

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 143
3315480

BETWEEN FIRST UNION INC
Applicant

AND ASB BANK LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Peter Cranney and Grace Liu, counsel for the applicant
Liz Coats and Zoe Fong, counsel for the respondent

Investigation Meeting: 2, 4 and 13 December 2024 in Auckland

Submissions (and other information) received: At investigation meeting and 3 March 2025 from the applicant
At investigation meeting and 28 February and 3 March 2025 from the respondent

Determination: 7 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] First Union Inc (First or the Union) and ASB Bank Limited (ASB or the Bank) have been negotiating for a new collective agreement. Unable to reach a resolution they were referred by the Authority to facilitation.¹

[2] Facilitation was undertaken but did not result in an agreement being reached. An unexpected issue arose regarding coverage, along with a related overtime issue, raised by ASB. The Authority issued a recommendation but the parties were still unable to agree. The facilitators considered a further facilitation session would be

¹ *First Union Incorporated v ASB Bank Limited* [2024] NZERA 340.

productive. After confirmation of an agreed date ASB advised it did not see a need for, or agree to, further facilitation.

[3] First applies under s 50J of the Employment Relations Act 2000 (the Act) for fixing of provisions of the collective agreement very largely in line with the facilitators' recommendation, with date changes. The Union's view is that the Bank breached its duty of good faith in not attending the further facilitation session. That breach is seen as a serious and sustained failure significantly undermining the bargaining, with no other reasonable alternatives for reaching agreement but fixing.

[4] ASB considers that it did not breach good faith and believes agreement can be achieved through continued good faith discussion and direct engagement between the parties. The Bank sees there being a genuine misunderstanding between the parties as to the current wording of provisions which only became apparent towards the end of facilitation.

The Authority's investigation

[5] The Authority and the parties agreed that there should be a first stage of investigation looking at whether fixing should occur. If that question is answered in the affirmative, a second stage about the fixing itself would proceed.

[6] Early on questions were raised by ASB about admissibility of parts of the Union's evidence, particularly in light of s 50F of the Act. This was resolved between the parties.

[7] It was established there was no objection to the Authority considering the Recommendation of the Facilitators and the Facilitators' Minute.

[8] The parties attended further mediation. As that did not resolve the matter, witness statements were received from:

- First's President and lead advocate Miles William (Bill) Bradford
- ASB's, Executive General Manager People Nicola Richardson, Head of Employee Relations and Policy Wisam (Sam) Audeau, General Manager Operations Andrew Wilson, General Manager Performance and Reward Sarah Brawn and General Manager Direct Channels Glen Martin
- ASB's lead advocate, barrister Donald (Don) Mackinnon.

[9] The investigation meeting began on 2 December 2024 in Auckland. Sworn or affirmed evidence was heard from Mr Bradford, Ms Richardson and Mr Mackinnon. At the start of the second day of the investigation meeting, 4 December 2024, discussion occurred between the parties and the Authority after the Authority raised a possible alternative path.

[10] Agreement was reached that the witness statements of those who had not yet given evidence were to be taken as read, the investigation meeting was to be adjourned and the parties would attend a without prejudice informal mediated session with the assistance of other Authority Members, previously involved in the facilitation. It was also agreed that if the fixing application was progressing Mr Audeau may file an affidavit of further evidence. In the end both Mr Audeau and Mr Bradford provided affirmed affidavits.²

[11] The parties did not reach resolution and the investigation meeting resumed on 13 December 2024 to hear submissions. The Authority indicated it would notify the parties before a determination was issued to allow the possibility of resolution before issuance.

[12] On that notification, ASB communicated that the parties have had further discussions in relation to a possible agreed outcome which had not yet concluded, requesting a deferral of the determination pending the outcome of current discussions. The Bank's preference to reach an agreed outcome was indicated. First responded that it did not agree with ASB's facts or assertions regarding current discussions and they awaited the issue of the determination. ASB indicated its surprise and disappointment as direct discussions were understood to have not concluded. The Authority informed the parties that in the absence of a shared understanding, it intended to issue the determination by the end of the week.

[13] All material from the parties has been considered. However, 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.

² Mr Audeau's affidavit and one of the annexures contained a redaction.

The issues

[14] The issues to be investigated are:

- (a) Has a breach of good faith occurred in relation to bargaining – s 50J(3)(a)(i) of the Act?
- (b) Was any breach sufficiently serious and sustained as to significantly undermine bargaining – s 50J(3)(a)(ii)?
- (c) Have all other reasonable alternatives for reaching agreement been exhausted – s50J(3)(b)?
- (d) Is fixing the provisions of the collective agreement the only effective remedy for the party affected by any breach – s 50J(3)(c)?
- (e) Is it appropriate in all the circumstances to fix – s 50J(2)(b)?

The history of bargaining

[15] The first collective agreement between the parties commences in late 2017. Four further collective agreements follow. It is fair to say other rounds have generally been more smooth than the one which is the subject of the fixing application.

[16] In mid-2019 First lodges claims including a coverage clause which would cover the entirety of ASB's staff. This was rejected. A named union members clause becomes is incorporated in the coverage clause of the concluded collective, supplementing provisions identifying coverage based on particular areas of work and/or roles.

[17] On 1 September 2022 ASB introduces an overtime policy.

[18] First's membership at ASB fluctuates but is around 5% of ASB staff. The Bank's position is that this means it has to progress things such as performance assessments and pay increases for other staff despite bargaining being ongoing. First's position is that this reflects an inequality of bargaining power which the Act requires to be taken into account.

The current bargaining round

[19] A summary chronology of the current bargaining round:

Date	Event

2023	
10 May	First initiates bargaining
6 June	Parties sign bargaining process agreement
16 June	First sends claims to ASB. The Bank has no claims
June to August	Several days of bargaining. Union tables claims. ASB makes offer. Union delegates raise split shift roster overtime issue
4 July	ASB emails First spreadsheet listing all Union members (in coverage or not) with proposed pay increase FY24
31 July	ASB emails about split shift/overtime issue
9 August	ASB emails latest offer. ASB indicates it will give an increase to non-members as part of organisation pay review process and to members if Union agrees
17 August	First rejects ASB's bargaining offer. Accepts payment to members
August – October	ASB slightly updated offer, rejected. Union seeks mediation
8 November	Mediated bargaining. Outstanding issues amount of pay increase, codification of fifth week of annual leave, working party on how ASB determines pay for members
2024	
31 January	Union writes seeking further mediated bargaining. ASB seeks short line out
15 February	Short line out, pay and working party discussed

20 March	Meeting on pay, at ASB request. Dispute whether this is part of bargaining or working party/workshop
5 April	Email ASB – considers bargaining for FY24 has been exhausted
2 May	Strike – 1 hour total withdrawal of labour
8 May	Union seeks facilitation. ASB opposes
20 May	Mediated bargaining
31 May	ASB tables formal offer based on mediation offer - percentage increases, band related + working party on remuneration
11 June	Authority determines matter referred to facilitation
2, 3 + 8 July	Facilitation. Appears prospect of settlement with coverage issue arising late in process
15 July	ASB asks Union about including members in organisation wide FY 24/25 individual pay review. First requests recommendation. Bank opposes
18 July	Recommendation issued - terms described as largely agreed with coverage issue left to be resolved at later date.
	Union accepts recommendation and offers to settle on that basis
23 July	Authority notice requiring parties to attend further facilitation day 1 August
29 July	ASB declines to attend (see below)
5 August	Minute of the Facilitators concluding facilitation
7 August	Authority receives First's fixing application

9 August	ASB through counsel requests mediation, First agreed.
19 August	ASB communicates to union members – facilitation outcome not accepted. First objects to that communication
1 September	Bank proceeds with individual pay reviews
9 September	Third mediation
11 September	ASB writes to First describing unresolved issues remuneration, coverage and overtime (not accepted by First). Wants time to reflect on its position before meeting again
	Union wrote to Bank inviting it to put any written proposal asap

[20] More recent events are mentioned in the description of the Authority’s process above but also involve ASB putting an open proposal following the informal mediation, which from its perspective provides a broader approach on coverage.

Two further elements

[21] Two elements warrant further examination – the introduction of new issues and non-attendance at facilitation.

[22] First suggests the Bank’s belated raising of coverage and the interplay with overtime issues suggest they were manufactured issues.

[23] It was certainly late in the piece. However, given the following factors, it was credible that did not become apparent until late in the process with the parties potentially talking at cross purposes for a period:

- The named union members clause was first added to the collective agreement in 2019, for employees in particular roles who did not otherwise fall within covered groups

- The wording of the clause changed from ‘those named employees’ to ‘any named employees’ in 2021 although it is unclear whether that received any specific attention during the bargaining
- Spreadsheets were sent between the parties listing individuals covered without necessarily focusing on which part of the coverage clause they fell within
- A previous wage offer was provided to non-union and union members so the question of coverage was less significant.

[24] I cannot be satisfied that the coverage issue can be said to be an insignificant matter or one which was manufactured late in the process.

Non-participation in further session

[25] As described in the Facilitators’ Recommendation and Minute the following occurred:

- There were two main issues at the start of facilitation – remuneration process and pay increases. Significant progress was made with the parties close to agreeing the terms of reference for a working party in individual advancement for remuneration and pay increases.
- In the course of finalising pay increases an issue arose about coverage with the parties having different views about the coverage clause.
- The facilitators believed a further session of facilitated bargaining would be productive as they saw a way forward that they wished to explore with the parties.
- A date was proposed which was not suitable for ASB with the Bank suggesting (what was clarified to be) 1 August 2024 which was acceptable for First and the facilitators. I add that on 23 July the Authority issued a notice to the parties for 1 August.
- On 29 July ASB’s lead negotiator advised that 1 August was not suitable as key decision makers had pre-existing commitments that day. Further, a recommendation had been made, ASB had explained why it could not

accept settlement on that basis and “at present, it does not see a need for, nor does it agree to, further facilitation”.

[26] The facilitators observe they found it difficult to reconcile ASB’s position, noting the Authority’s order referring the parties to facilitation and the obligation of good faith. The facilitators describe this leaving a difficult situation, not being able to condone a party to facilitation deciding not to attend. Insistence that the parties proceed with a session seemed futile and facilitation must come to an end.

Authorities

[27] The leading case concerning fixing is *Jacks Hardware and Timber Limited v First Union Inc.*³ In that case bargaining, including with use of facilitation, occurred over almost four years. The Employment Court found:

- A breach sufficient to trigger facilitation does not thus lose effect, no new breach is required.
- A relevant breach may occur after referral to facilitation
- The breach relied on must be adequate or important enough to warrant a fixing order, so something more than a trivial, negligible or transient breach
- The breach must have carried on for enough time to undermine the bargaining
- There must be a link between the breach and undermining the bargaining and that undermining must have been substantial. The bargaining must have been noticeably undermined.⁴

[28] These elements were again considered when the Court looked at fixing in *Reunited Employees Association Incorporated v Nelmac Limited.*⁵ The union in that case challenged fixing by the Authority.

³ *Jacks Hardware and Timber Limited v First Union Inc* [2019] NZEmpC 20.

⁴ At [54] – [66].

⁵ *Reunited Employees Association Incorporated v Nelmac Limited* [2023] NZEmpC 74.

Application

[29] The Bank argues the facts in those cases are not very analogous to the situation here as they involved significantly dysfunctional or broken down relationships.

[30] The Union sees the cases as applicable with a bargaining/mediation/facilitation/fixing pathway for orderly collective bargaining.

[31] Now to focus on the elements required in s 50J of the Act.

[32] Going back to the facilitation application, the determination referring the parties to facilitation determination did not consider a breach of good faith basis for referral.

[33] First effectively relies on one breach of good faith in the wider context of the whole bargaining and facilitation. The alleged breach is the Bank's refusal to attend the further facilitation session in the context of the bargaining.

[34] Refusal to attend a facilitation session set by the facilitators is a serious matter. Collective bargaining continues during facilitation but is subject to the process the Authority determines.⁶ The provision of facilitation cannot be called into question or challenged in any proceeding on the ground that the nature and content of facilitation provided was inappropriate.⁷ The Authority takes charge of the bargaining process whilst the matter is within facilitation.

[35] The Bank refused to attend a notified facilitation session which it had at an earlier point agreed to, although there had been some need to clarify the date. The refusal email mentioned party availability but also that it finds it "very difficult to accept the need for further facilitation ... at present, it does not see a need for, nor does it agree to, further facilitation". I cannot be satisfied that the reason the Bank asserted was sufficient to mean that it has acted in good faith in this regard. In conclusion ASB did not act in good faith in declining to attend a facilitation session it had previously agreed to and not agree to further mediation.

[36] There are however more elements which must be satisfied before fixing can be ordered. Was the breach adequate or important enough to warrant a fixing order, particularly being something more than a trivial, negligible or transient breach? The

⁶ The Act, s 50E(1)(b) and (2).

⁷ The Act, s 50E(4).

breach must have carried on for enough time to have substantially undermined the bargaining.

[37] The breach here was not trivial or negligible. Facilitation is an important additional step to assist parties when they are not able to bargain their own resolution. Had ASB refused any negotiation after that point, it would have put itself in jeopardy. Its refusal to engage however did not continue. It took a number of steps, participating in formal and informal mediation, making an open offer and approaching the Union on other occasions.

[38] The Union sees these things, effectively, as a superficial attempt to avoid fixing, with it having to pay ‘snakes and ladders’.

[39] On the information before the Authority I am not in a position to conclude that ASB has been undertaking surface bargaining. It is fair to say that ASB is eager to avoid having fixing imposed on it but not in such a way that leads to a finding that it is using delaying tactics. What can be seen is an expansion of the issues in terms of coverage and overtime entitlements, are within the realm of being viewable as legitimate issues to be resolved before conclusion of bargaining.

[40] The breach was not carried on for enough time to have substantially undermined the bargaining. On the information before the Authority there remains reasonable alternatives available with the parties able to continue bargaining, including through direct interactions and with the availability of mediation. I cannot conclude that fixing is the only effective remedy at this point.

[41] In conclusion all the grounds required to order fixing have not been satisfied and no order is made.

Next steps

[42] In order to allow the parties to discuss what ASB describes as the (latest) proposal and attempt to reach resolution of the bargaining they are directed to attend mediation within 20 working days of the date of this determination.

[43] The Authority is not precluded from having further involvement in this bargaining. The parties remain subject to good faith and other statutory obligations.

[44] There is a presumption against costs being awarded for matters involving collective bargaining which includes this fixing application. Costs are not usually seen as appropriate in circumstances where the parties to collective bargaining and collective agreements need to seek Authority assistance to resolve issues of impact across groups of current employees, so parties should bear their own costs. If a party here wishes to seek costs they are to attempt to resolve with the other party and if unable to do so approach the Authority.

Nicola Craig
Member of the Employment Relations Authority