 2023, Ms Harrison was leading the bargaining for TACL. Her affidavit sets out that in January 2023 TACL was contacted by PDU, who proposed a resumption of bargaining. Ms Harrison says that although TACL confirmed it was happy to resume bargaining, it did not hear anything further from PDU and as a result, no actual bargaining occurred.

[49] On 9 March 2023 TACL was served with a copy of PDU's statement of problem in this current proceeding.

[50] Ms Harrison's affidavit notes that the statement of problem, lodged on 9 March 2023, was two years after the lockout notice was served and lockout took effect.

[51] In its statement in reply, TACL notes that:

> PDU had not actually tabled a full proposal for settlement since 2020, and it seemed extraordinary … that the parties had been bargaining for a further three years since then, and at no time over that period had PDU actually tabled a specific proposal outlining exactly what it would accept.

[52] Ms Harrison says:

> As at the date of swearing this affidavit, we have still not received from PDU any indication of exactly what it is they are seeking, or what their proposal for settlement is. In the absence of this information, it is impossible to know what matters are in dispute, or how far apart the parties are.

[53] Following the lodging of the TACL's statement in reply, the parties were directed to mediation, which occurred on 25 May 2023.

[54] Although no agreement was reached on that day, the parties agreed to continue the mediation, which resumed on 29 June 2023.

[55] A further mediation occurred on 29 July 2023.

[56] At the end of that mediation, TACL agreed that it would provide PDU with a summary of the matters that remained to be addressed. TACL says that it expected to

receive a summary of PDU's position, and that mediation would then continue. However, no response was received from PDU.

[57] A further mediation occurred on 13 December 2023. Ms Harrison says that at this mediation, TACL reminded PDU that because the company had recently entered into a new combined union collective agreement, PDU's pay rate claims were now out of date, and invited PDU to table claims for updated pay rates that in some way reflected the new pay rates that were now being paid to other operators.

[58] Ms Harrison says PDU did not respond to this issue, and TACL remained unclear as to PDU's position. She says, "the mediation did not result in any agreement, in part because it was not clear what PDU were actually now seeking".

[59] Following the December 2023 mediation, TACL wrote to PDU summarising its position on the six issues which at that stage TACL considered needed to be addressed and resolved. TACL's letter concludes with an invitation for PDU to respond to TACL's position "either before or at, the mediation scheduled for 9 February 2024".

[60] TACL says it received no response to this letter.

[61] The parties had agreed that the 9 February mediation would start late, in order to accommodate Mr Webb's requirements. However, neither Mr Webb, nor anyone from PDU attended the mediation.

[62] Ms Harrison says:

> Eventually, the mediator suggested we adjourn and that he would contact us if he was able to get hold of PTU.
>
> We did not hear anything further.

[63] TACL then wrote to PDU requesting a response to its last letter, as well as asking whether PDU had unilaterally withdrawn from the mediation process, and seeking clarification about PDU's claims in bargaining. TACL says it did not receive any response to this letter.

[64] PDU's members remain locked out, and TACL says it remains unclear about what it is that PDU is seeking by way of a collective agreement.

Jurisdiction

[65] Section 161 of the Act provides:

> The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
>
> (l) any proceedings related to a strike or lockout (other than those founded on tort or seeking an injunction).

[66] The proceedings are not founded on tort, and nor is PDU seeking an injunction.

[67] The Authority gave both parties the opportunity to make submissions as to jurisdiction. Neither party protested the Authority's jurisdiction. I am satisfied that the Authority has jurisdiction to hear and make a determination in this matter.

Lockout

[68] PDU says that the lockout is unlawful because TACL did not give the requisite notice of the lockout; it gave individual notices to members of PDU but did not give notices to PDU, and TACL failed to specify the date and time on which the lockout would begin.

[69] In addition, PDU says that TACL has breached the duty of good faith in collective bargaining by:

(a) locking out its members without meeting the notice requirements under the Act;

(b) requiring PDU members to take annual leave whilst locked out;

(c) withdrawing a previous offer for backpay when the lockout was expressed to end upon the acceptance of an offer including backpay.

[70] PDU says that these breaches of good faith were sufficiently serious and sustained as to significantly undermine the bargaining.

Relevant law

[71] As TACL is an employer engaged in providing passenger road services, s 94 of the Act sets out the notice procedure required before its employees may be locked out:

> **Procedure to provide public with notice before lockout in certain passenger transport services**
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> (1) No employer engaged in providing a passenger road service or passenger rail service may lock out employees who are employed in the service—
>
> (a) unless participation in the lockout is lawful under section 83 or section 84; and
>
> (b) without having given to the employees' union or unions notice in writing of the employer's intention to lock out.

(2) The notice required by subsection (1) must specify—

(a) the period of notice, being a period of not less than 24 hours; and

(b) the nature of the proposed lockout, including whether or not it will be continuous; and

(c) the particular passenger road service or passenger rail service that will be affected by the lockout; and

(d) the date and time on which the lockout will begin; and

(da) the date and time on which, or an event on the occurrence of which, the lockout will end; and

(e) the names of the employees who will be locked out.

(3) The notice must be signed either by the employer or on the employer's behalf.

(4) An employer engaged in providing a passenger road service or passenger rail service and who intends to lock out any employees who are employed in the service must take all practicable steps to ensure that the public who are likely to be affected are notified of the lockout as soon as possible.

[72] Section 83 of the Act provides that participation in a lockout is lawful if the lockout relates to bargaining for a collective agreement that will bind each of the employees concerned,[1] and that the lockout is not unlawful under s 86.

[73] Section 86 in turn provides that participation in a lockout is unlawful if the lockout occurs while a collective agreement binding the employees affected by the lockout is in force, unless it relates to bargaining for a collective agreement which has expired, but remains in force as an expired collective agreement.[2] There is no dispute in this matter, that the parties' collective agreement had expired, and they were bargaining for a new collective agreement.

Notice requirements

[74] In *Hugh MacLeod & Ors v Wellington City Transport Limited* the Court observed at [39] "It is trite that notices must be accurately expressed, so as to enable the recipients to address the impending event."[3]

[75] Under s 94 TACL was required to give notice in writing to the PDU.[4] In addition, under s 94(2), the notice must specify the period of notice, being a period of not less than 24 hours,[5] and the time on which the lockout will begin,[6] and the date and

[1] Section 83(b)(i).
[2] Section 86(1)(a).
[3] *Hugh MacLeod & Ors v Wellington City Transport Limited* [2021] NZEmpC 55.
[4] Section 91(1)(b).
[5] Section 94(2)(a).
[6] Section 94(2)(d).

time on which, or an event on the occurrence of which, the lockout will end.[7] The notice that TACL was required to give to PDU is also to specify the names of the employees who will be locked out.[8]

[76] PDU submits that TACL has not complied with the requirements under s 94(2)(a) to give not less than 24 hours notice of a lockout because the notice was sent by email to Mr Webb at 6.03 pm on 14 January 2021. Mr Webb's evidence is that the "… lockout notice did not come to my attention until I checked my emails the following morning at about 0830". He says "I undertake my role as a union secretary on a voluntary basis and I do not generally check my emails outside of business hours".

[77] PDU is a registered incorporated society. The Companies Office website shows that in the months following its incorporation in 2007, the published email address for PDU is *driversassociation@xtra.co.nz*, which is not the email address to which TACL sent the notice.

[78] TACL says that it is disingenuous for PDU to be raising for the first time, during the course of this proceeding, questions about the validity of the lockout notice. However, there is no dispute that:

(a) the lockout notice was sent to *brianawebb@xtra.co.nz* and not to PDU's listed email address;

(b) no hard copy of the notice was sent to PDU's published address;

(c) the notice was sent to Mr Webb at 6.03pm on 4 January 2021; and

(d) the notice sent to Mr Webb did not contain a list of the names of all the employees who were being locked out.

[79] PDU's counsel referred to the Employment Court decision *Air Nelson v New Zealand Airline Pilots' Association IUOW Inc.*[9] Although the *Air Nelson* case was about the giving of strike notices, PDU submits that the approach of the Court is equally applicable to lockout notices. I accept that submission.

[80] In the *Air Nelson* case the full Court held at [42]:

> The purpose of requiring that notice be given is to ensure that the persons to

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[7] Section 94(2)(da).
[8] Section 94(2)(e).
[9] *Air Nelson v New Zealand Airline Pilots' Association IUOW Inc.* [2008] ERNZ 327.

> whom the notice is addressed are informed of its contents. Whether that has occurred in any particular case will be a matter of fact, as will the time at which that occurred. The employer and the chief executive can only be informed if and when they have a realistic opportunity to read, comprehend, and act on the notice. Thus, we find as a general rule that notice will only be given … when it comes to the attention of the intended recipient.

[81] At [45] the Court held:

> Had the notice of strike been sent … to the chief executive during office hours, as many other such notices were, the statutory test would have been satisfied. But it is artificial and wrong to say that a notice sent to the chief executive's fax machine during times when it is very unlikely that the notice will come to the chief executive's attention, has nevertheless been properly given at the time of sending and receipt by the unattended fax machine.

[82] As in the *Air Nelson* case, had the notice been sent during usual union office hours, this would have gone some way towards meeting the statutory requirements under s 94(1)(b).

[83] However, Mr Webb's evidence was that this email did not come to this attention until approximately 8.30am the following morning. Although this evidence was not challenged by TACL, Ms Harrison's affidavit sets out a number of occasions when TACL had sent Mr Webb emails outside normal business hours but received no complaint from Mr Webb as to the timing at which the emails were sent. However, this is not evidence of an agreement from PDU that its normal office hours had been extended, or that it had agreed to accept email communications at any time.

[84] In any event, the statutory requirement is for the notice to be given to the union, and Mr Webb is not the union. PDU submits that as the parties' bargaining process agreement required bargaining correspondence to be sent to Mr Webb and another PDU bargaining agent, the lockout notice should have been emailed to both people. I do not accept this submission. The statutory requirement is for the union to be given notice. The notice should have been delivered to PDU's registered office or sent to its published email address.

[85] In addition, the notice advised the lockout would begin at 4.00 am on 16 January 2021 for:

> … those members who have received a lockout notice before 4.00am on Friday 15th January. For those members who receive a lockout notice after 4.00pm on Friday 15th January 2021, the lockout will begin at the time specified in the lockout notice those members receive.

[86] As well as being unclear as to commencement time, as TACL did not provide a list of the names of the employees who were being locked out, PDU could not know when the lockout would commence for any of its members.

[87] TACL did not comply with the requirements of s 94(1)(b), s 94(2)(a), s 94(2)(d) and s 94(2)I. As such, the lockout is unlawful under s 86(1)(ba)(ii).

Breach of good faith

[88] The duty of good faith requires parties to an employment relationship to be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative".[10]

[89] PDU submits that in not complying with the statutory notice requirements, TACL has breached the duty of good faith in that it has not been appropriately communicative. Under s 94(2)I of the Act, TACL was required to give to PDU, as part of the lockout notice, a list of the names of the employees who will be locked out. It did not do this. This is inconsistent with the duty of good faith, and in particular the obligation to be communicative.

[90] PDU submits that if an unlawful lockout occurs, the party taking the industrial action cannot be said to have discharged its obligations to be active and constructive in maintaining a productive employment relationship, particularly in circumstances which involve a complete suspension of the employment relationship, without pay, for several years. I accept this submission.

[91] The lockout notice set out that TACL's objective was to compel PDU members to accept the terms of TACL's offer (also dated 14 January 2021). However, TACL has subsequently withdrawn this offer. PDU submits that an ongoing lockout, which was said to be to compel PDU members to accept an offer which is no longer capable of being accepted, is also a breach of good faith. I accept this submission. Upon the withdrawal of TACL's offer, it is difficult to comprehend what (if any) action PDU would be able to take to accept TACL's proposed collective agreement, given that that offer is now off the table. This is inconsistent with the obligation to not do anything to

[10] Section 4(1A)(b).

mislead or deceive.[11] In unlawfully locking out PDU's members, TACL has breached the duty of good faith.

The grounds for fixing the provisions of a collective agreement

[92] Under 50J of the Act, a party bargaining for a collective agreement may apply to the Authority for a determination fixing the provisions of the collective agreement being bargained for. Under s 50J(2) the Authority then has a discretion whether to fix the provisions if it is satisfied that certain conditions have been met. Section 50J(2) provides:

> (2) The Authority may fix the provisions of the collective agreement being bargained for if it is satisfied that—
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> (a) the grounds in subsection (3) have been made out; and
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> (b) it is appropriate, in all the circumstances, to do so.
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> (3) The grounds are that—
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> (a) a breach of the duty of good faith in section 4—
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> (i) has occurred in relation to the bargaining; and
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> (ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and
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> (b) all other reasonable alternatives for reaching agreement have been exhausted; and
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> (c) fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith.
>
> …

Has there been a breach of good faith in the bargaining which was sufficiently serious and sustained to significantly undermine the bargaining?

[93] Section 50J(3)(a) requires there to have been a breach of the duty of good faith in s 4, which has occurred in relation to the bargaining, and which was sufficiently serious and sustained as to significantly undermine the bargaining.

[94] As set out above, a breach of the duty of good faith in s 4 has occurred.

[95] TACL submits that s 50J is intended to be an option of last resort, and "… used only rarely and in circumstances where one party's conduct is seriously egregious …". There is no requirement for egregious conduct under s 50J.

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[11] Section 4(1)(b).

[96] In *Jacks Hardware and Timber Limited v First Union Inc*,[12] at [63] the Employment Court held that the words "sufficiently serious" do not imply a high threshold, rather they indicate that the Authority must be satisfied that the breach was "adequate or important enough to move to the next step of fixing the provisions of the collective agreement". At [66] of *Jacks Hardware*, the Court held:

> … 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.

[97] TACL says that if there has been some non-compliance with the notice provisions of the Act (which it does not accept it has), it says that any such non-compliance would be "technical". TACL says it is "not sufficient that there was merely some technical defect" in terms of the lockout notice.

[98] In addition, TACL submits that because PDU did not object to any defects in the notice, and/or raise any breaches of the requirements of s 94 at the time the notice was served, in only raising any such concern two years after the notice has been served, PDU has itself failed to comply with the statutory obligations of good faith and in particular TACL says PDU has breached its obligation to be responsive and communicative in respect of the defects in the lockout notice.

[99] I do not accept this submission. The statutory obligations under s 94 are TACL's obligations, they are not the obligations of the PDU.

[100] TACL's breach of good faith comprises more than mere "defects in service" of the lockout notice. In addition, it is the action of the unlawful lockout itself which comprises the breach of good faith.

[101] It is s 86 which provides for whether a lockout is unlawful under the Act. The lawfulness (or otherwise) of a lockout is not contingent upon whether the receiving party objects to the lawfulness of the notice at the time it was given.

[102] The lockout has continued for over three years. It can therefore be said to be a "sustained" lockout. In addition, the offer the lockout was expressed to compel

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[12] *Jacks Hardware and Timber Limited v First Union Inc* [2019] NZEmpC 20.

acceptance of has been withdrawn and is no longer capable of being accepted by PDU. I am satisfied that this is evidence of the bargaining being significantly undermined.

[103] I am satisfied that the grounds under 50J(3)(a) are met.

All other reasonable alternatives

[104] PDU submits that all other reasonable alternatives to reaching agreement have been exhausted, and fixing the provisions of the collective is the only effective remedy for the Union. PDU submits that the parties have met to bargain themselves, attended mediation, and have attended facilitation bargaining.

[105] In standing back and looking at this dispute as a whole, although it appears that all the usual methods of reaching agreement have been attempted (such as direct negotiations, mediated bargaining, and facilitation), I am not satisfied that all reasonable alternatives for reaching agreement have been "exhausted" as required by s 50J(3)(b).

[106] Since the facilitation process concluded in 2022, TACL's evidence is that there has been little engagement on the part of PDU. TACL says that PDU approached it in January 2023 asking if the company would agree to further bargaining. TACL says it agreed to this request, but then received no further response from PDU, and that the next it heard about the bargaining was when it was served with a copy of PDU's statement of problem in March 2023. TACL says that the parties attended further mediation in May 2023, July 2023, and again in December 2023. TACL submits that it has repeatedly sought clarity as to what PDU is seeking by way of a collective agreement, and that it understood the parties were to attend further mediation in February 2024, however PDU failed to attend that scheduled mediation. TACL says it wrote to PDU after it failed to attend the February mediation, again seeking clarification as to what it was seeking, but received no response to its letter.

[107] Since facilitation concluded, TACL's evidence is that it expressly asked for PDU to set out its claims on 13 December 2023, 19 December 2023, and 13 February 2024. On no occasion did it receive a response, and a reasonable alternative to the Authority fixing the terms of the collective, would be for PDU to first clarify its current claims, so that the parties can then gauge the extent to which there are gaps in the parties' positions, and consider what might be done to address any such gaps.

[108] On the evidence before the Authority, there is some deficiency in PDU's engagement and responses. A reasonable alternative would be for PDU to resume bargaining with TACL, with appropriate engagement and clarity. In addition, sufficient time has elapsed that a further reference for facilitation could be made. The Authority's acceptance of the reference for facilitation (if this was granted) would be an effective remedy for the PDU.

[109] The grounds under s 50J(3) are conjunctive. All the grounds must be met. I find that the ground required under s 50J(3)(b) has not been met, therefore the grounds are not made out at this stage.

Outcome

[110] For the above reasons, I am not satisfied that the requirements of s 50J(3) are met, and PDU's application under s 50J to have the Authority fix the provisions of the collective agreement is declined.

[111] The parties are encouraged to continue bargaining.

[112] If either party considers further mediation would be of assistance they may advise the Authority Officer.

[113] Furthermore, as noted above, given the length of time since the facilitation process concluded in 2022, the parties are encouraged to consider a fresh application for reference to facilitation.

Costs

[114] It is the Authority's usual practice to let costs associated with resolving collective bargaining disputes is to let costs lie where they fall.[13] Accordingly, there is no order for costs.

Jeremy Lynch
Member of the Employment Relations Authority

[13] See www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf at 5.