

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 87  
5546986

BETWEEN                      FIRST UNION  
   INCORPORATED  
   Applicant

AND                                JACKS HARDWARE AND  
   TIMBER LIMITED  
   Respondent

Member of Authority:        Christine Hickey

Representatives:             Peter Cranney, Counsel for the Applicant  
   Richard Upton, Counsel for the Respondent

On the papers:                Application received 2 June 2015 from the Respondent  
   Response received 2 June 2015 from the Applicant

Determination:                1 July 2015

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**DETERMINATION OF APPLICATION TO REMOVE TO THE  
EMPLOYMENT COURT**

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- A.     The application by FIRST Union Incorporated that Jacks Hardware and Timber Limited did not have genuine reasons based on reasonable grounds not to enter into a collective agreement and that even if it did it was not entitled to unilaterally conclude bargaining on that basis is removed to the Employment Court under s.178 of the Employment Relations Act 2000.**

**Employment relationship problem**

[1]     This determination deals with an application made by the respondent, Jacks Hardware and Timber Limited (Jacks), that FIRST Union Incorporated's (the Union) application to the Authority be removed to the Employment Court to hear and determine the matter. This arises in the context of bargaining for a greenfields

collective employment agreement. On 20 February 2015 at a bargaining meeting Jacks issued a statement to the Union that it had genuine reasons based on reasonable grounds not to conclude a collective agreement.<sup>1</sup> It notified that Union that it would take no further part in bargaining for the collective agreement and asserted that bargaining was at an end.

*The original application*

[2] On 9 March 2015 the Union applied to the Authority for a determination that Jacks did not have genuine reasons based on reasonable grounds not to enter into a collective agreement, and that even if it did it was not entitled to unilaterally conclude bargaining on that basis.

[3] The Union also applied for an order for facilitated bargaining under s.50C of the Employment Relations Act 2000 (the Act), specifically under s.50C(1)(b), on the basis that the bargaining had been unduly protracted and extensive efforts, including mediation, had failed to resolve the difficulties.

[4] In its Statement in Reply lodged on 27 March 2015 Jacks defended its view that under s.33 of the Act, as it then was, it was not required to conclude a collective agreement because there were genuine reasons, based on reasonable grounds, for it not to do so.

[5] On 21 April 2015 the Authority held a telephone conference with Mr Cranney and Mr Upton, set a timetable for the exchange of evidence and canvassed the possibility that the application may be dealt with on the papers. A further telephone conference was to be scheduled after the evidence was exchanged.

[6] On 6 May 2015 Mr Upton emailed asking for the timetable to be adjourned because he intended to file an application for removal to the Court. Mr Cranney confirmed his agreement with Mr Upton's request and the Authority granted an adjournment of the dates for the exchange of evidence.

[7] On 2 June 2015 Jacks lodged an application that the matter be removed in its entirety to the Employment Court pursuant to ss.178(1) and 178(2)(a) of the Act.

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<sup>1</sup> Jack's Hardware and Timber Bargaining Statement is appended.

[8] By email of 2 June 2015 Mr Cranney wrote that the Union did not oppose the removal and *agrees with the respondent that the questions of law identified are likely to arise.*

### **Background facts**

[9] The facts are largely agreed. On 18 October 2013 the Union initiated bargaining for its members<sup>2</sup> for an inaugural collective employment agreement with Jacks.

[10] The parties agreed that collective bargaining was to be conducted in accordance with:

- The requirements of the Act;
- The applicable Code of Good Faith in Collective Bargaining approved pursuant to s.35 of the Act; and
- The relevant provisions contained in the Bargaining Process Agreement.

#### *The Bargaining Process Agreement*

[11] On 6 March 2014 the parties entered into a Bargaining Process Agreement (the BPA).

[12] I set out some relevant clauses here. Clause 14 of the BPA is headed *When the parties consider bargaining is completed* and provides:

*The parties agree that bargaining would be completed if at the conclusion of the ratification process and written confirmation of the results, all parties have signed the Collective Agreement.*

[13] Clause 15 of the BPA provides:

*Where there is a dispute over any process requirement or either of the parties reach a point where they are unable to progress the bargaining, they will discuss options for resolving their differences. The options available to them include the use of the Mediation Service of the Department of Labour or such other person as may be agreed to carry out this function. The cost of the Mediator (if any) shall be shared 50% by FIRST UNION and 50% by the Employer. ...*

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<sup>2</sup> At that stage there were 25 members.

*The bargaining*

[14] According to Jacks, at the commencement of bargaining the Union tabled a set of claims running to 24 pages, which included what Jacks refers to as the *material claims*:

- (i) a claim for backdated wage increases;
- (ii) claims about frequency of wage increases;
- (iii) claims associated with the methodology of any remuneration increase, e.g. that there would be pay scales based on role and tenure;
- (iv) claims to include wage scales within any collective agreement;
- (v) enhanced sick leave entitlements;
- (vi) separate domestic and sick leave entitlements;
- (vii) that Jacks would pay insurance premiums for the Union members access to a funeral benefit scheme provided by the Union's insurers;
- (viii) recognition of Easter Sunday being treated as a public holiday even though the respondent does not trade on that day;
- (ix) a participation agreement regarding health and safety that would be separate to the respondent's existing practices;
- (x) a separate list of employment relationship problems and disciplinary scenarios differing from Jacks' existing policy; and
- (xi) paid long service leave.

[15] Since bargaining was initiated the parties have met on seven occasions for the purpose of bargaining, communicated about a number of claims by email and in November 2014 attended mediation for a day.

[16] Agreement had been reached over a number of the overall claims. However, no agreement was reached over any of the material claims listed above.

[17] On 20 February 2015 the parties met for scheduled further bargaining in Dunedin. At the beginning of that bargaining meeting Jacks invited the Union to

provide its position in relation to remuneration. The Union maintained its previously expressed position that it was opposed to performance-based remuneration.

[18] The respondent adjourned to consider the Union's position.

*Jacks' decision to decide bargaining was ended*

[19] When the parties came back together again, Jacks advised the Union that it considered a collective agreement could not be concluded and therefore it believed it was acting in accordance with s.33 of the Act in stating that bargaining was at an end.

*Jacks' Statement in Reply*

[20] Jacks' reasons for deciding a collective agreement could not be concluded and that bargaining was at an end include<sup>3</sup>:

- The parties had invested significant time and resources in the bargaining without success;
- There were philosophical differences between the parties about what remuneration increases should reward; that is, performance vs experience;
- There were philosophical differences about what should be contained in the collective agreement, for example, whether remuneration should be included within it or not;
- The philosophical differences were very unlikely to change;
- There appeared to be little or no prospect of reaching an agreement over any of the material claims.

[21] Jacks claims that bargaining is deadlocked. The Union claims that bargaining has been unduly protracted, although disagrees that it is deadlocked. Both parties agree that they are having serious difficulties in concluding a collective agreement.

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<sup>3</sup> As set out in Jacks' Statement in Reply.

[22] In deciding that it had genuine reasons, based on reasonable grounds, not to conclude a collective agreement Jacks relied in part on the Code of Good Faith (the Code) that was in effect at the relevant time.<sup>4</sup>

[23] In relation to *areas of disagreement* the Code provided:

*3.14 Where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give further consideration to their respective positions in the light of any alternative options put forward.*

*3.15 However, the parties are not required to continue to meet with other about proposals that have been considered and responded to.*

*3.16 Even though the parties have come to a standstill or reached a deadlock about a matter, they must continue to meet, consider and respond to each other's proposals on other matters.*

*3.17 The parties should attempt to settle any differences arising from the collective bargaining. To assist this, the parties should not behave in ways that undermine the bargaining for the collective agreement.*

[24] Jacks claimed that it had already met about the Union's proposals and had it had considered and responded to the Union's proposals as required by clause 3.15 of the Code.

[25] In its response to the Union's application for facilitated bargaining Jacks claimed that the Authority could not order facilitation as bargaining had concluded. In the alternative, if the Authority determined that bargaining remained ongoing, then Jacks opposed the application for facilitation because in the context of the entire claims put forward by the Union, bargaining has not been unduly protracted.

### **Application to remove the matter to the Employment Court**

[26] Section 178 of the Act empowers the Authority to use its discretion to remove all or part of a matter to the Employment Court without investigating it. The Authority may do so of its own motion or on the application of a party. The grounds for removing a matter include if *an important question of law is likely to arise in the matter other than incidentally*.<sup>5</sup>

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<sup>4</sup> A new Code of Good Faith in Collective Bargaining was approved by Michael Woodhouse, Minister of Workplace Relations and Safety, on 6 March 2015. On the same day he revoked the previous Code Of Good Faith in Collective Bargaining which had been approved by the then Minister of Labour, the Honourable Paul Swain, on 9 August 2005.

<sup>5</sup> Section 178(2)(a).

[27] Jacks submits that the matter involves a number of important questions of law that arise other than incidentally, including:

- (i) Was Jacks acting lawfully in determining there were genuine reasons, based on reasonable grounds, not to conclude a collective agreement?
- (ii) If section 33 of the Act (as it was prior to 6 March 2015) was fulfilled, was it lawful for a party to collective bargaining to unilaterally determine that bargaining was not able to be concluded?
- (iii) What are the implications (if any) of section 9 of the Employment Relations Amendment Act 2014/section 33 of the Employment Relations Act as amended since 6 March 2015, to this situation?

[28] The Union agrees that the questions of law above arise in this case. However, it has not commented on whether they arise *other than incidentally*.

*What are the implications, if any, of the new s.33 of the Act?*

[29] I deal with this question first as out of the three identified by Jacks it seems to be the primary issue that needs to be addressed before the original application can be considered and certainly before the other two questions identified in paragraph [27] above can be answered.

[30] That is, effectively there needs to be an answer as to which version of s.33 should now be applied when considering whether Jacks was entitled to decide bargaining was at an end, and whether there should now be an order for facilitated bargaining in the Authority. I conclude that this is a question of law which arises, other than incidentally, in determining whether or not Jacks was entitled to unilaterally conclude bargaining. My reasons for this conclusion follow.

[31] Before 6 March 2015 s.33 of the Act provided:

- (1) *The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds not to.*
- (2) *For the purposes of subsection (1), **genuine reason** does not include-*
  - (a) *opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or*

*(b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.*

[32] As at 6 March 2015 the Employment Relations Amendment Act 2014 took effect amending section 33 of the Act to:

- (1) The duty of good faith in section 4 does not require a union and an employer bargaining for a collective agreement-*
  - (a) to enter into a collective agreement; or*
  - (b) to agree on any matter for inclusion in a collective agreement.*
- (2) However, an employer does not comply with the duty of good faith in section 4 if-*
  - (a) the employer refuses to enter into a collective agreement; and*
  - (b) the employer does so because the employer is opposed, or objects in principle, to bargaining for or being a party to a collective agreement.*

[33] Schedule 1AA, clause 2(2) of the Act contains the transitional provisions affecting s.33 arising from the 2014 Amendment Act and provides:

*Section 33 of this Act (replaced by section 9 of the 2014 Act) applies to all bargaining, whether the bargaining commenced before, on, or after the commencement of the 2014 Act.*

[34] Therefore, the new s.33 applies to all bargaining, whether or not the bargaining commenced before the commencement of the 2014 Act. In this case bargaining clearly commenced before the commencement of the 2014 Act so now the amended s.33 applies.

[35] However, in relation to that bargaining Jacks acted to purportedly end bargaining before the commencement of the 2014 Act and it did so in reliance on the provisions of s.33 that applied before commencement of the 2014 Act. The provisions it purported to apply no longer exist.

[36] The question is which version of s.33 should be applied in considering whether Jacks was entitled to unilaterally conclude bargaining on the basis that it did. The transitional provisions are silent on whether the pre-6 March s.33 or the post-6 March s.33 should be applied to the question of whether Jacks could have concluded that bargaining was at an end.

[37] This appears to be the first case in which the meaning of the transitional provision in relation to s.33 and perhaps the meaning of the amended s.33 falls to be judicially considered.

[38] The answer to the other two questions identified by Jacks in the application for removal depend on the answer to the question of what the amendment to s.33 means for matters in which bargaining commenced before the amendment of s.33 and in which a party declares bargaining to be at an end in reliance on the tests in the pre-amendment s.33.

*Other considerations*

[39] In deciding whether or not to remove a matter to the Employment Court I need to also consider other discretionary factors. If there were disputed facts those might be better resolved in the Authority before any question/s of law were referred to the Court. However, I have already indicated that there are not many disputed facts, if any.

[40] Both parties agree that the matter should be removed to the Court. The Authority should be reluctant to refuse to remove a matter when the parties agree that the matter should be removed, so long as at least one of the s.178 tests is met.

[41] Because the questions to be resolved are at least in large part questions of law there will an opportunity for appeal to the Court of Appeal in the event that either party is unsatisfied with the Court's decision.

[42] Having resolved at least the primary question about s.33 identified above, and the others that arise, it is open to the Court to refer the matter back to the Authority for determination at least of the specific issue of whether the Authority should accept a reference to facilitation to be dealt with under s.50C of the Act. That is not an application that can be dealt with by the Court. It could be stayed until after the issues identified as questions of law in the application to remove, and any others identified by the Court, are dealt with.

[43] I note that the issue of reference to facilitation is something the Authority can usually deal with at reasonably short notice and can do so on the papers in suitable cases.

[44] Overall, I consider that this matter should be removed to the Employment Court to deal with the Union's application that Jacks did not have genuine reasons based on reasonable grounds not to enter into a collective agreement, and that even if it did it was not entitled to unilaterally conclude bargaining on that basis.

**Conclusion**

[45] The application by the Union that Jacks did not have genuine reasons based on reasonable grounds not to enter into a collective agreement and that even if it did it was not entitled to unilaterally conclude bargaining on that basis is removed from the Authority to the Employment Court under s.178 of the Act.

**Costs**

[46] Costs are reserved until the proceedings are finally resolved.

Christine Hickey  
Member of the Employment Relations Authority