IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 230
EMPC 175/2015

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	FIRST UNION INC Plaintiff
AND	JACKS HARDWARE AND TIMBER LIMITED T/A MITRE 10 MEGA, DUNEDIN, AND MITRE 10, MOSGIEL Defendant

Hearing: 2, 3 and 4 November 2015
(Heard at Dunedin)

Appearances: P Cranney and G Liu, counsel for plaintiff
P Churchman QC and R Upton, counsel for defendant

Judgment: 17 December 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

INDEX

Introduction

[1] The plaintiff (the Union) seeks a declaration that the defendant (Jacks) acted unlawfully in purporting to declare that the parties' collective bargaining for a collective agreement concluded on or about 20 February 2015 when Jacks announced this to the Union's bargainers. The plaintiff also seeks an order under s 50C of the Employment Relations Act 2000 (the Act) directing the parties to facilitated bargaining (if bargaining has not concluded). That is on the ground that Jacks's unilateral declaration of bargaining being at an end was a failure by the company to comply with its duty of good faith. It is on the further ground that its continued persistence in this stance amounts to a serious and sustained breach of the legislative scheme for collective bargaining and has undermined that bargaining. In reply, Jacks admits some of the plaintiff's factual allegations but denies others and opposes the granting of any relief to the Union.

[2] Jacks is a home hardware and building supplies merchant. It trades as Mitre 10 Mega in Dunedin and Mitre 10 in Mosgiel. It is one of a number of companies that constitute a nationwide cooperative, the members of which go by the Mitre 10 brand.

[3] On 18 October 2013 the Union initiated collective bargaining for its members at Jacks who then numbered approximately 25 of a staff of about 170. Collective bargaining continued intermittently until 20 February 2015 but the Union says that the parties are having serious difficulties in concluding a collective agreement and that bargaining has now become unduly protracted. Jacks agrees that the parties have been unable to conclude a collective agreement but denies (enigmatically) that they are having serious difficulties in concluding one. It also denies that, in all the circumstances, the bargaining has become unduly protracted, even if the parties are found in law still to be bargaining.

[4] The parties agree, however, that at a scheduled collective bargaining session on 20 February 2015 Jacks asserted that it had genuine reasons based on reasonable grounds not to conclude a collective agreement, and thereby purported to end

bargaining. It has not participated in bargaining since then and does not intend to do so unless required by law.

[5] It is common ground that the parties' bargaining process agreement (BPA), which is relevant to these matters, was entered into on 6 March 2014 and appears to require the parties to continue bargaining until a collective agreement is settled. Jacks says, however, that the relevant provisions of the parties' BPA were subject to statutory criteria with which it was inconsistent, so that the BPA's provisions must yield to the statute's.

The pleadings

[6] These are the plaintiff's amended statement of claim of 7 August 2015 and the defendant's statement of defence (to the plaintiff's amended statement of claim) filed on 10 September 2015. The plaintiff seeks two orders. Dealing with them in reverse order to which they are pleaded, the second is a claim under s 50C of the Act that the parties be directed to undergo facilitated bargaining on the ground that the defendant's purported ending of bargaining on 20 February 2015 was a failure to comply with the duty of good faith and was a serious and sustained breach of that duty which undermined the parties' collective bargaining.

[7] To get to that point, however, and to resist successfully the defendant's argument that there is no current collective bargaining, the plaintiff first seeks a declaration that the defendant acted unlawfully in purporting to conclude collective bargaining on and from 20 February 2015 so that collective bargaining is, in law, currently in place between the parties. This cause of action will focus, in turn, upon the defendant's assertion that it was not required to continue collective bargaining (and therefore that bargaining was, in law, at an end) as from 20 February 2015 because it had genuine reasons based on reasonable grounds not to conclude a collective agreement with the plaintiff.

[8] In its statement of defence the defendant describes its genuine reasons, based on reasonable grounds for not concluding a collective agreement, as consisting of "philosophical differences about the Plaintiff's claims". The plaintiff did not require

greater particularisation of this bald assertion, so that the particulars of it were disclosed first at the hearing.

[9] In the course of the hearing Jacks defined its "genuine reasons based on reasonable grounds" for not entering into a collective agreement. These are essentially two. The first is that Jacks refuses to agree to employee remuneration being addressed at all in a collective agreement. Second, and alternatively, it says that if remuneration is to be the subject of the collective agreement, the establishment of individual employees' remuneration levels and any increases to these must be based only on the employer's assessment of each individual employee's performance of his or her own job.

[10] The Union's position is that it wishes a collective agreement to contain minimum rates for different classes of employees with increases to these being the product of a combination of periodic universal cost of living increases for all employees who meet adequate standards of performance, together with additional increases based on extraordinary person performance as assessed by the employer after a fair performance review process.

[11] The Court decided, in a preliminary judgment,[1] that the pre-6 March 2015 s 33(2) of the Act applies to this case, Jacks having purported to cease bargaining in reliance on that section about two weeks before that section was abolished statutorily. So, not only is this case among, but not the, first to interpret and apply s 32, it will probably be among the last to do so as well, in view of that recent statutory change to the requirements of good faith under the Act.

Relevant facts

[12] The Union covers employees in shop or store retailing. Jacks owns and operates two combined retail and trade building and home products stores known as Mitre 10 Mega in Dunedin and Mitre 10 in Mosgiel. It employs about 170 non-managerial staff including full and part-time staff. It calls its non-managerial staff "team members".

[1] *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 142.

[13] The following is my general impression of some of the background events that have led to this litigation. This assessment has been made from the evidence presented, although this was not complete because of the puzzling and unexplained absence from the hearing of one of the central actors in the case, Martin Dippie. Mr Dippie and his wife are the sole shareholders, and Mr Dippie is the sole director of, a holding company which, in turn, is the sole shareholder in Jacks. Mr and Mrs Dippie have, in effect, owned and continue to own the Jacks business, with Mr Dippie at its helm, for about the last 20 years after purchasing what I infer was a local hardware, timber and building supplies merchant. Some of the Jacks employees, especially in Mosgiel, were engaged before Mr and Mrs Dippie's purchase of the business. Jacks has an average staff turnover rate for the sector, bearing in mind that some of its part-time staff are students in Dunedin.

[14] In recent years especially, Jacks's business has expanded significantly, as has the number of its employees. So, too, has the complexity of the company's management. Jacks has apparently done well financially, based on Mr Dippie's periodic advice to this effect to staff. Probably at the medium end of the spectrum of small to medium business enterprises in New Zealand, Jacks employs, in local terms, a significant number of staff. Mr Dippie and Jacks regard themselves still as a "family business", despite now trading more anonymously under the Mitre 10 brand. One of the attributes of considering and portraying itself as a family business is that staff members are likened to members of an extensive family (although now called a "team") who look after each other, especially in times of trouble or need.

[15] It is significant, also, that there has been no collective union presence within the Jacks business, at least until a couple of years ago. That, too, is not untypical of such family businesses, as is what I assess from the evidence to be Mr Dippie's own view that unions are unnecessary in his business because staff are well treated in a personal or family way. In many similar cases, the emergence for the first time of union members and union officials, the latter of whom are perceived by business owners to be antithetical to that mutually supportive family nature of a business, is puzzling at best, threatening at worst, and most frequently seen as unwanted outside interference in the family. Mr Dippie's reaction to the emergence of the Union and collective bargaining was one of puzzlement and disappointment, as he expressed at

the first collective bargaining session which he attended and at which he spoke before departing.

[16] Unused to dealing with unions and collective bargaining, Jacks approached the emergence of unionism in its business cautiously and carefully. It took legal advice and, from the outset of receiving the Union's notice initiating collective bargaining with it, engaged the local employers' association's lawyer not only as its adviser on employment law, but as an integral and consistent part of its collective bargaining team. As will be seen later in the narrative, that was augmented in late 2014/early 2015 by the engagement of an Auckland barrister specialising in employment law, who also became part of the company's bargaining team as well as its lead legal adviser on employment matters. That dependence on legal and strategic advice is unusual in most collective bargaining, even for a first collective bargaining. Nevertheless, it appears to have ensured that Jacks's legal obligations were carefully laid out and significant attempts were made by it to adhere to those statutory rights and obligations.

[17] Despite significant criticism of the company by union officials, they nevertheless agreed that it complied with its significant legal requirements in bargaining, even if it went no further than it had to in doing so.

[18] Many of the employees affected by this case were, at material times, paid only marginally above the adult minimum hourly rate of pay under the applicable Minimum Wage Orders pursuant to the Minimum Wage Act 1983. Most employees were paid between $14 and $16 per hour although at different levels within that range.

[19] In 2013 there emerged some employee dissatisfaction with the degree of Jacks's control over hours and days worked and rosters, as well as its apparent ability and preparedness to alter these unilaterally without much notice to the employees affected.

[20] All employees were then (and are now) engaged on a standard form of individual employment agreement which was minimal but into which was

incorporated contractually a very extensive range of house rules and policies which were set and varied unilaterally by the employer. Employees had, in practice, little control over their terms and conditions of employment and were completely unable to affect these collectively. So, too, were variations to them determined unilaterally by Jacks, albeit on occasions following a degree of consultation with the affected individual employees.

[21] Until very recently, Jacks conducted, or was meant to conduct, an annual performance review of each employee. This was a process by which an employee's supervisor would fix a rating (from one to three) reflecting the employee's performance of a number of attributes of his or her job as demonstrated over the previous year. The process included an opportunity for the employee to comment on the supervisor's assessments and also set out areas for improvement for the following year. These assessments were signed by both the employee and the assessor. They do not appear to have been linked directly, or referred in any way, to remuneration reviews which were also meant to be carried out annually. I infer this link because of Jacks's insistence that remuneration increases be linked to job performance.

[22] I say that such annual reviews "were meant to be carried out" because the evidence establishes that in some cases at least, employees had either no remuneration reviews conducted for a number of years or, even if those reviews were conducted unilaterally by the company, received no wage increases, whether as a result of them or otherwise.

[23] Jacks's staff remuneration policy was, and continues to be, that levels of, and increases to, remuneration should be set by its assessment of an employee's job performance, and not by reference either to the nature of the position held or an employee's length of service with the company, and therefore experience.

[24] Jacks's employment philosophy also includes an intention not to distinguish in any way between union members and employees who are not union members. Internal committees and other representatives of employees, established for a variety of functions, include both union members and others on groups that performed roles

that in many other workplaces are performed by bodies made up of union and employer representatives.

[25] In September 2013 a staff member of Jacks approached the local organiser of the Union to discuss issues of union membership and the possibility of a collective agreement for Jacks's employees. That approach arose as a result of the employee's dissatisfaction with a roster change which, although he had apparently been consulted about, was to be made over his objections. That employee joined the Union and then, over the following four to five weeks, recruited a further 25 or so members from amongst the Jacks's staff.

[26] During October 2013 there were discussions between the Union's local organiser, Shirley Walthew, and the union members at Jacks about the process of initiating bargaining for a collective agreement. Before that could occur, however, Jacks's human resources manager and administrator raised concerns with the Union about union membership conversations taking place between staff in the store during working hours. Their concern was that these were impacting negatively on the business. Ms Walthew agreed to advise union members that they should have such conversations at reasonable times and for a reasonable duration. However, on 8 November 2013, the human resources officers presented Ms Walthew with a detailed document containing proposed protocols to which they wished the delegate and members to adhere when conducting union business on site. The Union considered that a number of these restrictions contravened the relevant legislation and an amended protocol proposal was put to the company by the Union on 18 November 2013. In the absence of agreement between the parties on this issue, the Union reverted to the legislation's provisions for conduct of union business at Jacks's premises.

[27] Meanwhile, on 18 October 2013, collective bargaining with Jacks had been initiated by the Union. The company complied with its advertising obligations under s 42 of the Act and attempts were then made between Ms Walthew and the company's human resources officers to set dates for bargaining and, first, to settle the terms of a BPA. Although the plaintiff now complains that, from this time, Jacks was consistently dilatory, delayed unreasonably, and even tried to frustrate the

bargaining process by drawing it out interminably, I do not think for the most part that this criticism can be levelled fairly at the company in all the circumstances. Delays in the process were not all attributable to Jacks. Written communications between the representatives were civil, constructive and consistent with what was, for Jacks, a new, complex and difficult experience to be undertaken in conjunction with running a business. That included the current employment on an individual employment agreement basis of a significant number of staff. Ms Walthew, who was at that time representing the Union, was also conciliatory and, although clearly now regretting doing so because she considers that this was not reciprocated, she proverbially cut the company some slack at the time.

[28] In late 2013 the Union and Jacks met to discuss, and to attempt to agree on, protocols for dealings between the two. Protocols could not be agreed at that stage.

[29] Before bargaining commenced, someone then distributed amongst the Union's members at Jacks, a wage table taken from a collective employment agreement that Jacks understood to be one between the Union and another business similar to Jacks known as Bunnings Warehouse (Bunnings). Jacks regards Bunnings as a primary competitor in what it calls "the DIY space". Union members wished to have similar wages to those enjoyed by its members at Bunnings. This distribution of Bunnings's material concerned Jacks significantly. Jacks's own wage information was expected to be kept confidential by its employees and the company feared that collective bargaining and a collective agreement could endanger that secrecy of information by disclosing wage rates to both its other employees and competitors in business, as the Bunnings' wage information appeared to have been disclosed.

[30] In December 2013 the Chief Executive Officer of Jacks, Mr Dippie, relinquished his general managerial responsibilities for employment relations to Neil Finn-House. There were some further delays while this change took effect.

[31] The first bargaining meeting between the parties was on 31 January 2014. Mr Dippie was present for the preliminary part of this initial bargaining. He spoke in generalities about the business and, I assess, although acknowledging the Union's entitlement in law to bargain, nevertheless conveyed the impression to the plaintiff's

representatives that the Union and a collective agreement were unnecessary in what he considered was a happy and successful working relationship between staff and the company. After these preliminaries, the parties discussed a BPA. There were difficulties in agreeing some aspects of the BPA and the parties adjourned their bargaining to attempt to resolve these problems.

[32] The next bargaining meeting between the parties was on 5 and 6 March 2014. At the conclusion of these meetings the BPA was finalised and signed. It contained no precise express reference as to what would occur if bargaining was deadlocked. That is perhaps not surprising because, as it then stood, the Employment Relations Act 2000 (the Act) made provision for such a circumstance out of which the parties could not have contracted even if they wished to do so.

[33] Provisions of the BPA that are relevant to the decision of this case include those at cls 7.2, 14 and 15 as follows:

> 7.2 … Claims or counterclaims may be amended or withdrawn by either party at any time during negotiations.
>
> **14. When the parties consider bargaining is completed**
>
> 14.1 The parties agree that bargaining would be completed if at the conclusion of the ratification process and written confirmation of the results, all parties have signed the Collective Agreement.
>
> **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. …

[34] As to the BPA's agreed provision that bargaining will end when an agreement is concluded between the parties, Jacks's position conveyed by Mr Finn-House in evidence is that it does not "believe that the FIRST position can be right … [and that] … seems ridiculous" if it means that the parties could still be engaged in bargaining but without being able to resolve that.

[35] Also on 5 March 2014 the Union presented its bargaining claims in the form of a draft collective agreement. This document consisted of 25 A4 pages. Again not surprisingly, many of the terms and conditions sought by the Union differed significantly from those that Jacks had in its existing form of individual employment agreement (IEA) with staff. For example, the Union's proposals included that remuneration increases would be based on roles held and individuals' tenures of those roles rather than the assessment of their performance in those roles. Another of Jacks's concerns was that the Union's proposed terms and conditions of employment were so different to those in its IEAs with employees, that the majority of employees on those IEAs who were not union members would have to agree to variations of their agreements to accommodate the Union's proposals for a collective agreement if the business was to continue to operate efficiently and, as between all employees, equitably.

[36] Among a number of heads of fundamental opposition to the Union's proposals was Jacks's wish not to have (tenure-based) remuneration scales included in a collective agreement. Jacks also opposed the Union's proposals to include in a collective agreement, minimum statutory rights such as parental leave, rest and meal breaks, and the like. In the circumstances of Jacks's unfamiliarity with draft collective agreements, of the unusually comprehensive nature of the document that had been presented to it, and because of the financial and other implications for the business and its staff, the company wished to take time to consider and respond to the Union's proposals.

[37] In the course of bargaining, before the 5 and 6 March 2014 bargaining meeting, Jacks had its accountants prepare a costing of the Union's initial proposals in bargaining. This purported to show that if the Union's proposals were agreed to, and then passed on to the remainder of the workforce who were not covered by a collective agreement containing those remuneration provisions, the company's employment costs of approximately $5.4 million per year would increase by a little over $2 million, what Mr Finn-House said would be a 45 per cent increase that was completely unsustainable for the company. As was established in evidence, however, this costing was inaccurate and/or, as time and bargaining went on, outdated in a number of respects.

[38] First, the cost to the company of improving the terms and conditions of the majority of employees who were not union members would come about as a result of Jacks's view that it was obliged to pass on the same benefits to non-union members although the Union's claim in collective bargaining were only for union members.

[39] It must be said, however, that any significant improvements in terms and conditions obtained in collective bargaining for union members could well have encouraged other employees on individual employment agreements to join the Union and, thereby, to become subject to the collective agreement. This would have resulted in better terms and conditions for them, and increased costs to Jacks beyond those it would have incurred in respect of only those union members who were being bargained for. That was a valid consideration for Jacks at the time and underpinning its position in the bargaining.

[40] Next, by the time that this analysis was relied on, the Union had withdrawn its claim in collective bargaining for redundancy compensation reducing, on Jacks's figures, the increase of $2 million by half. By the time the company pulled out of bargaining, the Union had also modified or abandoned other claims that would have increased Jacks's labour costs.

[41] There were further bargaining meetings on 30 May, 13 August, 27 August and 15 September 2014. Limited progress on significant proposed terms and conditions was achieved between the parties at these meetings or in some of the intermediate exchanges between the bargainers by email and telephone. In particular, the Union was surprised and even perturbed to have encountered an employer which was not prepared to address remuneration at all in a collective agreement and, from what the Union understood to be Jacks's stance, was not prepared to agree to a range of terms and conditions including remuneration, additional leave and the like, which would come at an increased cost to the employer.

[42] One particular example of the resistance of a company that portrayed itself as a family business to a modest claim in bargaining, was the defendant's opposition to contributing 77 cents per employee union member per week to a funeral cost

insurance scheme which had been arranged and established by the Union. Jacks's opposition to this claim appeared to be expressed not as one of unaffordability but, rather, that because the Union did not pay Jacks's business insurance premiums, there was no reason why the company should meet the premiums for employees' funeral coverage. These and similar unusual oppositional stances taken by Jacks caused the Union to consider that the collective bargaining could be progressed by the involvement of a more senior union official and it sought Jacks's agreement to this.

[43] Before the 13 August 2014 bargaining meeting, the Union proposed to add to the membership of its bargaining team, the Union's Southern Regional Secretary, Paul Watson. Jacks regarded this as a departure from the parties' BPA and would not agree. Following the Union's threat of litigation if it declined to continue to meet with its proposed augmented team, Jacks backed down and Mr Watson was involved in bargaining thereafter.

[44] At that time, also, Jacks was conducting its annual remuneration reviews, wishing that all employees would have their pay reviewed, including those represented by the Union in the collective bargaining. Jacks and the Union agreed that these remuneration reviews would go ahead and a joint statement to this effect was issued. Union member employees were given pay increases ranging from nil to about 12 per cent per annum, with the mean increase being about 8 per cent per annum. For many employees, these were significant increases on a percentage basis, although for many also, they were the first pay increases for several years. This adjustment to remuneration rates under Jacks's own performance review system became effective in August 2014.

[45] At the bargaining meeting on 27 August 2014 Jacks proposed an alternative remuneration scale based on performance, together with a band of wage rates based on job codes. This was an apparent about-face to Jacks's previous opposition to a collective agreement containing any reference to remuneration. The Union wished to consider this development so that no further progress could be made for some time, even in resolving other outstanding issues. These included long service leave,

sick leave, redundancy, a disciplinary process and the term of the agreement the commencement of which the Union wished to back-date to March 2014.

[46] At the bargaining meeting on 15 September 2014 the Union made counter-proposals to Jacks's performance-based pay structure. The Union's counter-offer on wages was similarly structured to Jacks's proposal, but differed as to detail including having a single minimum wage rate for each class of employee, rather than Jacks's range of rates.

[47] Jacks then immediately withdrew its remuneration claim, claiming that the Union's proposals, if they were agreed to, would provide union members with four pay increases in the period of 12 months. It was not explained how agreement to Jacks's proposal would not have meant, if not four, then multiple wage increases in the same period. Jacks reiterated, also, that it was unnecessary for remuneration to be contained in a collective agreement and, as already mentioned, that this view was reinforced by its professed concerns for the confidentiality of its employees' remuneration.

[48] In mid-October 2014 unionised staff sent an open letter in the form of a petition to the Managing Director, Mr Dippie, saying that they wanted pay scales included in the collective agreement and, if they were not, that the Union "would involve the media". Neither Mr Dippie personally nor Jacks responded to the employees, although Mr Finn-House did deal with it eventually in subsequent correspondence with the Union, by rejecting it.

[49] In an effort to make progress in what appeared to Jacks at least to have become stalled negotiations at that point, the Union proposed obtaining the assistance of a mediator and declined to negotiate further until mediation could be undertaken. It did so in reliance on cl 15.1 of the BPA set out at [33]. Mediation was by agreement and took place on 10 November 2014. Despite efforts over a period of between six and seven hours on that day, facilitated by an experienced mediator, no real progress was made on the major roadblock issues.

[50] The parties' approach to bargaining had been that if agreement could not be achieved or progress made on a particular issue after discussion of it, the negotiators would move on to the next provision to be discussed in the proposed collective agreement. Some provisions had been agreed and others were 'parked' as just described. This progression was recorded by Jacks because, it said, when it had first attempted to timetable an update, the manner in which the Union's draft collective agreement was formatted did not accurately represent the parties' agreed positions in Jacks's opinion.

[51] Jacks took the view that despite some proposals being agreed upon, the parties in bargaining were not necessarily making progress due to very significant areas of disagreement. This was that, despite ongoing discussion, the parties could not reach a compromise or agreement.

[52] Even after the mediation on 10 November 2014, a fundamental difference remained between the parties, the Union being adamant that it sought pay scales included in any collective agreement and Jacks being equally adamant in resisting this. There were also other differences between the parties, but this was the major road block.

[53] On 12 November 2014 Jacks prepared and provided to the Union a summary of its view of the bargaining and the status of each of the parties' claims, in the form of a spreadsheet. It says that this illustrated that there were still numerous claims on which the parties had not reached agreement.

[54] In late November 2014 union members presented an "open letter" to Jacks's Managing Director, Mr Dippie. Signed by named individual employees, the union members expressed their "deep dissatisfaction with the company's current bargaining position" and wished to see a company commitment to include "a remuneration schedule in a new collective agreement and for bargaining to recommence around that matter and other outstanding issues". The employees' open letter advised Mr Dippie that if the company was not agreeable to recommencing bargaining, then they had instructed the Union "to notify the media of our concerns and to call a two-hour paid meeting of members in December under s 26 of the

Employment Relations Act". The employees respectfully asked that urgency be given to concluding the protracted negotiations.

[55] In early December 2014 the Union proposed to hold a stop work meeting of its members on 19 December 2014 which coincided with one of the business's busiest days of the trading year. To avoid this, Jacks later agreed to recommence collective negotiations in early 2015. The correspondence between the parties about these events is important to the decision of this case, and was as follows.

[56] On 3 December 2014 the Union's organiser, Ms Walthew, wrote to Mr Finn-House confirming that the affected employees had been "particularly upset that the company had failed to present a wages schedule as part of its settlement package". Ms Walthew reiterated that if there was no willingness to progress the substantive outstanding matters, then union members wanted to hold a two-hour stop-work meeting with the Union to discuss their next steps. Ms Walthew sought an assurance from Mr Finn-House by the end of the following day that the company would resume bargaining either directly between the parties or with the assistance of a mediator. Ms Walthew's letter concluded:

> In the meantime I need to advise you that under Section 26 of the ERA the Union intends holding a two hour paid stop meeting on 19th December 2014 between 2:00 pm and 4:00 pm. The reason for this advanced notice is that we will need to plan a meeting should it be necessary as the statutory holiday period is close and members want to meet before then.

[57] Ms Walthew reiterated that the Union was hopeful of getting back to negotiations "very soon".

[58] Mr Finn-House's reply on behalf of Jacks was contained in a letter to Ms Walthew dated 8 December 2014. He wrote:

> It is our intention to continue bargaining until we have a document both parties are agreed upon. As I have stressed many times, we are negotiating an inaugural collective agreement and it is extremely important to us to have a document that we can work with and will fit into our business model and values. Therefore, I believe it is naïve to impose timeframes on such negotiations, they will take as long as they take. I fully expected them to be a robust process as there are strong views on both sides. If your members, our team, are frustrated then I make no apologies as this is not a renegotiation, this is a serious multi-million dollar agreement and due to every single

> clause requiring precise negotiation rather than collectivising our IEA, the process is inevitably long.
>
> We obviously still have a number of issues that are outstanding and we are happy to get back to the negotiation table with you to continue bargaining. Given this is our busiest trading period, you would appreciate we are unable to meet in December 2014. My team and I are away in January 2015, therefore the earliest we can recommence the bargaining process is February 2015.

[59] Mr Finn-House rejected the request for a stop-work meeting on 19 December 2014, not only because that was the Friday before Christmas but because Jacks had already agreed to three s 26 meetings for union members in line with its legal obligations.

[60] Mr Finn-House continued:

> Threatening us with media is not helpful. We have acted in good faith throughout this process and while the negotiations are protracted, it is with good reason. I do not see any value in publicising where both parties do not agree and to be frank I do not understand what your motivation is when both sides of the bargaining table cannot settle. We are certainly not seeking to intimidate with pressure tactics just because we disagree with your position. However, just to be clear, we are extremely serious about our reputation locally and Mitre 10 is one of the most trusted brands in New Zealand. Therefore, any media comment needs to be consistent with section 10.1 of the bargaining process agreement signed by you and I. Any failure to abide by this will be vigorously contested and as such I would request that this threat is withdrawn if we are expected to recommence bargaining.

[61] As already noted, in these circumstances, a compromise was reached with Jacks agreeing to a 30-minute stop-work meeting on 19 December 2014 to be held at a time that caused least inconvenience to the business on that day.

[62] On Saturday 13 December 2014 another issue arose between the parties. On that day the Union had delivered a notice to the Mosgiel store for display to staff advising of the stop-work meeting on Friday 19 December 2014 by its members. Mr Finn-House then advised Ms Walthew by email sent on the same day that:

> … this has not been agreed upon or authorised and is not to occur. We have fulfilled our legal obligation for 2014 with respect to sect 26 meetings, Team members attending this meeting do not have permission to leave work.
>
> … I am very disappointed at such an adversarial approach to our business at such a critical trading time with many customers that require serving. It is

> not helpful to be telling your members that they have permission to have a stop work meeting without permission.

[63] Ms Walthew's email to Mr Finn-House sent at the end of the business day on Monday 15 December 2014 included, after asserting the lawfulness of the planned stop-work meeting on 19 December 2014:

> We have clearly indicated on a number of occasions that this was the basis members instructed First Union to initiate the bargaining process for a new collective agreement. As stated in our conversation earlier today if the company is willing to give a commitment in response to their open letter to recommence bargaining that includes discussions on a remuneration schedule then the two hour stop work meeting could be deferred in favour of a half hour meeting to pass on that commitment to all members and that negotiations will reconvene early February 2015.

[64] Finally, on 15 December 2014 Mr Finn-House confirmed by email addressed to Ms Walthew of the Union:

> 1. [A] ½ hour meeting on site on Friday 19.12.14 to let your members know what is happening will be acceptable. …
> 2. As discussed we will be available to meet in Feb 2015 to carry on bargaining.
> 3. With regards to the remuneration schedule we are still not wanting to have this in the collective agreement due to it being part of our performance framework, we can negotiate on issuing it as a policy document to be included with our performance framework to ensure transparency for the members.

[65] After the Christmas break, the parties resumed bargaining on 20 February 2015. The discussions began with remuneration and with Jacks's invitation to the Union to indicate whether it was prepared to move from its previous position. The Union indicated that it was not; it still sought the inclusion of pay scales in the collective agreement. After a short adjournment, Jacks advised the Union of its position by reading out a largely pre-prepared statement which said:

> - Jacks Hardware & Timber has been considering its position over the weeks since we last met. We have now invested a year of time and considerable resources in attempting to settle a collective agreement with you, FIRST Union.
>
> - Prior to today, we believed that there were some philosophical differences that represented road blocks to us concluding a collective agreement. In particular, these included the entirely different remuneration systems that FIRST Union and Jacks Hardware & Timber wanted to have included in any collective agreement. They also include

issues such as sick leave entitlements and also payment for funeral leave, among a number of others.

- We have spent many months trying to resolve these issues and have also attended mediation on 10 November for a full day. We have discussed all of your claims. We believe we have provided clear and reasonable explanations of our position in relation to each claim.

- Neither party requires further information to assist with resolving the collective. There are no requests for documents or information that remain unresolved.

- In spite of these steps, we do not believe that these steps have led to us being any closer to resolving the collective. What is required is a fundamental shift in both parties' positions.

- Jacks Hardware & Timber is not prepared to move fundamentally from the position it has already advanced over the last few meetings we have had. For example, we will not agree to having a pay structure that does not reward individual performance and we also do not agree to the inclusion of pay in a collective agreement. What we have already heard here today is that there is not likely to be an adjustment in either parties position.

- Overall, this leaves us in a position where there are a number of fundamental roadblocks to our ability to successfully resolve and conclude the proposed collective agreement.

- We have considered what to do about this and what options there are for resolving the differences between us. We have bargained for a long time. We believe that we have worked together (i.e. with you) to identify the barriers that exist that are preventing us reaching an agreement but do not believe there is anything further we can do. We have attended mediation – and we do not believe that further mediation is likely to assist. We do not believe that there is anything further that we can do.

- As a result we have then considered what our legal obligations are. The bargaining process agreement does not provide any specific process that applies in these circumstances. However, it does stipulate that bargaining is to be conducted in accordance with the Code of Good Faith. The Code of Good Faith provides that the parties to bargaining are not required to continue to meet each other about proposals that have been considered and responded to. We believe that Jacks Hardware & Timber and the Union itself have considered each other's proposals and have considered and responded to them. Looking at it the other way, we do not believe that there are any outstanding proposals in this regard. Accordingly, we believe that obligation is fulfilled.

- The Code also requires that when we come to a standstill or reached a deadlock about a matter then we must continue to meet consider and respond to proposals on other matters. We believe that we have responded to all other matters. There is nothing "untouched". The roadblocks that we have identified are part of a cumulative agreement. Although we have reached agreement, in theory, on some potential

clauses there are still many clauses that have not been agreed – and this is in spite of a considerable investment of time and effort.

- As I've mentioned, we have also considered whether further mediation will assist us with resolving the collective. Neither party is prepared to move in relation to the clauses that are unresolved. Mediation is, in our view, very unlikely to change this.

- Based on all of the above, Jacks Hardware & Timber believes that it has taken this bargaining as far as it can. In accordance with s33 of the ERA, it believes that it is now able to say that there are genuine reasons, which are based on reasonable grounds not to conclude a collective. Given this, Jacks Hardware & Timber believes that bargaining is able to be concluded. Accordingly, it will take no further part in bargaining for this collective, which is now at an end.

[66] The parties have not engaged in any further bargaining since 20 February 2015. Instead, the Union made an application to the Employment Relations Authority on 2 June 2015 and the Authority removed it to the Court for decision at first instance.[2]

[67] I now need to go back in time to deal with a series of contemporaneous events affecting one employee of Jacks which I understand the Union to say exemplifies relevant dealings by the company with individual employees during the period of bargaining. I am not satisfied that the following events affecting Anne Burridge were necessarily representative of Jacks's dealings with all employees or even those who were union members. However, the following events do affect, and assist in deciding, the question at the heart of this case, the genuineness of Jacks's belief that it could not reach agreement with the Union, and the reasonableness of its grounds for that belief. Ms Burridge was, however, as a union member and bargaining delegate, closely involved with the collective bargaining, and her circumstances are arguably reflective of how Jacks treated its staff involved in, or potentially affected by, the collective bargaining.

[68] During 2010 and 2011, Ms Burridge's work performance as a check-out operator was rated, in all eight categories except one, at the highest level and she received a total rating score of 23 out of 24 with her reviewer manager's comments being consistent with those rankings. Nevertheless, Ms Burridge had received no remuneration increase during those two years.

[2] *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZERA Christchurch 87.

[69] In August 2014 whilst bargaining was going on, Ms Burridge received, unilaterally in the sense that this did not appear to be related to a performance assessment if indeed one took place, a wage increase of almost 12 per cent. Most recently, in 2015, and in the absence of any suggestion that there had been any deterioration in her work performance, Ms Burridge received no wage increase although, by 2015, the company had adopted a different and more complex performance development assessment system.

[70] Remarkably, in the sense that Jacks's strongly held philosophy is to link wage increases to individual performance assessments, in late August 2015 Ms Burridge was advised that she would not be receiving any wage increase for the 2015/2016 financial year. That determination was remarkable because by the time of the hearing in early November, Ms Burridge's performance assessment had still not been completed. There were matters that she still wished to discuss with her supervisor who had agreed to do so in mid-November, before finalising that performance assessment and seeking Ms Burridge's agreement to it. That failure by Jacks to adhere to its policies of tying wage increases to performance assessments reinforced, justifiably in my view in some respects, Ms Burridge's suspicion that she was being disadvantaged or penalised for her involvement in the proceedings, in the collective bargaining and in union activity, by being unfairly and prematurely awarded no wage increase. Her belief was that her almost 12 per cent wage increase in August 2014 was also a tactical response by Jacks to the revelation by the Union that some employees, including Ms Burridge, had gone for several years without remuneration increases. Ms Burridge believed that, in August 2014, unless Jacks could show its staff that it was making significant remuneration increases, there was a risk of expanding union membership. The plaintiff and Ms Burridge were justified in my view in holding those strong suspicions.

[71] As I have already noted, it appears from Jacks's documentation that by 6 October 2015 Ms Burridge had been told that she would not receive a wage increase for the following year although the performance development assessment process had not been completed by then. When Ms Burridge discussed her deficiencies with her manager, these included, principally if not exclusively, that she did not offer to sell additional products to purchasers at the check-out (or at least to the "mystery

shopper" on one occasion who reported on her performance in this way). Another alleged deficiency was that she had a low rate of customers who filled out surveys about their visits to Mitre 10. This indicated to the company that she was not informing many customers about the survey and/or encouraging them to complete it.

[72] Ms Burridge's response to this included that the company's conclusion was true in relation to a number of repeat customers well-known to her whom she considered were sick and tired of being asked repeatedly by her to fill out the survey form.[3] The advice given to Ms Burridge by her manager was that her wage rate would not change for the forthcoming year but that there would be assistance given to her to improve her performance for the next year's assessment.

[73] At least in the case of Ms Burridge, who was both a long-term and well performing employee and took a prominent role in the Union and the collective bargaining, Jacks's assessments of her work performance and relating to her wage reviews and their outcomes, reflected significantly its responses to the Union's actions in collective bargaining. Because there is no case advanced on Ms Burridge's behalf that she was discriminated against in her employment by reason of her participation in union activities, it is inappropriate to reach any further conclusions about that relationship.

Legislative background to s 33

[74] Surprisingly, because this is the first case to address authoritatively the interpretation and application of s 33, neither party presented submissions about the interpretation of these phrases intended by Parliament by reference to statutory materials. The following is, therefore, research which has been undertaken by the Court.

[75] The Act's original s 33, as enacted in 2000, provided:

> **Duty of good faith does not require concluded collective agreement**
> The duty of good faith in section 4 does not require a union and an employer bargaining for a collective agreement –

[3] This is a modern retail trend affecting even innocuous and minor purchases of goods and services which is not always welcomed by customers.

(a) to agree on any matter for inclusion in a collective agreement; or
(b) to enter into a collective agreement.

[76] It will be seen from the foregoing that there was no requirement for the parties to conclude collective bargaining and, specifically, a party's unwillingness to agree on a particular item for inclusion in a collective agreement was not deemed to be a breach of good faith.

[77] Following a Ministerial review of the 2000 Act in practice, the Minister of Labour concluded that s 33, as originally enacted, was a hurdle to successful bargaining and a new section was framed.[4] This proposed new section was included in the Employment Relations Law Reform Bill 2003 and sought to reverse the emphasis in the original s 33 from one in which there was no requirement to conclude collective bargaining, to a legislative expectation that bargaining will be concluded unless there is a genuine reason not to do so. The explanatory note to the 2003 Bill said:[5]

> *In order to encourage collective bargaining and settlement*, the Bill amends the Act to make explicit the principle that the process of collective bargaining should result in a collective agreement unless there is a genuine reason not to.

[78] The first draft of the Bill contained the following clause:

> **Duty of good faith requires parties to conclude collective agreement unless genuine reason not to**
> The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is genuine reason not to.

[79] The Bill was reported back from a select committee which recommended a clarification of what was meant by a "genuine reason". The Select Committee identified "uncertainty about whether a genuine reason could be a genuinely held belief, or whether it was to be determined on a more objective basis."[6]

[80] The report of the majority of the members of the Select Committee explained its intention as "wish[ing] to ensure that opposition or objection in principle to

[4] Mazengarb's Employment Law ERA 33.4, 301,605.
[5] Employment Relations Law Reform Bill (92-1) (explanatory note) at 4 (emphasis added).
[6] Employment Relations Law Reform Bill 2003 (92-2) (Select Committee report) at 6.

collective bargaining or collective agreements does not prohibit the conclusion of a collective agreement."[7] At the same time, however, the Select Committee reported that it wished to make allowance for the possibility, in good faith, of genuine reasons that are objectively founded preventing the conclusion of collective bargaining."[8] Therefore, the Select Committee recommended the addition of the phrase "based on reasonable grounds" qualifying the phrase "unless there is a genuine reason not to do so".[9] It said that its aim was to clarify "that the approach is objective and does not include genuinely held beliefs that are not objectively reasonable".[10]

[81] This led to the inclusion of the new subcl 2 that now appears in s 33:

> (2) For the purposes of subsection (1), genuine reason does not include opposition or objection in principle to bargaining for, or being a party to, a collective agreement.

[82] As is often the case, unfortunately, these legislative process materials do not assist greatly in interpreting s 33, at least beyond emphasising that the test is to be ascertained objectively as opposed to subjectively.

Genuine reason based on reasonable grounds

[83] The former s 33 of the Act (that was in effect until 6 March 2015) provided relevantly as follows:

> **33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to**
>
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.
>
> (2) For the purposes of subsection (1), genuine reason does not include—
>
> (a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or
>
> (b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.

[7] At 6.
[8] At 7.
[9] At 6-7.
[10] At 6.

[84] There are a number of features of the former s 33 which require examination and interpretation in deciding this case. Some of these significant questions have not been examined before although, in view of the section's repeal and replacement earlier this year, it is also unlikely that it will be for consideration in many cases similar to this under the current legislative regime.

[85] First, consideration of s 33 in light of its legislative background indicates that the examination of the party's genuine reason based on reasonable grounds must be objectively assessed. It is not the party's subjective assessment of either the genuineness of reason(s), or the reasonableness of its grounds, that is the test. That is an assessment that Parliament has left largely, although not completely, to the specialist institutions, the Authority and the Court, to determine in all relevant circumstances including current collective bargaining practices.

[86] The second notable feature of s 33 is that it does not, as is sometimes commonly thought, require a union and an employer bargaining for a collective agreement to conclude a collective agreement in most circumstances. Rather, the section deems it a requirement of the duty of good faith in s 4 of the Act that a union and an employer bargaining for a collective agreement are to conclude such an agreement in most cases. The ultimate statutory objective is, nevertheless, the conclusion of a collective agreement, at least in most cases. That requires recourse to s 4 of the Act in determining the meaning of s 33(1).

[87] Next, the exceptions to the particular duty of good faith requiring the conclusion of a collective agreement, involve two separate elements. These are "genuine reason" and "reasonable grounds". First, one or both of the parties must have "a genuine reason" not to do so. The legislation does not specify whether either the union or employer parties, or both parties, to collective bargaining must have that genuine reason. It is sufficient, in my conclusion, for one party (in this case, the employer Jacks) to have such a genuine reason as long as the failure to conclude a collective agreement is not a breach of the obligation of good faith under s 4.

[88] Section 33(2) sets out two alternative circumstances which the section deems not to be genuine reasons. It is noticeable that these exclusions are from the class of

"genuine reason[s]", not the class of "reasonable grounds". First, pursuant to subs (2), it is not a genuine reason under subs (1) that a union or an employer may oppose, or object in principle to, bargaining for, or being a party to, a collective agreement. Second, and alternatively, pursuant to subs (2) a genuine reason required by subs (1) does not include disagreement about including, in a collective agreement, a bargaining fee clause under Part 6B of the Act. This too, in turn, requires at least a brief examination of the legislation's provisions affecting bargaining fee clauses under Part 6B, if only to ascertain the statutory context in which exceptions to the general rule are not allowed.

[89] Part 6B of the Act ("Bargaining fees") was added to it by s 30 of the Employment Relations Amendment Act (No 2) 2004, on 1 December 2014. It consists of ss 69P-69W (inclusive). A bargaining fee clause means a provision in a collective agreement applying to "employees who are not members of a union and who perform work that comes within the coverage clause of the collective agreement."[11] A bargaining fee is an amount payable by such an employee to a union, whether by a lump sum or on a periodic basis,[12] in return for the benefit of the application to that non-union employee of the provisions of a collective agreement. Such a fee is negotiated by a union whose members in the employment of the same employer contribute fees for that purpose.

[90] Part 6B, as a new provision from 2004, was intended to address the perceived inequities of what was described as 'free riding' by non-union employees who obtained the benefits, but did not pay a contribution towards the costs of bargaining for a collective agreement.

[91] That an employer may bind that employer's non-union employees to pay a fee to the union was anticipated to be controversial and likely to meet resistance in principle from some employers, not to mention the non-union employees. Nevertheless, Parliament considered, and it continues to be the law, that bargaining fee clauses may be negotiated for in collective agreements. Section 33 seeks to avoid employers opposed to such arrangements being able to avoid thereby entering

[11] Employment Relations Act 2000, s 69P.
[12] Section 69P.

into collective agreements with unions. Because bargaining fee arrangements do not feature in this case, my examination of this ground is for the purpose of divining the overall statutory intent of s 33. It reinforces my conclusion that s 33(2) was intended to address what might be called "principled" objections to entering into collective agreements or at least collective agreements' usual contents.

[92] Returning to s 33(1), the controversial question arises whether the two circumstances outlined in s 33(2)(a) and (b) constitute the only circumstances in which a party's reason under subs (1) may not be a genuine reason. If that is not so, will other genuine reasons be affected in their interpretation by the nature of the two examples given?

[93] I conclude that the two specific examples in subs (2) of what are not "genuine reason[s]" do not limit the class of statutorily unacceptable reasons. They are exemplary and have been included by Parliament in an attempt to address what might be two of the more common reasons that a party may have (for refusing to conclude bargaining); but these examples are not exclusive. Specifically, they do not exclude Jacks's reasons in this case simply because it has entered into collective bargaining, claiming that it intends to conclude a collective agreement but so circumscribing, as a matter of principle, the essential components of a collective agreement as to make the conclusion of bargaining extremely difficult if not impossible.

[94] Next is the equally challenging question of what is meant by the word "genuine" in the phrase "a genuine reason" in subs (1). In common use, at least these days, the word "genuine" means sincere, not a pretence or a sham. It focuses on the reality of a person's belief or assertion. However, by deeming that a reason is not a genuine reason when it includes either of the two grounds under subs (2), Parliament has apparently legislated for an uncommon, or term-of-art definition of genuineness. So, for example, a party's sincere and real objection in principle which might commonly be assessed as "genuine" will not be a genuine reason where that is an objection in principle to bargaining for a collective agreement. It follows that if Parliament intended a particular and uncommon meaning to be ascribed to the word 'genuine' in s 33 (1), how should it be interpreted?

[95] In determining that something is not a "genuine reason" in subs (2), I conclude that Parliament has addressed the cumulative effect of those words, so requiring the first word, "genuine" to have a particular meaning either instead of, or at least in addition to, its current common interpretation. So, however sincere, honest or transparent a party may be in holding the view that it will not enter into a collective agreement, that is not sufficient. 'Genuine' also takes its meaning from the examples set out in subs (2) which are declared not to be "genuine reason[s]".

[96] Next, pursuant to subs (1), whatever constitutes a genuine reason must be "based on reasonable grounds". Again, what Parliament intended to constitute "reasonable grounds" must be ascertained but here, unlike the phrase "a genuine reason", Parliament has not given any indication in s 33 about what might constitute "reasonable grounds" on which a genuine reason is based. In the circumstances of this case, were the defendant's grounds for purporting to end bargaining (opposing remuneration being dealt with in a collective agreement and/or opposing a remuneration system based other than solely on the employer's assessment of individual employees' performance of their jobs) reasonable grounds?

[97] Determining the reasonableness of grounds must be undertaken on a case-by-case basis and from the context of current bargaining for and setting terms and conditions of employment, both collectively and individually. So, for example in this case, all of the relevant circumstances of the particular parties will determine whether the grounds for having a genuine reason will be reasonable. In particular, but not exclusively, the employer's insistence in this case that details of employees' remuneration must remain confidential between the individual employee and the employer, will need to be assessed objectively as to the reasonableness of the employer's reason for not entering into a collective agreement in reliance on that principle.

Case law on s 33

[98] There is really only one judgment interpreting and applying s 33 of the Act, in its 2004 incarnation, applicable to this case. That is *New Zealand Public Service*

Assoc Inc v Secretary for Justice.[13] In that case, also, a union applied to the Court for a declaration that an employer's unilateral conclusion that bargaining had ceased was in breach of s 33. Although decision of that case turned very much on its facts (bargaining was still, in fact, continuing even at the date of the hearing), the Court's consideration of s 33 is nevertheless a useful guide to its application in this case.

[99] After summarising the importance of other sections in the Act (notably 3, 4, 31(d) and 32) in the interpretation of s 33, the Court concluded:[14]

> The legislative scheme for bargaining encourages its continuation, even in difficult circumstances, and emphasises that in all but exceptional circumstances, collective bargaining should result in the settlement of a collective agreement between the parties.

[100] The judgment then referred to the Act's other mechanisms for addressing problems in collective bargaining:[15]

> … These include, first in escalating order of seriousness, seeking the assistance of a mediator under Pt 10 of the Act. In practice, as in this case, parties may also involve a privately retained mediator instead of one provided by the Department of Labour. …
>
> [26] Since 2004, the legislation has also provided additional statutory mechanisms for resolving serious difficulties in concluding a collective agreement by what is called facilitated bargaining in ss 50A-50I of the Act. …
>
> [27] Finally, in the most serious of cases (as defined by a very high qualifying threshold), the Act provides for the Authority to fix the provisions of a collective agreement, in effect a binding arbitration. …

[101] The judgment then examines what is meant by "bargaining" but because that is not an issue in this case, I will not repeat what is said in the *PSA* case.

[102] The Court proceeded to summarise generally the scheme of the Act which is:[16]

> … essentially that collective bargaining ceases in two ways. The first is upon settlement of a collective agreement that is subsequently ratified. The other way in which bargaining ceases, although it is not so expressed in the

---

[13] *New Zealand Public Service Assoc Inc v Secretary for Justice* [2010] NZEmpC 11, [2010] ERNZ 46 [*the PSA case*].
[14] At [24].
[15] At [25]-[27].
[16] At [47] and [49]-[50].

> legislation, is when a settlement cannot be reached because one or more of the parties has a genuine reason or reasons, based on reasonable grounds, not to conclude a collective agreement.
>
> …
>
> [49] The statutory scheme is that collective bargaining should ordinarily conclude upon the settlement and subsequent ratification of a collective agreement but accepts that in certain circumstances this will not be able to be achieved so that parties do not have to continue to bargain ad nauseam when either or both have a genuine reason to not enter into a collective agreement.
>
> [50] I should note, also and perhaps obviously, that parties to collective bargaining may of course agree to its cessation other than by their entry into a collective agreement but that is not the position here.

[103] The judgment in the *PSA* case was based essentially on the employer's non-adherence to the parties' Bargaining Process Agreement (BPA) and the Court did not need, in those circumstances, to go on and examine the potentially difficult questions of what were genuine reasons, based on reasonable grounds, for the employer not concluding a collective agreement and declaring unilaterally an end to the collective bargaining. However, the Court in the *PSA* case observed:[17]

> [61] I deal first with the defendant's contention that she is entitled to regard and declare collective bargaining at an end because the statutory test, in effect for doing so, in s 33(1), has been satisfied. What a party in the position of the defendant must establish is that she has a genuine reason, based on reasonable grounds, not to conclude a collective agreement. The defendant has concluded in this case that the parties' bargaining is deadlocked. That is not the same thing as determining not to enter a collective agreement. Indeed, the defendant has throughout expressed the strong view that she wishes to conclude a collective agreement with the plaintiff. That is the defendant's preferred, indeed strongly preferred, means of settling terms and conditions of employment with the substantial number of her employees that are members of the PSA.
>
> [62] So while I accept that the defendant's conclusion that the bargaining is deadlocked is genuine, that does not satisfy the test under s 33(1) for not concluding a collective agreement as the statute otherwise requires.
>
> [63] Alternatively, if the defendant's case is that she has a genuine reason not to conclude a collective agreement, I am not satisfied that this is reached on reasonable grounds in all the particular circumstances of this case.
>
> [64] The union has not withheld unreasonably its agreement with the defendant's position that there is a genuine reason, based on reasonable grounds, not to conclude a collective agreement settlement. That is because it is reasonable for the union to conclude at this stage that although currently deadlocked, the bargaining is not in such a state that, as [counsel for the defendant] submitted, it would be futile to attempt to continue to bargain ad infinitum.

[17] At [61-[65].

> [65] That is for a number of reasons including the unexceptional duration and intensity of the bargaining to date and the preparedness of the parties to continue to meet with the assistance of a mediator to try to explore options and compromises to achieve the strongly-held mutual goal of a collective agreement. A cessation of bargaining other than by concluding a collective agreement has significant ramifications for the parties and the union members in particular. These include what were described in evidence as the four "interests" that were taken into account by the defendant when she decided to treat bargaining as at an end and would flow as matters of important factual and legal consequence from that decision if it were correct.

[104] The *PSA* case distinguishes between deadlocked bargaining and futile bargaining, the former of which states is addressed by and amenable to other statutory provisions for making progress towards a collective agreement.

Interpretation of the BPA

[105] The relevant clauses of this document have been set out at [33]. They require examination because the parties now disagree about their interpretation, and their contents affect whether good faith has been followed in the bargaining.

[106] The starting point for interpreting the BPA and the consequences of this, is where BPAs sit in the legislative scheme for collective bargaining. Also relevant in this exercise is the statutory code of good faith promulgated under s 35 of the Act at the relevant time which also provided Ministerial directions to parties about minimum standards in collective bargaining.

[107] At the relevant time the Ministerially-approved Code of Good Faith in Collective Bargaining 2005 was that approved on 12 August 2005 which had replaced the initial Code approved by the then Minister of Labour on 1 May 2001. In the Minister's introductory approval remarks he said:[18]

> In accordance with section 39 of the Act the Employment Relations Authority or Employment Court may have regard to an approved Code in determining whether or not a union and an employer have dealt with each other in good faith in bargaining for a collective agreement. This means that if the parties can show that they have followed the Code, the Authority or Court may consider this to be compliance with the good faith provisions of the Act.

[18]Minister of Labour "Code of good faith: Introductory note, 6 March 2015, <http://employment.govt.nz/er/starting/unions/code.asp>

> The Code will also help parties to identify all the things they should be considering when trying to bargain in good faith.

[108] As the Code itself notes, it "is not a substitute for the Act".[19] Under cl 1.3:

> Good faith under the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship. This includes a requirement that the parties are responsive and communicative and do not do anything likely to mislead or deceive each other. Therefore, when bargaining for a collective agreement the parties need to consider whether their actions will establish and maintain the type of relationship required.

[109] Further relevant paragraphs include:

> 1.4 The parties should also develop good faith practices that are consistent with the legal requirements of the Act. Employers and unions who act in good faith are more likely to have productive employment relationships.
>
> 1.5 Bargaining for a collective agreement (including a multi-party agreement) means all the interactions between the parties that relate to the bargaining. This includes negotiations and communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining. Bargaining also includes interactions about a bargaining process agreement.
>
> …
>
> 1.8 The good faith matters set out in this code are not exhaustive.

[110] Under the heading "**Agreeing to a Bargaining Process**", the Code provides relevantly:[20]

> 2.1 In order to promote orderly collective bargaining the parties must use their best endeavours to enter into an arrangement, preferably in writing, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and an efficient manner. Even if the parties cannot agree on an arrangement they must continue to bargain in good faith, and should endeavour to ensure that such bargaining is effective and efficient.
>
> 2.2 The parties should consider the following matters which may, where relevant and practicable, in whole or in part, make up any such arrangement:
>
> a. advice as to who will be the representative(s) or advocate(s) for the parties in the bargaining process
>
> b. advice as to whom the representative(s) or advocate(s) represent

[19] Clause 1.2.
[20] Emphasis added.

c. the size, composition and representative nature of the negotiating teams and how any changes will be dealt with

d. advice as to the identity of the individuals who comprise the negotiating teams

e. the presence, or otherwise, of observers

f. identification of who has authority to enter into an agreement, any limits on their authority, and signing off procedures

g. the proposed frequency of meetings

h. the proposed venue for meetings and who will be liable for any costs incurred

i. the proposed timeframe for the bargaining process

j. the manner in which proposals will be made and responded to

k. the manner in which any areas of agreement are to be recorded

l. when the parties consider that negotiation on any matter has been completed, and how that will be recorded

m. communication to interested parties during bargaining

n. the provision of information and costs associated with such provision

o. appointment of, and costs associated with, an independent reviewer should the need arise

p. any process to apply if there is disagreement or areas of disagreement

q. appointment of a mediator should the need arise

r. in the case of multi-party bargaining, how the employer parties will behave towards one another and how the union parties will behave towards one another

s. where appropriate, ways in which good faith relations during bargaining can take into account tikanga Māori (Māori customary values and practices), and/or any cultural differences or protocols that might exist in the environment in which the bargaining occurs.

2.3 The parties will adhere to any agreed process for the conduct of the bargaining.

[111] Turning to "**Bargaining**", the following appear:

3.1 The duty of good faith under the Act does not require a union and an employer bargaining for a collective agreement—

a. to enter into a collective agreement, or

b. to agree on any matter for inclusion in a collective agreement.

3.2 However, an employer does not comply with the duty of good faith if—

a. the employer refuses to enter into a collective agreement, and

b. the employer does so because the employer is opposed, or objects in principle, to bargaining for or being a party to a collective agreement.

3.3 The parties should, therefore, at all stages in the bargaining, act in a way that will assist in concluding a collective agreement.

…

3.13 A union and employer must provide to each other, on request, and in a timely manner, information in accordance with sections 32(1)(e) and 34 of the Act that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of bargaining.

3.14 The parties must consider and respond to proposals made by each other.

3.15 Even though the parties have come to a standstill or reached a deadlock about a matter, they should continue to meet, consider and respond to each other's proposals on other matters.

3.16 Where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give further consideration to their respective positions in the light of any alternative options put forward.

3.17 However, the parties are not required to continue to meet each other about proposals that have been considered and responded to.

[112] As to "**Mediation**", cl 4.1 provides:

Where the parties are experiencing difficulties in concluding a collective agreement they may agree to seek the assistance of a mediator. This could be a mediator provided by the Ministry of Business, Innovation & Employment's mediation services. Parties should note that for strikes and lockouts in essential industries there are specific requirements in relation to the use of mediation services.

[113] Under the heading "**Facilitation**" is cl 5.1 as follows:

Where there are serious difficulties in concluding a collective agreement, a party may apply to the Authority for facilitation to assist in resolving those difficulties. The Authority will then decide whether the application for facilitation satisfies one or more of the grounds set out in the Act.

[114] The genesis of a BPA lies in s 32(1) ("Good faith in bargaining for collective agreement") of the Act. This provides materially:

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:

(a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and

(b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining; and
(c) the union and employer must consider and respond to proposals made by each other; and
(ca) *[Repealed]*
(d) the union and the employer—
  (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
  (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and
  (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and
(e) the union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

[115] A BPA is also referred to in s 32(3)(b) of the Act which says that the matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith include "… the provisions of any agreement about good faith entered into by the union and the employer …".

[116] The starting point for defining these clauses is that they must not be given an interpretation that conflicts with the legislation's relevant requirements about collective bargaining. If there is a conflict, the legislation trumps the BPA and the BPA provisions must be read to conform to the scheme of the legislation. If the BPA's provisions do not cover any particular question that may have arisen between the parties, to the extent that the legislation may do so, that is to prevail.

[117] First, BPA cl 14.1 records the parties' agreement that bargaining will be complete, that is at an end if, following (implicitly) a settlement between the negotiators, adoption of this settlement in the required ratification process (under cl 9) and written confirmation of the results of that process, all parties then sign the collective agreement so settled and ratified. This means that until that final sequential act of signing, the parties agreed that they would be in collective bargaining.

[118] Clause 15.1 (set out previously) operates in one or both of two circumstances. The first is "a dispute over any process requirement" and the second is that "either of the parties [reaches] a point where they are unable to progress the bargaining …". Clause 15.1 then requires a discussion between the parties of the options for resolving their differences. It was agreed that those options would include the use of the Mediation Service (of the now Ministry of Business, Innovation and Employment), or the use of such other person as may be agreed to carry out a mediatory function. The balance of the clause deals with the responsibility for the costs of mediation assistance, if those arise.

[119] The defendant's interpretation of cl 15.1 must, logically, be that it is to apply to a first, and only one, situation of inability to progress the bargaining. That is because its case is built on the assertion that because the parties obtained the assistance of a mediator in late 2013 but to no avail, the defendant was entitled to rely (among other things) on the failure of that mediation to settle or make progress in collective bargaining. This was one basis of its claim to have had a genuine reason based on reasonable grounds to refuse to bargain further, as it did on 20 February 2015.

[120] However, in my assessment, cl 15.1 does not bear that narrow interpretation. Collective bargaining, especially difficult collective bargaining as this was, frequently involves more than one dispute about a process requirement and/or points at which parties are unable to progress the bargaining. I interpret cl 15.1 as both being available to the parties and creating obligations on them to use those mediatory mechanisms whenever there was either a dispute about a process requirement, or when the parties reached a position (or another position) where they were unable to progress the bargaining. Mediation is not a once-only opportunity or requirement.

[121] It follows that on such occasions, the parties were obliged under their BPA to discuss options for resolving their differences. That they did so in November 2014 at the instigation of the Union, and subsequently went to mediation, was in accordance with cl 15 but was not the complete fulfilment of Jacks's obligations under cl 15.1. Where it considered that the parties had reached a point where they were unable to progress the bargaining between January and mid-February 2015, Jacks was obliged

again to discuss with the Union the options for resolving the parties' difficulties. It did not do so, declaring instead that it considered that the bargaining had concluded and, in effect, that it would not participate in any further collective bargaining or in any mediated attempts to make progress which the parties had been unable to achieve to that point.

[122] Other relevant provisions of the BPA included cl 7.1 ("The parties agree to conduct the negotiation meetings in accordance with the Code of Good Faith") and cl 7.2 ("Claims or counterclaims may be amended or withdrawn by either party at any time during negotiations"). These will arise when I come to consider the propriety of the employer's withdrawal of an offer when the Union sought to negotiate about it.

[123] In evidence, Mr Finn-House who himself executed the BPA on 6 March 2014, described the plaintiff's interpretation of the BPA as follows:

> … I also understand that FIRST argue that our BPA suggests that bargaining will only end when an agreement is reached. I accept that this is what the BPA says. However, I don't believe that FIRST's position can be right. If that was the case, then we could still be locked in bargaining now, going to the table with FIRST simply to discuss matters that we would still not be able to resolve. That seems ridiculous.

[124] Accepting, as Mr Finn-House appears to in his evidence, that the BPA contemplated an end to collective bargaining only when a collective agreement was signed, Mr Finn-House's conclusion about what that could only mean, in practice, is wrong. If it were right, I agree that it would seem "ridiculous" that the parties could still be locked in bargaining now. However, clauses 14.1 and 15.1 are not the last word on what happens where there is deadlocked bargaining. The legislation provides further alternatives to, and assistance for, the parties.

[125] Clause 15.1, as just interpreted, requires a party to such deadlocked bargaining to discuss different resolution options with the other party. These may include further mediation, especially where progress has been made between the parties since a previous mediation. The other options available to the parties under the Act are for a request to be made to the Authority for a direction to facilitated bargaining and, ultimately, if the facts meet the stringent tests for this, what is known

as ‘fixing’ whereby the Authority is empowered to determine the terms and conditions of a collective agreement.

[126] Dealing with the defendant’s contention that the provisions of the BPA must yield to the statute because they are in conflict with it, I conclude that is not so. Clause 14 of the BPA only sets out one circumstance in which the parties have agreed that bargaining will have been completed, that is when a collective agreement is signed. That is not inconsistent with the Act. The BPA is, however, silent on other circumstances in which bargaining may come to an end, assuming that is the same as being “completed”. Section 33 (which is at the heart of this case) provides another circumstance in which, as a matter of good faith, parties are not required to conclude a collective agreement and, therefore implicitly, not required to continue collective bargaining for that outcome. As the case law, referred to elsewhere in this judgment, also notes, a third circumstance in which collective bargaining will not be completed is if the parties themselves agree upon this outcome.

[127] Clause 15 of the BPA is not in conflict with, or affected by, either s 33 or any other statutory provision and in fact may be said to encapsulate the spirit of the legislative intent for employment relations generally and collective bargaining in particular.

Confidentiality of employment terms and conditions

[128] Jacks also wished that its remuneration arrangements with its employees be confidential between the company and each individual employee. The Union’s proposals in bargaining would have been inimical to that. Jacks did not wish its competitors to be aware of what it was paying its employees for comparative work. There was mention in evidence of one competitor known as Bunnings in Dunedin and there may have been others. The Union had made Jacks aware of current remuneration rates for employees of Bunnings and Jacks did not wish its equivalent information to be disclosed to others including to Bunnings. Nor did Jacks want any other employee to know what it was paying other staff, even those doing comparable jobs alongside each other.

[129] While individual employment agreements can and often do remain confidential, it is rarer and more difficult for the contents of collective agreements to be similarly confidential. That is because those are agreements between at least one employer and a union, the latter of which may have members employed by a competitor or, as here, by other Mitre 10-branded stores. This makes collective agreements unlikely to be completely confidential. There is, also, at least one situation in which the statute requires that collective agreements are not confidential to the parties to them or governed by them. What is an employer to do in response to the request of a potential new employee to see the terms and conditions contained in a relevant collective agreement to which he or she may be subject if that prospective employee joins the Union? The employer is obliged to disclose those terms and conditions and runs the risk, whether or not the potential employee takes on employment and/or is a union member, of wider disclosure of the remuneration elements.

[130] The reality of workplaces such as Jacks's is that employees talk among themselves, including about their wages, and there is a natural curiosity about why someone else with similar experience who is performing the same job may be paid more or less.

[131] In these circumstances, Jacks's expectations of confidentiality are, even if genuinely-based, unrealistic in practice.

[132] Did Jacks have a genuine reason or reasons, based on reasonable grounds, not to conclude a collective agreement with the Union?

[133] Jacks's reasons for concluding that the parties cannot conclude a collective agreement are two inter-related ones. The first is that Jacks considers that a collective agreement must not include reference to the remuneration to be paid to its employees covered by such a collective agreement. The second, and connected, ground is that remuneration is to be set unilaterally by Jacks as employer based on consideration of Jacks's assessment of the work performance of each individual employee (and of the business commercially) without reference to the nature of the

position held by the employee and without reference to the duration of the employee's employment.

[134] Are these "genuine reason[s]"? I have concluded that they are not genuine reasons on the following grounds.

[135] First, the evidence about Jacks having failed in the recent past to re-assess employees' close-to-minimum wages when it held that power unilaterally, causes me to doubt the genuineness of its insistence on the enshrinement of this practice for the future. That it did so when prompted to by the collective bargaining in 2014, also casts doubt upon such an important consideration being adhered to in future where there would otherwise be no enforceable collective agreement to ensure this.

[136] The Union's proposals for a collective agreement included minimum remuneration scales that were expressed by reference to the class of work performed by the employee and the duration of the employees' employment. These were not inimical to performance assessments and to augmentation based on performance following a fair assessment process undertaken by Jacks and involving the individual employees in that process.

[137] For the first ten months or so of collective bargaining, Jacks resisted, apparently resolutely, those remuneration proposals of the Union on the grounds already outlined.

[138] However, on 27 August 2014 Jacks proposed an alternative remuneration scale with pay to be based on performance and assessed by reference to a band of wage rates based on job codes. This formal proposal in bargaining contrasted starkly with Jacks's previous responses to the Union's proposals. That is in the sense that from 27 August 2014, it was agreeable to having negotiated remuneration included in a collective agreement and would have provided for rates of remuneration to be determined other than entirely unilaterally by the company. Mr Finn-House, as Jacks's general manager responsible for these matters, agreed in his evidence, had the Union agreed to the company's proposal of 27 August 2014 at that time, that would have concluded the bargaining on remuneration – in other words, Jacks's

wages proposal of 27 August 2014 was a serious and genuine one and was one in which it took the risk of acceptance by the Union.

[139] The Union regarded this offer seriously and as one that allowed significant progress to be made in the collective bargaining. It wished to consider its position and the bargaining was adjourned for this purpose.

[140] The Union's response was to make a counter-proposal based on the employer's offer although incorporating a fixed rate rather than a range of rates but, significantly for the Union, not including any element of length of employee service. The Union's counter-proposal also included its claim for a funeral insurance policy premium of 70 cents per week per Union member; that the term of the agreement be of eight months (as compared to the two-year term proposed by Jacks); and that there would be established a working party to refine pay scale classifications and rates "to better reflect skills attainment, experience, and competency levels". The Union's counter-proposed hourly remuneration rates were, for the most part, the top of the band rates that the employer had proposed.

[141] Whilst the Union's counter-proposal clearly sought to negotiate further on some of the employer's proposals, it nevertheless conceded some of the Union's previous claims and accepted some of the employer's proposed remuneration claims. Finally, the evidence is that the Union then indicated a preparedness to allow for increased hourly rates for individual employees based on the employer's assessment of their performance.

[142] Jacks's response to the Union's counter-proposal, when this was made on 15 September 2014, was both to reject it and also to immediately withdraw from bargaining the employer's own remuneration proposals that it had made less than a month previously, stating again its view that it was unnecessary or inappropriate for remuneration to be contained in a collective agreement.

[143] If Jacks had genuinely held the views which it now proclaims it had about remuneration not being dealt with in a collective agreement and the rates of it being set unilaterally by the employer based on performance, it would not, logically, have advanced the contradictory claim that it did in bargaining. That is not to doubt the employer's dislike of the Union's counter-proposal. It was, however, an indication that what had been, up until 27 August, and was, after 15 September 2014 including its stance in the litigation, a principal objection to settling a collective agreement other than on its terms, was not a genuine reason not to enter into a collective agreement. So too was the employer's effective stance in the bargaining at this point of "take-it-or-leave-it". Neither of these Jacks's strategies was excused or ameliorated by its ability to withdraw its offer pursuant to cl 7 of the BPA.

[144] On Sunday 22 February 2015, two days after the company's announcement that it would no longer participate in bargaining and that it had declared collective bargaining to be at an end, one of Jacks's bargaining team and its legal adviser, Diana Hudson, wrote to company representatives (although inadvertently including the union organiser in the email) describing the Union's notification to its members of what had occurred on 20 February 2015 as being "unethical union behaviour!". Ms Hudson's email asserted that Jacks's declaration of cessation of bargaining on 20 February 2015 "was most certainly not illegal". Ms Hudson continued:

> The communication is a breach of C10 Bargaining process agreement in that it went to all staff (not just those represented by the union), is not accurate and is not consistent with the Code of Good Faith.
>
> When coupled with your actions in delaying any release to enable the union to communicate with its members, an action for breach of good faith would be an option from here.

[145] Given that Ms Hudson had consistently been a member of the employer's bargaining team to provide it with legal and strategic advice, and that Jacks had purported to announce an end to collective bargaining with effect on 20 February 2015, it is difficult to reconcile that position with Ms Hudson's advice two days later that subsequent union activity had breached the BPA and would support an action by the company for breach of good faith (I assume in bargaining). If Jacks had genuinely considered bargaining to be at an end on 20 February 2015, it is not clear how subsequent actions of the Union could, at the same time, be in breach of its

obligations in bargaining. This throws doubt on the genuineness of Jacks's announcement of 20 February 2015.

[146] Alternatively, even if Jacks's reason for not concluding a collective agreement was genuine, was it based on reasonable grounds?

[147] Remuneration is a fundamental element of an employment relationship. Individual employment agreements must contain, statutorily, information about the remuneration to be paid to the employee. There is, however, no such statutory requirement of a collective agreement. That is perhaps because it is so obvious that collective agreements will deal with remuneration, or at least minimum remuneration, that it has always been assumed that a collective agreement will contain such a term or condition. So, too, is it a fundamental underlying assumption of employment relations that remuneration will be the subject of agreement between the parties and not by unilateral imposition by the employer based on its own assessment of the employee's performance of his or her job. For example, whilst minimum remuneration provisions in a collective agreement will ensure that an employer's assessment of what an employee should be paid will not amount to a reduction of that remuneration even if it does not allow for an increase to it, Jacks's stance about unilaterally determined remuneration would allow for decreases as well as increases and no changes.

[148] It must be remembered, also, that the employees in this case were, at the relevant times and in many cases, paid only marginally above the statutory minimum wage. That makes it particularly appropriate (not to mention usual) that the matter of their wages is to be the subject of negotiation including as part of collective negotiations for a collective agreement.

[149] Together, these factors cause me to consider that even if Jacks's objection to the inclusion of a remuneration clause had been a genuine ground for not entering a collective agreement (as I have concluded it was not), it would not have been one based on reasonable grounds.

In these circumstances, Jacks's unilateral declaration that it would not do so is a breach of its obligations of good faith in collective bargaining under ss 4 and 32.

Good faith in bargaining - decision

[150] Although there are discernible examples of the Union's conduct in bargaining that fall short of the legislation's requirements for good faith in that exercise, the focus of the decision in this case as pleaded is to determine the plaintiff's claims of bad faith in bargaining by the defendant. Reciprocal instances by the plaintiff may, however, be taken into account in an overall remedial consideration of the case.

[151] I am satisfied that Jacks misled or deceived the Union between mid-December 2014 and 20 February 2015. The Union had sought to bring pressure on Jacks to accept the Union's claims in bargaining or to modify or withdraw its counterclaims, which were unacceptable to the Union, in the lead-up to a busy pre-Christmas period. There is no suggestion that the Union was not entitled to do so, especially if its strategy may have constituted a strike.

[152] The Union notified Jacks that it wished to hold two stop-work meetings with its members on 19 December 2014, one of Jacks's busiest days of the trading year. Jacks's response was to refuse the Union's request for these stop-work meetings and although it did not provide a justification in law for that refusal, it is clear from the evidence of its legal adviser, Ms Hudson, that this would have been regarded by Jacks as, and would probably, in law, have amounted to, strike action. Whether such strike action would have been lawful is not to the point because a compromise was reached between the parties whereby the Union would hold a half-hour stop-work meeting with its members on that day in return for Jacks's assurance that it would return to bargaining with it in the new year.

[153] The misleading conduct by Jacks was that it did not meet part of its side of that bargain, that is, it did not return to the bargaining other than in a very restricted, artificial and strategic way on 20 February 2015. Jacks's "bargaining" on that day consisted of a request to the Union to clarify whether it would make any concession to its previous claims and responses to Jacks's claims in collective bargaining. The

Union's response was that it would not do so and Jacks confirmed its unpreparedness in those circumstances to negotiate further with the Union. That was not the continued bargaining to reach a collective agreement that Jacks had assured the Union on 8 December 2014, the last relevant bargaining event between the parties before 20 February 2015. Jacks's representations about returning to bargaining were reiterated in its subsequent correspondence to the Union set out earlier in this judgment. Returning to bargaining could not reasonably have meant simply a further meeting at which, if there was no major concession by the Union, bargaining would cease.

[154] Jacks's breach of good faith in those circumstances was also its failure to comply with cl 15.1 of the BPA; that is to discuss the options for resolving the parties' differences resulting from their inability to progress the bargaining. Rather, Jacks purported to declare unilaterally that bargaining had ceased and, because it considered itself free from any obligation to enter into a collective agreement in these circumstances, it was implicit in its stance that it would not engage in further collective bargaining as has subsequently proved to be the case. Adherence to good faith requirements includes adherence to the BPA's requirements to discuss resolution options with the Union at that point. Jacks did not do so.

Was bargaining concluded by 20 February 2015? Decision of s 33 question

[155] Did Jacks's unilateral declaration of cessation of bargaining on 20 February 2015 meet the then applicable statutory provision (old s 33) so that there was no longer the statutory obligation under s 33(1) to conclude a collective agreement.

[156] Jacks's decision was not based on reasoning that it opposed or objected in principle to bargaining for, or being a party to, a collective agreement. Nor is it asserted that its reason for wishing to conclude bargaining was a disagreement with the Union about including a bargaining fee clause under Part 6B in a collective agreement. So the focus in this case is on s 33(1).

[157] As well as being satisfied that Jacks's decision to cease bargaining was not genuine, the Court must also be satisfied that Jacks's grounds for not participating

further in bargaining were both genuine and based on reasonable grounds. If the Court finds that they were not, then the parties remain in collective bargaining which has not concluded.

[158] One of the fundamental points of disagreement between the parties in the bargaining was whether a collective agreement entered into between them would contain and set wage rates for the employees it covered. A second but associated subsidiary issue was, if it did so, whether wage rates and increases thereto would be determined on the tripartite bases of the nature of the position held, length of service, and performance (the Union's claim) or on the employer's assessment of individual employees' performance (the defendant's position).

[159] Although collective agreements have traditionally included at least some reference to minimum rates of remuneration and many have reflected the actual paid rates of employees' remuneration, there is no statutory requirement for a collective agreement to contain any reference to employee remuneration. The minimum requirements for a collective agreement are themselves minimal. Section 54 of the Act requires, in addition to a collective agreement being in writing and being signed by the parties, a coverage clause and a plain language explanation of the services available for the resolution of employment relationship problems. A further requirement is a clause providing how the collective agreement can be varied as is the statutory requirement for the date or event of the collective agreement's expiry to be specified: s 54(3). Subsection (2) provides: "A collective agreement may contain such provisions as the parties to the agreement mutually agree on" so long as these are neither contrary to law nor inconsistent with the Act: s 54(3)(b).

[160] That is to be contrasted with s 65 of the Act which is more prescriptive. In addition to an individual employment agreement having to be in writing, it "may contain such terms and conditions as the employee and employer think fit": s 65(1)(b). Subsection (2) sets out the minimum requirements for an individual employment agreement which, under subs (2)(a)(v), requires the inclusion of "the wages or salary payable to the employee".

[161] It is well-established that a collective agreement cannot and does not, in law, set out exhaustively all of the terms and conditions of an employee's employment. It sets those which are common to employees covered by the agreement but does not contain, for example, implied terms, terms mandated by statute or, significantly, individual terms and conditions which may be agreed between the employee and the employer which are not inconsistent with those of the collective agreement. So, many employees are provided with written individual employment agreements as well as being covered by a collective agreement although the contents of the former cannot be inconsistent with the latter.

[162] The plaintiff, its representatives and also a number of its members working for Jacks were very surprised that the company did not wish to refer in a collective agreement to the wages that it would pay to its employees. That was not something they had experienced in practice before. It was, nevertheless in law, a legitimate bargaining point by Jacks to which the Union was adamantly opposed in negotiations. That was not merely trenchant opposition to not having wages referred to in the collective agreement, but also to Jacks's wish to have wage levels and increases thereto determined by the company following its assessment of the work performance of individual employees.

[163] Whether Jacks's philosophical reasons for not including remuneration elements in a collective agreement and insisting that all remuneration should be set unilaterally by the employer after consultation with an individual employee but not collectively, amounted to a "genuine reason" for purporting to conclude bargaining unilaterally, must be determined by the 'genuineness' of that reason. Although this was not an objection in principle by Jacks to ever entering into any collective agreement (a statutorily excluded "genuine reason" under s 33(2)), Jacks's objections in principle to those matters being dealt with by a collective agreement are very similar to an "opposition or objection in principle to bargaining for … a collective agreement" under s 33(2)(b). To rule out, philosophically, any collective bargaining about such an important element of a collective agreement, as Jacks did, casts significant doubt that what it said were these "genuine reason[s]" fell within the permitted category of exceptions under subs (1). They are objections "in principle"

and, I conclude, are not "genuine reasons" as the meaning of that term was intended by Parliament using the examples contained in subs (2).

Reference to facilitation?

[164] The parties remain in collective bargaining which must now be reinvigorated. Some of the evidence heard by me indicates that the parties may no longer be in precisely the same intractable positions as they were previously, particularly around remuneration.

[165] Independently of that, however, the Court must now deal with the plaintiff's second application, that is for an order directing the parties to facilitated bargaining under s 50C of the Act.

[166] Are the appropriate statutory tests for direction to facilitation met in this case?

[167] There is a body of case law interpreting and applying s 50C which I intend to follow. I will state the relevant principles and the authorities for those propositions. In *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd* the Court observed generally:[21]

> [42] The bargaining facilitation sections are … to be seen as part of a scheme that allows, encourages and assists collective bargaining and the timely and orderly settlement of collective agreements. This will inform the approach of the Employment Relations Authority to a reference under s 50B. Whilst the Authority must ensure that the statutory grounds exist, it should not be astute to find reasons to refuse a reference to facilitation where a common sense assessment of the overall position indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.

[168] As to the statutory requirements that bargaining be "unduly protracted", coupled with a failure of "extensive efforts", in *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, the Court noted:[22]

---

[21] *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd* [2012] NZEmpC 168, [2012] ERNZ 525 at [42].
[22] *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28 at [64].

> [64] "Protracted" bargaining is allowed for by the legislation although this cannot constitute a ground for a reference to facilitated bargaining. Undue protraction (the statutory test) is excessive or disproportionate protraction as opposed to reasonable or expected or common protraction.
>
> [65] Similarly, the "efforts" required by s 50C(1)(b)(ii) that have failed to resolve the difficulties and have precluded the parties from entering into a collective agreement, must meet the qualification of having been "extensive". This implies having a wide scope, being far-reaching or comprehensive, covering a large area or time range of activities.

[169] The Court noted that comparative references to delay in other negotiations in other industries and covering different sorts of employees are generally not of great assistance. Some pertinent examples of undue protraction have been used where bargaining that has become stalled after 34 months, when compared to the 36-month maximum term for any collective agreement, "may be seen to be unduly protracted"[23] in terms of the temporal element of protraction.[24] In another case, the participation of a mediator in no fewer than four of 10 bargaining meetings between the parties was found to have gone significantly towards constituting "extensive efforts".[25]

[170] In *Sanford*, the Court noted:[26]

> As … *McCain* illustrates, the statutory requirement for bargaining being "unduly protracted" is a temporal consideration. "Extensive efforts", whilst these may include temporal elements, focus more upon the quality and dynamism of bargaining and the nature and quality of attempts that may have been employed by one or both of the parties to achieve settlement of a collective agreement.

[171] Also relevant to this case were the Court's remarks in *Sanford* about progress in bargaining regressing, despite the assistance of mediation, so the previous gains were perceived to have been lost. This was described as "a not insignificant element of the "efforts" that the parties had made and, in a broad sense, the extensiveness of those efforts."[27] At [79] of *Sanford* the Court concluded:

> Bargaining for a collective agreement that has extended over the period of the last 41 months has been unduly protracted. The "extensive efforts" test

---

[23] At [63].
[24] At [68].
[25] At [67].
[26] *Sanford*, above n 21 at [72].
[27] At [73].

> that is at the heart of this challenge has included 14 face to face bargaining sessions, two of them conducted with the assistance of a mediator, some bargaining by correspondence, three periods of strike action, and an address by the plant manager directly to affected employees in an attempt to persuade them of the company's position. There are serious difficulties in the bargaining and, in particular, over four issues that will need to be resolved together and on which the parties are now no further forward than they have been for some time and arguably further apart in some respects. These serious difficulties have precluded the parties from entering into a collective agreement. The extensive efforts outlined above have failed to resolve those serious difficulties. It is now time for the facilitation process described earlier in this judgment to be used to achieve a settlement of a collective agreement.

[172] I need only reiterate that comparisons alone of such elements as the duration of bargaining in months, numbers of bargaining sessions, numbers of mediator interventions and the like will not be determinative of this or any other particular case on its unique facts.

[173] First, the Court must be satisfied before accepting the Union's reference for facilitation, that one or more of the statutory grounds under s 50C(1)(a), (b), (c) or (d) of the Act exists.

[174] Addressing, first, s 50C(1)(a)(i) of the Act, I conclude that the parties have failed to conclude a collective agreement, principally because of Jacks's unilateral declaration that it would not do so, which is in breach of its good faith obligations in collective bargaining under ss 4 and 32 of the Act. Was that failure either serious and sustained or has it undermined the bargaining? Both of those statutory tests are met. Jacks's refusal to participate in collective bargaining since February this year has been serious in the sense that it has precluded any bargaining at all from taking place when it should have been. It has also been sustained in that it has resulted in no collective bargaining taking place for almost 10 months. I conclude that the grounds under s 50C(1)(a) are made out.

[175] Under s 50C(1)(b) the Court must decide both that the bargaining has been unduly protracted and that "extensive efforts (including mediation) have failed to resolve the difficulties and have precluded the parties from entering into a collective agreement". That test has likewise been made out on the facts of this case. Unconcluded bargaining, which commenced as long ago as December 2013, has

been unduly protracted. There have been extensive efforts, which have included mediation and the defendant's non-compliance with the BPA to discuss further mediation, to resolve the difficulties that have precluded the parties from entering into a collective agreement and, in particular, Jacks's refusal to bargain. The statutory grounds for s 50C(1)(b) are also made out.

[176] The grounds for facilitation under s 50C(1)(c) relating to strikes which have been protracted or acrimonious, are not in issue. Nor are the grounds under s 50C(1)(d), relating to a proposed strike which would be likely to affect the public interest substantially. Section 50C(3) does not provide a bar to the Authority accepting the plaintiff's reference in relation to bargaining.

[177] For the foregoing reasons, the Authority shall accept the plaintiff's application for facilitation and will no doubt now apply its usual procedures for that exercise. For that purpose, a copy of this judgment is to be sent to the Chief of the Employment Relations Authority.

[178] The plaintiff is entitled to costs on the application, including the preliminary question decided by the Court. I do not propose to put a time limit on the making of that application as it may not be conducive to the parties' resolution of their collective bargaining.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Thursday 17 December 2015