IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 200
5641452

	BETWEEN	FIRST UNION INC. Applicant
	A N D	KAIKORAI SERVICE CENTRE LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Cranney and Grace Liu, Counsel for Applicant Penny Swarbrick, Counsel for Respondent
Investigation Meeting:	30 August 2017 at Invercargill
Submissions Received:	On the day
Date of Determination:	16 November 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A **All of the grounds in s 50J(3) of the Employment Relations Act 2000 (the Act) that are required to be made out before the Authority may fix the provisions of the collective agreement being bargained for have not been made out.**

B **The ground that there has been a breach of the duty of good faith in s 4 of the Act and that that breach was sufficiently serious and sustained so as to significantly undermine bargaining has been made out.**

C **The parties may be assisted by this determination in any resumption of collective bargaining.**

D Costs are reserved.

Employment relationship problem

[1] First Union Inc. (First Union) is a registered union under the Employment Relations Act 2000 (the Act).

[2] Kaikorai Service Centre Limited is a duly incorporated company having its registered office in Dunedin and carrying on the business of owning and operating Invercargill Pak 'N Save (Invercargill Pak 'N Save or the Company). The two directors of the Company are Bryan and Anne Dobson.

[3] First Union has members at Invercargill Pak 'N Save.

[4] By notice dated 16 November 2015 Bill Bradford, First Union National Organiser for Industrial Growth and Support, initiated bargaining for a collective agreement at Invercargill Pak 'N Save.

[5] This was the first occasion that Invercargill Pak 'N Save had been involved in collective bargaining. Its employees have individual employment agreements.

[6] Neil McPhail has represented the majority of New World and Pak 'N Save supermarkets in the South Island for day to day employment relationship issues and in some cases wage bargaining. He has been associated with Invercargill Pak 'N Save and Mr and Mrs Dobson for over 20 years. He was asked by them to act as the employer's advocate in the bargaining.

[7] First Union says that the Company would not engage in collective bargaining about wages at the bargaining meeting on 8 December 2015 and that refusal continued.

[8] First Union applies to the Authority for a determination fixing the provisions of the collective agreement being bargained for under s 50J of the Act on the following grounds:

- that a breach of the duty of good faith in s 4 of the Employment Relations Act 2000 (the Act) has occurred in relation to the bargaining by the refusal and continued refusal to engage in collective bargaining about wages and;

- that the breach is sufficiently serious and sustained so as to significantly undermine the bargaining and;

- all other reasonable alternatives for reaching agreement have been exhausted and;

- that fixing the provisions of the collective agreement is the only effective remedy for First Union.

[9] Invercargill Pak 'N Save denies that the grounds in s 50J (3) exist. It does not accept that there has been a breach of the duty of good faith in s 4 in relation to bargaining and none that is sufficiently serious and sustained so as to significantly undermine the bargaining. Further, it does not accept that all other reasonable alternatives for reaching agreement have been exhausted and that fixing the provisions of the collective agreement is the only effective remedy for the party affected by the breach of the duty of good faith.

The issues

[10] Section 50J of the Act came into effect on 1 December 2004 to provide a remedy for serious and sustained breaches of good faith in s 4 in relation to collective bargaining.

[11] The Authority may under s 50J (2) fix the provisions of the collective agreement being bargained for if it is satisfied that the grounds in s 50J (3) have been made out and further that it is appropriate in all the circumstances to do so.

[12] The grounds that are set out in s 50J (3) all have to be made out in order for the Authority to fix the provisions of the collective agreement.

[13] The Authority will need to determine the following issues:

(a) Has a breach of the duty of good faith in s 4 of the Act occurred in relation to bargaining?

(b) If there has been a breach of the duty of good faith in relation to the bargaining then is it sufficiently serious and sustained as to significantly undermine the bargaining?

(c) Have all other reasonable alternatives for reaching agreement been exhausted?

(d) Is fixing the provisions of the collective agreement the only effective remedy for the party or parties affected by the breach of the duty of good faith?

(e) If the grounds are found to be made out then is it appropriate in all the circumstances for the Authority to fix the provisions of the collective agreement being bargained for?

Has there been a breach of the duty of good faith in s 4 in relation to bargaining?

Bargaining process agreement

[14] Although discussions took place about a bargaining process agreement one was not signed.

In advance of the 8 December 2015 bargaining meeting

[15] Mr Bradford explained in his evidence that it is not uncommon for him to initiate bargaining for a collective agreement in a work site where the employer has not been involved previously in collective bargaining. He refers to such work sites as "greenfield sites." Mr Bradford recognised in his evidence that there can be some apprehension on the part of employers at these work sites when bargaining is initiated for collective agreements. Often at greenfield sites the employer provides before the first bargaining meeting the "bones of the individual employment agreement" and claims are then made by First Union against that agreement.

[16] That is what occurred leading to the bargaining meeting on 8 December 2015. Mr McPhail provided to Mr Bradford what the Company considered a collective agreement should look like.

[17] Invercargill Pak 'n Save wanted to continue with its practice of setting wage (pay) rates by way of individual annual review. It proposed a clause for the collective agreement that provided the applicable pay rate is specified in the employee's individual agreement and that wages are reviewed annually. Mr McPhail said the individual agreement would "run alongside a collective agreement." A proposed

individual agreement was attached to the version of what the Company thought a collective agreement should look like.

[18] First Union wanted a wage fixing scale in the collective agreement.

8 December 2015 bargaining meeting

[19] At the bargaining meeting Mr Bradford spoke to his claims including the wage scale. There was then an adjournment and when Mr McPhail returned he advised that the Company would not accept the wages clause and the hours of work provision. These were two key areas.

[20] Mr Bradford said in his evidence that there was no engagement with the claims and the only response from the Company was that they were happy with the way things are.

[21] Mr McPhail said that Mr Bradford became heated and made references to breaching good faith and words such as "exploitation" and "abuse" were used in relation to working hours. Mr Bradford then sought an adjournment and returned wanting, if there was to be no further bargaining, a "final offer" to take to the members. There was mention of the potential for some action.

[22] The Company took an adjournment and returned to advise that they decided that they needed to investigate the allegations made about hours of work before proceeding further. Mr McPhail advised he would write to Mr Bradford. Bargaining concluded at that point.

What happened after 8 December 2015 bargaining?

Communication by letter and email

[23] Initially in correspondence after 8 December 2015 both Mr McPhail and Mr Bradford indicated a willingness to resume bargaining although Mr Bradford qualified that by stating if there was engagement by the Company with the issues raised in the claims.

[24] Mr McPhail in a letter dated 2 February 2016 advised amongst other matters that his client has reconsidered its position in relation to the key issues between the parties including wages and advised that it has no further offer to make and the issues

have been considered and responded to in good faith. He set out that there may be other issues that could be considered and his client would sit at the table if First Union was willing. By email dated the same date Mr Bradford raised good faith concerns about refusal to bargain on pay and most of the other key areas.

[25] On 30 March 2016 Mr Dobson proposed in an email to First Union a review of union members' rates and asked whether there was consent to the proposed increase. Mr Bradford responded to that in an email dated 31 March 2016 and said amongst other matters:

> Given you are now prepared to make an offer of a wage increase to members we believe the appropriate way to deal with this is for us to resume bargaining for a collective agreement. Given the difficulties we have had in reaching an agreement to date we would suggest we request the assistance of mediation.

[26] By email dated 4 April 2016 Mr McPhail wrote to Mr Bradford and stated:

> As you are well aware, the company's position at bargaining was/is for wages to be dealt with by way of individual review. This approach is consistent with the existing individual agreements, and the company's offer for a collective agreement. Our client's request for the union's approval of the review results is consistent with its past practice during bargaining, as demonstrated by previous email correspondence between you and I, as set out below.
>
> The company is prepared to return to the bargaining table as it has indicated to you previously. However, you should not mistake the company's request for approval of the reviews as any change to its position in relation to how wages should be dealt with in the collective agreement.

[27] Mr McPhail considered in his email that mediation would be premature given that there has only been one bargaining meeting to date. Mr McPhail asked for dates for reconvening bargaining.

[28] By email dated 8 April 2016 Mr Bradford wrote to Mr Dobson about the union consent to individual pay increases for members. He wrote that First Union would be taking legal action over the refusal to negotiate pay rates as part of bargaining for a collective agreement but as pay rates for members are so low "under duress" the union approves the increases.

Legal Action

[29] A statement of problem in the nature of a dispute was lodged with the Authority in early April 2016 seeking a compliance order requiring the Company to

bargain and settle wages in a collective agreement and a determination about the validity of the individual agreement.

[30] There was mediation between the parties on 8 July 2016.

[31] The s 50J application was then lodged and the earlier statement of problem withdrawn.

[32] A bargaining mediation in respect of this application took place on 16 February 2017 and Invercargill Pak 'N Save agreed to give further reconsideration to the two significant issues outstanding of wages and hour of work provisions.

[33] Mr McPhail after the bargaining mediation sent an email to Mr Bradford dated 28 February 2017 in which he responded about reconsideration to wages and hours of work. Materially in respect of wages he said that:

> The company has further considered the matters you raised at mediation and has again reflected on its position that it wishes to set wages by individual review. We advise that nothing we heard at mediation nor considered upon reflection has changed the company's view that the best and most practical system for wage setting is by individual review.

Conclusion on breach of good faith

[34] Having set out the background to the bargaining I return to answer the question of whether there has been a breach of good faith. The breach alleged is a refusal and continued refusal to engage in collective bargaining about wages.

[35] Parties to an employment relationship that are required to deal with each other in good faith in s 4 include a union and an employer and the duty of good faith in s 4 (4) of the Act applies to bargaining for a collective agreement. The duty of good faith in s 4 (1A) (b) requires First Union and the Company to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[36] Ms Swarbrick submits that the collective agreement does not need to include a wages clause under s 54 (3) of the Act which provides what must be in a collective agreement. She submits that as a matter of logic, there can be no breach of good faith by the fact a party is reluctant to include in a collective agreement a matter which is not required to be present.

[37] In any event she submits that the Company has met with First Union and has bargained about wages, considered and responded to proposals about wages and has not undermined First Union's authority.

Does there need to be collective bargaining about wages?

[38] Ms Swarbrick correctly submits that s 54(3) of the Act which sets out what a collective agreement must contain makes no reference to wages. There is comment about that matter in *First Union Inc v Jacks Hardware and Timber Limited* by the then Chief Judge Colgan[1] which, although not on all fours with this matter, does provide some guidance. This guidance includes recognition that remuneration is a fundamental element of an employment relationship. Section 54 (2) provides that a collective agreement may contain such provisions as the parties to the agreement mutually agree on.

[39] Wages is a fundamental element of the employment relationship. This supports on a preliminary view that for employees who chose to bargain collectively and not individually there should be collective bargaining about wages.

[40] It is more usual for the Authority to see matters where parties in collective bargaining have difficulty reaching agreement in bargaining on what the wage increase/wage scale should be rather than whether there should be a mechanism in the collective agreement fixing wages at all.

[41] Mr McPhail said in his evidence that there are collective agreements without a wage clause particularly in Local Government. Each work site and the nature of collective bargaining will be different. It would seem, without knowing more, the parties in those collective agreements in the circumstances must have agreed to that and were content with that.

[42] That preliminary view that there should be collective bargaining about wages needs to be cross checked with the overall scheme of the Act and the bargaining itself in determining whether there is such a requirement.

[43] Section 3 contains the object of the Act which is to build productive employment relationships through the promotion of good faith in all aspects of the

[1] *First Union v Jacks Hardware and Timber Limited* [2015] NZEmpC 230 at [147]

employment environment and relationship. Two ways this is achieved is by promoting collective bargaining and protecting the integrity of individual choice.

[44] Mr Cranney refers in submissions to ss 12 and 18 of Part 4 of the Act which is concerned with recognition and operation of unions. Section 12 sets out the object of Part 4 of the Act. Section 12 (a) provides the object is "to recognise the role of unions in promoting their members' collective employment interests; and..".

[45] Section 18 (1) provides that a union is entitled to represent its members in relation to any matter involving their collective interests as employees. Mr Cranney submits the right in s 18 (1) of the Act is for a union to represent workers in relation to any matter involving their collective interests as employees and includes the right to bargain collectively and the right to bargain collectively about wages.

[46] Mr Bradford I find did make clear in his correspondence, for example the letter of 21 December 2015, to Mr McPhail that he wanted the Company to engage with the issues raised in the claims on the basis that they "are of genuine concern to employees and need to be addressed in a structural manner through appropriate clauses in the collective agreement."

[47] The bargaining in this matter and any issue of good faith needs to be viewed against the overall scheme of the Act that promotes collective bargaining and protects the integrity of individual choice. Further bargaining needs to be considered in line with the entitlement of First Union to represent its members in any matter involving their collective interests as employees. That interest included collective bargaining for wages. I find when that exercise is undertaken and regard is had to the fundamental element of remuneration in the employment relationship there is a requirement for collective bargaining about wages in the circumstances.

Was there collective bargaining about wages?

[48] I now turn to the equally important issue as to whether there was in fact collective bargaining about wages. I agree with Ms Swarbrick that Invercargill Pak 'N Save did meet with First Union at a meeting about collective bargaining on 8 December 2015. First Union wanted to bargain collectively about wages. Invercargill Pak 'N Save wanted to continue to set wages by individual review as is the practice at Invercargill Pak 'N Save with the wage rate proposed to be in an individual employment agreement to run alongside the collective agreement.

[49] Ms Swarbrick does not accept in her submission that there has been a refusal to engage with First Union in collective bargaining about wages. She submits that there was consideration of the claims by First Union including for a fixed wage scale and a response to them.

[50] Mr Bradford put the claim for a wage scale at the meeting on 8 December 2015. An adjournment was taken by the Company and then on return there was advice that this was not acceptable.

[51] Invercargill Pak 'N Save was clear, and consistently so, that its position was for wages to be dealt with by way of individual review. Mr McPhail in a letter dated 2 February 2016 to Mr Bradford advised that there was after reconsideration by the Company no further offer to make in relation to three key issues, one of which was wages. He noted there may be other areas in the union's claims that could be considered. In an email dated 2 February 2016 to Mr McPhail amongst other matters Mr Bradford stated:

> The Invercargill Pak n Save has refused to bargain on pay and most of the other key areas that would normally become provisions in a collective agreement. Simply pretending to consider major claims is not enough to meet good faith requirements and has the same effect as refusing to negotiate at all

[52] I have placed some weight on the response to the suggestion by Mr Bradford on 31 March 2016, after the offer of a wage increase to individual members, to resume bargaining for a collective agreement. Mr McPhail in an email dated 4 April 2016 sets out again the Company position for wages to be dealt with by individual review consistent with existing individual employment agreements and the company offer for a collective agreement. Although Mr McPhail said the company was prepared to return to the bargaining table he is clear that Mr Bradford should not mistake the request to First Union for approval of the reviews as any change to the position in relation to how wages should be dealt with in the collective agreement.

[53] Mr Bradford confirms in his evidence that the members at Invercargill Pak 'N Save want to bargain collectively through First Union about wages. It is clear from Mr Bradford's communication with Mr Dobson and Mr McPhail that increases to member's wages after the commencement of collective bargaining that were bargained individually through First Union were only agreed to "under duress".

[54] The Company proposed for the purposes of collective bargaining a clause with a wage rate to be specified in an individual employment agreement and with an annual individual review. There was, I find, objectively assessed some basis for the concerns raised by Mr Bradford that thereafter the Company was more going through the motions in bargaining for wages than undertaking such bargaining in a genuine and engaging manner as the duty of good faith required. That was more likely than not because the Company was of the view that it did not have to collectively bargain wages and it preferred something that was consistent with the existing individual employment agreements. I do not find as a result that there was collective bargaining in good faith for wages by Invercargill Pak 'N Save with First Union.

[55] Ms Swarbrick refers in her submissions to s 32 of the Act which provides a minimum framework for good faith bargaining. Section 32 (5) provides it does not limit the application of the duty of good faith in s 4 in relation to bargaining for a collective agreement. Ms Swarbrick places some reliance on s 32 (3) (c) of the Act. Section 32 (3) sets out some matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith. Section 32 (3) (c) provides one of these matters is the proportion of the employer's employees who are members of the union and to whom the bargaining relates.

[56] Ms Swarbrick submits that the wage fixing mechanism proposed is put forward on behalf of only a very small proportion of employees of about 3%. She submits that any response to the claim for a wage fixing mechanism must be informed and measured by that fact and the reasonableness of having in place a wage fixing mechanism that is different to the majority of its employees undertaking the same work.

[57] I accept that the Union is representing the collective interests of only a small proportion of employees at Invercargill Pak 'N Save in bargaining. That has to be considered with the object of the Act being met by the promotion of collective bargaining and the fundamental element of remuneration in the employment relationship. I do not find that the proportion of employees is a relevant consideration as to whether there was a breach of good faith by the Company when it refused to bargain collectively in good faith for wages in the circumstances of this case.

[58] I find that there was a breach of good faith by Invercargill Pak ‘N Save in s 4 when it refused to bargain collectively in good faith with First Union about wages. That refusal continued after the bargaining meeting on 8 December 2015. Invercargill Pak ‘N Save failed to recognise the individual choice the members of First Union made to bargain collectively for a fundamental element of their employment relationship. There was also a failure to recognise that First Union was entitled to represent its members in relation to their collective interests as employees by collectively bargaining wages under s 18 of Act.

If there has been a breach of the duty of good faith in relation to the bargaining then was it sufficiently serious and sustained as to significantly undermine the bargaining?

[59] I have found a breach of the duty of good faith because there was a refusal by Invercargill Pak ‘N Save to bargain wages collectively in good faith. I need to be satisfied that the breach of the duty of good faith was sufficiently serious and sustained as to significantly undermine bargaining.

[60] Ms Swarbrick submits that there could have been bargaining about matters other than wages. Remuneration is a fundamental element of the employment relationship. I find the breach was sufficiently serious. Further I find that the breach was sustained over an extended period of almost two years during which Mr Bradford asked on several occasions for wages to be collectively bargained to no avail and there was legal action.

[61] I find that the breach of the duty of good faith was sufficiently serious and sustained as to significantly undermine the bargaining.

Have all other reasonable alternatives for reaching agreement been exhausted?

[62] Mr Cranney in his submissions states that if there is a finding of a breach of good faith that is serious and sustained so as to undermine bargaining then there are no other reasonable alternatives for reaching an agreement which have not yet been exhausted.

[63] Ms Swarbrick in her submission does not accept that all other reasonable alternatives for reaching agreement have been exhausted.

[64] There has only been one bargaining session and there is a dispute as to whether of the two mediations held they were both about collective bargaining.

[65] There has not been a reference for facilitation.

[66] Even when I weigh the serious and sustained nature of the breach of the duty of good faith and its significant undermining of the bargaining I am not satisfied that there are no reasonable alternatives for reaching agreement.

[67] This ground is not made out.

Is fixing the provisions of the collective agreement the only effective remedy for the party or parties affected by the breach of the duty of good faith?

[68] I have not found that all other reasonable alternatives for reaching agreement have been exhausted. In those circumstances I find there is strength in Ms Swarbricks submission that there should be an opportunity having found a breach of good faith that is serious and sustained and has undermined the bargaining that Invercargill Pak 'N Save have an opportunity to remedy that before fixing the provisions of the collective agreement.

[69] Having considered some relevant Employment Court judgments including *New Zealand Public Service Association Inc v Secretary for Justice*[2] I do not consider the Authority is able to refer the parties to facilitation on its own motion but that is something the parties can give thought to as well. I would be hopeful that this determination provides some assistance for resumed bargaining in the first instance.

If the grounds are found to be made out then is it appropriate in all the circumstances for the Authority to fix the provisions of the collective agreement being bargained?

[70] In conclusion although I have found a breach of the duty of good faith in s 4 occurred in relation to bargaining and that it was sufficiently serious and sustained as to significantly undermine the bargaining I have not found all the grounds in s 50J (3) have been made out to satisfy the requirements for fixing the provisions of the collective agreement being bargained for.

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[2] *NZPSA v Secretary for Justice* [2010] NZEmpC 11

Costs

[71] I reserve the issue of costs. Both parties have had a measure of success that will have to be considered on any application for costs.

Helen Doyle
Member of the Employment Relations Authority