



Centre for Labour, Employment and Work

Pay rates in collective agreements – *Jacks Hardware and Timber Ltd v First Union Inc* [2018] NZEmpC 94

Peter Kiely, Partner, Kiely Thompson Caisley

In this case, First Union successfully obtained external intervention to conclude collective bargaining by applying for the Employment Relations Authority (the **Authority**) to fix the provisions of a collective agreement under section 50J of the Employment Relations Act 2000 (the **Act**). At the time of writing, Jacks Hardware and Timber Ltd (**Jacks**) has challenged this determination in the Employment Court and has been granted a stay of the Authority proceedings.

Factual Background

Jacks and First Union commenced bargaining in October 2013. In particular, First Union wanted to address Jack's use of remuneration reviews for setting wage increases by ensuring that the collective agreement provided for minimum wage rates and wage rate increases.

Jacks' position was that the remuneration structure proposed by First Union was entirely different to the existing structure because it was not fundamentally based on rewarding individual performance.

After protracted bargaining and a failed mediation, Jacks unilaterally declared on 20 February 2015 that it had taken bargaining as far as it could and had a genuine reason based on reasonable grounds to conclude the bargaining without reaching an agreement (as was required under the 'old' section 33 of the Act before it was amended on 6 March 2015).

The matter went to the Employment Court, which found that Jacks' objection to the inclusion of a remuneration clause was not a genuine reason for refusing to enter into a collective agreement, and the refusal was not based on reasonable grounds. The Authority was directed to undertake facilitation to address the wage rate issue. Jacks ultimately rejected a recommendation issued by the Authority and requested further facilitation. First Union opposed further facilitation arguing that it would not assist the parties. It subsequently lodged an application with the Authority to fix the wage rate provisions of the collective agreement.

The Authority was required to determine under section 50J(2) and (3) of the Act whether it was appropriate in all the circumstances for it to fix the wage rate provision of the collective agreement on the grounds that:

- a) there had been a breach of good faith which had occurred in relation to bargaining;
- b) that the breach had been serious and sustained so as to significantly undermine bargaining;
- c) that all reasonable alternatives for reaching agreement had been exhausted; and
- d) that fixing the provisions was the only effective remedy for the party affected by the breach of good faith.

Employment Relations Authority Determination

The Authority found that Jacks' earlier breach of good faith (its unilateral declaration that it would not conclude a collective agreement) which had been identified by the Employment Court had not been remedied by the Employment Court's direction for facilitation and as such, was sufficient to satisfy the first part of the test.

In assessing whether the breach had significantly undermined collective bargaining, the length of time parties had been engaged in bargaining was a highly relevant factor. The Authority also found that all reasonable alternatives for reaching an agreement as to what wage rates were to be included in the collective agreement had been exhausted. These included mediation, facilitation and litigation, all of which had failed.

Furthermore, the Authority rejected Jacks' proposal of leaving the collective agreement unconcluded as an available alternative. As a result, the Authority found that fixing the wage rate provision in the collective agreement was the only effective remedy to conclude bargaining. However, before it could fix the terms of the collective agreement, Jacks challenged the Authority's determination and the parties now await the Employment Court's judgment.