IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 20
EMPC 174/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JACKS HARDWARE AND TIMBER LIMITED Plaintiff
AND	FIRST UNION INCORPORATED Defendant

Hearing:	15 and 16 August 2018 (Heard at Dunedin)
Appearances:	P Wicks QC and R Upton, counsel for plaintiff P Cranney and O Christeller, counsel for defendant
Judgment:	28 February 2019

JUDGMENT OF JUDGE K G SMITH

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[1] On 18 October 2013, First Union Inc initiated bargaining for a collective agreement with Jacks Hardware and Timber Ltd. Despite the passage of time since then a collective agreement has not been concluded. On 7 June 2018, the Employment Relations Authority granted an application by the union to fix the provisions of the collective agreement being bargained for, relying on s 50J of the Employment Relations Act 2000 (the Act). The Authority concluded that the case was one of the rare sort contemplated by the Act requiring the "game-breaker" of fixing the provisions of the agreement.[1]

[1] *First Union Inc v Jacks Hardware and Timber Ltd* [2018] NZERA Christchurch 85 at [81].

[2] Jacks Hardware has challenged that determination maintaining s 50J of the Act has not been satisfied and that it is prepared to continue bargaining. In response the union says Jacks Hardware has breached the duty of good faith and the test in s 50J is satisfied.

The beginning of bargaining

[3] A notice initiating bargaining was served by the union on Jacks Hardware on 18 October 2013. The union and the company had not previously been parties to a collective agreement. Jacks Hardware trades as Mitre10 Mega in Dunedin and Mitre10 in Mosgiel and some of its employees in both locations had become union members shortly before the notice initiating bargaining was served. At the time Jacks Hardware employed approximately 170 non-managerial staff over both locations, the vast majority of whom were not members of the union.

[4] The first bargaining meeting occurred on 31 January 2014, and discussed a bargaining process agreement although one was not concluded until a subsequent meeting on 5 and 6 March 2014.[2] When completed that agreement specified how the union and company would bargain for the collective agreement.

[5] During the meeting on 5 March 2014 the union presented its claims to the company and provided a draft collective agreement. This draft included proposed remuneration based on the roles held by Jacks Hardware's employees and how long they had held them for.

[6] A fundamental disagreement emerged over the union's proposed pay scale. The union wanted to have the scale included in the collective agreement but Jacks Hardware did not. Despite that disagreement bargaining continued on four other occasions in 2014. Over time some of the union's claims were modified or abandoned. For example, it withdrew a claim for redundancy compensation.

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[2] See, Employment Relations Act 2000, s 32(1)(a).

[7] Mediation followed on 10 November 2014 but settlement was not reached. A fundamental difference remained over whether the pay scale would be included in the collective agreement.

[8] Eventually, the union planned industrial action at both of Jacks Hardware's stores during December 2014, by convening two-hour stop-work meetings at them. Had the meetings taken place there would have been disruption to the business because they were scheduled to occur at a busy trading time in the lead up to Christmas. Jacks Hardware objected to the union's proposed action. Eventually, after an exchange of correspondence between the union's organiser, Shirley Walthew, and Jacks Hardware's Chief Executive, Neil Finn-House, alternative arrangements were agreed. Instead of the planned stop-work meeting the union conducted two much shorter meetings. In exchange, the company made a commitment to resume bargaining in February 2015.

[9] The bargaining in February 2015 was perfunctory. At the meeting Jacks Hardware invited the union to say whether it was prepared to move from its previous position; that is, on the pay scale being in the collective agreement. This invitation was rejected by the union.

[10] The union's refusal to make that concession was met by an announcement from Jacks Hardware that bargaining had gone as far as it could. Relying on s 33 of the Act, it purported to conclude bargaining because, it claimed, there were genuine reasons, based on reasonable grounds, not to reach agreement.[3] No further bargaining occurred from 20 February 2015 through to the date of the subsequent decision by the Court, on 17 December 2015, granting a declaration to the union that the company had acted unlawfully.[4]

[11] Jacks Hardware's unilateral decision to end bargaining was criticised by the Court. The company was held to have misled or deceived the union, between

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3 This statement followed s 33 of the Act as it was at the time, providing grounds not to conclude a collective agreement. That section was subsequently repealed and replaced by s 9 of the Employment Relations Amendment Act 2014.

4 *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 230, [2015] ERNZ 159.

December 2014 and February 2015, over its intentions in resuming bargaining.[5] The Court's conclusion was that Jacks Hardware did not return to bargaining in February 2015 other than "…in a very restricted, artificial and strategic way".[6] The company's bargaining consisted of a request for a concession and, when that was declined, to declare it was not prepared to continue bargaining.[7] The Court concluded that the company's statement, that it was returning to bargaining, could not reasonably have meant simply a further meeting at which, in the absence of a major concession, bargaining would cease.[8]

[12] The Court concluded that Jacks Hardware's actions breached the bargaining process agreement. Under cl 14.1 of that agreement the parties had agreed bargaining would be completed if, at the conclusion of the ratification process and written confirmation of the results, all parties had signed the collective agreement. That meant the parties had agreed to continue to bargain until a conclusion was reached. Technically, the parties remain in bargaining until the present time.

[13] The Court held that another breach of the bargaining process agreement had occurred because Jacks Hardware had failed to comply with cl 15.1, the relevant part of which reads:

> **15. Appointment of a mediator should the need arise**
>
> 15.1 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…

[14] When the company made its announcement to end bargaining there had been no discussion about mediation or other ways to address the impasse. The Court held that adherence to the duty of good faith included complying with the bargaining process agreement which Jacks Hardware had not done.

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5 At [151].
6 At [153].
7 At [153].
8 At [153].

[15] Facilitation under s 50C of the Act was ordered.

Facilitation begins

[16] The Authority conducted facilitated bargaining on 27 and 28 July 2016, 26 October 2016 and 9 November 2016 but agreement was not reached.

[17] The three issues that remained outstanding during facilitated bargaining were:[9]

(a) the wording of a trial period provision (under ss 67A and 67B of the Act);

(b) the form that a wage clause would take when included in the collective agreement; and

(c) the term of the collective agreement if one was concluded.

[18] The Authority made a recommendation to the parties on 13 March 2017, recording progress in reducing the outstanding issues, and proposing the wording of a trial provision and a wage clause. The draft wage clause proposed to distinguish between employees who were new to the industry, with no skills, and those who have some industry experience and skills. Eventually, this distinction became known as tier one and tier two employees respectively.

[19] The Authority did not recommend wage rates because there had not been any significant bargaining about them during the facilitation. It also did not have sufficient information to make a recommendation about them.[10] Finally, no recommendation was made about the term of a collective agreement because both parties had put forward proposals the Authority considered to be unsuitable.

[20] The union was prepared to accept the recommendation but Jacks Hardware did not accept or reject it, instead stating a preference to return to facilitated bargaining. The union's response was predictable. On 26 April 2017, it informed the Authority

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9 The Employment Relations Authority Recommendation (dated 13 March 2017) at [10].

10 *First Union Inc v Jacks Hardware and Timber Ltd*, above n 1, at [23].

that it did not wish to continue facilitation, because it considered the process would not be productive. The Authority was asked to end facilitation and publish its recommendation. When Jacks Hardware responded to the union's request to the Authority it did not resile from the previous statement, about wanting to return to facilitation. In an email from its counsel to the union's counsel the company asked whether the union wanted to bring "the entire facilitation process" to an end. The answer was yes.

[21] In response to that correspondence the Authority ended the facilitation. At the same time it produced a further recommendation, dated 19 May 2017, which was materially the same as the one in March. The same outstanding issues remained unresolved. The May recommendation included a trial provision and a wage clause for tier one and two employees for inclusion in a collective agreement. The recommendation did not include wage rates because the Authority thought that would be premature.

[22] The decision to end facilitation left the union and Jacks Hardware still bargaining for a collective agreement but at an impasse that had existed from the previous year.

Other bargaining

[23] On 10 July 2017, Mr Finn-House informed the union by email that the company wanted to continue bargaining. In response, Ms Walthew noted that the bargaining had been going on for almost four years and criticised the company for engaging in delaying tactics but stated that, if it genuinely wanted to settle, a proposal should be made which would be considered. In his reply, Mr Finn-House declined to make a proposal about the outstanding claims. He said wage rates were a "primary issue" and the company wanted to discuss them in a meaningful way at the bargaining table. He described the wage rates as a "very complicated matter" involving a number of considerations, including the background to the business, its economic position, and staffing costs. He proposed to discuss this issue, and all outstanding claims, at the bargaining table and stated a preference for facilitation with the same Authority

member who had assisted previously.[11] He expressed the hope that his proposal reflected the company's priority to continue discussing the proposed agreement:

> …so that we can actually determine once and for all whether all of the terms can be agreed. At this point we don't believe that we've done that.

[24] By the time these emails were exchanged the union had applied to the Authority to fix the provisions of the collective agreement. While proposing a continuation of facilitated bargaining Mr Finn-House did not suggest the union's application should be delayed or discontinued.

[25] Despite a subsequent request from Mr Finn-House for a response to his invitation to return to facilitation none was provided by the union.

Fixing application

[26] On 2 June 2017, the union applied to the Authority for an order fixing the provisions of the collective agreement, relying on the grounds in s 50J of the Act having been established.[12] The application recorded the parties reaching agreement on all of the provisions of a collective agreement except for wages and its term. A draft collective agreement was attached containing a wage clause in the form drafted by the Authority in facilitation, but including rates of pay for tier one and two employees as sought by the union. The claimed wage rate for tier one was no less than a minimum of $19 per hour and tier two was a minimum of $22 per hour, rising by an additional $1 per hour if the employee held a relevant trade qualification. This draft contained a proposed term of twelve months.

[27] Jacks Hardware opposed this application, maintaining that the grounds in s 50J of the Act were not satisfied, and there had not been any significant bargaining on the outstanding issues.[13]

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11 Section 50D of the Act provides that a member of the Authority who facilitates collective bargaining must not be a member of the Authority who accepted the reference for facilitation. In this case one Authority member dealt with all the facilitation meetings and another member dealt with the application for fixing the provisions of the collective agreement.

12 The application is dated 2 June 2017 and is referred to as that date in the determination whereas earlier determinations referred to 6 June 2017.

13 *First Union Inc v Jacks Hardware and Timber Ltd* [2017] NZERA Christchurch 189 at [2].

Determination 6 November 2017

[28] An investigation meeting was to be held on 19 October 2017. Beforehand, an issue arose about the admissibility of statements in proposed evidence to be relied on by Jacks Hardware because of s 50F(1) of the Act.[14] On 18 October 2017, the day before the scheduled investigation meeting was due to start, Jacks Hardware applied for a referral of questions of law to the Court.[15] The application was declined on 6 November 2017, but new dates for the investigation had to be scheduled.[16]

Determination 12 January 2018

[29] In the Authority's November determination it recorded the union's case for its application to fix the provisions of the collective agreement as relying on the breach of the duty of good faith found to exist by the Court in 2015.[17] After the November determination both parties asked the Authority to deal with a preliminary issue, under s 50J(3) of the Act, which was whether the breach of good faith required to be established to enable the application to fix the agreement needed to be a new breach or could be the same breach as the one the Court had already found to exist.[18]

[30] The Authority concluded that a new breach was not required because, otherwise, simply by refraining from causing one, the party in default could continue to undermine the bargaining indefinitely without any remedy being available to the other party.[19] This determination was not challenged.

[31] The investigation meeting was scheduled for a date in March 2018 but the actual date was not recorded in the determination.[20] By the time the Authority issued a determination on this second preliminary matter, on 12 January 2018, the date suggested by the Authority for the March meeting was not suitable to Jacks Hardware.

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14 This section provides that a statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under the Act.
15 *First Union Inc v Jacks Hardware and Timber Ltd*, above n 13, at [33].
16 At [56].
17 At [48].
18 *First Union Inc v Jacks Hardware and Timber Ltd* [2018] NZERA Christchurch 2 at [5].
19 At [41].
20 At [6].

The Authority noted in the determination it was awaiting a response about a new date, out of a number suggested by the Authority, that would be suitable.[21]

Further facilitation

[32] The investigation meeting to consider the union's application was scheduled for 24 April 2018. At the beginning of the meeting that day Jacks Hardware proposed to return to facilitation instead of holding the investigation. The union agreed to adjourn, and to take part in further facilitation, subject to conditions.[22] The conditions were that this further facilitation would take place speedily and there would be a backup date for an investigation meeting, within four to five weeks, if it did not result in a collective agreement. The investigation was adjourned.

[33] Further facilitated bargaining took place on 7 May 2018 and resulted in another recommendation, dated 15 May 2018. Some progress was made but a collective agreement was not concluded.

[34] The May 2018 recommendation recorded:

(a) both parties accepted the two-tiered wage clause and trial provision; but

(b) they could not agree on the wage rates for each of those two tiers; and

(c) they accepted that, if wage rates could be agreed, a short-term collective agreement expiring at the end of June 2018 would be appropriate.

[35] The purpose of a short-term agreement was to provide an opportunity for further bargaining to coincide with the annual wage review Jacks Hardware carried out in June or July each year, before the beginning of its new financial year.

[36] As part of this facilitation the Authority received written submissions on wage rates. It considered, but dismissed, an estimate by Jacks Hardware that the union's proposed rates would cost an additional $500,000 per year. The Authority recorded

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21 At [6].

22 *First Union Inc v Jacks Hardware and Timber Ltd*, above n 1, at [41].

Jacks Hardware as stating that it had not considered wage increases for the financial year which would begin in July 2018. It also recorded that the company did not provide financial information about what it might be budgeting for wage rates or the range of increases likely to be considered. The Authority declined to criticise Jacks Hardware for not providing that information, but observed that not receiving that material made it "almost impossible to analyse any proposed rates from the company's economic or financial perspective".[23]

[37] In making the recommendation the Authority took into account the minimum wage, expectations for possible changes in that minimum in the near future, and growing support for a living wage.[24] A competitor was considered as a comparator. The recommendation was that the collective agreement should contain a two-tier wage clause, where tier one employees were paid no less than $16.75 per hour and tier two employees were paid no less than $19 per hour. A short-term agreement to the end of June 2018 was recommended. The recommendation included an aspirational statement that, if it was accepted, the parties would be able to bargain meaningfully for the wage rates to apply from July 2018.

[38] A collective agreement was not concluded. On 18 May 2018, the union informed the Authority that the recommendation had been considered by it and was accepted. On 24 May 2018, Jacks Hardware rejected the recommendation.

Bargaining continues

[39] That rejection did not end the bargaining because the parties continued to correspond. On 25 May 2018, Mr Finn-House sent the union an email stating that the company had rejected one of the recommendations, the wage rate for tier two employees, but agreed on everything else. He restated the company's offer, that the tier two rate should be $17.50 per hour and the union was invited to reconsider it. In an attempt to persuade the union to agree, his email went on to say that its members had received a wage review in 2017, for the 2018 financial year, so the rate sought by the union would provide an increase on an increase that had not been budgeted for.

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[23] The Employment Relations Authority Recommendation (dated 15 May 2018) at [12].
[24] By reference to the Living Wage Movement Aotearoa New Zealand.

This email added that the company was finalising the accounts for the 2018-19 financial year and would be "…in a better position to bargain in a meaningful way about an increase to the tier 2 rate (and any other terms) once that exercise is complete".[25]

[40] The company made an offer to the union to enter into an inaugural collective agreement based on the terms which had been agreed in facilitation but with its proposed rate for tier two employees. A short term was proposed, expiring approximately five weeks later, on 30 June 2018. The email included a comment that agreement would mean the union would have a platform from which to recruit members and that the wage rates would be renegotiated as early as in June or July. At the time this email was sent the union's fixing application was scheduled to be investigated six days later, on 31 May 2018.

[41] The union rejected this offer and stated what it would accept by referring to its email to the Authority of 18 May 2018. Agreement was not reached and the Authority was asked to conclude its investigation into the fixing application.

[42] On 7 June 2018 the Authority granted the application.[26] A submission that a further breach of the duty of good faith was required before the test in s 50J(3) could be established was rejected, as was a submission that the company's previous breach had been remedied by participating in facilitation.[27] In reaching its decision the Authority considered that the parties had unsuccessfully used direct bargaining, mediation, facilitation and litigation, to try to reach agreement so that all reasonable alternatives had been exhausted.[28]

The challenge

[43] Jacks Hardware challenged the Authority's determination that s 50J(3) had been satisfied. It pleaded that the determination was not justified in law because:

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25 The reference to "accounts" is probably an error and budgets for the new financial year were being referred to.
26 *First Union Inc v Jacks Hardware and Timber Ltd*, above n 1, at [81]-[82].
27 At [58]-[59].
28 At [66].

(a) the breach of good faith found to exist by the Court in 2015 was or is no longer sufficiently serious and sustained as to significantly undermine the bargaining;

(b) all other reasonable alternatives for reaching agreement have not been exhausted; and

(c) fixing the provisions of the collective agreement is not the only effective remedy.

[44] Orders setting aside the Authority's determination, and a return to bargaining, were sought as remedies. The union supported the determination and pleaded that there had been a continued serious and sustained breach of good faith since the Court's decision in 2015.

Relevant sections of the Act

[45] Facilitated bargaining was introduced into the Act on 1 December 2004.[29] Before facilitation can be ordered the grounds in s 50C have to be met. That section reads:

> **50C Grounds on which Authority may accept reference**
>
> (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
>
> (ii) the failure—
>
> (A) was serious and sustained; and
>
> (B) has undermined the bargaining:
>
> (b) that—
>
> (i) the bargaining has been unduly protracted; and

[29] By s 14 of the Employment Relations Amendment Act (No 2) 2004.

(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

(c) that—

(i) in the course of the bargaining there has been 1 or more strikes or lockouts; and

(ii) the strikes or lockouts have been protracted or acrimonious:

(d) that—

(i) in the course of bargaining, a party has proposed a strike or lockout; and

(ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

…

[46] Facilitation between the union and Jacks Hardware was directed by the Court because there had been a breach of the duty of good faith that was serious and sustained, and had undermined the bargaining.[30] Once facilitation was granted the process was directed by the Authority.

[47] The remedy for a serious and sustained breach of the duty of good faith, in relation to collective bargaining, is provided by s 50J the relevant parts of which read:

50J Remedy for serious and sustained breach of duty of good faith in section 4 in relation to collective bargaining

(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

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30 *FIRST Union Inc v Jacks Hardware and Timber Ltd*, above n 4, at [175] and [178].

(ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and

(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.

…

[48] If the grounds in s 50J(3)(a)-(c) are established the Authority is still required to be satisfied that fixing the provisions of the agreement is appropriate in all the circumstances.[31] That discretion is beyond challenge and Jacks Hardware has not sought to do so.[32] The effect of a determination to fix a collective agreement means that ratification, and signing by the parties, is not required.[33] Section 50J is the final step in a detailed and lengthy process.[34]

[49] There is an important distinction between s 50J and s 50C. Section 50J does not include an equivalent to s 50C(1)(b)(i) and (ii), that the bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties that have precluded the parties from entering into an agreement.

[50] There are two other relevant sections that have a bearing on this case. First, s 50H provides for the Authority to make a recommendation about the process to be followed or the provisions of the collective agreement or both.[35] A recommendation has to be considered by the parties but is not binding. The other section is s 50G, which provides that a proposal or position reached during facilitation is not binding after that process comes to an end.[36]

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31 Employment Relations Act 2000, s 50J(2)(a) and (b).

32 See Employment Relations Act 2000, s 179A(2), prohibiting an election to challenge a determination fixing the provisions of a collective agreement unless the matter is whether one or more of the grounds in s 50C(1) or s 50J(3) exist. The discretion in s 50J(2)(b) is excluded but may be open to review, see s 194.

33 Section 50J(5).

34 Section 33(1), specifies that the duty of good faith does not require the parties to enter into a collective agreement or to agree on any matter for inclusion in one. See also s 33(2)(a) and (b).

35 Section 50H(1)(a)-(c) inclusive. Public notice of a recommendation may be given.

36 Section 50G(1); but note subs (2) which allows the parties to reach a different agreement.

The issues

[51] The issues that need to be addressed in this case are those arising from s 50J(3) namely:

(a) Has there been a breach of the duty of good faith by Jacks Hardware?

(b) If there has been a breach was 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?

A breach of the duty of good faith?

[52] Jacks Hardware maintained that s 50J(3)(a)-(c) inclusive, creates a high threshold so that only rare cases reach the fixing stage and what transpired in this case did not reach that threshold.[37]

[53] Mr Wicks QC accepted that a breach of the duty of good faith was established in the Court's decision in 2015 and, consequently, that s 50J(3)(a)(i) was satisfied at that time. However, he submitted the breach relied on by the union does not exist any longer having been remedied by the granting of an order for facilitation. He made the point, which Ms Walthew accepted in cross-examination, that no new breach of the duty of good faith had been, or was being, alleged. This submission was that, while the company had unlawfully ended bargaining in February 2015, since then it had been involved in the collective bargaining and had participated fully. On this basis, the previous breach had been sufficient to get over the threshold for facilitation to be directed but could not support the fixing application. Consequently, Jacks Hardware's

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[37] Relying on obiter comments in *Assoc of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] ERNZ 224 (EmpC) at [61]; and *New Zealand Public Service Assoc Inc v Secretary for Justice* [2010] NZEmpC 11, [2010] ERNZ 46 at [66].

conduct after facilitation was ordered meant the breach could no longer be said to be sufficiently serious within the meaning of s 50J(3)(a)(ii). It must follow that a new, or further, breach would be required before the section could apply.

[54] That argument is unpersuasive. There is nothing in s 50J indicating that a breach sufficient to trigger facilitation under s 50C dissipates because of subsequent remedial behaviour so that it loses any effect or relevance. There is also nothing in that section requiring the breach relied on to be new. Had a new breach been required, s 50J(3)(a) would have used words or expressions to make it clear that was the intention and that some further, or other, breach was necessary. The use of the past tense, "has occurred", supports that conclusion. The section could have referred to a further breach of the duty of good faith having occurred during facilitation, or something similar, but it does not do that. There is also merit in Mr Cranney's submission, that what transpired could not be described as conduct curing the breach, because it occurred under the compulsion of an order for facilitation.

[55] The Authority concluded that if the Act required a new or further breach a party in Jacks Hardware's position could escape the prospect of the provisions of the collective agreement being fixed by merely refraining from repeating the same breach that led to facilitation. I agree.

[56] Jacks Hardware was exposed to the risk that it might be confronted with an application to fix the provisions of the collective agreement when it made its unilateral decision to end bargaining in February 2015. To accept Jacks Hardware's argument would be to deprive the union, as the innocent party to the breach, of one of the tools available to it to attempt to overcome that breach and to secure a collective agreement.

[57] A further difficulty with Mr Wick's submission is that the Authority's second preliminary determination concluded that the test under s 50J did not require a finding that the company had committed a further breach of the duty of good faith.[38] That determination was not challenged and cannot now be challenged tangentially which would be the result if his submission was accepted.

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[38] *First Union Inc v Jack's Hardware and Timber Ltd*, above n 18, at [53].

[58] In any event, had it been necessary to do so, I would have found that Jacks Hardware breached the duty of good faith after facilitation was ordered. The duty in s 4(1A) requires the parties to an employment relationship be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative. The company was not bound to conclude a collective agreement, but the duty of good faith prevents behaviour designed to frustrate bargaining. Jacks Hardware did not comply with that duty during the facilitation process. It engaged in delaying tactics contrary to the duty. These tactics included a lengthy delay when it did not respond to the recommendations by accepting or rejecting them from March 2017 until May 2018. It declined to engage with the union about wage rates unless that occurred in a facilitated meeting, which involved delay while a meeting was organised and, on the last occasion where it invited further facilitation, that process was not available unless the Authority determined that circumstances had changed or bargaining since the previous facilitation had been protracted.[39] It also unsuccessfully sought to adjourn an investigation meeting, scheduled to fix the provisions of the collective agreement, because the timing of it clashed with its annual budgeting, claiming that until that task was undertaken it would not be able to complete its evidence. While there was an occasion when Jacks Hardware pursued the union for answers to correspondence, the pattern was one where the company was delaying and, as a result, was frustrating bargaining.

Seriously sufficient and sustained?

[59] Mr Wicks submitted strong language was used in s 50J indicating that fixing the agreement is a remedy of last resort. He concentrated on the meaning and cumulative effect of the words "significantly", "sufficiently", "serious", "exhausted" and "only" in s 50J(3), to illustrate that the threshold is high and that the evidence did not reach it.

[60] To emphasise that high threshold a comparison between s 50J and s 50C was drawn. Mr Wicks submitted the words "sufficiently" and "significantly" are used in s

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39 Section 50C(3)(a) and (b).

50J(3)(a)(ii), "exhausted" is used in s 50J(3)(b) and "only" is used in s 50J(3)(c). His submission was that the words "sufficiently" and "significantly" are not used in s 50C so that the circumstances that were enough to get over the threshold for facilitation in in that section are not enough to satisfy s 50J(3). In developing this submission Mr Wicks referred to an ordinary meaning of "sufficiently" as being "serious and sustained enough".

[61] I am not persuaded that the threshold is as high as Mr Wicks' submissions suggest it is either by reference to a comparison with s 50C or because of the language used in s 50J(3). The word "sufficient" carries several meanings as is illustrated by the following definition:[40]

> *adj*. **1.** sufficing, adequate, enough (*is sufficient for a family*; *didn't have sufficient funds*). **2. = SELF-SUFFICIENT**. **3.** *archaic* competent; of adequate ability, resources, etc. **sufficiently** *adv.*
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> …
>
> (emphasis original)

[62] From that definition it is possible that "sufficiently", when used in s 50J(3), means that the Authority must be satisfied what happened was adequate to support the application. Mr Wicks' submissions considered the words "sufficiently serious" together but did not address the meaning of "serious" in the section. The New Zealand Oxford Dictionary defines "serious" as follows:[41]

> *adj*. **1** thoughtful, earnest, sober, sedate, responsible, not reckless or given to trifling (*has a serious air*; *a serious young person*). **2** important, demanding consideration (*this is a serious matter*). **3** not slight or negligible (*a serious injury*; *a serious offence*). **4** sincere, in earnest, not ironical or joking (*are you serious?*). **5** (of music and literature) not merely for amusement (opp. **LIGHT[2] 5a**). **6** not perfunctory (*serious thought*). **7** not to be trifled with (*a serious opponent*). **8** concerned with religion or ethics (*serious subjects*) **9** *colloq*. (of price or value) high; (of an amount of money) large.
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> …
>
> (emphasis original)

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[40] Tony Deverson and Graeme Kennedy (eds) *New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 1122.

[41] At 1029.

[63] I consider that, rather than suggest a high threshold, the words "sufficiently serious" in the section mean the Authority has to be satisfied that the breach was adequate or important enough to move to the next step of fixing the provisions of the collective agreement. That can be contrasted with breaches that are trivial, negligible or transient.

[64] Section 50J(3)(a)(ii) also requires the breach to be sustained. A definition of "sustain" is:[42]

> *v. & n.* ►*v.tr.* **1** support, bear the weight of, esp. for a long period. **2** give strength to; encourage, support. **3** (of food) give nourishment to. **4** endure, stand; bear up against. **5** undergo or suffer (defeat or injury etc.). **6** (of a court etc.) uphold or decide in favour of (an objection etc.). **7** substantiate or corroborate (a statement or charge). **8** maintain or keep (a sound, effort, etc.) going continuously. **9** continue to represent (a part, character, etc.) adequately.
>
> …
>
> (emphasis original)

[65] In the context of the section sustain means something that is ongoing.

[66] When read as a whole, s 50J(3)(a)(ii) means that before an order can be made the Authority must be satisfied a breach has occurred that is adequate or important enough to warrant that step meaning it is more than a trivial, negligible or transient breach, and that it has carried on for enough time to undermine the bargaining. What moderates the application of the section is that it requires a link between the breach and undermining the bargaining, which has to have been "significantly undermined". Those words indicate that the Authority must be satisfied the impact on the bargaining was such that it was noticeably undermined.

[67] The Authority was entitled to conclude that Jacks Hardware's actions went further than just not concluding a collective agreement or using its bargaining power to its advantage. It was doing more than taking a hard line with the union, as is illustrated by how the company dealt with negotiations over wage rates. When Jacks Hardware offered an explanation about its need to return to facilitation to bargain over

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[42] At 1131.

the wage rate that task was described as "a very complicated matter" because of the need to consider the impact on the business.

[68] Undoubtedly agreeing on wage rates will have an impact on a business, but that does not explain why the subject was so complicated that it could only be addressed during supervised bargaining. Mr Finn-House did not adequately explain why this task was so complex that it required the assistance of an Authority member in facilitation, when the company was able to complete its budgets for each year, including addressing remuneration for the majority of its staff who are not union members. Jacks Hardware's behaviour illustrated that it was delaying and going through the motions of bargaining, a practice commonly known as surface bargaining. That behaviour significantly undermined the bargaining.

[69] This analysis has rejected Mr Wicks' submission that a high threshold needs to be reached before the Authority can decide to fix the provisions of a collective agreement. Even if his submission had been accepted, the same conclusion would have been reached because Jacks Hardware's behaviour did reach such a threshold.

[70] Jacks Hardware breached the duty of good faith in 2015 and continued to do so by delaying and attempting to frustrate bargaining. The breach was sufficiently serious and sustained as to significantly undermine bargaining and s 50J(3)(a)(ii) was satisfied.

All other reasonable alternatives exhausted?

[71] Jacks Hardware's case is that s 50J(3)(b) has not been satisfied, because all other reasonable alternatives for reaching agreement have not been exhausted. It said there was a reasonable alternative in continued bargaining, because neither party had stated its final bargaining position.

[72] It is correct to say that neither party announced a final position had been reached but that is not surprising. From Jacks Hardware's perspective such a statement would have been risky because of what happened following its unilateral declaration in February 2015.

[73] While the union had not announced its final position had been reached, it had come to the end of its patience which must have been obvious to the company from the passage of events. When the union was unable to achieve a collective agreement, following the recommendation in March 2017, it asked the Authority to end the process and applied for fixing. It wanted a third party to impose a decision it had been unable to reach by agreement.

[74] The union did not move from that position all the way through to the conclusion of the second facilitation process, which was only conducted following the late request for it by Jacks Hardware on the day of the investigation meeting. Ms Walthew's email to Mr Finn-House, when he asked to return to the bargaining table to discuss wage rates, invited him to state the company's proposal. It should have been apparent from the tone of the email, and what had already happened, that the union had got to the point where it could see little usefulness in returning to the supervised process of facilitation. The union's position was clear, if the company was serious it could make an offer.

[75] Those observations aside, there is nothing in s 50J(3) that makes it necessary for either party to state a final position has been reached before the Authority is able to conclude that all other reasonable alternatives have been exhausted. The section does not require something as demonstrative as that but, even if it did, the union had made its position plain.

[76] Mr Wicks developed two other submissions to support the contention that s 50J(3)(b) had not been satisfied. The first submission was that the tier two wage rate had not been the subject of meaningful bargaining. The second submission was that the union was said to have changed its position over the wage rates and term, and its new position should be bargained over. That was because Jacks Hardware had not had an opportunity to consider and respond to any new wage rates the union intended to seek from the Authority.

[77] What was said to support the first submission, about the tier two wage rate, was that it had only been discussed during a four to five-hour facilitation meeting on 7 May 2018 and not otherwise. That approach is too narrow to support Jacks

Hardware's case that s 50J(3)(b) had not been satisfied. The facilitation at which this rate was proposed by the company was at the end of a long process where wages had been bargained over, at least generally, and remained unresolved. There was no basis to consider further bargaining was a reasonable alternative.

[78] The second submission, about the claimed change of position, was based on Ms Walthew's evidence. She made it clear that the union considered itself entitled to pursue different rates for each of the tier one and tier two employees than those recommended by the Authority (and presumably from those in its application). The union also considered it may seek a term it believes to be appropriate.

[79] Before receiving Ms Walthew's brief of evidence Jacks Hardware had no advance knowledge that the union considered itself not to be bound by the rates it had previously accepted in response to the recommendations. Mr Wicks questioned Ms Walthew about the union's decision to proceed on this basis, pointing out that there had been little in the way of bargaining over the tier one rate and none about the term of the agreement.

[80] Based on what had been learned from receiving Ms Walthew's brief of evidence, a day before the hearing, counsel for Jacks Hardware sent an open letter to counsel for the union inviting private mediation. The invitation was rejected.

[81] On the basis that the union had changed its position, Jacks Hardware maintained that it was not possible to conclude that all other reasonable alternatives for reaching agreement had been exhausted. That was because, it said, there had been no bargaining over whatever rates the union now want, or the term it intends to seek, which was all new information gleaned just before this hearing started. Part of this submission was that, in response to this new information, the company had moved promptly to invite mediation which was an available option under cl 15 of the bargaining process agreement. This invitation was said to not be inconsistent with the company previously informing the Court that mediation was not likely to be beneficial so that it was not directed under s 188(2) of the Act. This aspect of Jacks Hardware's case necessarily involved a criticism of the union for not drawing to the Authority's

attention, when applying to fix the collective agreement, that it intended to seek something new or different.

[82] Mr Cranney's response was that the intention of s 50J(3)(b) could not be to require the parties to endlessly go through the process of mediation, facilitation and fixing, each time a new proposal was made or considered. He likened such a process to a game of snakes and ladders where every time the union gained an advantage on one aspect of bargaining it ascended a ladder but immediately landed on a snake, represented by a claim that it had changed its position, to be forced to resume the climb again. Colourful as it is, that description captures the essence of what Jacks Hardware was seeking to achieve.

[83] I consider the union has not changed its position in any way meaning that s 50J(3)(b) has not been satisfied. Wrapped up in the concept that the union has changed its position was that it remained committed to what it was prepared to accept during facilitation, or as was described in the application to the Authority. That is untenable because a recommendation is not binding and an application could be amended.[43] To the extent that the union's acceptance of the Authority's recommendation might be interpreted as a proposal (that it was proposing to enter into a collective agreement on the terms recommended) that was also not binding once facilitation ended.[44]

[84] Once facilitation failed, the union was entitled to apply for fixing and to invite the Authority to reach conclusions about all unresolved issues. The Authority will need to determine what the wage rates should be and to do so against contemporary circumstances including any marketplace changes since facilitation began. The recommendation also suggested a short-term for the collective agreement expiring at the end of June 2018. It is no longer possible to have a collective agreement expiring on that date, and the union is not interested in one that might last for a few weeks and then need to be replaced by further bargaining. That must mean it is inevitable the Authority will be asked to fix the term and it is difficult to see how such a situation could be characterised as a change of position.

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43 Section 50H(3).
44 Section 50G(1).

[85] It mischaracterises the unions entitlement to pursue its application to say that it must, in some way, be linked back to what was acceptable to it previously. Whether or not the union is able to satisfy the Authority about the wage rates, and the term it seeks, are matters for that investigation. Jacks Hardware is entitled to resist whatever rates, or terms, are claimed and to offer its own instead supported in any way it considers necessary, such as by calling expert evidence.

[86] There is nothing in this Part of the Act requiring a party adversely affected by a breach of good faith to adhere to a position advanced, but not accepted, during facilitation. Once it became apparent no agreement was possible the union was entitled to pursue its fixing application.

[87] The submission was made that Jacks Hardware has now obtained independent evidence about wage rates from two sources that it has not previously discussed with the union in bargaining. This evidence was obtained in preparation for the investigation into the fixing application. It has not been made available to the Court although, I understand, it includes empirical material about collective agreements and wage rates in this industry. If the evidence is as compelling as Jacks Hardware believes it to be the Authority may conclude the wage rates should be as the company contends, but that does not require bargaining about this evidence before it is presented to the Authority.

[88] In these circumstances the offer of further mediation was not a reasonable alternative. All reasonable alternatives have been exhausted.

Only effective remedy?

[89] Jacks Hardware's case about s 50J(3)(c), is that the word "only" means no option other than fixing is available. It says that the private mediation proposed by the company was an effective remedy to enable bargaining about the outstanding issues. The Court was invited to place weight on the evidence of Mr Dippie, and Mr Finn-House, emphasising their genuine desire to reach an agreement by further bargaining.

[90] Mr Wicks emphasised that the "last resort nature" of s 50J means that these matters ought to be decided in Jacks Hardware's favour. He submitted that, while progress has been slow, and the parties have not yet been able to resolve all their differences, it would be premature to say fixing the agreement is the only effective remedy. That was because tough bargaining is not the same as futile bargaining and this case is an indication of the former not the latter.

[91] Section 50J(3)(c) requires fixing to be "the only effective remedy", available to the party affected by the breach. This part of the test in s 50J is the end of a cumulative process. Once those obstacles have been negotiated the Authority needed to be able to reach a conclusion that the only effective remedy was to fix the collective agreement. The emphasis in the section is on "effective remedy" not any remedy. The test cannot require an applicant in the union's position to establish a breach of the duty of good faith that satisfies the cumulative steps in s 50J(3)(a)-(b) and then to explore options, no matter how remote or unlikely they are to produce agreement, before fixing can occur. In a sense, having worked through s 50J(3)(a)-(b) inclusive, satisfying s 50J(3)(c) may be self-evident.

[92] All of the processes provided by the Act to assist the union and Jacks Hardware in negotiating, and settling a collective agreement, have been used unsuccessfully. There are no other effective remedies available to the union.

[93] Section 50J(3)(c) was satisfied. The only effective remedy available to the union in the face of the breach of the duty of good faith by Jacks Hardware was to apply to the Authority for it to fix the provisions of the collective agreement.

Conclusion

[94] Section 50J(3)(a)-(c) inclusive was satisfied by the union. It established that the test was made out and it was, therefore, open to the Authority to exercise its discretion to conclude that fixing was appropriate in all the circumstances. The challenge to the Authority's determination is unsuccessful and it is dismissed.

[95] The investigation meeting in the Authority was stayed pending the outcome of this proceeding. That stay is set aside and the Authority can now fix the provisions of the collective agreement.

[96] Costs are reserved. Provisionally costs were categorised as being Category 2 Band B on the Court's Guideline Scale. If the parties are unable to agree on costs the union may file a memorandum within 20 working days of the date of this decision and Jacks Hardware has the same amount of time to respond. The union may then file a memorandum in reply within a further 10 working days.

K G Smith
Judge

Judgment signed at 4.45 pm on 28 February 2019