IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2017] NZERA Christchurch 189
File number: 3012211

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

Member of Authority: Christine Hickey

Date: 6 November 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

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[1] On 6 June 2017, First Union Incorporated (the Union) applied for the Authority to fix the provision of a collective agreement under s 50J of the Employment Relations Act 2000 (the Act).

[2] On 20 June 2017, Jacks Hardware Limited (Jacks) lodged its Statement in Reply. Jacks opposes the application. It considers there are no grounds for granting the application because the grounds under s 50J are not satisfied. In particular, it considers that there has not been any significant bargaining on aspects of the two outstanding terms.

[3] In my absence, on 6 July 2017, Member van Keulen held a case management conference. On 12 July 2017, he issued a Notice of Direction that the Authority would hold an investigation meeting into the Union's claim in Dunedin on 19 October 2017. He also set a timetable for statements of evidence, being 15 September for the Union and 29 September for Jacks, with the Union able to lodge statements strictly in reply by 6 October 2017.

Background facts

[4] There is no collective agreement between the parties. On 18 October 2013, the Union initiated collective bargaining with Jacks. The first bargaining meeting took place on 31 January 2014.

[5] On 20 February 2015, at a bargaining meeting Jacks advised the Union that it considered that it had:

> taken this bargaining as far as it can. In accordance with s33 of the ERA, it believes that it is now able to say that there are genuine reasons, which are based on reasonable grounds not to conclude a collective. Given this Jacks Hardware & Timber believes that bargaining is able to be concluded. Accordingly, it will take no further part in bargaining for this collective, which is now at an end.

Previous litigation

[6] There was no further bargaining. On 9 March 2015, the Union made an application to the Authority that:

(i) It issue a declaration that Jacks acted unlawfully when it purported to conclude collective bargaining on and from 20 February 2015, so that collective bargaining remained in place between the parties; and

(ii) Under s 50C of the Act the parties be directed to undergo facilitated bargaining on the ground that Jacks' purported ending of bargaining on 20 February 2015

was a failure to comply with the duty of good faith, which was serious and sustained, and had undermined the bargaining.

[7] On 2 June 2015, Jacks lodged an application that the matter be removed in its entirety to the Employment Court on the basis that there were important questions of law that would arise other than incidentally.

[8] That question of law arose because there was a new s 33 of the Act, enacted on 6 March 2015. Did the new s 33 apply, or the old s 33, which required the parties to conclude a collective agreement unless there was a genuine reason not to do so?

[9] The earlier section 33 did not consider a party's opposition or objection in principle to bargaining for, or being a party to, a collective agreement to be a genuine reason.

[10] On 1 July 2015, I removed that application to the Employment Court under s 178 of the Act. Chief Judge Colgan, as he then was, decided in a preliminary judgment[1], that the pre-6 March 2015 s 33(2) applied to the case.

[11] In November 2015, Chief Judge Colgan heard the substantive case, and on 17 December 2015 issued his decision[2]. He held that Jacks' objection to the inclusion of a remuneration clause was not a genuine ground for not entering a collective agreement, and was not one based on reasonable grounds. Therefore, Jacks' unilateral declaration that it would not continue collective bargaining was a breach of its obligations of good faith in collective bargaining under ss 4 and 32 of the Act.

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[1] *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 142
[2] *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 230

[12] He also decided that Jacks misled or deceived the Union between mid-December 2014 and 20 February 2015 by not meeting part of its side of a bargain struck between the parties in December 2014. It did not return to bargaining on 20 February 2015 except:

> [153] … in a very restricted, artificial and strategic way
> …
> Returning to bargaining could not reasonably have meant simply a further meeting at which, if there was no major concession by the Union, bargaining would cease.
>
> [154] Jacks's breach of good faith in those circumstances was also its failure to comply with cl 15.1 of the BPA[3]; that is to discuss the options for resolving the parties' differences resulting from their inability to progress the bargaining. Rather, Jacks purported to declare unilaterally that bargaining had ceased and, because it considered itself free from any obligation to entering into a collective agreement in these circumstances, it was implicit in its stance that it would not engage in further collective bargaining as has subsequently proved to be the case. Adherence to good faith requirements includes adherence to the BPA's requirements to discuss resolution options with the Union at that point. Jacks did not do so.

[13] Chief Judge Colgan concluded Jacks' philosophical objections to the inclusion of remuneration elements in a collective agreement were not genuine reasons to conclude bargaining.

[14] The Chief Judge also decided the application for a reference to facilitation under s 50C:

> (1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:
>
> (a) **that—**
>
> > **(i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and**

[3] Bargaining Process Agreement

> **(ii) the failure—**
>
> **(A) was serious and sustained; and**
>
> **(B) has undermined the bargaining:**
>
> **(b) that—**
>
> **(i) the bargaining has been unduly protracted; and**
>
> **(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:**
>
> …
>
> (3) The Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator unless—
>
> (a) circumstances relating to the bargaining have changed; or
>
> (b) the bargaining since the previous facilitation has been protracted.

[15] In considering s 50C(1)(a)(i) of the Act, Chief Judge Colgan concluded that

> [174] … the parties had failed to conclude a collective agreement, principally because of Jacks unilateral declaration that it would not do so, which is in breach of its good faith obligations in collective bargaining under ss 4 and 32 od he Act. Was that failure either serious or sustained or has it undermined the bargaining? Both of those statutory tests are met. …
> I conclude that the grounds under s 50A(1)(a) are made out.
>
> [175] Under s 50C(1)(b) the Court must decide both that the bargaining has been unduly protracted and that "the extensive efforts (including mediation) have failed to resolve the difficulties and have the precluded the parties from entering into a collective agreement". That test has likewise been made out on the facts of this case.

[16] Chief Judge Colgan ordered the Authority to accept the Union's application for facilitation.

The facilitation

[17] Member van Keulen was the Authority member who undertook the facilitation. That process began on 29 June 2016 and culminated with a recommendation made by Member van Keulen.

[18] Jacks did not accept the Member's recommendation. Instead, it asked to return to the bargaining table so that it could discuss the wage rate, which it considered needed to be discussed in the business context. It also proposed discussing the term of the inaugural collective agreement.

[19] The Union did not agree with Jacks' wish to continue with facilitated bargaining. It believed that further facilitation would not assist the parties and asked Member van Keulen to bring the facilitation to an end.

[20] On 19 May 2017, Member van Keulen issued a Member's Minute in which he agreed with the Union that is was appropriate to bring the facilitation to an end. He ended publication restrictions on his recommendation and empowered the parties to disclose the recommendation as they saw fit.

The fixing application

[21] As set out above, the Union then lodged its claim for the provisions of the collective agreement to be fixed by the Authority under s 50J of the Act.

[22] In line with the Notice of Direction, on 20 September 2017 the Union duly lodged and served three witness statements, from Shirley Walthew, Anne Burridge and Glenn Smaill.

[23] On 5 and 6 October 2017, Jacks filed and served three witness statements from Martin Dippie, Neil Finn-House and Jackie Billyard.

[24] Later on 6 October 2017, Ms Liu for the Union, wrote to the Senior Authority Officer and Mr Upton and attached updated statements from Shirley Walthew and Anne Burridge because:

> There are some parts in the applicant's evidence (specifically statement of Shirley Anne Walthew and statement of Anne Lynette Burridge) which contained statement(s) made for the purpose of facilitation and are not admissible in the proceedings.
> We have therefore removed the relevant parts.
> …
> The respondent's evidence filed yesterday and today contained statements made for the purpose of the facilitation which are not only inaccurate but also inadmissible. We ask the respondent to take urgent steps to remove them. The documents the respondent had referred to in its statement in reply (specifically documents 4.2 to 4.9) also contain inadmissible statements. Therefore, those documents should be removed from the proceedings.
>
> We respectfully request that those evidence/documents containing inadmissible statements not to (sic) be put before the Authority Member for now until they are updated.

[25] The Union's object to admissibility of some evidence is based on s 50F(1) of the Act:

> (1) A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act.

[26] On 11 October 2017, Mr Upton emailed the Authority asking for an urgent teleconference with a member in relation to the issue about admissibility of evidence raised by the Union.

[27] Mr Upton also sent a memorandum clarifying his view that s 50F does not render any of the Applicant's original evidence or the Respondents' evidence inadmissible. However, he submitted that if the Authority agreed that the original evidence did contain statements that are inadmissible (which Jacks denies), then by filing and serving that evidence the Applicant has waived any privilege it may have had.

[28] Mr Upton asked the Authority to determine whether:

> (i) Section 50F(1) or any other section renders the evidence of what was said at facilitation inadmissible in the proceedings under the Act?
> (ii) If so, can the inadmissibility of that evidence be waived, whether potentially inadvertently (as in the case of the Applicant) and/or intentionally (as in the case of the Respondent)?

[29] Also on 11 October 2017, Mr Upton clarified that Jacks' position was that under s 50F there was no general blanket confidentiality. "Even if there was some form of privilege/confidentiality, it has been waived."

[30] Shortly before an urgent case management teleconference convened for 12 October, Mr Upton filed a further memorandum seeking orders that:

> (i) the applicant's original evidence remain on file and be used for the substantive hearing scheduled for 19 October 2017; and
> (ii) the documents filed with Jacks' statement in reply be found admissible as evidence, and admitted into evidence.

[31] In that Memorandum, Mr Upton proposed that the Authority determine the following questions of law:

(i) Does section 50F of the Act, or any other section, render the evidence of what was said at facilitation inadmissible in proceedings under the Act?
(ii) If any of the evidence in question is admissible, are there any limitations around that (and, if so, what are they)?
(iii) If any of the evidence in question is inadmissible, can that be waived, whether potentially inadvertently (as in the case of the Applicant) and/or intentionally as in the case of the Respondent)?

[32] At the case management teleconference, both parties asked me to vacate the 19 October date for the investigation meeting into the fixing application, on the basis that they would submit a joint application for questions of law to be referred to the Employment Court under s 177 of the Act.

The application to remove questions of law

[33] On 18 October 2017, Mr Upton submitted an application for referral of questions of law. He identified the questions as broadly in line with his earlier two memoranda. The three questions posed are:

(i) Question one – The legal issue is whether certain evidence which the respondent seeks to lead in a s 50J fixing proceeding (being statements it claims were made by the applicant in the fixing proceeding during a previous facilitation) is admissible or inadmissible within the meaning of s 50F.
(ii) Question two – if any of the evidence in question is admissible, are there any limitations around that (and if so what are they)?
(iii) Question three – if the evidence in question is, prima facie, inadmissible, can that inadmissibility be waived?

[34] Despite the parties' original intention to file a joint application the Union considers that the proposed Question Two is not necessarily a further question of law but a proposal that could be raised in submissions. The Union considers that the proposed Question Three is not one that arises on the facts of this case because filing a statement of evidence which if given in evidence is inadmissible can never amount to waiver. Further, the Union submits that it is not appropriate to call the filed briefs "evidence" at this stage because briefs are not evidence, if their content is inadmissible.

[35] The reasons given for the application to refer the questions of law to the Court are:

(i) Both parties support the removal of at least one of the questions of law.
(ii) The question/s of law have not been considered by the Authority or the Court before.
(iii) The questions of law are fundamentally important to these proceedings, as well as potentially every other instance of facilitation under the Act.
(iv) The denial of the orders sought will be likely to cause significant and irreversible prejudice to the Applicant and/or the Respondents' case.
(v) If not referred to the Court, it is very likely that the questions of law will be the subject of a challenge to the Court in any event.

[36] At the 12 October 2017 teleconference, counsel agreed that most of the statements made at facilitation were made by counsel. That alone makes production of evidence difficult. However, that may not be an issue in this case.

[37] For the avoidance of doubt, I can clarify that I did not read the Union's original statements of evidence and I have not read the Respondent's statements of evidence. At the time the statement in reply was lodged, I read it and the documents annexed to it. Therefore, I

have knowledge of some emails sent by both parties in relation to the recommendation and their reactions to it.

[38] I know that during facilitation the parties had agreed on all but two aspects of a collective agreement. The first aspect was what form of a remuneration clause should be contained in the collective agreement, and what the pay scales would be. The second aspect was the term of the collective agreement.

[39] The proceedings asking the Authority to fix the terms of the collective agreement are the proceedings foreseen under s 50F(1) of the Act.

[40] I do not know what information was in the Union's original statements of evidence that it now says cannot be admitted because it could be used against the Union in these proceedings. However, it is possible the Union considers the facts outlined in paragraphs [18] and [19] above to be statements made by the parties for the purposes of facilitation. Therefore, they may be part of the evidence that the Union seeks to have declared inadmissible, but that Jacks wants admitted. If so, that means I already have knowledge of some of the evidence.

The law on s 177

[41] Section 177 of the Act provides that:

> (1) The Authority may, where a question of law arises during an investigation,
> (a) refer that question of law to the court for its opinion; and
> (b) delay the investigation until it receives the court's opinion on that question.
> …
> (4) Subsection (1) does not apply –
> (a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and
> (b) without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.

[42] The first issue I need to determine is whether the issue of admissibility of evidence under s 50F gives rise to a question of law or is simply a question about the procedure I intend to follow in investigating and determining the fixing proceedings. If it is a question about the procedure the Authority will follow, I cannot refer the question/s to the Court.

[43] Section 50F is not a complex section. It says that statements a party made for the purposes of facilitation cannot be admitted as evidence in any proceedings under the Act if that evidence would be used against the party that made the statement/s. Therefore, it is clear that some evidence may not be admissible. Decisions on admissibility of evidence are the kind of decision routinely made by Authority members. Issues of admissibility can be seen as procedural matters. I do not consider this case is any different just because it appears to be the first time the Authority has been asked to apply s 50F.

What issues need to be resolved in these proceedings?

[44] Although neither party has requested that Member van Keulen not be the member making the s 50J determination, it is not proposed that he makes the s 50J determination.

[45] I set out my approach to the fixing application as s 50F applies to it below. In order to be able to apply s 50F to the facts of this case and identify statements made in the course of facilitation, I need to determine when facilitation ended. Did the facilitation end when Member van Keulen made his recommendation, when the recommendation was rejected, or when Member van Keulen decided that facilitation had come to an end?

[46] Determining when facilitation ended is important to set the parameters of what evidence s 50F can apply to. If facilitation did not end until Member van Keulen declared it to have ended, then all statements made by both parties prior to that are arguably inadmissible. If it ended earlier, such as with the issuing of the recommendation, statements

made after that must be admissible. I can hear submissions on this point. Evidence is not required to establish an answer to this.

[47] Once I have established when facilitation ended I need to consider the following s 50J issues:

(i) Has there been a breach of the duty of good faith as set out in s 4 of the Act?
(ii) If so, did that occur in relation to the bargaining?
(iii) Was that breach sufficiently serious and sustained as to significantly undermine the bargaining?
(iv) Does that breach need to be a 'new' breach or can it be the breach the Employment Court found in 2015 before referring the parties to facilitation in the Authority?
(v) Have all other alternatives for reaching agreement been exhausted?
(vi) Is fixing the provision of the collective agreement the only effective remedy for the party affected by the breach of the duty of good faith?

How will I approach the issues?

[48] Questions (i) to (iii) do not need evidence of statements made by a party for the purposes of facilitation if the breach of good faith does not need to be a new one. The Union appears to rely on the existing breach.

[49] In its statement in reply Jacks states that "there is no relevant breach of the duty of good faith." I take that to mean that it contends either that the existing breach is no longer relevant or that a new breach has to be established. Question (iv) can be dealt with without evidence, purely by submissions.

[50] If I determine that there needs to be a further breach of good faith that occurred in relation to bargaining and that breach was sufficiently sustained and serious as to undermine bargaining, I would need to hear any evidence about a new breach. It is at that point that decisions would need to be made about the admissibility of statements made during facilitation.

[51] Question (v) requires a consideration of what other alternatives are now available, apart from fixing. Therefore, I may need evidence on this point, but statements made during facilitation may not be relevant. Relevant evidence will be that about what stances the parties take now and why.

[52] Question (vi) would largely be a matter for submissions, but there may need to be evidence presented about why fixing would or would not be the most effective remedy. It is possible that decisions about admissibility of statements made during facilitation would need to be made.

[53] It is unclear to me why an Authority member could not make decisions about admissibility of evidence, which is a role members undertake on a routine basis. It may not be appropriate for the member who will investigate and determine the fixing application to make those decisions, but another member could do so.

Conclusion on referral of questions of law

[54] There are practical reasons why the proceedings should be expedited and not held up by referrals to the Court. The parties have been in bargaining and facilitation now since 31 January 2014, a period of three years and nine months. It is four years since the Union initiated collective bargaining.

[55] One of the objects of the Act is to promote collective bargaining. In addition, among the Authority's obligations is the obligation to promote good faith behaviour, and resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. I consider treating the issue of s 50F as a question of law is unduly technical and will delay the matter unnecessarily. This matter needs to proceed as soon as possible and not be delayed further.

[56] Proposed Question One is not a legal question but a question about what procedure to use in these proceedings. Questions Two and Three are not questions of law. Therefore, I decline to refer any of the suggested questions of law to the Court.

[57] Once I have determined the fixing application, the parties have the option of challenging the determination in the Employment Court. Refusing to refer a question or questions of law to the Court at this stage does not take away that right.

[58] The Senior Authority Officer will be in touch with both parties to set down a case management conference in order to set the fixing application down for an investigation meeting as soon as possible.

Christine Hickey
Member of the Employment Relations Authority