

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 677  
3408224

BETWEEN HEALTH NEW ZEALAND  
Applicant

AND ASSOCIATION OF  
SALARIED MEDICAL  
SPECIALISTS INC  
Respondent

Member of Authority: Nicola Craig

Representatives: Susan Hornsby-Geluk, counsel for the applicant  
Peter Cranney, counsel for the respondent

Investigation Meeting: 23 October 2025 and on the papers

Submissions received: At the investigation meeting and 23 October 2025 from  
the applicant  
At the investigation meeting and 23 October 2025 from  
the respondent

Determination: 23 October 2025

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**SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**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] This is an urgent fixing application with the background dealt with in an earlier Authority determination of 21 October 2025.<sup>1</sup> The Authority removed facilitation

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<sup>1</sup> *Health New Zealand v Association of Salaried Medical Specialists* [2025] NZERA 662.

material in the statement of problem, an affidavit and witness statement under s 50F of the Employment Relations Act 2000 (the Act).

[3] Yesterday HNZ lodged an amended statement of problem which removed the material as ordered by the Authority and substituted another first ground of serious and sustained breach of good faith.

### **Authority's process**

[4] This morning the investigation meeting commenced into the substantive issue of whether the test was met to establish fixing should occur. As a preliminary matter ASMS objected to the new material in HNZ's statement of problem and sought to strike it out. There was also a difficulty with a witness unable to arrive in Wellington due to inclement weather. It was agreed that witness could give evidence by audio-visual link.

[5] The parties made initial comment on the objection to the new material then the investigation was adjourned for a few hours to allow the parties to provide written submissions. Both did so.

### **Section 50F of the Act**

[6] 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.

[7] There is no definition in the Act of the word “statement”.

### ***Jack's Hardware***

[8] As set out in the first determination, in *Jack's Hardware and Timber Ltd v First Union Inc* the Employment Court examined the admissibility of statements made in the course of an Authority facilitation under s 50F of the Act.<sup>2</sup>

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<sup>2</sup> *Jack's Hardware and Timber Ltd v First Union Inc* [2018] NZEmpC 93.

[9] In conclusion Judge Corkill finds:

[48] In my view, section s (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.

[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.”<sup>3</sup>

### **What material is sought to be removed?**

[10] The new first ground of serious and sustained breach of good faith alleged by HNZ relates to evidence in ASMS’s advocate Steve Hurring’s witness statement. The statement of problem at para 2.27 states the union has “questioned the independence of the Employment Relations Authority including the fact that appointments and tenure are subject to the Minister’s discretion”, referring to Mr Hurring’s witness statement.

[11] Paragraph 2.28 goes on to state that the comments demonstrate a preconceived view of the Authority’s objectivity and tainted the approach taken by ASMS at facilitation, undermining the bargaining in breach of ss 4(1A)(b) and 32(1)(d)(iii) of the Act.

[12] Paragraph 2.29 also alleges that the union’s comments demonstrate a lack of respect for the process and the Facilitators which breached s 50I of the Act to deal with the Authority in good faith.

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<sup>3</sup> *Just Hotel v Jesudhass* [2007] NZCA 582.

[13] The relevant portion of Mr Hurring's statement refer to discussions seemingly just prior to the Authority's referral of the parties to facilitation.

**Are there "statements" in the evidence?**

[14] ASMS objects to the new material as being an allegation about what happened at facilitation. And says that part of it misstates Mr Hurring's evidence. That last point can be dealt with in evidence and/or submissions.

[15] In the earlier determination I referred to witness evidence describing how the witness interpreted what was happening, in the absence of any description of non-verbal or visual forms of communication, leading to a conclusion that the descriptions were wholly or primarily based on what was said – namely statements.

**Conclusion and next steps**

[16] However, the evidence at paragraph 48 and 49 of Mr Hurring's evidence regarding what happened shortly before the referral to facilitation is not captured by s 50 of the Act, as it does not concern statements made at facilitation or other evidence relying on such statements. HNZ is entitled to ask questions about the union and Mr Hurring's attitude to facilitation prior to the facilitation referral.

[17] HNZ is entitled to pursue the new first issue about breach of good faith but I note that if it attempts to seek evidence during the investigation meeting regarding the parties' facilitation, that will be closely scrutinised to assess if it is covered by s 50F of the Act.

[18] The investigation meeting will continue this afternoon at **2.30pm**.

**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.<sup>4</sup>

Nicola Craig  
Member of the Employment Relations Authority

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<sup>4</sup> <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority>