



Authority Imposes Wage Rates

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A recent decision of the Employment Relations Authority involving **Jacks Hardware & Timber Limited v. First Union Inc** is the first time the Authority has exercised its powers to fix the provisions of a Collective Agreement being negotiated between the parties. This is despite the Authority having the jurisdiction to fix terms and conditions pursuant to s.50J of the Employment Relations Act since 1 December 2004.

Section 50J of the Employment Relations Act provides that a party may apply to the Authority for a determination fixing the provisions of the Collective Agreement being bargained for on the following grounds:

1. A breach of duty of good faith (as defined in s.4 of the Act) has occurred in relation to the bargaining and that breach was sufficiently serious and sustained as to significantly undermine the bargaining; **and**
2. All other reasonable alternatives for reaching agreement have been exhausted; **and**
3. 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.

Clearly there is a high threshold required before the Authority will intervene to “fix” terms and conditions in a collective agreement bargaining setting which is demonstrated by the fact that this is the first case of its kind within 14 and a half years since the Authority had the ability to act in this manner.

The background to this case involved the union initiating bargaining for a new collective agreement on 18 October 2013. The Authority noted that since the initiation of bargaining there had been extensive bargaining which had been the subject of seven Employment Relations Authority determinations, two recommendations of the Employment Relations Authority after two facilitation processes previously and 6 Employment Court judgments.

The Authority was asked to fix the following 3 provisions, a trial period, the term of the agreement; and remuneration.

Trial Period Provision

By the time this matter had progressed to the Authority legislation had come into effect on 6 May 2019 which limited the use of trial periods to employers who engaged 19 or less staff. Jacks Hardware employs between 180 – 200 staff and consequently both parties agreed that the trial period provision included in the draft collective agreement must be deleted.

Term of Agreement

The union sought the term of the agreement to be from the date of the Authority determination until 31 August 2020. Jacks Hardware requested an expiry date of 30 June 2020.

The union indicated that “. . . members require as much certainty as possible before having to re-enter bargaining. The bargaining to date has been long, costly and unfruitful and it does not have sufficient faith that a shorter term would be of any benefit to its members. In addition, the term sought by the Union would allow the Bunnings collective agreement negotiations to likely have been concluded, allowing the Union to refer to the rates agreed to in that agreement in bargaining with Jacks.”

Jacks Hardware had proposed an expiry date of June 2020 because “It wants bargaining to have concluded resulting in a new collective agreement, resulting in certainty for its wages budget before beginning the 2020 PDR process.

The Employment Relations Authority determined:

“[71] I agree with the Union that its members will be best served by a slightly longer term than that sought by Jacks. In addition, the term is not likely to significantly disadvantage Jacks.

[72] This term, only two months longer than Jacks sought, does not stop it going ahead with its PDR process in 2020.”

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson, Peter Zwart** or **Dean Kilpatrick**.

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Remuneration:

The following table reflects the respective parties position on remuneration and the Authority's determination:

	Union	Jacks Hardware	Authority Determination
Tier 1	\$21.50	\$17.95	\$19.00
Tier 2	\$23.00	\$18.70	\$21.00
Additional Trades Qualification Rate	\$3.00 per hour	\$1.00 per hour	\$2.00

The Authority noted the following in respect to its exercising its powers in accordance with s.50J of the Act:

"[21] It is the Authority's duty to promote collective bargaining. It has attempted to do that throughout these proceedings. In addressing the inherent inequality of power in these proceedings, I bear in mind that Jacks has to date been able to avoid being a party to the collective agreement."

The union argued that Jacks Hardware had "deliberately stalled the bargaining and therefore the wage rates should be set at figures that compensate the workers for the significant delay". Jacks Hardware submitted that the Authority cannot use the wage rates to "punish it" and that the necessity for the breakdown of the bargaining "is the fixing provision itself". The Authority agreed "that it would be inappropriate to set artificially high wage rates as a punishment. However, I consider that it is reasonable to take into account the period of time since a collective agreement could have been agreed to consider what wage rates could have been by now."

The evidence before the Authority also included financial information provided by Jacks Hardware in support of their claim that they could not afford to pay the increase sought by the union, the market rates of pay paid by a number of other employers in the same or similar industries, the overall pressure in the economy to increase wages as illustrated by the recent increase in minimum wages and the living wage movement which the union argued is "gaining traction".

In reaching its decision the Authority held:

"[62] If Tier 1 and Tier 2 rates are set at the rates Jacks' proposes nothing will change for at least 44 of their lowest paid staff. That would defeat the purpose of the collective bargaining, which is to increase wages for the Union's members. Jacks' rates remain out of step with the upward market pressure on wages."

[63] I consider the rates the Union claims are too high when I compare them with Retail NZ's figures and the rates paid by the two other Mitre 10 franchises in the South Island for which we have detailed information. However, in all the circumstances I consider the Mitre 10 wages in Invercargill and Greymouth to be less compelling models than Jacks asserts. That is because they are in smaller centres and the Union's members in those stores receive other benefits that have monetary value to them. I consider Bunnings rates should be influential in setting what Jacks' lowest two rates should be.

[64] Having weighed all the evidence and considered the arguments of the parties, I conclude that the Tier 1 rate should be \$19.00 per hour, and the Tier 2 rate should be \$21.00 per hour. The additional trade qualified rate should be \$2.00 per hour.

[65] Standing back, the following "counterfactual" scenario supports my conclusion. If Jacks and the Union had agreed on all provisions of a collective agreement, say, in 2015 and again in 2017 it is likely that there would have been negotiated increases above the minimum Jacks now pays. In addition there would have been further bargaining this year.

[66] I acknowledge there is an element of crystal ball gazing in this exercise. However, if such bargaining and agreement had happened it is reasonable to conclude that the Tier 1 rate could be \$19.00 per hour by now, and the Tier 2 rate could be \$21.00 per hour.

[67] In addition, it is reasonable to assume that the additional trade qualification rate would be up to \$2.00 per hour by now.

[68] Those are the rates I fix. That will potentially see pay increases for about 140 of Jacks' current employees. I do not consider it reasonable to raise those rates again on 1 September 2019 as the Union claims. Any further increases will be a matter for the next bargaining round."

While it is unlikely that you will be faced with a similar situation to which Jacks Hardware found themselves in, it is important to be aware of the Authority's ability to fix the provisions of a collective agreement and to consequently be mindful of your good faith obligations in a collective agreement bargaining setting.

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