**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 662
3408224

BETWEEN	HEALTH NEW ZEALAND Applicant
AND	ASSOCIATION OF SALARIED MEDICAL SPECIALISTS INC Respondent

Member of Authority:	Nicola Craig
Representatives:	Barnaby Locke, counsel for the applicant Peter Cranney, counsel for the respondent
Investigation Meeting:	17 October 2025 by audio-visual link
Submissions received:	At the investigation meeting and 17 and 20 October 2025 from the applicant At the investigation meeting and 17 and 20 October 2025 from the respondent
Determination:	21 October 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Health New Zealand (HNZ or the employer) and the Association of Salaried Medical Specialists (ASMS or the union) were parties to a collective employment agreement which commenced on 1 September 2023 and expired on 31 August 2024.

[2] HNZ employs around 6,400 Senior Medical and Dental Officers (SMOs) who provide health care to the public in hospitals and associated settings. Many of the SMOs are members of ASMS.

[3] Bargaining was initiated by the union in July 2024. Since then there have been multiple days of bargaining, mediated bargaining and facilitation. There have also been four periods of strike action, two of which each covered only one district each. Further nationwide strike action has been notified to HNZ.

[4] HNZ comes seeking that the Authority fix the provisions of the next ASMS collective agreement on the basis of there being a serious and sustained breach of good faith which has significantly undermined the bargaining. ASMS opposes the application saying there is no basis on which to grant fixing, with the application undermining the collective bargaining and the union.

Authority investigation and issues

[5] Urgency was sought and granted for the fixing application.

[6] With the parties' agreement, the Authority decided to deal with this matter in two steps – firstly determine whether the tests for fixing were met and if so, second to fix the terms and conditions of the collective agreement.

[7] This determination deals with a preliminary issue about section 50F of the Employment Relations Act 2000 (the Act). ASMS seeks orders it describes as striking out paragraphs of the statement of problem, an affidavit and witness statement. The affidavit and statement are the evidence of Alice O'Connor HNZ's Principal IR Specialist and its lead advocate in the current bargaining. The Authority deals with this under s 160 of the Act.

[8] The union argues that material from facilitation is included in those documents and should be struck out in reliance on section 50F of the Act. It also disputes the conduct Ms O'Connor alleges. HNZ maintains that her evidence can be given. Neither party suggests that another Member need consider this question separately from the Member hearing the substantive application.

[9] Witness statements filed for ASMS contain certain evidence in response to HNZ's evidence but note that it does not consider that evidence to be admissible under s 50F and will not rely on that evidence if the union is successful in its application to strike out HNZ's evidence.

[10] A short investigation meeting was held by audio-visual link on 17 October 2025 to hear submissions on this preliminary issue. ASMS provided written submissions before the investigation meeting and HNZ provided written submissions afterwards. ASMS replied in writing, with HNZ then filing a memorandum.

[11] For the sake of completeness the issues for the upcoming substantive investigation are whether the tests under s 50J of the Act are met to establish that fixing should occur:

(a) Has a breach of good faith occurred in relation to bargaining – s 50J(3)(a)(i)?

(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 – s 50J(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)?

[12] During the 17 October 2025 investigation meeting the parties accepted the Authority is able to consider the Facilitators' Recommendation of 16 July 2025.

Section 50F of the Act

[13] Section 50 F provides:

> Statements made by parties during facilitation
>
> (1) A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act or under the Equal Pay Act 1972.
>
> (2) A party may make a public statement about facilitation only if –
>
> (a) it is made in good faith; and
> (b) it is limited to the process of facilitation or the progress being made.

[14] There is no definition in the Act of the word "statement".

Jack's Hardware

[15] In *Jack's Hardware and Timber Ltd v First Union Inc* the Employment Court examines the admissibility of statements made in the course of an Authority facilitation under s 50F of the Act.[1] Judge Corkill notes that the s 50F limitation relates only to statements made by a party for the purposes of facilitation and contrasts that with s 148(3) of the Act which "imposes a blanket prohibition on admissibility of communications made for the purposes of mediation."[2] The s 50F facilitation restriction is "a more limited admissibility rule".[3]

[16] Further, his Honour outlines:

- the context of facilitation being conducted in private under s 50E;
- the limitations on public statements in s 50F(2) as well as the limit on admissibility of statements made in facilitation;
- that proposals or positions during facilitation are, under s 50G, not binding after facilitation ends, subject to any agreement the parties have reached;
- the Authority's power to give public notice of its recommendations under s 50H;
- the important role of the Authority as emphasised in s 50I with the requirement that a party must deal with the Authority in good faith; and
- whereas mediation is entirely confidential, "this is not necessarily the case for facilitation".[4]

[17] In conclusion Judge Corkill finds:

> [48] In my view, s 50F(1) is also intended to strike a balance. The object is to preclude the possibility that statements made during the private process of facilitation by a party can be used against that party in subsequent proceedings. Like the other provisions I have reviewed, the aim of the provision is to promote active and constructive bargaining. The restriction in s 50F(1) is an understandable factor having regard to the scheme relating to facilitation.

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[1] *Jack's Hardware and Timber Ltd v First Union Inc* [2018] NZEmpC 93.
[2] Above at [27].
[3] Above at [28].
[4] Above at [36] – 43].

> [49] A final point relating to the text of s 50F(1) relates to the phrase “for the purposes of facilitation”. That is not unlike the phrase “for the purposes of the mediation” which appears in s 148 of the Act. Of that section, the Court of Appeal stated in *Just Hotel:*
>
> > “[32] In accordance with the ordinary meaning of the word “purpose”, that of the intended object of an activity, a communication (written or oral) is protected unless it is created or made independently of the mediation.
> >
> > [33] Documents which are prepared for use in or in connection with a mediation therefore come within the ambit of s 148(1). So do statements and submissions made orally at the mediation, or a record thereof. Only documents which come into existence independently of the mediation are excluded.”[5]

[18] Section 50F does not on its face prevent a party I call Party A bringing evidence of its own statements at facilitation. If Party B considers that evidence is misleading or wrong, it may be prevented by s 50F from bringing its own evidence of Party A’s statements. In *Jack’s Hardware* Judge Corkill dealt with this by use of the Court’s equity and good conscience jurisdiction under s 189 of the Act - where there is a contest as to accuracy of evidence, consider excluding (Party A’s) evidence as it would be unfairly prejudicial (to Party B) not to be able to give contrary evidence due to s 50F.

Robustness of bargaining

[19] Although good faith obligations apply in bargaining, by way of background, the Court has on at least two occasions indicated that the duty of:

> … good faith does not require bargaining to be undertaken in a courteous way, or require polite language, or that parties not engage in robust position-taking, or avoid a combative style.[6]

What material is sought to be removed?

[20] One of the grounds of serious and sustained breach of good faith alleged by HNZ relates to the sixth and final day of facilitated bargaining – 30 July 2025, when the parties returned after the 16 July 2025 Recommendation of the Facilitators. The conduct HNZ is concerned about occurred in open facilitation sessions with both parties in exchanges when facilitators were engaged.

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[5] *Just Hotel v Jesudhass* [2007] NZCA 582.

[6] *Reunited Employees Association Inc v Nelmac Ltd* [2023] NZEmpC 74 at [81], citing *Kaikorai Service Centre Ltd v First Union Inc* [2018] NZEmpC 160 at [63].

[21] It relates to an open It alleges that ASMS's advocate engaged in behaviour described by such words as "disrespectful, undermining and obstructive". The relevant paragraphs of the statement of problem and related evidence provide some more details. No particular comments are cited.

[22] The Authority has little documentation regarding the events Ms O'Connor describes. No contemporaneous or near contemporaneous notes are relied on. There is no reference to subsequent communications from HNZ to ASMS regarding the alleged behaviour. Subsequently bargaining has been held on 12, 16 and 18 September 2025.

Are there "statements" in the evidence?

[23] I move to assess whether this evidence is captured by s 50 of the Act. As HNZ emphasises it has carefully avoided providing evidence of particular words uttered or quoting from what the union advocate Steve Hurring said during the facilitation day.

[24] Ms O'Connor summarises HNZ's concerns as not being about "statements" but relating to "conduct and the nature of the behaviour". It is difficult to assess conduct or behaviour without knowing what was said. And there is no specific evidence of physical actions, tone of voice or the like, such as finger pointing, standing over someone, raising fists, door slamming or shouting. Had there been evidence of negative physical behaviour that would then lead to a question of whether such matters were captured by the word "statement". There is some artificiality in trying to divide whole communication into "statements" and all other aspects of communication.

[25] What is presented here are the witness's descriptions of how she interpreted what was happening. In the absence of any description of non-verbal or visual forms of communication it must be concluded that the descriptions were wholly or primarily based on what was said – namely statements. During the investigation meeting HNZ conceded that discussions and statements are relied on, although evidence is not being given of them.

Were statements made for the purposes of facilitation?

[26] To be captured by the s 50F restriction, statements must be made "for the purposes of facilitation". HNZ argues the conduct objected to was not for the purposes of facilitation.

[27] As noted above the ordinary meaning of "purpose" is the intended object of an activity.[7] The purpose of facilitation, as outlined in s 50A of the Act, is to provide a process where there are serious difficulties in concluding a collective agreement, with the Authority assisting in resolving difficulties. In *Jack's Hardware* Judge Corkill identifies the purpose of s 50F, like other ss 50A – I provisions, as being to promote active and constructive bargaining.[8] On the face of it statements by parties which relate to the process itself or to the bargaining would seem to come within that purpose.

[28] HNZ's evidence includes descriptions of behaviour as disrespectful, obstructive, rude, dismissive, critical of the process and recommendation and lacking willingness to consider alternatives. All are disputed by ASMS.

[29] HNZ saw behaviour escalation as leading to it being "compelled to call proceedings to a halt. The meeting was adjourned and the Authority Members left the room". The facilitated bargaining meeting resumed that day although HNZ's advocate saw "behaviours" as continuing to obstruct further discussions moving forward with a maintenance of the same position.

[30] This evidence is disputed by two ASMS witnesses in the evidence they will give if HNZ's evidence is not removed. ASMS submits that parties are entitled to criticise a facilitation process or a facilitator's proposal.

[31] There are good faith obligations owed by parties to the facilitator as well as the other party.[9] I have considered whether there is evidence of statements indicating refusal to deal with facilitators or bargaining agents of HNZ, similar to that in *Reunited Employees Association Inc v Nelmac Ltd* which was found to be a clear breach of the duty of good faith.[10] But such evidence is not relied on here.

[32] At least some versions of criticism of a facilitation process or of a recommendation could be seen as within an acceptable range of responses in facilitation by a party, given the robustness of bargaining referred to in *Reunited Employees Association Inc v Nelmac Ltd* and *Kaikorai Service Centre Ltd v First Union Inc*.[11] The inability to challenge or call into question the nature, content or manner of facilitation

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[7] Above at para 17 and n 9.
[8] Above at n 1, at [48].
[9] The Act, s 50I.
[10] Above at n 6.
[11] Above at n 6.

in proceedings, does not on its face prevent such questions being raised during a facilitation.[12] Parties would of course be well advised not to stray close to crossing the line.

[33] On the evidence before me I am unable to conclude that criticism amounted to conduct based on statements which are not made for the purposes of facilitation.

[34] An additional view in submissions for HNZ speaks to ASMS having a political agenda that is not specifically related to bargaining. The suggestion appears to be that statements were not made for the purposes of the facilitation or the bargaining more broadly. The advocate gives some broad evidence of her view that the union is not interested in resolving the bargaining but rather in political point scoring and sending a message to the government.

[35] The evidence before the Authority is insufficient to allow a conclusion at this time that whatever statements were made, were in fact made for purposes other than pursuing the union's bargaining position.

Are there statements within the limited "public statements" exception?

[36] HNZ suggests some of the material could be covered by the exception in s 50F(2) of the Act that they were made in good faith and limited to the process of facilitation or the progress being made. No examples are provided.

[37] As referred to above, there are no specific statements identified in HNZ's material, making the application of the "public statements" exception more challenging.

[38] Also, could any statements made in a statement of problem and written witness evidence before the Authority be described as "public statements"? Even if they could, it is difficult to be satisfied that such an expression of an advocate's views about the other party's attitudes and approach at facilitation can be seen as being solely a statement about the process or progress of facilitation.

[39] In conclusion I am not satisfied that there are statements impliedly relied on in HNZ's material which come within the s 50F(2) exception.

[12] The Act, s 50E(4).

Another exception applicable?

[40] An exception to s 50F in extreme situations is a possibility. The Court of Appeal in *Just Hotel v Jesudhass* noted public policy considerations may require an interpretation of s 148 regarding mediation confidentiality to permit evidence of serious criminal conduct to be given.[13] Reference is made to an possible example given in another case of an attack in a counselling session causing serious physical injury or death.

[41] There is no evidence of anything remotely close to that occurring in this case so it is not necessary to make a definitive finding on such an exception.

Conclusion and orders

[42] Considering all of the above, I conclude that some material provided by HNZ should be excluded under s 50F of the Act.

[43] Unsurprisingly, there is substantial overlap between some paragraphs of the statement of problem and Ms O'Connor's affidavit and witness statement. The same approach should be taken to all.

[44] Some paragraphs initially identified by ASMS as problematic, were recognised at the investigation meeting, at least partially, as not requiring a strike out. I accept the following are not impacted by s 50F – statement of problem (paragraphs 2.14 and 2.17 (other than the first word)) and Ms O'Connor's affidavit (paras 21 and 24 (other than the first word)) and witness statement (paras 21, 22 and 26 (other than the first word)).

[45] ASMS argues with Ms O'Connor's witness statement in reply there should be a striking out of paras 3 to 9 to the extent they refer to facilitation or effectively add "this comment does not relate to facilitation" or similar to each of those paragraphs. There is some difficulty with that approach as facilitation is not clearly identified in many of the paragraphs and in this preliminary setting I have not heard from Ms O'Connor that she is prepared to add such comment. My preferred approach is to exclude paragraph 5 which relates to facilitation and I will take the remainder of the paragraphs as not referring to facilitation.

[13] Above, at n 5 at [41].

[46] The following sections are removed:

(a) Statement of problem paras 2.15, 2.16, the first word of 2.17, 3.1 a.i. and 3.1 c. (only as regards "frustrated and");

(b) Affidavit of Ms O'Connor paras 22, 23 and the first word of para 24;

(c) Witness statement of Ms O'Connor paras 23 – 25, the first word of para 26 and all of paragraphs 41 and 42 (along with the heading before those paragraphs);

(d) Reply witness statement of Ms O'Conner – para 5; and

(e) Parts of the three ASMS witness statements identified as not relied on if the HNZ evidence is excluded – Mr Hurring (paras 5, 50 - 86 and attachment "B"), Ms Dalton (para 40 from "This includes the allegations" to the end of the paragraph) and Ms Dixon (paras 5 - 13).

Costs

[45] Costs are reserved, although noting the Authority's Practice Direction contains a presumption that the parties will bear their own costs in a matter of this type.[14]

Nicola Craig
Member of the Employment Relations Authority

[14] https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority