IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 74
EMPC 468/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	REUNITED EMPLOYEES ASSOCIATION INCORPORATED Plaintiff
AND	NELMAC LIMITED Defendant

EMPC 137/2022

AND IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NELMAC LIMITED Plaintiff
AND	REUNITED EMPLOYEES ASSOCIATION INCORPORATED Defendant

Hearing:	13–15 February 2023 (Heard at Nelson)
Appearances:	K Drummond, agent for Reunited Employees Assoc Inc N Mason and S Thompson, counsel for Nelmac Ltd
Judgment:	16 May 2023

JUDGMENT OF JUDGE K G SMITH

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[1] Reunited Employees Association Inc (REA) and Nelmac Ltd have been bound by collective agreements for many years. Until relatively recently that employment

relationship has been uneventful. Things changed in about 2017 and since then bargaining between them for further collective agreements has been fractious.

[2] Disputes between Nelmac and REA have produced three recent Employment Relations Authority determinations. On 3 June 2021, the Authority concluded that grounds were established to accept a reference for facilitation under s 50C(1) of the Employment Relations Act 2000 (the Act).[1]

[3] On 26 November 2021, the Authority issued a determination in which it fixed the collective agreement between the union and company.[2] In reaching that conclusion the Authority held that REA had breached the duty of good faith.[3]

[4] The Authority reserved costs arising from its investigations in June and November 2021. Nelmac sought costs, but the Authority decided that they should lie where they fall.[4]

[5] The Authority's determinations to fix the collective agreement and to decline to award costs produced two challenges. REA disputed the Authority's determination of November 2021. Nelmac challenged the costs determination.

[6] The challenges were heard together. By agreement the challenge to the costs determination was dealt with by the parties filing affidavits and written submissions.

REA's challenge

[7] REA challenged the whole of the Authority's determination seeking to set it aside. The union sought to place in issue the conclusion that it breached the duty of good faith. Instead, it sought to establish that Nelmac breached that duty and to have

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1 *Reunited Employees Assoc Inc v Nelmac Ltd* [2021] NZERA 241 (Member van Keulen) [First determination].

2 *Reunited Employees Assoc Inc v Nelmac Ltd* [2021] NZERA 530 (Member van Keulen) [Second determination]. As provided for by s 50J of the Act.

3 At [112].

4 *Reunited Employees Assoc Inc v Nelmac Ltd* [2022] NZERA 119 (Member van Keulen) [Costs determination].

the Court fix a collective agreement different from the one fixed by the Authority. REA claimed as relief:

(a) declarations that:

(i) it did not breach the duty of good faith in collective bargaining but Nelmac did;

(ii) Nelmac breached its contractual obligations to address progression rates under the 2019 collective agreement;

(b) that the collective agreement be fixed by the Court including a 75 cent per hour wage increase; and

(c) that penalties be imposed on Nelmac for breaching the collective agreement and duty of good faith.

[8] Nelmac disputed the union's claims and pleaded that the Authority's determinations were sound.

Nelmac's challenge

[9] Nelmac sought to set aside the Authority's determination that costs should lie where they fall. It sought indemnity costs or increased costs and disbursements encompassing the June and November determinations.

The determinations

[10] To provide some context to the parties' competing positions it is necessary to say a little more about the determinations.

Determination of 3 June 2021 and facilitation

[11] On 3 June 2021, the Authority dealt with an application for facilitation.[5] Under s 50C(1) of the Act, the Authority must not accept a reference for facilitation unless it is satisfied that one or more of the statutory grounds exist. In this case s 50C(1)(b) was relied on, namely that bargaining was unduly protracted and extensive efforts had failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

[12] By that stage the parties had been in bargaining since July 2020. The Authority held that the union and company adopted approaches to the bargaining which were "problematic, unproductive and antagonistic".[6] It concluded that the level of mistrust and scepticism between them was exacerbated by the history of bargaining.[7] The grounds to accept the dispute for facilitated bargaining were made out.

[13] Facilitated bargaining was conducted on 21 and 22 June 2021. At it the parties reached an agreement in principle that was recorded in the presiding Authority member's minute. That agreement covered wages, allowances, annual leave, what was referred to as obnoxious work outside of normal duties, allowances for tools, protective clothing and training.

[14] Significantly, the minute recorded an agreement in principle about a wage increase from 1 September 2020 of 50 cents per hour to be applied to all rates, increasing by a further 50 cent increase in the following 12 months.

[15] The minute also contained a table referred to as the "new printed rates schedule" to apply. Allowances previously payable were to be the subject of a four per cent increase to be applied to all printed rates effective from the date that the agreement in principle was ratified.

[16] Despite facilitated bargaining REA members declined to ratify the agreement and a collective agreement did not eventuate.

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5 First Determination, above n 1.
6 At [16].
7 At [18].

[17] After facilitation failed both REA and Nelmac applied to the Authority to fix the collective agreement.[8] REA's application alleged a breach of good faith by Nelmac including a claim arising from the company allegedly continuing to deny an agreement was reached for certain pay increases.

[18] The Authority recorded Nelmac as claiming breaches of good faith by REA that:[9]

(a) it refused to acknowledge the agreement reached in facilitation; and

(b) its continued approach to collective bargaining was unnecessarily aggressive in refusing to acknowledge Nelmac's representative in the post-facilitation process for producing a collective agreement for ratification, and threatening and then raising claims in the Authority without any substance.

[19] The Authority rejected REA's claims and accepted Nelmac's claims. It did not accept the union's claim that an agreement was reached for a 75 cent per hour wage increase and parity between this collective agreement and one Nelmac settled with the Amalgamated Workers Union of New Zealand (AWUNZ). The Authority found that Nelmac had only agreed to parity in a limited way relating to wage and grading criteria and rates for allowances but had not agreed on the claimed wage increase.[10]

[20] The Authority concluded that the agreement reached in facilitation was a compromise by Nelmac accepting an across-the-board wage increase but not at the rate sought by the union. It found that the company offset the lower pay increase by providing a higher percentage increase to the allowance rates than it budgeted for.[11]

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8 Second determination, above n 2, at [12].
9 At [12].
10 At [76].
11 At [78].

[21] The Authority held that REA refused to acknowledge the agreement reached in facilitation and had accused the company's bargaining representative, Marianne Wilkinson, of acting without authority, ignoring processes and breaching confidentiality.[12] It also held that REA refused to meet with Ms Wilkinson after facilitation.[13]

[22] Adverse findings were made about REA's behaviour during bargaining. The union was criticised for continually revisiting what had occurred or was agreed. Its behaviour was described as involving blatant denials of what had clearly occurred or asserting things had occurred when the evidence showed that they had not.[14] The Authority concluded that the union went on the offensive on occasions by accusing Nelmac of improper conduct to attempt to obfuscate or hide its own improper actions.[15]

[23] The Authority decided that the preferable course to take, arising from these breaches by REA, was to fix the collective agreement which it did.

The issues

[24] The issues arising out of REA's challenge are:

(a) Was there a breach of the duty of good faith by Nelmac?

(b) Was there a breach of the duty of good faith by REA?

(c) If breaches occurred, were they enough to enable the Authority to fix the collective agreement?

(d) If Nelmac breached the duty of good faith, should penalties be imposed?

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12 At [80].
13 At [80].
14 At [91].
15 At [91].

(e) Does the Court have jurisdiction to overturn the Authority's determination to fix the collective agreement and to fix a different collective agreement?

Was there a breach of good faith by Nelmac?

[25] REA's complaints about Nelmac stem from how the parties bargained in late July 2020.

[26] Attempting to summarise the breaches attributed to Nelmac in the union's evidence they were that:

(a) it's bargaining representative, Gerry French, used his laptop for other business during the first bargaining meeting, was distracted and then disruptive;

(b) it reneged on an agreement to provide parity with a collective agreement it had with AWUNZ, which would be achieved by a pay increase of 75 cents per hour for union members;

(c) it presented "take it or leave it" proposals during bargaining in contravention of the parties' bargaining process agreement;

(d) it made proposals outside of bargaining meetings instead of tabling them at those meetings;

(e) it arranged a bargaining meeting for 20 August 2020 which it did not attend causing inconvenience to the union and its delegates who did;

(f) it made an offer to two union members of individual employment agreements which increased their hourly rate, presumably outside the collective bargaining process;

(g) Ms Wilkinson falsely claimed to have taken notes of meetings;

(h) meetings were abruptly ended by Nelmac;

(i) it failed to implement union's members progression through the pay scales that then existed; and

(j) emails sent by Nelmac's Chief Executive, Jane Sheard, to union members prior to facilitation undermined bargaining.

[27] John Drummond, REA's secretary and one of its bargaining agents, said the union and Nelmac enjoyed a collaborative working relationship until 2017, which changed when the company appointed new senior executives.

[28] Mr Drummond briefly described the history of bargaining during 2017–2019 resulting in facilitation on 5 May 2019, although that process does not form part of this proceeding. He said that in the Authority's recommendations in 2019 the parties agreed on a collaborative collective bargaining process but that Nelmac failed to comply with it when the 2020 bargaining round began. The departure from the union's expectations for this bargaining round were not described but generally appear to arise from its view of what was required by the bargaining process.

[29] Bargaining was initiated on 3 July 2020. The first meeting occurred on 23 July 2020, and was described by Mr Drummond as a "pre-bargaining exchange of claims". At this meeting the parties settled on a bargaining process agreement that included agreeing to adhere to a specific code of good faith during their bargaining.

[30] The bargaining process agreement specified that each party would recognise the role and authority of any person chosen by the other party as a representative. The union's representatives were listed as Mr Drummond and Kathleen Drummond supported by up to five union delegates. Nelmac's representatives were listed as Mr French, Lindsay Coll, Mark Jowsey and Ms Wilkinson.

[31] Under the bargaining process agreement the parties were required to provide written details of their claims. Specifically, neither party was to table a completely

new proposal or revoke an existing offer without a compelling reason or to make "take it or leave it" offers.

[32] The first claimed breach Mr Drummond referred to occurred at a meeting on 3 August 2020. He said that at this meeting Mr French was disengaged, focussing on unrelated matters on his laptop. He accepted that he did not know what Mr French was looking at or typing on his laptop and cooperated with a request from the union to stop using it. However, he said that Mr French then resorted to being disruptive, abrasive and confrontational towards the union and its delegates.

[33] The disruption was that Mr French repeatedly interrupted the union's presentation of its claims by making comments to the effect that there was no need to waste time and the union should "just go through [its] claims". Mr Drummond considered those remarks undermined any collaborative group discussion, and he said the meeting ended without the claims being properly heard.

[34] This ground does not support a claim of a breach of the duty of good faith. There was no evidence that Mr French's preference for using a laptop was for any unrelated purpose or could be said to be disruptive in some way. Mrs Drummond took exception to the laptop being used, but why she did so was never adequately explained. Even if the use of a laptop could be said to have been inappropriate, which I do not accept, Mr French stopped using it when asked. Complaints about Mr French's subsequent attitude, even if established, would not justify a conclusion that there was a breach; his words fall squarely into the category of robust bargaining and nothing more.

[35] The next claim Mr Drummond referred to arose from a bargaining meeting on 10 August 2020. The claim was that at this meeting the union fully presented its wages claims, seeking parity with an agreement between Nelmac and AWUNZ. He said it did so by claiming an increase of 75 cents per hour in 2020 with further increases for the 2021–2022 years. The point of this claim seemed to be that the company's subsequent assertion that the wage increase claim breached the bargaining process agreement by being raised late was wrong.

[36] The evidence did not establish that the union's claim from the beginning of bargaining involved seeking such an increase or that the company agreed to pay parity with AWUNZ in the way claimed. The union's first bargaining claim did not state that pay parity with AWUNZ was sought. Its wages claims involved an uplift without mentioning parity. The actual increase sought was more than 75 cents per hour. Mr Coll said, and I accept, that the tabled pay claim cherry-picked from the agreement between Nelmac and AWUNZ and added an uplift.

[37] The wage claim was made for the first time at a meeting on 14 September 2020, which was the parties' seventh meeting and well after the initial claims were tabled. Bargaining broke down that day because this new claim was raised. Nelmac eventually ascertained that REA was seeking parity with AWUNZ, but not because that claim was articulated by the union at the beginning of bargaining.

[38] As it transpired, on 15 September 2020, Ms Wilkinson wrote to REA proposing terms of settlement arising from the negotiations and referred to parity with AWUNZ being agreed to with exceptions. However, in the same letter she drew attention to the late claim and declined what the company saw as an effort to obtain an across-the-board increase.

[39] The next claim was that at a bargaining meeting on 11 August 2020 the union was presented with a "take it or leave it conditional package" which affected the grades in the pay schedules and proposed to introduce a clause into the collective agreement which dealt with drug and alcohol testing. According to Mr Drummond this tactic meant no opportunity was provided for collaborative discussion.

[40] A similar claim was made by the union that the company made "take it or leave it" offers when Ms Wilkinson presented Nelmac's proposal at the meeting on 14 August 2020. Presenting offers on such a basis breached the bargaining process agreement.

[41] None of the company's offers contained an ultimatum of the sort alleged or were accompanied by language amounting to one. Ms Wilkson and Mr Coll both said

that offers were not presented in that way. I prefer their evidence to what Mr Drummond said on this subject.

[42] The next part of the union's claim was that during the evening of 13 August 2020, after the business day, Ms Wilkinson sent an email to Mr and Mrs Drummond containing four proposals to consider at the meeting the following day. The complaint was not about the content of the proposals but was about the use of an email to convey them and when it was sent. The union took the view that this method of providing the proposals was inappropriate and they should have been tabled at a meeting.

[43] Mr Drummond went on to say that at the meeting on 14 August 2020, Ms Wilkinson criticised the union's failure or refusal to review the proposals sent the previous evening. The criticism attributed to her was that the union was more concerned about the processes its representatives preferred to use during bargaining than the substance of it. Nelmac was said to have terminated the meeting without providing an opportunity for the union to discuss the proposals.

[44] Mrs Drummond's submissions did not explain how or why providing proposals for consideration the evening before a scheduled meeting amounted to a breach of good faith. The bargaining process agreement did not preclude Ms Wilkinson from sending proposals in this way or at that time and, if anything, the company's action was consistent with s 4 of the Act. It had proposals for consideration in relation to which it was being communicative.

[45] The company was also said to have breached good faith because a meeting was arranged for 20 August 2020, which its representatives did not attend. The complaint was that the union's delegates arrived at the venue but that Nelmac's representatives failed to show up. On inquiry REA was informed that the venue had not been booked by Nelmac, which led to the union subsequently writing to the company's Chief Executive raising concerns about what had happened, who then denied that the meeting was ever arranged.

[46] It is correct that a meeting was planned which Nelmac did not attend. The company's non-attendance resulted from miscommunication for which it subsequently

apologised. The miscommunication was unfortunate, but what happened could not amount to a breach of good faith let alone one that could be reflected in any of the claimed remedies.

[47] Mr Drummond claimed that the union became aware that, on 16 September 2020, Nelmac's contract manager and a team leader approached two of the union's members and offered them individual employment agreements which increased their hourly rates of pay. He said the union objected when this information came to its attention but the evidence went no further in explaining what happened.

[48] The union members Mr Drummond said were approached did not give evidence. What they were offered, and why, was not otherwise explained and the evidence petered out at the point where Mr Drummond referred to the union objecting. That is insufficient from which to draw a conclusion that what was intended or in fact occurred was behaviour undermining bargaining.

[49] A further claim REA made about Nelmac was that the company's bargaining agent, Ms Wilkinson, did not take notes during meetings. Mr Drummond went so far as to say that in the Authority Ms Wilkinson admitted when asked that she had not taken notes.

[50] It is possible that the union intends this claim to support its other claims to the effect that Nelmac always knew pay parity with AWUNZ was being sought. That is, Ms Wilkinson did not need to take notes of such a claim because she knew what was in the AWUNZ collective agreement having been part of the bargaining team that negotiated it. This part of the claim may also be intended to support an underlying REA contention to the effect that the company's bargaining agents were not interested in hearing the union's claims and were involved in surface bargaining, although that was not pleaded.

[51] Some of the union's delegates supported what Mr Drummond said although at least one of them accepted it was possible the company's representatives were doodling.

[52] Ms Wilkinson explained that she took detailed handwritten notes in each of the bargaining meetings. Those notes became the basis for Nelmac's consideration of the union's position from time to time. She denied making the statement to the Authority attributed to her by Mr Drummond and there is no comment on this subject in the determinations. Copies of her notes were produced in evidence.

[53] I prefer Ms Wilkinson's evidence for the following reasons. First, the evidence of what transpired at various meetings is consistent with the notes Ms Wilkinson produced about them.

[54] Second, the company was always in a position to respond to the union's proposals. It is unlikely it would have been able to do so without having kept a record of discussions during meetings.

[55] Third, it is likely that a person in Ms Wilkinson's position, engaged by Nelmac to assist it with bargaining, would have wanted a record of the meetings to provide assistance to the company.

[56] However, even if Mr Drummond's assertion was accepted it is difficult to see that the absence of note taking amounted to a breach of the duty of good faith as between the company and union. An absence of notes may have compromised Nelmac's ability to comprehend the union's claims and respond to them but, if anything, that may have provided an advantage to REA.

[57] For completeness, because the subject was mentioned in paragraph [50], it is important to add that there is nothing to suggest that Nelmac was engaged in surface bargaining by going through the motions having no intention of engaging meaningfully with the union.

[58] Mr Drummond also mentioned that meetings ended abruptly, and sometimes without a full discussion, which seemed to be significant to the union in its claim that there was a breach of duty by the company. There was some evidence that from time to time meetings ended before REA anticipated they might, but there was nothing to indicate that Nelmac did not receive and listen to the union's claims or that when

meetings ended that was in some way an attempt to disrupt bargaining. This claim does not support the allegation that the company breached the duty of good faith.

[59] REA claimed that when the collective agreement was previously settled an obligation was imposed on Nelmac to review the progression through pay grades of its staff who were union members. According to Mr Drummond, Nelmac did not undertake that task. The evidence about what happened, and what was required, was sparce. How progression was supposed to have been dealt with, and in what ways it was not dealt with, did not get canvassed.

[60] In any event, when the company proposed terms of settlement on 15 September 2020, a commitment was included to meet with REA after ratification to discuss pay scale progression for union members. The proposal included an annual grade and remuneration review and to backdate any pay grade claims and pay increases.

[61] While I am not satisfied REA has proved that the company failed as alleged, so far as the duty of good faith in this bargaining round is concerned, an unequivocal commitment was made to address the union's complaint and to review progression for members while addressing any deficiencies that arose. That conduct is consistent with the duty of good faith.

[62] The only matters that might, potentially, breach the duty were two emails from Nelmac's Chief Executive to the union's members shortly before they were asked to ratify the proposed collective agreement. Mrs Drummond did not make submissions to explain why this correspondence was a breach or undermined bargaining.

[63] The company's Chief Executive sent an email to union members dated 16 November 2020. The email informed them that the time and location of the ratification meeting could be obtained from an identified staff member. The email expressed disappointment that the union had lodged a proceeding in the Authority seeking facilitation and advised them that there might consequently be a delay to concluding negotiations. It concluded with an expression of hope that the ratification meeting would be successful. A copy of Nelmac's most recent offer of the previous day was attached to the email, in the form of a letter to the union by Ms Wilkinson of

15 September 2020, and its recipients were advised that the company considered the offer to be fair.

[64] The second email was dated 6 January 2021. In it the Chief Executive informed the union's members that Nelmac was still waiting for the current round of bargaining from July 2020 to be ratified. After expressing uncertainty about when that step might be taken, she referred to proceedings by the union in the Authority before concluding that staff would not be disadvantaged. That was because the company was accruing a pay increase negotiated for the members that would be honoured and back-paid to July 2020.

[65] The bargaining process agreement acknowledged that during bargaining Nelmac was not prevented from communicating with its employees who were union members. The agreement extended to acknowledging that the company's proposal for the collective agreement could be communicated to staff members as long as what was said was consistent with the duty of good faith.

[66] All the correspondence did was provide to union members information about the company's position, which they are likely to have already received from the union's bargaining agents, and information about backpay. Given that Nelmac was not precluded from communicating with its employees, and did nothing more than pass on its position, no breach could have arisen.

[67] For completeness, the union criticised the Authority's decision to fix the collective agreement by claiming that what it produced was in some way incomplete or failed to recognise agreements that had been made. Mr Drummond's evidence did not examine these allegations. Mrs Drummond's submissions did not explain them. In fixing the collective agreement the Authority received drafts from both parties and chose the one presented by Nelmac. It appears that the union did not raise with the Authority any concerns it may have had about completeness, and if there were any they were not pursued in this proceeding.

[68] REA has not established that there was a breach of the duty of good faith by Nelmac. It is therefore not necessary to consider issue (d) and the possible imposition of penalties.

[69] That leaves whether REA breached the duty of good faith.

Was there a breach of duty by REA?

[70] Nelmac has established that there was a breach of duty by REA arising from the union's insistence that it did not breach the bargaining process agreement in belatedly pursuing an across-the-board wage increase of 75 cents per hour.

[71] The claims tabled by the union did not refer to this pay increase or an attempt to achieve parity with AWUNZ. As already described, it was not until the seventh meeting, on 14 September 2020, that this claim was made.

[72] There was an attempt by REA to claim that parity with AWUNZ was mentioned, or at least explained, in a memorandum Mrs Drummond prepared dated 10 August 2020. When pressed, Mr Drummond accepted that the memorandum had not been presented to the company.

[73] Mr Mason submitted that raising the pay claim late was a breach by the union which was compounded by insisting it was not late. That behaviour was criticised as misleading therefore breaching the duty of good faith, even though the company was not actually misled. I agree.

[74] The second part of Nelmac's case was that REA's members were asked to ratify something different from the agreement reached in principle at facilitation.

[75] Ms Wilkinson produced a document she said was provided by the union to the Authority to show what was presented to its membership at the ratification meeting. In this version several differences were identified when compared to the agreement in facilitation the most significant of which was a 75 cent per hour increase that would apply from 1 September 2020. At facilitation the bargaining agents agreed in principle to a 50 cent per hour increase, subject to ratification. However, Ms Wilkinson did not

attend the union members' ratification meeting and could not say what was presented to them for consideration.

[76] The document produced by the union at the hearing, as having been provided to its members for ratification, referred to the 50 cent per hour wage increase agreed in principle at facilitation. A note at the end of this version of the proposed agreement was to the effect that the ratification meeting endorsed the terms of settlement except in relation to the wage increase where the union members continued to seek a 75 cent per hour uplift. In other words, the union says that what was presented to its members accurately reflected what happened at facilitation but was rejected. Its representatives were effectively instructed to return to bargaining to seek an improved pay increase. Mr Drummond was not cross-examined about what was discussed during the ratification meeting.

[77] Mrs Drummond submitted that the union members were within their rights to reject the proposed agreement. That is clearly correct.

[78] Given the uncertainty created over the fact that two different versions of the proposed agreement presented to the ratification meeting were provided (one by Ms Wilkinson and the other by the union) it could not safely be said that a breach occurred by submitting for ratification a proposed agreement at odds with the agreement in principle reached during facilitation. This ground could not support a finding of a lack of good faith on the part of the union.

[79] Finally, it is necessary to consider the conduct of the union's representatives after facilitation. Once the process was completed the Authority member who conducted the facilitation invited Ms Wilkinson to prepare a draft agreement for review. Without adequate justification the union's bargaining representatives refused to allow Ms Wilkinson to participate in preparing that draft.

[80] In rejecting Ms Wilkinson's assistance REA undertook unjustified attacks on her, criticising her integrity and credibility. All of those claims were baseless but relying on them the union refused to deal with Ms Wilkinson any further stating instead a preference to meet Mr Coll and another company representative.

[81] The duty of good faith does not require bargaining to be undertaken in a courteous way, or require polite language, or that the parties not engage in robust position-taking, or avoid a combative style.[16]

[82] In this case the union's comments, coupled with refusing to deal with Ms Wilkinson, cannot be passed over as merely some aspect of acceptable bargaining, a lack of courtesy, robust bargaining or a combative style. The union had no right to refuse to deal with her as a bargaining agent for two reasons. First, she was named in the bargaining process agreement as one of Nelmac's bargaining agents which status the union was required to acknowledge. Second, there was no substance to any of the union's claims about her. Refusing to deal with Ms Wilkinson was a clear breach of the duty of good faith.[17]

Were the breaches enough to enable fixing?

[83] Under s 50J(3) of the Act the Authority had to be satisfied that there was a breach of the duty of good faith in relation to the bargaining before it could consider fixing the collective agreement. Section 50J(3)(a)(ii) requires the Authority to conclude that the breach was sufficiently serious and sustained as to significantly undermine the bargaining. Before an order could be made the Authority needed to be satisfied that a breach occurred that was important enough to warrant that step, meaning that it is not something which was trivial or negligible.[18]

[84] The union's insistence that it proposed a 75 cent per hour wage increase from the beginning of bargaining rather than having contravened the parties' bargaining agreement, and refusing to deal with Ms Wilkinson, were within the scope of s 50J(3)(a)(ii).

[85] Under s 50J(3)(b) of the Act before the Authority can conclude that fixing the collective agreement is appropriate it must be satisfied that all other reasonable alternatives for reaching agreement have been exhausted. Clearly that was the case. By the time the Authority concluded that fixing the collective agreement was

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16 *Kaikorai Service Centre Ltd v First Union Inc* [2018] NZEmpC 160, [2018] ERNZ 533 at [63].
17 Employment Relations Act 2000, s 32(1)(d)(i).
18 *Jacks Hardware & Timber Ltd v First Union Inc* [2019] NZEmpC 20, [2019] ERNZ 22 at [63].

appropriate the parties had been involved in protracted bargaining that had reached an impasse. They had attended facilitation which was unsuccessful, and no obvious means to progress bargaining was apparent.

[86] There were no other realistic options for the Authority to consider. Referring the parties back to bargaining would have been an invitation to continue the impasse that led to facilitation in the first place. The Authority would not have been able to entertain a further application for facilitation unless satisfied that the circumstances relating to the bargaining had changed or that bargaining since the previous facilitation had been protracted.[19] The parties did not suggest in their submissions that this option was one that should have been canvassed by the Authority.

[87] Finally, s 50J(3)(c) specifies that the Authority must be satisfied that fixing the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith. The emphasis is on an effective remedy and does not require that all and any potential remedies have been tried and/or exhausted.[20]

[88] I agree with the Authority that fixing the collective agreement was the only effective remedy available to Nelmac.

[89] That conclusion is sufficient to dispose of REA's challenge to the determination. However, in deference to submissions made by Nelmac it is necessary to consider whether the Court would have had jurisdiction to fix the collective agreement if the union's claim had succeeded.

Jurisdiction of the Court

[90] In a telephone directions conference before the hearing the parties were advised that this litigation is the first in which an issue had arisen about whether the Court has jurisdiction to fix a collective agreement. The parties' attention was drawn to ss 50C, 50J, 179(1), and 179A of the Act, and they were invited to make submissions about them.

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19 Employment Relations Act 2000, s 50C(3).

20 *Jacks Hardware & Timber Ltd v First Union Inc*, above n 18, at [66] and [91].

[91] Mr Mason submitted that the Court does not have jurisdiction to grant the relief claimed by the union. Mrs Drummond did not to make submissions on this subject concentrating instead on evidence said to support the union's claims.

[92] Under s 179 of the Act a party to a matter before the Authority dissatisfied with a written determination may elect to have it heard by the Court.[21] A party may elect to challenge the whole determination or, alternatively, to specify particular errors of law or fact to be resolved.[22]

[93] That otherwise broad right to challenge an Authority determination is limited by s 179A(2). The section reads:

> **179A Limitation on challenges to certain determinations of Authority**
>
> (1) This section applies to a determination of the Authority made—
>
> (a) for the purposes of sections 50A to 50I; or
>
> (b) under section 50J.
>
> (2) A party may not elect, under section 179(1), to have the matter heard by the court unless the matter is whether 1 or more of the grounds in section 50C(1) or section 50J(3) exist.

[94] Section 50C(1) instructs the Authority not to accept a reference for facilitation unless satisfied that one of four situations exist, and s 50J(3) sets out the grounds that must be established before the Authority fixes a collective agreement.

[95] The introductory words of s 179A(2) are explicit: the right to challenge is confined to establishing whether the Authority had grounds to accept a matter for facilitation or to fix a collective agreement.

[96] Had REA established a breach by Nelmac that would not have opened the door to the Court setting aside the collective agreement fixed by the Authority and replacing it with something else. The limited scope of the challenge under s 179A(2) precludes that outcome.

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21 Employment Relations Act 2000, s 179(1).
22 Section 179(3)–(4).

Nelmac's costs claim

[97] Nelmac applied unsuccessfully to the Authority for an order for costs.[23] The costs sought totalled $72,724.80 with disbursements of $9,093.75.[24] The amount claimed encompassed awards for the June and November determinations.

[98] The Authority's decision that costs should lie where they fall was based on accepting that the nature of the claim can influence costs and result in an order that they not be awarded in certain circumstances.[25] The Authority relied on three grounds. They were that:

(a) there was public interest in, and the interests of justice supported, parties accessing the Authority for assistance with bargaining when they were unable to reach agreement and it would be inappropriate to hamper them by concerns over costs;

(b) there is a public interest in having the Authority resolve collective bargaining impasses by fixing an agreement; and

(c) the union did not act unreasonably in bringing its claims against Nelmac particularly as they related to seeking assistance in fixing the terms of a new collective agreement.

[99] The Authority's application of public interest considerations relied on *Four Midwives v Ministry for COVID-19 Response* and *GF v OO*.[26]

[100] In *PBO v Da Cruz* the Court established principles to apply in deciding costs in the Authority in light of a challenge.[27] Those principles are that:[28]

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23 Costs determination, above n 4.
24 At [5]. I note that the amount claimed included GST which presumably Nelmac has the ability to claim back and which tax would not usually be part of an award.
25 At [16].
26 *Four Midwives v Ministry for COVID-19 Response* (No 2) [2021] NZHC 3420; and *GF v OO* [2022] NZEmpC 1.
27 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].
28 At [44].

(a) there is a discretion as to whether costs would be awarded and in what amount;

(b) the discretion is to be exercised in accordance with principle and not arbitrarily;

(c) the statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority (and the Court);

(d) equity and good conscience are to be considered on a case-by-case basis;

(e) costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award;

(f) it is open to the Authority to consider whether all or any of the party's costs were unnecessary or unreasonable;

(g) costs generally follow the event;

(h) without prejudice offers can be taken into account;

(i) awards will be modest;

(j) frequently costs are judged against a notional daily rate; and

(k) the nature of the case can also influence costs and this has resulted in the Authority ordering costs lie where they fall in certain circumstances.

[101] In *Da Cruz* the Court was satisfied that those principles are appropriate and consistent with the Authority's functions and powers.[29] In the same case the Court

[29] At [45].

concluded that there was nothing wrong in principle with the Authority adopting a tariff-based approach to costs.

[102] At the time the Authority's costs determination was issued it usually applied a tariff for all determinations of $4,500 for the first day of an investigation and $3,500 for the second and subsequent days.[30]

[103] Nelmac sought costs on the basis that in both the June 2021 and November 2021 determinations it was the successful party and ought to receive them. There is no dispute about that. REA did not seek to argue that it had, in fact, succeeded in some way material to costs.

[104] In support of Nelmac's claim for indemnity costs it submitted that:

(a) there was conduct which increased costs unnecessarily which ought to be taken into account; and

(b) as set out in *Da Cruz*, costs should not be rigidly fixed and need to adequately reflect the conduct of the parties and the complexity of the matter.

[105] The behaviour attributed to REA said to have increased costs unnecessarily was that the union:

(a) brought proceedings to fix the collective agreement when the parties had not attempted facilitation; in other words that the application had no prospects of success given the test in s 50C;

(b) opposed Nelmac's application for a reference to facilitation despite on a previous occasion the parties successfully using that process to conclude an agreement;

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[30] From 2 May 2022 the Authority operates a revised practice note in which it has indicated parties will bear their own costs in relation to referrals for facilitated bargaining and fixing the terms of a collective agreement. The practice note post-dates the Authority's costs determination in this case and is not therefore relevant.

(c) did not follow the Authority's procedural rules leading to Nelmac incurring additional costs at short notice. This was a reference to filing amended statements of problem shortly before the investigation meeting and a claim that the union failed to serve relevant documents as directed;

(d) claimed improperly that it had raised a claim for a pay increase of 75 cents in the initial bargaining meeting in July 2020 despite having no basis for that claim;

(e) refused to accept the facilitated agreement made by the parties relating to the allowances disregarding the Authority member's minute recording that agreement;

(f) maintained a defence without any reasonable prospect of success, claiming the union had not breached its duty of good faith in post-facilitation conduct; and

(g) continued to raise new claims throughout the process leading to the November determination.

[106] In relation to the last claim, submissions were made that the Authority's directions were breached in a brief of evidence filed jointly by the union's representatives and in submissions presented on its behalf. Attention was also drawn to the Authority's adverse comment in the November determination criticising the union's behaviour.

[107] Mr Mason's submissions relied on *Bradbury v Westpac Banking Corporation*.[31] *Bradbury* held that indemnity costs are exceptional and require "exceptionally bad behaviour".[32] That behaviour included:[33]

(a) The making of allegations of fraud knowing them to be false.

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31 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.
32 At [28].
33 At [29].

(b) The making of irrelevant allegations of fraud.

(c) Particular misconduct that causes loss of time to the Court and to other parties.

(d) Commencing or continuing proceedings for some ulterior motive.

(e) Doing so with disregard of known facts or clearly established law.

(f) Making allegations which ought never to have been made or unduly prolonging the case by groundless contentions.

[108] Category (f) has been described as the "hopeless case" test. Two aspects were relied on to establish that REA's case should be categorised as hopeless. They were the union's claim that the company agreed to a 75 cent per hour wage increase and maintaining that the collective agreement should be fixed at that increased pay rate.

[109] Nelmac took issue with the Authority's reliance on public interest to decline to award it costs. Relying on *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd,* the company's case was that there were no aspects of the litigation that might properly be seen as involving public interest.[34] The company submitted that this litigation concerned private interests with no broader application than resolving the dispute between the parties.

[110] Nelmac considered an award in its favour was in the public interest because:

(a) that would be reflective of the general principle that costs follow the event;

(b) it would support the object of the Act to attempt to reduce judicial intervention, encouraging parties to accept facilitation when negotiations break down;

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[34] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 167.

(c) it would support the agreements made in facilitation and that process; and

(d) it would ensure parties who engage in misleading and deceptive conduct are accountable by being responsible for an award of costs or increased costs.

[111] Rounding out these submissions Mr Mason argued that it would be in the interests of justice for an award to be made particularly given the protracted litigation. He argued that REA's financial position, so far as it was known, was not a relevant consideration.[35]

[112] The union's opposition to costs was contained in an affidavit from Mr Drummond which had the dual purpose of providing its responses to the evidence relied on by the company and commenting on the grounds relied on by Nelmac. The union confirmed that it did not intend to make further submissions and would rely on Mr Drummond's affidavit.

[113] Mr Drummond queried the necessity for the company to have incurred the expense that it did. In a general way he sought to support the Authority's conclusions that there was a public interest in resolving disputes about the collective agreement that favoured ordering costs to lie where they fell.

[114] Importantly, while in response to a previous interlocutory application the union had disclosed its small membership and limited financial resources, those matters were not referred to in opposition to the costs claim.

Analysis

[115] The Court has a broad discretion as to costs.[36] The primary principle is that costs follow the event.[37] There was no disagreement as to the purpose of costs, or the Authority's jurisdiction to order them.

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35 *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196 at [22].
36 Employment Relations Act 2000, sch 3 cl 19; Employment Court Regulations 2000, reg 68.
37 See for example *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

[116] The first issue to assess is whether, as submitted by REA, this was public interest litigation so that costs should lie where they fall.

[117] Under the High Court Rules 2016 an order of costs might be refused, or what might otherwise be payable reduced, if the proceeding is a matter involving public interest.[38] What underpins that approach is the risk of adverse costs awards creating a chilling effect on public interest cases being brought before the Court.[39] There is no reason to depart from that approach.

[118] Two matters need to be satisfied to establish the existence of a public interest:[40]

(a) The proceeding brought by the unsuccessful litigant must be one of genuine public interest, must have merit, and must have some general importance beyond the interests of the particular unsuccessful litigant.

(b) The unsuccessful litigant must have acted reasonably in the conduct of the proceeding.

[119] I agree with Mr Mason that this litigation could not be described as one involving public interest in the sense that term was used in *King Salmon*. The resolution of this dispute involved no broader applicability than resolving disagreements between two parties.[41] The Authority's determinations dealt entirely with disputes about what happened and who was responsible. Factual findings about good faith behaviour were determinative. The dispute did not, for example, address some previously untested aspect of the law or result in an outcome that might be of wider assistance to employers and employees.[42]

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38 High Court Rules 2016, r 14.7(e); and see Employment Court Regulations 2000, reg 6.

39 See David Bullock and Tim Mullins *The Law of Costs in New Zealand* (2022, LexisNexis NZ, Wellington) at [3.38].

40 *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 993, (2014) 21 PRNZ 766 at [10]. See also the discussion in *King Salmon*, above n 34, at [41] where the majority in the Supreme Court ordered costs against the company on the basis that its participation in the proceeding was as a company seeking to further its commercial objectives.

41 See generally *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 3314; and *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525.

42 See generally *Vulcan Steel v Manufacturing and Construction Workers Union* [2022] NZEmpC 144 at [12]–[14].

[120] REA is also in difficulty over the second limb. It could not be said that it acted reasonably. The Authority made strong criticisms of its conduct. In this hearing the union maintained claims that the Authority rejected, namely about the proposed wage increase. It did not resile from its attack on Ms Wilkinson although it did not repeat quite the same vehement comments as appear to have been made in the Authority.

[121] I am satisfied that Nelmac was successful and is entitled to an award of costs. The issue then becomes what to award? Nelmac has not established a case for indemnity costs or, for that matter, increased costs in the Authority. While the union's case fell well short of success, I am not persuaded that its claims fall into the "hopeless" case category described in *Bradbury*. What emerged was more in the nature of muddled, confused and misdirected attempts to bargain than anything more compromising. For the same reasons I am not satisfied that an uplift in costs is justified.

[122] I have reached the conclusion that the just outcome is to award Nelmac costs arising from the two determinations by reference to the Authority's daily tariff that applied at that time. The investigations were allocated four hearing days and, while they did not use all the allocated time, must have involved attendances beyond the commitment to the investigation meetings. My assessment is that an allocation equivalent to the daily tariff for four days would be appropriate. That sum is $15,000.

[123] Nelmac has not established that it should be awarded the disbursements it claimed, which were Ms Wilkinson's fees. The claim was premised on Nelmac incurring unnecessary costs for her attendances after facilitation. It assumes that having reached a position at facilitated bargaining the union was committed and had to accept the agreement reached in principle, so that when its members did not agree the resultant expense was unnecessarily incurred. I do not accept that proposition.

[124] Nelmac made a decision to instruct Ms Wilkinson to assist with its bargaining, and it follows the company was committed to incurring the costs of her attendances. Those costs would not have ended at the point in time when there was a response to facilitation given that the union's members rejected the proposal. That cost was a

function of the bargaining process and cannot now be categorised as wasted expense arising from the litigation.

Conclusion

[125] REA's challenge is unsuccessful, and it is dismissed.

[126] Nelmac's challenge is successful.

[127] REA is to pay Nelmac $15,000 for costs arising from the Authority's investigation meetings.

[128] The costs of these proceedings are reserved. If they cannot be agreed the parties may file memoranda.

K G Smith
Judge

Judgment signed at 3.50 pm on 16 May 2023