IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 2

3012211

	BETWEEN	FIRST UNION INCORPORATED Applicant
	AND	JACKS HARDWARE AND TIMBER LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Peter Cranney and Grace Liu, Counsel for the Applicant Richard Upton, Counsel for the Respondent
Investigation meeting:	On the papers
Submissions received:	18 December 2017 from the Applicant, 8 December and two submissions on 20 December 2017 from the Respondent
Determination:	12 January 2018

SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY

A. Section 50J of the Employment Relations Act 2000 does not require the Authority to find that Jacks Hardware and Timber Limited has committed a further breach of its duty of good faith to First Union Incorporated.

B. The Authority will proceed to set down dates to hear the fixing application.

Employment relationship problem

[1] On 2 June 2017, First Union Incorporated (the Union) made an application for the Authority to fix the provisions of a collective agreement. The application is opposed by Jacks Hardware and Timber Limited (Jacks). Jacks says that there are no grounds on which the Authority could grant the fixing application. It says it did not breach good faith during facilitation and has stated it wishes to undergo ongoing bargaining.

[2] The matter was set down for an investigation meeting to take place on 19 and 20 October 2017.

[3] On 18 October 2017, Jacks applied to have the Authority refer questions of law related to s 50F[1] of the Employment Relations Act 2000 (the Act) to the Employment Court. The Union agreed with such a referral although the parties disagreed on the questions of law. Both parties requested a stay to allow that application to be dealt with.

[4] On 6 November 2017, I issued a determination[2] on that preliminary matter declining to refer the questions of law to the Court.

[5] I held a case management conference on 30 November 2017 to set a date for hearing the fixing application. However, the parties asked me to deal with this discrete preliminary issue on the papers:

> Does the breach of good faith required under s 50J(3)(a) of the Act, before the Authority can fix the provisions of a collective agreement, need to be a "new" breach or can it be the breach the Employment Court found in 2015[3] before referring parties to facilitation in the Authority?

[1] "A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act." The Union sought to exclude some written evidence that had been submitted to the Authority.
[2] *Frist Union Inc. v Jacks Hardware and Timber Ltd* [2017] NZERA Christchurch 189.
[3] *First Union Inc. v Jacks Hardware and Timber Ltd* [2015] NZEmpC 230.

[6] The Union's agreement to me dealing with this matter separately and on the papers was conditional on setting a new date for an investigation meeting to consider the fixing application. I set a date in March 2018. That date is no longer suitable for the respondent and the Authority is awaiting the respondent's advice on which new date, out of a number suggested by the Authority, is suitable.

[7] I have received written submissions from both parties.

The relevant law

[8] Section 50J was inserted into the Act on 1 December 2004. To date there has not been a determination of the Authority under s 50J granting the remedy of fixing the provisions of the collective agreement.[4]

[9] The relevant part of s 50J provides:

> (1) A party to bargaining for a collective agreement may apply, on the grounds specified in subsection (3), to the Authority for a determination fixing the provisions of the collective agreement being bargained for.
>
> (2) The Authority may fix the provisions of the collective agreement being bargained for if it is satisfied that—
>
> > (a) the grounds in subsection (3) have been made out; and
> >
> > (b) it is appropriate, in all the circumstances, to do so.
>
> (3) The grounds are that—
>
> > (a) a breach of the duty of good faith in section 4—
> >
> > > (i) has occurred in relation to the bargaining; and
> > >
> > > (ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and

[4] In *First Union Inc. v Kaikorai Service Centre Ltd.* [2017] NZERA Christchurch 200, Member Doyle found that all of the grounds in s 50J(3) were not made out. However, the ground, under s 50J(3)(a)(i) and (ii) that there had been a breach of the duty of good faith set out in s 4 of the Act and that the breach was sufficiently serious and sustained as to significantly undermine bargaining, was made out. The respondent has challenged that determination in the Employment Court.

> (b) all other reasonable alternatives for reaching agreement have been exhausted; and
>
> (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…

[10] Therefore, for the Authority to make a determination that gives it the power to fix the provisions of the collective agreement being bargained for, it must be satisfied that all the grounds in s 50J(3)(a) – (c) have been made out AND that it is appropriate, in all the circumstances, to make a determination giving it the power to fix the provisions.

[11] At this point, I need to decide simply whether the breach of good faith referred to in s 50J(3)(a)(i) and (ii) needs to be a new breach of good faith, that is, one that occurred after the breach that occurred in late 2014 and in February 2015.

Interpreting s 50J in context

[12] Section 5 of the Interpretation Act is entitled "ascertaining the meaning of legislation":

> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[13] I need to ascertain the meaning of s 50J in the light of its purpose. To do so I will consider the text of s 50J and will ascertain its purpose from its text and other indications in the Act.

[14] The Authority's power to deal with questions on the construction of the Act is set out in Schedule 2, clause 1(1)(b).

[15] The objects of the Act include to promote collective bargaining and to promote observance of the principles underlying the International Labour Organisation Conventions 87 (on Freedom of Association) and 98 (on the Right to Organise and Bargain Collectively).

[16] Part 5 of the Act, in which s 50J sits, is concerned with collective bargaining. It sets out all the legislative provisions governing collective bargaining, beginning with, at s 31, the objects of Part 5. They include:

> (a) to provide the core requirements of the duty of good faith in relation to collective bargaining …
> (c) to recognise the views of the parties to collective bargaining, as to what constitutes good faith.

[17] Section 32 sets out specific additional matters that constitute the duty of good faith in s 4 of the Act as far as collective bargaining is concerned.

[18] Sections 50A to 50I of the Act are in Part 5 entitled "Facilitating bargaining". Section 50A provides that:

> the purpose of sections 50B to 50I is to provide a process that enables 1 or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.

[19] Parties are not prevented from seeking other assistance from another person in solving their difficulties. That is, bargaining facilitated by the Authority is not the only recourse available to parties having serious difficulties in concluding a collective agreement. In reality, parties generally use the assistance of the Mediation Service, as these parties did, and would do so before seeking a reference to facilitation, as these parties did.

[20] Section 50C sets out the grounds on which the Authority may accept a reference for facilitation. A serious and sustained breach of the duty of good faith in section 4 that has undermined the bargaining is one of four separate grounds that empower the Authority to accept a reference for facilitation.

[21] More than one round of facilitation may occur but only if the circumstances relating to the bargaining have changed, or if the bargaining since the previous facilitation has been protracted.[5] In this case, no further facilitation has occurred since the recommendations in the facilitation were made. Nor am I aware of any change in the circumstances relating to bargaining.

[22] Section 50J is the next section in Part 5. That section is headed "determining collective agreement if breach of duty of good faith". It is the only section under that heading. The heading to s 50J itself reads "remedy for serious and sustained breach of duty of good faith in section 4 in relation to collective bargaining".

[23] Section 50J provides the ultimate remedy available to a party engaged in collective bargaining that has stalled. Having the Authority fix the terms of a collective agreement is a significant break from the process of bargaining, the general purpose of which is to produce agreement between the parties. Fixing takes away the power of the parties to produce a mutual agreement and must, logically, be a very late step in the bargaining process.

The parties' submissions

[24] The Union's position is that there is no need for a further breach of the duty of good faith by Jacks to be proved. It relies on the breach of good faith already found by the Court.

[5] Section 50C(3).

[25] Jacks submits that the remedy that the Union chose to seek for the established breach of good faith in late 2014 and in 2015 was a direction to facilitation. Jacks says that there were two other potential remedies. The first was a penalty under s 4A of the Act, and the other was an application that the Authority fix the provisions of the collective agreement.

[26] Jacks says that what the Union is now seeking is a second, or further, remedy when it already received the remedy of facilitation for the breach.

[27] Res judicata is the principle that when a final judicial decision has been made on a matter in which the same litigants were parties, those litigants cannot receive further judicial consideration leading to a second judicial decision on the same question or same factual situation.

[28] Jacks says that having chosen, and been granted, the remedy of facilitation for Jacks' breach of good faith the Union cannot now choose to also claim the remedy of fixing based on the same breach of good faith. Jacks invites me to conclude that in considering the application for fixing the Authority must be presented with new facts showing a further breach of good faith.

[29] The Union agrees that it did not seek a penalty or make an application for fixing. Instead, it sought facilitation. It notes that res judicata merely prevents a party from re-litigating a matter that has already been decided. Since there has been no previous fixing application determined between these parties res judicata cannot apply to the current proceedings.

[30] However, Jacks says its position on this is supported by s 50J(4) of the Act:

> (4) The Authority may make a determination under this section whether or not any penalty for a breach of good faith has been awarded under section 4A in relation to the same bargaining and whether or not the breach is the same breach.

[31] Jacks submits that s 50J(4) expressly recognises that a breach of good faith may result in a penalty as well as another remedy, such as facilitation or fixing. However, it says that it clearly does not allow an applicant to "double dip". It says in this case the remedy for a breach of good faith the applicant sought was facilitation. Jacks submits that s 50J(4) illustrates that was permissible and would have been permissible even if a penalty for a breach of good faith had been imposed. It also concedes that seeking a penalty and an application for fixing may be allowable.

[32] But Jacks says that the applicant having already once sought a remedy or remedies for the lack of good faith cannot then apply for the further penalty of fixing on the same breach, without offending against the principle of res judicata.

[33] The Union submits that collective bargaining disputes, such as this, are subject to a sequential statutory scheme. In part it relies on s 50J(7) for that assertion. Section 50J(7) of the Act provides:

> If the bargaining for the collective agreement was subject to facilitation under sections 50A to 50I, the member of the Authority who makes a determination under this section must not be the member of the Authority who conducted the facilitation if a party to the bargaining objects.

[34] It submits that facilitation is one of the steps that comprises one of all reasonable alternatives to fixing which must be attempted before fixing can be undertaken by the Authority under s 50J. For a reference to facilitation to be accepted, a breach of good faith is necessary. It cites *First Union v Kaikorai Service Centre Ltd*[6] as authority for the proposition that collective bargaining remedies are sequential.

[6] Above, note 3, at [65].

[35] Jacks submits that the *First Union v Kaikorai Service Centre Ltd* case is not authority for the principle that the same breach of good faith may support facilitation and later also support fixing. Instead, that determination was considering whether all reasonable alternatives for reaching agreement in bargaining had been exhausted. It concluded they had not, partly because there had not been a reference for facilitation.

[36] Jacks does not agree that the collective bargaining scheme provides sequential steps moving towards the conclusion of collective bargaining, culminating in fixing. It points out that in the *Kaikorai* case the Union skipped the step of facilitation. It says, therefore, the Union cannot now submit that in this case facilitation was an essential step before the remedy of fixing could be obtained. In any event, even if that was the case, there still needs to be a new and further breach of good faith established, because the Union has already had a remedy awarded for the previous breach of good faith.

[37] Jacks disagrees that s 50J(7) supports a view of the collective bargaining scheme as sequential. It says it simply deals with the specific situation of whether the same Authority member that conducted the facilitation should be the member who decides the fixing application.

Is the collective bargaining scheme in the Act a sequential process?

[38] The structure of the Act, the text of s 50J and the nature of fixing as a remedy, require that "all other reasonable alternatives for reaching agreement have been exhausted" so that "fixing … is the only effective remedy" available to the party "affected by the breach of good faith".

[39] Facilitation is one of the "reasonable alternatives for reaching agreement" set out in the Act. That means that, in practice, the party affected by the breach of good faith will have to have at least applied for a reference for facilitation. In most cases, parties will have actually undergone facilitation that has failed to produce a concluded collective agreement before a fixing application could be granted. Logically therefore, a fixing application could only be made after an application for facilitation.

[40] I do not have to consider the Union's strategy in *Kaikorai* to determine this matter.

[41] If a new breach of the duty of good faith was required, it must have occurred during facilitation or after facilitation had failed to produce agreement. The problem with that view is that during and after facilitation, by simply refraining from causing a further breach of the duty of good faith and doing nothing else, the party already guilty of an earlier breach could continue to undermine the bargaining indefinitely, without any legislative remedy available to the other party. That is so even though the same party had already breached the duty of good faith in such a serious and sustained way as to significantly undermine the bargaining. That cannot have been Parliament's intention when it enacted s 50J.

[42] Fixing is the ultimate statutory step that the party that has been disadvantaged by the other party's breach of good faith can take. It is a significant disadvantage potentially to both parties but always to the party that has breached good faith. The fact that it cannot be granted as a remedy until all other reasonable alternatives to reaching agreement have been exhausted makes it the final step in the sequential scheme of collective bargaining set out in the Act.

What is the effect of ss 50J(4) on the interpretation of s 50J(3)?

[43] Section 50J(4) does not assist me to interpret s 50J(3) in the way advocated for by Jacks. Its likely purpose is to ensure that what could be seen as a second and further penalty, that of taking away control of the bargaining process and the outcome from the offending party, is permissible. However, that is only if the process of facilitation is seen in the same light as a penalty (clearly punitive) and fixing, which also has a punitive effect.

[44] Instead, I consider that it strongly supports the Union's view that the Authority may make a determination under s 50J whether or not the breach of good faith is the same breach.

Does res judicata prevent the Union applying for the remedy of fixing having already been granted facilitation?

[45] Given my conclusion about the sequential nature of the collective bargaining scheme my logical conclusion to the argument about res judicata is that res judicata does not apply in these circumstances. The Authority has not considered and ruled on the issue of fixing the provisions of the collective agreement and remains empowered to do so.

The effect of s 142T of the Act on the interpretation of s 50J

[46] In its final submission, Jacks referred to s 142T of the Act, which I set out in full in paragraph [48] below. Jacks submits that Parliament intentionally introduced this section specifying that a further order for the same breach was permissible although an earlier order had already been made. It would not have needed to make such a specific provision if, generally, it was permissible to impose two kinds of penalties for the same breach. This should be compared to the collective bargaining scheme. The fact that Parliament has specifically stated that a further and subsequent penalty can be imposed after one has already been imposed for a breach of good faith must mean a "double dipping" approach is otherwise unlawful.

[47] Part 9A of the Act was introduced in 2016. Most applications under Part 9A need to be made by Labour Inspectors. The object of Part 9A is:

> to provide additional enforcement measures to promote the more effective enforcement of employment standards (especially minimum entitlement provisions) …

[48] Section 142T is in Part 9A and provides:

> (1) The court may make one kind of order under this Part against a person even though the court has made another kind of order, whether under this Part or another Part, against the person in relation to the same breach.
>
> (2) Without limiting subsection (1) and by way of example,—

> (a) a pecuniary penalty order and a compliance order may be made against a person for the same breach:
>
> (b) a compensation order and a banning order may be made against a person for the same breach.

[49] The purpose of s 142T is to clarify that in cases of breaches of minimum employment standards the Employment Court can impose more than one order on a party in breach of employment standards for the same breach.

[50] In both cases set out in s 142T(2) the types of orders, or remedies, that can be granted or imposed are for two different purposes. The purpose of compensation orders and compliance orders are to ensure past or future compliance with an employer's statutory obligations to its employees. Whereas, a pecuniary penalty order and a banning order are punitive orders with the purpose of punishing an offending employer.

[51] For example, under s 142T(2)(a) the Court could make a compliance order to ensure that in the future an employer pays its employees at least the minimum wage for each hour worked alongside a pecuniary penalty order punishing the same employer for breaching its obligation/s in the past.

[52] Ms Liu's final submission simply referred to Jacks argument that s 142T reinforces its belief that the Union, having already been granted the remedy of facilitation in relation to the breach of good faith cannot also be granted the remedy of fixing, as "weak". I agree. I consider s 142T to be of specific application only within Part 9A in relation to enforcing a regulatory regime of minimum employment standards. It does not assist in determining the meaning of s 50J(3) in the quite different sphere of a scheme to assist parties in collective bargaining.

Conclusion

[53] No new breach of good faith, during or after a facilitation application or the process of facilitation, is necessary before the Authority can consider an application for fixing the provisions of the collective agreement.

[54] I expect Mr Upton to contact the Senior Authority Officer as soon as possible after his return to work this year to confirm one of the dates already offered to the parties for the investigation meeting. Unfortunately, 19 March 2018, a date I offered on 11 December 2017, is no longer available.

Costs

[55] I reserve the issue of costs until I have determined the application for fixing.

Christine Hickey
Member of the Employment Relations Authority