

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 774
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 and 24 October and 10 November 2025 in
Wellington and by audio-visual link

Submissions received: At the investigation meeting and 31 October and 10
November 2025 from the applicant
At the investigation meeting and 5 and 11 November
2025 from the respondent

Determination: 28 November 2025

THIRD DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Health New Zealand (HNZ or the employer) employs some 6,400 Senior Medical and Dental Officers (SMOs) who provide health care to the public in hospitals and associated settings. Around 6000 of them are members of the Association of Salaried Medical Specialists Toi Mata Hauora (ASMS or the union).

[2] HNZ and ASMS were parties to a collective employment agreement which commenced on 1 September 2023 and expired on 31 August 2024.

[3] Bargaining for a replacement collective agreement has been underway for some time and strikes have occurred. HNZ brings an application to have the terms of the collective agreement fixed by the Authority, with ASMS responding that it has not breached the duty of good faith and opposes fixing.

The Authority's process

[4] Urgency was granted to this application.

[5] 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, secondly fix the terms and conditions of the collective agreement.

[6] The union applied to remove material from the statement of problem and evidence, which resulted in a preliminary determination of the Authority of 21 October 2025.¹ The Authority removed facilitation material in the statement of problem, an affidavit and witness statement under s 50F of the Employment Relations Act 2000 (the Act). Although the Authority's facilitation recommendation was not a public one, the parties agree that I could consider it for the purposes of the fixing application.

[7] On 22 October 2022 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. At the start of the 23 October 2025 investigation meeting ASMS objected to the new material and sought to strike it out.

[8] Having received oral and written submissions during an adjournment the Authority issued a second determination the same day, with the investigation meeting resuming that afternoon and continuing the following day.²

[9] Witness statements were received from HNZ's lead advocate Alice O'Connor, its Executive National Director-Clinical Dr Richard Sullivan, ASMS's advocate Steve Hurring and co-advocate Chandra Dixon, as well as its Executive Director Sarah Dalton. Affidavits were also initially received from Ms O'Connor and an HNZ contingency planner.

¹ *Health New Zealand v Association of Salaried Medical Specialists Inc* [2025] NZERA 662.

² *Health New Zealand v Association of Salaried Medical Specialists Inc* [2025] NZERA 677.

[10] The parties lodged written submissions and attended a resumed investigation meeting by audio-visual link to hear submissions on 10 November 2025. During that session the Authority offered both parties the opportunity to resume bargaining if the Authority adjourned this matter for a short period. Neither were agreeable.

[11] This determination has not recorded all material received from the parties but has stated findings, expressed conclusions and specified orders made as a result, as permitted by s 174E of the Act.

The issues

[1] 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 – 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)?

The history of bargaining

[2] The parties and their predecessors have undertaken collective bargaining for many years, concluding collective agreements. Some of the negotiations have lasted for an extended period.

[3] There was evidence of some lower-level strike action during the previous bargaining but no total withdrawal of labour by senior doctors for 24 hours. Dr Sullivan, who has previously been involved in resident (junior) doctors' bargaining, referred to there often being strikes with those negotiations.

The current bargaining round

[4] Below is a summarised chronology of the current round:

Date	Event
2024	
2 July	ASMS initiates bargaining for a collective agreement with HNZ
20 August	Advocates meet to discuss preliminary matters
31 August	2023-2024 collective agreement expiry date
10 and 24 September	Formal bargaining days
October	Bargaining process agreement drafted but not agreed by the parties
3 October	Formal bargaining day
1, 13 and 14 November	Formal bargaining days, including HNZ tabling its “bargaining parameters”
5 December	Formal bargaining day
19 December	Meeting in respect of bargaining
2025	
12 February	Meeting in respect of bargaining
26 February	Formal bargaining day
14 April	ASMS gives strike notice to HNZ for a 24-hour full withdrawal of labour by members on 1 May 2025. Meeting in respect of bargaining
17 April	Radio New Zealand interview with Ms Dalton - refers to ASMS press release mention of the 24 hour strike as “unprecedented”. Ms Dalton says the parties are “stuck”
24 April	Urgent mediated bargaining day. First remuneration offer made by HNZ
26 April	Formal remuneration offer by HNZ, confirming components of offer on 24 April. HNZ informs ASMS if offer not accepted and/or strike action goes ahead on 1 May, it will be applying for facilitation

28 April	HNZ applies for facilitation
1 May	24 hour national full withdrawal of labour strike
9 May	Authority determines that a referral to facilitation is made ³
14, 15, 21 and 22 May	Facilitated bargaining occurs
28 May	24-hour full withdrawal of labour strike in the Tairāwhiti/Gisborne district
10 June	Further facilitated bargaining occurs
18 and 19 June	24 hour full withdrawal of labour in the Te Tai Tokerau/Northland district
16 July	Recommendation of Authority Facilitators issued
30 July	Further facilitated bargaining occurs
31 July	HNZ presents offer to ASMS based on Authority's Recommendation
11-21 August	ASMS holds union meetings
31 August	Collective agreement with continuation under s 53 of the Act expires
1 September	ASMS advises HNZ its offer is rejected by members
4 September	Parties receive letter from the Minister of Health, Hon Simeon Brown requesting that they attend binding arbitration HNZ accepts the request
5 September	ASMS rejects the request
8 September	ASMS issues strike notice for a national full withdrawal of labour for 48 hours, to take place from 23 to 24 September
12, 16 and 18 September	Formal bargaining days. Proposals by HNZ
23 and 24 September	48 hour national full withdrawal of labour strike

³ *Health New Zealand v Association of Salaried Medical Specialists Inc* [2025] NZERA 259.

30 September	ASMS announces it is balloting its members for further strike action
23 October	Full national withdrawal of labour strike from 11am to 3pm, part of what becomes referred to as the Mega Strike, involving other health and education workers

Initial considerations

[5] The ASMS constitution gives its national executive the authority to ratify settlements of collective agreements. The union's practice is on occasions to do an indicative ballot of members prior to the executive's decision.

[6] The failure to sign off on the bargaining process agreement is not seen by either party as being an issue so far. They were unable to agree on the name of an adjudicator for contingency plan purposes.⁴

[7] Although bargaining did commence in September 2024 HNZ was not in a position for some months to make a remuneration offer as it was awaiting confirmed bargaining parameters. HNZ acknowledged the delay. ASMS likely felt some frustration but did not express objection to this, with the parties' commencing discussions focused on non-remuneration issues.

[8] HNZ provided its bargaining parameters in November but did not make its first remuneration offer until April 2025. The union's position is that it only received an offer regarding remuneration after it had given strike notice and it was the notice which motivated the offer. HNZ takes a different position.

[9] As outlined above, strike action has involved 4, 24, and 48 total withdrawals of labour across the country and two 24-hour strikes, each covering a region.

[10] The Minister's letter refers to binding arbitration and ceasing industrial action. At the investigation meeting Ms O'Connor referred to another possible model of arbitration – binding on the employer but not on the union. This appears designed to avoid difficulties with fitting binding arbitration within statutory and union constitution/rules requirements. As yet there has been no offer of such a process.

⁴ The Act, Sch 1B, cl 13.

[11] The referral to facilitation was made on the basis of s 50C(1)(b) of the Act – bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties.⁵

Claim, offers and proposals

[12] The claims, offers and proposals including remuneration are broadly:

Date	Maker	Key offer/proposal points
1 November 2024	ASMS	Claim - 12% increase to base rate; superannuation rate to increase from 6 to 8%; increased Continuing Medical Education (CME) from \$16,000 to \$20,000 per member per annum. 1 year term from 1 September 2024
As above	HNZ	“Bargaining parameters” (envelope rather than offer as such) – 1.5% increase in “total cost” above the cost of the previous year, including to fund Emergency Department (ED) Allowance settled in previous bargaining; ED allowance estimated at 0.5% cost. 12-month term.
24 April, formalised 26 April 2025	HNZ	Offer - for most employees 1% increase on rates at time of settlement, 2% on rates a year later; no backdating; removal of bottom three steps on salary scale; two lump sum payments of \$4,000.
Coming out of facilitation May 2024	ASMS	Offer - increase step 15 (top of scale) by 4.4% + adjust other steps proportionally with equal increments, averaging to 5.6%, concertinaing steps. 3% from 1 September 2025. Same retention payments as HNZ offer below. 21-month term
31 July 2025	HNZ	Offer - wage increases of 2% on 1 June 2025, 0.5 or 0.8% on 1 September 2025; removal of steps 1-3; and 1% on 1 September 2026. Also includes \$34m in targeted retention payments delivered as two lump sums in June 2025 (\$17m)

⁵ Above at n 3, at [15].

		and June 2026 (\$17m) to services and locations to assist in retaining senior doctors. 21-month term from 1 June 2025 HNZ says this largely reflects the Authority's Recommendation
12 September 2025	HNZ	Proposal, "not final offer" – 5% salary increase - 2.7% at start, 2.3% at some point after that. One-off fund \$20m, application to be discussed. Term reduced from 24 to 16 months
16 September 2025	HNZ	Proposal – same as 12 September with increased one-off fund of \$40M.

[13] Although larger figures were mentioned at points, seemingly the best evidence before the Authority has the parties at \$97.8 million apart over the relevant period, in the context of an annual employment cost figure for 6,500 FTE employees of \$1.54billion per annum.⁶ Both parties agree, that they are, in my words, currently "a long way apart".

Legislation and case law

[14] The requirements for the Authority to order fixing are set out in s 50J of the Act – a breach of the duty of good faith which occurred in relation to bargaining, was sufficiently serious and sustained as to significantly undermine the bargaining, where all other reasonable alternatives have been exhausted, and fixing is the only effective remedy.

[15] The starting point is a breach of the duty of good faith. The duty of good faith applies to the employment relationship between a union and an employer, as well as between a union and its members.⁷

[16] Good faith means the parties must not mislead or deceive each other, directly or indirectly, or engage in conduct which is likely to mislead or deceive the other.⁸ In

⁶ This takes into account what is referred to as the tail, the cost resulting from SMOs moving through the salary scale during the term of the agreement.

⁷ The Act, s 4(2)(b) and (c).

⁸ The Act, s 4(b)(1) and (ii).

addition they must be active and constructive in maintaining a productive relationship, including by being responsive and communicative.⁹

[17] Of relevance to the bargaining context is the statement by Judge Smith in *Kaikorai Service Centre Ltd v First Union Inc*, that other than through the section 4 obligations:

...the Act does not attempt to regulate, restrict, or confine how the parties to an employment relationship communicate with or about each other. While there is likely to be a point where what has been said or done is so offensive or undermining that good faith is breached, the duty does not require bargaining to be undertaken in a courteous way. It does not require using polite language, or to resist robust position-taking, or avoiding a combative style.¹⁰

[18] However, in this case the parties are also subject to obligations under the Code of good faith of public health sector set out in Schedule 1B of the Act, discussed below. In *20 District Health Boards v New Zealand Nurses Organisation* the Code is referred to as “an expansive set of good faith principles”.¹¹

[19] The leading cases on fixing are in *Jacks Hardware and Timber Ltd v First Union Inc* litigation.¹² In that situation, bargaining, including with use of facilitation, occurred over almost four years. The Court observed fixing to be the “most draconian mechanism” with the tests “for such an order significant”.¹³

[20] Judge Smith in the fixing judgment found:

- A breach sufficient to trigger facilitation does not thus lose effect, no new breach is required for fixing
- 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

⁹ The Act, s 4(1A)(b).

¹⁰ *Kaikorai Service Centre Ltd v First Union Inc* [2018] NZEmpC 160 at [63].

¹¹ *20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 138 at [79].

¹² *Jacks Hardware and Timber Ltd v First Union Inc* [2018] NZEmpC 93 (admissibility of evidence) per Corkill J and [2019] NZEmpC 20 (fixing) per Smith J.

¹³ Above, 2018 decision at [35].

- The breach must be something ongoing and 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 significant. The bargaining must have been noticeably undermined.
- It is not necessary for either party to state that a final position has been reached before the Authority is able to conclude that all other reasonable alternatives have been exhausted.¹⁴

[21] In addition, in *Reunited Employees Assoc Inc v Nelmac Ltd* the Court found that the “emphasis is on an effective remedy and does not require that all or any potential remedies have been tried and/or exhausted”.¹⁵

Submissions from HNZ

[22] To summarise, HNZ argues ASMS has breached its duty of good faith in several regards and has undertaken surface bargaining.

[23] An argument which developed relatively late in the Authority’s process concerned the impact of the Code of good faith in the public health sector. HNZ describes enhanced obligations on parties in the public health sector by reason of the risk of harm to patients and communities when strike action occurs. The balance is described as being recognised between the Act’s fundamental right to strike whilst providing enhanced obligations on the parties to bargain in good faith.

[24] These obligations are described as requiring the parties to look beyond their own immediate industrial ambitions and consider the whole of sector context and impact. Also to undertake a higher than usual degree of co-operation between the parties and a stronger solution focused approach.

[25] Two overriding themes are submitted to emerge from the union’s conduct – a desire to send a message to the government that it needs to change its policy setting and approach and a lack of genuine engagement in the bargaining with the purpose of seeking solutions to settle.

¹⁴ Above at n 10, 2019 decision at [54] – [66] and [75].

¹⁵ *Reunited Employees Assoc Inc v Nelmac Ltd* [2023] NZEmpC 74 at [87].

[26] HNZ sees bargaining at an impasse with fixing being the only effective remedy.

Submissions from ASMS

[27] The union's focus, with support of members, is on achieving an arrangement which does not involve real wage cuts. This bargaining is not seen as anything out of the ordinary other than some employer actions of concern – including very long delay before making remuneration offer, making remuneration offers only when strike action is threatened, collapsing the bargaining in September and refusing to continue it.

[28] Effectively, serious misconduct is needed to warrant fixing. ASMS denies there was such misconduct here.

[29] The union accepts the applicability of the Code, saying that ASMS recognises the obligations to consider the sector in its focus on workforce issues, including recruitment and retention of senior doctors.

Code of good faith in public health sector

[30] Non-compliance with the Code by a person to whom it applies is a breach of the duty of good faith in s 4 of the Act.¹⁶ However, the Code applies subject to other provisions of the Act, such as for example, the right to strike.¹⁷

[31] The Code applies to HNZ, its employees and unions whose members are employees of HNZ.¹⁸ The purpose of the Code includes to promote productive employment relationships in the sector and require the parties, amongst other things to “engage constructively and participate fully and effectively in all aspects of their employment relationships.”¹⁹

[32] Parties must:

- engage constructively, as well as participate fully and effectively
- behave openly and with courtesy and respect to each other

¹⁶ The Act, s 100D(4).

¹⁷ The Act, s 100D(2)(a).

¹⁸ The Act, Sch 1B, cl 1(1).

¹⁹ Above at cl 2.

- make time to meet as and when required to address industrial issues and issues facing the sector and search for solutions that will result in productive employment relationships and the enhanced delivery of services
- consider third party decision-making if agreement is not reached or bargaining is in difficulty.²⁰

[33] It could be suggested that the employer has not promptly been in strict compliance with the Code - clause 22 requires a party believing another party to be in breach to bring this to the attention of the party in breach at “an early stage”. There was no explicit raising here of good faith concerns until the fixing application was lodged.

The requirements of a breach of good faith

[34] Fixing requires a breach of the duty of good faith. That duty applies to the employment relationship between a union and an employer, as well as between a union and its members.²¹

[35] Good faith means the parties must not mislead or deceive each other, directly or indirectly, or engage in conduct which is likely to mislead or deceive the other.²² In addition they must be active and constructive in maintaining a productive relationship, including by being responsive and communicative.²³

[36] The facilitation application was not decided on the grounds of a breach of good faith. Rather it was based on there being unduly protracted bargaining with extensive efforts failing to resolve difficulties. That is not enough in itself to found a fixing application.

[37] For the “draconian” step of fixing to be imposed there must be not only a breach of the duty of good faith occurring in relation to bargaining but one which is sufficiently serious and sustained to significantly undermine the bargaining.²⁴ Even

²⁰ Above at cls 4(1)(a) and (b), (2)(a) and (d)(i) and(ii), and 10(2).

²¹ The Act, s 4 (2)(b) and (c).

²² The Act, s 4(b)(1) and (ii).

²³ The Act, s 4(1A)(b).

²⁴ The Act, s 50J(3)(a)(i) and (ii).

substantial lawful strike action, for example, which may impact patients, is not of itself a ground to impose fixing.

[38] HNZ argued that the combined effect of more than one breach of good faith can be considered and I accept that.

[39] HNZ relies on the following alleged breaches of good faith:

- (i) The union questioned the constitutional independence of the Authority including the fact that appointments and tenure were subject to Ministerial discretion;
- (ii) Since the commencement of bargaining the union has frustrated and undermined the bargaining by maintaining fixed positions and refusing to genuinely consider and respond to the employer's bargaining proposals in breach of ss 32(1)(c), 32(1)(ca) and 32(1)(d)(iii) of the Act; and
- (iii) The union has on multiple occasions engaged in misleading and/or dishonest communications in both its announcements to the media and its own members.

First breach relied on

[40] This allegation concerns questioning the independence of the Authority.

[41] By way of background, Mr Hurring gave evidence of the HNZ's industrial relations manager (not one of the witnesses here), at mediated bargaining referring to a draft of an as yet unpublished facilitation recommendation for HNZ and the New Zealand Nurses Organisation (NZNO) and their expectation of receiving a recommendation favourable to HNZ. Mr Hurring told the Authority the manager said HNZ's offer to ASMS was similar and should be accepted, with HNZ intending to seek facilitation if its offer did not resolve the matter. Further, ASMS was concerned as the nurses' facilitation was private and the union believed the reference was intended to persuade ASMS to accept HNZ's offer.²⁵

²⁵ The Act, s 50E(1)(a).

[42] ASMS rejected HNZ's offer and the employer applied for facilitation. The next day the NZNO Recommendation was issued. Mr Hurring says ASMS saw it as favourable to HNZ as the manager had predicted.

[43] The union then considered its approach to the application for facilitation in the context of the recent NZNO Recommendation. It had internal discussions about concerns related to the constitutional independence of the Authority, particularly that appointments and tenure of members are subject to Ministerial discretion. "This renders Members of the Authority subject to potential political pressure and can raise issues of bias and apparent bias." ASMS submits it would have been irresponsible for the union not to discuss the constitutional independence issue, noting it to be a topic discussed recently by political and judicial figures.

[44] The union decided to agree to the facilitation process as it is a non-binding one.

Conclusion on first alleged breach

[45] From a timing point of view, the internal discussions referred to occurred during its consideration of the employer's application for facilitation. At that stage it was bound by good faith obligations to HNZ but good faith obligations to the Authority under s 50I of the Act had yet to kick in. ASMS then did agree to a referral to facilitation, with Mr Hurring's evidence being it was decided to agree so they put their faith in that process.

[46] Once a referral to facilitation was made good faith obligations to the Authority were applicable. There are also limitations on the evidence available regarding facilitation, as discussed in the previous determinations in this matter.

[47] An ASMS amended offer came out of facilitation, showing movement by the union. HNZ has difficulty establishing that any ASMS concerns had any impact on the facilitation, let alone to such an extent as significantly undermining the bargaining. No good faith breach is found.

Second breach relied on

[48] This became the key issue from the employer's perspective. HNZ emphasises ASMS's refusal to bargain in good faith – rather than genuinely considering and responding to the employer's offers and seeking solutions, it intentionally took a

position it knew was out of reach and then has maintained that position. Rather it wants to send a message to the government.

[49] There is reference to earlier events but HNZ is particularly focused on September's bargaining. I now look more at the bargaining.

[50] Ms O'Connor identifies ASMS's first key failure point as its refusal to take out HNZ's April offer to members which she says addressed key issues the union had tabled during the mediation including on pay, relativity and urgent recruitment. She recalls the union describing the offer as not good enough and does recognise that the union retains a choice about whether to take offers to members. I note there is no suggestion the union said it would take the offer out and failed to do so. It is the union's national executive which makes the ratification decision.

[51] The union provided its own modified position coming out of facilitation which the employer did not take up.

[52] The union however did take HNZ's 31 July 2025 offer out to members and it was very roundly rejected. Mr Hurring refers to the indicative ballot on a 68% turnout, showing 95% of members voting to reject the offer. He notes this to be a very strong rejection from a very high turnout of members. Feedback from meetings include members expressing concern about eroding the value of their salary, in relation to the resident medical officers (junior doctors), to Australian doctors and to the general New Zealand population.

[53] For HNZ it is accepted in evidence that after the August 2025 meetings the union provided some useful feedback - including regarding the removal of steps and the factoring matrix. The pay offer was described generally as not being seen as good enough by members.

[54] HNZ is critical of the union progressing from the rejection of the 31 July offer to immediately ballot its members for strike action, rather than returning to the bargaining table to try to move forward from the impasse. There was no response or counteroffer to HNZ's proposal. ASMS's view is that it only received changes in wage offers from HNZ when a strike notice was issued, as in April and September 2025. It regards the July offer as effectively similar to the April offer.

[55] In terms of the Minister's letter raising arbitration, the union was not agreeable but did respond promptly, identifying its position in some detail.

[56] The parties re-entered bargaining at pace after the Minister's offer. HNZ understood that a strike ballot was underway. On the evidence it is fair to say that HNZ representatives were very eager to get the notice for the upcoming strike lifted but were also aiming to get the bargaining concluded.

[57] An improved "proposal" was raised by HNZ on 12 September 2025. Dr Sullivan, who was acting chief executive for the week, was asked to attend by the Chief Executive. The union was critical that prior to that the most senior manager at the table was a regional executive director.

[58] Dr Sullivan indicated this was not a "final offer" but HNZ wanted ASMS to engage with the proposal through constructive discussion, working together on a way forward. The union provided what was described by HNZ's advocate as two key elements in response – percentage increase and reduced term.

[59] HNZ saw its 16 September proposal as improving on those key aspects with a shorter term and a doubled one-off fund which it was open to creative ways to spend or apply. It suggested some possibility and sought engagement on how it was applied. Ms O'Connor refers to \$40m as being approximately equivalent to a 3% of pay lump sum which costs around \$42 or \$43m.

[60] HNZ is unwilling to make any back pay offers so everything has to be paid within the confines of the term of a new agreement. The union understands that position but says the implication is there must be a higher amount loaded into the term payments or else members fall behind relativity with CPI. Reference is made to evaluation over the "effective term" – expiry of last agreement to expiry of the new one. That relativity was a key bargaining position of ASMS. Mr Hurring describes the union as being open to discussion on what to do with the one-off fund but wanting to focus on base rates as they were enduring. The employer's representatives did not have authority at that time to move the one-off fund money onto the salary scale.

[61] Over these days both parties requested more information. There was some work required with it becoming apparent an HNZ figure was incorrect with clarification later provided on that. Ms O'Connor recalls talk about CPI and its

relativity to the employer's proposals. She asked for details behind a graph the union uses to compare rates to indices.

[62] HNZ's last proposal had the application of the 2.3% amount as up for discussion, not necessarily applied at 12 months after the term begins. Ms O'Connor refers to the 2.7% increase from the start of the first year, 2.3% at some point after that. HNZ saw the offer as being consistent with CPI. ASMS says this was on the basis of disregarding the period before settlement (from original expiry). The on-off fund had potential to cover that but not on an on-going basis.

[63] Ms O'Connor describes ASMS as having an obstructive approach and maintaining a fixed position. She did accept that there were references by the union to the long term impact of previous settlements which needed to be corrected and to 'real pay cuts' throughout the bargaining. This included in the 12 and 16 September 2025 bargaining. When asked what was wanted one union reply was "Something that is not a real pay cut".

[64] The union proposed a meeting of the advocates the following day, the 17th of September. That occurred but the union was expecting it to be fuller.

[65] On 18 September 2025 the parties were only scheduled to meet in the morning. The union had brought a significant proportion of its executive members (the decision makers) to the meeting, anticipating a solid bargaining session. ASMS indicated it had assessed HNZ's latest position and determined it was still a real pay cut and they could not lift the strike action as the offer was not enough. The main issues were identified by Mr Hurring as the top salary step still diverging from the LCI and CPI between the bottom and the top of the scale.

[66] HNZ raised its proposal from two days before and questioned whether that is enough to continue the conversation or not. Dr Sullivan expressed frustration by what he saw as a refusal to engage, describing feeling like he was bargaining with himself.

[67] The union indicated it was open to further discussion between then and the strike starting on 23 September, expressing the possibility of seeing if there was a way to avert strike action. Dr O'Sullivan had a significant personal commitment out of town that night but told the Authority he would have come back the next day had progress or resolution seemed feasible. By contrast, the union sees HNZ as effectively collapsing the bargaining with mention, in a side conversation, to a fixing application.

[68] HNZ's position was it was willing to bargain without impending strike action but a 48 hour strike requires a lot of work within the organisation, including from Ms O'Connor. It declined further meetings including a one on one meeting suggested by Mr Hurring between the two advocates in the days before the strike. In addition HNZ was working towards lodging its application for urgent fixing of the collective agreement, which occurred on 22 September.

[69] The union's position was that engagement was good on the 12th and 16th of September, it had expected a fuller meeting on the 17th and then the mood was different on the 18th.

[70] Dr Sullivan notes ASMS put out a communication to members on the afternoon of 18 September that he sees as misleading and deceptive – "... there has been no substantive progress on other matters, such as CME." More on this below under the third alleged breach of good faith.

[71] On 30 September Mr Hurring wrote to Ms O'Connor saying that the union wished to continue bargaining and requested dates. She responded on 6 October 2025 saying HNZ refused further bargaining or mediation.

[72] In terms of suggested ASMS dissatisfaction with the government, HNZ witnesses accept the union was entitled to hold views but did not think the bargaining should be about that.

Conclusion on second alleged breach

[73] Submissions for HNZ argue that the union did not approach the bargaining in good faith with a view to genuinely considering and responding to its offers and seeking solutions, instead intentionally taking a position it knew was out of reach for HNZ and then maintained that fixed position. Rather than a genuine desire to resolve bargaining, ASMS's approach is said to appear to be designed to send a message to government.

[74] The Code of good faith in the public health sector requires consideration of the interests of the sector, which must include patients but ASMS says it does this. This includes by considering the need for adequate SMO staffing numbers, workforce planning and the recruitment and retention related need for wages to keep up with New Zealand cost of living and Australian medical salaries.

[75] The proposition that the union was not considering and responding to matters was not reflected in the evidence. Ultimately HNZ witnesses accepted the union had indicated repeatedly over time in response to offers that it was trying to deal with the impact of past bargains, causing a drop below maintaining cost of living relativities and also that the offers or proposals being made were a real pay cut. Graphs laying out the changes since 2012 between the top and bottom of the specialists' salary range and the two indices CPI and LCI were updated by ASMS with the passage of time and provided to HNZ.

[76] The evidence did not enable an inference to be safely drawn that the union was intentionally taking a position it knew was out of reach. HNZ itself had bargaining parameters and obviously limited resources but there was the prospect, even if not easy, of it seeking further funding or making other arrangements within its own resources.

[77] On the evidence before the Authority it cannot be concluded that the union did not genuinely wish to resolve the bargaining and was focused instead on making a point to government or breaking down the bargaining. There was solid evidence of the union's members being strongly motivated to ensuring cost of living relativity was maintained on an enduring basis. Likewise there was little before the Authority to support a suggestion that ASMS's May pay claim is significantly out of step with other settlements reached in the health sector.

[78] HNZ argues that the union has undertaken surface bargaining – delaying and going through the motions of bargaining.²⁶ I am not, on the information before the Authority, in a position to conclude that ASMS has been undertaking surface bargaining.

[79] Frustration was apparent from HNZ's witnesses that they could not make progress in September on lifting of the strike and resolution of the agreement, with no offer or proposal put up by the union. However, the union had the majority of its decision makers (the executive) at the table on 18 September 2025, likely indicating it felt positive about making progress. There is nothing to suggest a view amongst those people that a lower offer should be made. Putting up an offer which a union knows will not fly with those ratifying the agreement could be seen as bargaining falsely.

²⁶ As above.

[80] A breach of good faith on this second ground is not established.

Third breach relied on

[81] This alleged breach has three strands – recruitment and retention payments, bargaining dates and CME. HNZ says each involved misleading and/or deceptive communications. The union describes these as very thin pickings to result from scouring over 18 months of press reports.

Recruitment and retention payments

[82] Initially the union claimed what could be seen as a relatively complex scheme for payments to support recruitment and retention of SMOs. This scheme was rejected by HNZ but the employer looked for other ways to address the issues. From its perspective, at a 17 March 2025 meeting Mr Hurring and Ms Dalton advised there were four locations with urgent need for recruitment and retention allowances. HNZ says then, in the absence of other feedback, it urgently structured recruitment and retention payments around these four locations. But Ms Dalton for ASMS sought to criticise that approach when speaking to Radio New Zealand on 28 April 2025:

They have coincidentally limited those [recruitment and retention areas] to the four that have been in the media the most. Some of them do have the greatest need like Tairāwhiti, but there are regions that have demonstrably higher vacancy levels that have not been included in this list.

So they continue to ignore their own data in terms of what they say they are doing.

[83] Ms Dalton recalls mentioning these areas in March as examples of the kinds of problems that needed to be addressed. This is in keeping with Mr Hurring’s memory of her responding to a question about what sort of problems, saying something like “you only have to look at Nelson, Tairāwhiti, Mid-Central and Northland”.

[84] It is apparent that HNZ did not initially inform ASMS that it was taking this action to develop the recruitment and retention scheme. Once the employer sought feedback, ASMS said it (namely payments for those four regions only) was not a union claim and they did not support it. There was then movement to a factoring matrix.

[85] Such public comments are perhaps unwise given awareness of those areas at least being referred to by the union to the employer.

Bargaining dates

[86] HNZ argues that the union was responsible for proposing bargaining dates but (presumably deliberately) then denied that it was.

[87] Having heard the evidence, the most likely explanation is that the two lead negotiators had a miscommunication regarding which of them was supposed to get back to the other in early September about bargaining dates. Both thought it was the other one. They agreed to disagree. This situation is not unusual in the context of bargaining and I was unable to attribute any misleading communication to either party.

CME

[88] The situation regarding the alleged CME breaches is not entirely straightforward.

[89] The union's initial claim to increase the allowance from \$16,000 to \$20,000 was rejected by HNZ in late 2024.

[90] This union claim was withdrawn on 21 May 2025 but the parties do not have the same perception on whether the withdrawal was conditional or not. Ms Dalton and Mr Hurring say it was, whereas Ms O'Connor says she was not aware that withdrawal was conditional until sometime later. The union's position is that they would let it go into abeyance if they had progress on pay. No written material from bargaining was provided supporting either position.

[91] Ms Dalton gave evidence of discussion she had outside bargaining with two HNZ personnel as an attempted circuit breaker, in around mid-September. Ms O'Connor, who was not one of those personnel, regarded the discussion as without prejudice. A legal claim of privilege was not pursued. During the discussion, Ms Dalton raised an increase in CME as a possible circuit breaker.

[92] At bargaining on 18 September 2025 CME was referred to, being a potential use of the one-off fund money. ASMS was asked about whether it was putting the CME claim back on the table and did not communicate that it was.

[93] In the union's communication to its members on 18 September it stated "there has been no substantive progress on other matters, such as CME".

[94] Regardless of whether its May 2025 withdrawal was conditional, there is no evidence the union had an active claim on the table in September 2025. Referring in September 2025 to no substantive progress suggests there is such a claim and could be seen as misleading although the context was communication to members who had some background on the claim.

[95] Further, HNZ argues that in an interview for The Front Page podcast on 24 September, Ms Dalton suggested that Health NZ had rejected the CME claim, in circumstances where the claim had been withdrawn. She refers to the union saying “how about we put a bit more money into that. And they [HNZ] said, ‘Oh no we don’t think we could do that’.”

[96] It is somewhat difficult from the transcript of the podcast to get a clear sense of the timing of events Ms Dalton is describing. Technically HNZ had originally rejected the CME claim in late 2024 so a comment suggesting HNZ had rejected could be seen as correct, although subsequently ASMS withdrew the claim.

Conclusion on third alleged breach

[97] It is noteworthy that no one on HNZ’s bargaining team had raised concerns about misleading or deceptive comments with ASMS prior to the fixing application being lodged. Ms O’Connor indicated there was a desire to keep the bargaining moving forward.

[98] Ms O’Connor accepted that the examples provided could individually be seen as small or insignificant but the cumulative effect was detrimental to bargaining. However, the only element which I have found to be misleading was the 18 September 2025 reference to CME in a way that suggested it was on the table.

[99] There is no basis for a suggestion of dishonesty. But is this an important enough breach to warrant a fixing order or is it something more trivial, negligible or transient?²⁷ And was it something ongoing and carried on for enough time to undermine the bargaining?

[100] Although the comment related to a topic which had been the subject of discussions it did not relate to the main remuneration claim. It was made at the end of

²⁷ *Jacks Hardware and Timber Ltd v First Union Inc*, above at n 14.

the last day of bargaining, shortly before the fixing application was made so it is hard to see it as ongoing or linked to noticeable undermining of the bargaining. The test in s 50J is not reach on this point.

Overall conclusion

[101] The test to impose fixing on the parties' terms and conditions of employment is high. There are no findings of breaches of good faith which were sufficiently serious and sustained to significantly undermine the bargaining between HNZ and ASMS. Therefore no order for fixing can be made.

[102] The parties are a distance apart but it is not unusual in bargaining for a lot of progress to be made in a short time, even after a long period of little progress. Ms Dalton provided a list of subjects which she considers can still be the subject of options for bargaining. Neither party have made a final offer. There does seem room for further bargaining.

[103] The parties are encouraged to participate fully, openly and in good faith to work together to reach a resolution.

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

Costs

[105] 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.²⁸

Nicola Craig
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²⁸ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority>