



BRIEFING

Fair Pay Agreements – Should there be a time limit on bargaining?

| | | | |
|---------------------------------|-----------------|-------------------------|------------|
| Date: | 2 December 2020 | Priority: | Medium |
| Security classification: | In Confidence | Tracking number: | 1427 20-21 |

| Action sought | | |
|--|--|------------------|
| | Action sought | Deadline |
| Hon Michael Wood Minister for Workplace Relations and Safety | Decide whether the threshold for fixing the terms and conditions of a Fair Pay Agreement should include a time limit on bargaining. | 14 December 2020 |

| Contact for telephone discussion (if required) | | | | |
|--|---|-------------|--|-------------|
| Name | Position | Telephone | | 1st contact |
| Beth Goodwin | Acting Manager, Employment Relations Policy | 04 901 1611 | | ✓ |
| Hannah Adams | Senior Policy Advisor, Employment Relations Policy | 04 896 5262 | | |

| The following departments/agencies have been consulted |
|--|
| |

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



BRIEFING

Fair Pay Agreements – Should there be a time limit on bargaining?

| | | | |
|---------------------------------|-----------------|-------------------------|-----------|
| Date: | 2 December 2020 | Priority: | Medium |
| Security classification: | In Confidence | Tracking number: | 1427 2021 |

Purpose

This briefing provides you with advice on whether the FPA system should include a time limit on bargaining, as requested by you during a meeting with officials on 17 November 2020.

Executive summary

The rationale for including a time limit on bargaining would be to reduce the risk of one side intentionally dragging out the bargaining process.

Time limits on bargaining interact with other features of a collective bargaining system to affect when and how bargaining concludes. A time based element could be included in the threshold for when a bargaining dispute can be referred to the Authority to fix the terms and conditions of the FPA. There are various options for what this could involve (eg, allowing a party to apply for terms to fixed after a set time limit or after a reasonable period and sufficient efforts for resolving the dispute has occurred).

Our previous advice was to enable the Authority to fix the terms or conditions of an FPA only if it is satisfied that all other reasonable alternatives for resolving the dispute have been exhausted.

If you place most value on a bargained outcome, we continue to recommend not including a time limit on bargaining to maintain a high threshold for when the Authority is able to fix the terms and condition of an FPAs. This is intended to encourage parties use all available mechanisms to resolve the issue themselves, so that wherever possible FPAs are a bargained agreement that is ratified by the sector. Ensuring that the terms and conditions of an FPA are only fixed by the Authority as a last resort would also reduce the risk that the FPA system contravenes our international obligations in relation to voluntary bargaining and freedom of association.

The risk of protracted bargaining could be mitigated, to some degree, by other aspects of the system (eg good faith obligations and support provided by the navigator).

If, however, you consider the risk of protracted bargaining should be given greater weight, we recommend the best option is to include an additional alternative threshold where the terms and conditions of a FPA can be fixed once “a reasonable period has elapsed within which the parties have used their best endeavours to identify and use reasonable alternatives” to negotiate and conclude a fair pay agreement. This additional threshold is included in the Equal Pay Act 1972 (EPA) for fixing pay equity claims.

This option has the least risk that parties will disengage from bargaining and the dispute resolution process. However, the main issue with this option is that is likely to result in litigation over the meaning of ‘reasonable period’.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** in assessing the options, we have given greater weight to the importance of achieving a bargained outcome (through only enabling the terms or conditions to be fixed by a determination as a last resort) compared to the risk of prolonged bargaining.

Noted

b **Agree** to either:

| | |
|------------------------|--|
| <p>Yes / No</p> | <p>Option 1: (MBIE recommended) Not include any form of time limit and continue with the current approach of enabling the Employment Relations Authority to fix the terms and conditions of a Fair Pay Agreement if:</p> <p>a. the parties have first tried to resolve the difficulties by mediation or by any other process recommended by the Authority; and</p> <p>b. the Authority is satisfied that all other reasonable alternatives for settling the dispute have been exhausted.</p> |
| <p>Yes / No</p> | <p>Option 2: Adopt the approach in the Equal Pay Act 1972 and enable the Employment Relations Authority to fix the terms and conditions of a Fair Pay Agreement if:</p> <p>c. the parties have first tried to resolve the difficulties by mediation or by any other process recommended by the Authority; and</p> <p>d. the Authority is satisfied that</p> <p>a. all other reasonable alternatives for settling the dispute have been exhausted; OR</p> <p>b. a reasonable period has elapsed within which the parties have used their best endeavours to identify and use reasonable alternatives to negotiate and conclude a fair pay agreement</p> |

c **Note** the risks of protracted bargaining could be mitigated, to some degree, by other aspects of the system.

Noted

Beth Goodwin
Acting Manager, Employment Relations Policy
 Labour, Science and Enterprise, MBIE
 2/12/20

Hon Michael Wood
Minister for Workplace Relations and Safety
 / /

Background

1. On 17 November 2020 you met with officials to discuss the development of a Fair Pay Agreement (FPA) system. At this meeting you requested further advice on a number of design features of the system. You also indicated that the timely development of the system is a high priority for you.
2. In relation to the bargaining process, you asked whether there had been consideration of whether to include time limits in bargaining and requested advice on this matter.
3. Time limits on bargaining interact with other features of a collective bargaining system to affect when and how bargaining concludes. A time based element could be included in the threshold of when a bargaining dispute can be referred to the Authority to fix the terms and conditions of the FPA. There are various options for what this could involve (eg, allowing a party to apply for terms to fixed after a set time limit or after a reasonable period and sufficient efforts for resolving the dispute has occurred).

We advised the former Minister to not include a time limit on bargaining

The Working Group recommendations did not include a time limit on bargaining

4. In December 2018, the FPA Working Group (FPAWG) recommended that “clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost”, although that recommendation was focused on the initiation process, and the FPAWG did not explicitly mention a time limit in relation to protracted bargaining. The FPAWG also recommended that as a default, the bargaining process provisions in the ER Act should apply (it contains no time limits, as described below).
5. The FPAWG recommended that if a dispute during bargaining cannot be resolved by mediation, the determining body should be able to fix the terms and conditions of the FPAs. The FPAWG’s recommendations did not include any further requirements for when the determining body can accept an application to fix terms and conditions.
6. In October 2019, the discussion document asked for feedback on ‘what should count as a bargaining stalemate’. Of the submitters who responded, only two submitters suggested a time limit.

The former Minister agreed to adopt the EPA threshold for a determination to fix the terms and conditions of an FPA, but without the ‘reasonable period and best endeavours’ clause

7. We provided advice to the former Minister of Workplace Relations and Safety, Hon Iain Lees-Galloway, on the threshold that must be met before the Authority can accept a request to fix the terms and conditions of an FPA (refer 2210 19-20).
8. We recommended that the determining body should be able to fix the terms and conditions of an FPA if:
 - a. the parties have first tried to resolve the difficulties by mediation or by any other process recommended by the determining body, and
 - b. it is satisfied that all other reasonable alternatives for settling the dispute have been exhausted.
9. This is based on threshold for fixing pay equity claims in the Equal Pay Act 1972 (EPA), but without the additional alternative threshold included in the EPA that enables terms to be fixed when “a reasonable period has elapsed within which the parties have used their best

endeavours to identify and use reasonable alternatives to settle the pay equity claim”. We did not recommend including this alternative threshold due to concerns that it could lead to situations where parties do not genuinely attempt to bargain and might instead “wait out” the “reasonable period” to access a determination.

10. The former Minister agreed to the proposed approach.
11. We have not yet provided advice on whether the FPA system should include a duty to conclude as part of the duty of good faith during bargaining, but intend to recommend basing this on the duty in Employment Relations Act 2000 (ERA), with variations where required.

Including a time limit would be consistent with the Equal Pay Act 1972, but not the ERA or Screen Industry Workers Bill

12. We have assessed whether time limits are used in other existing or planned bargaining system and these are summarised in the table on the following page.
13. Under the Employment Relations Act 2000 (ERA), there is no formal time limit on bargaining. However, parties are under a duty to conclude a collective agreement (with limited exceptions), and a determination fixing terms can be made if certain non-time criteria are satisfied.
14. The ERA threshold for determination is deliberately set as a high bar, as collective bargaining is meant to be a voluntary process. One of the objectives of the ERA is to promote observance in New Zealand of the principles underlying the International Labour Organization Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively. The right of workers to bargain freely with employers is an essential element in the right to freedom of association. Therefore, enabling a third party to step into and fix the terms of a freely negotiated private arrangement is included only as a last resort, where it is the only effective remedy left for a serious and sustained breach of the duty of good faith during bargaining. Once fixed by the Authority the collective employment agreement is effectively ratified and parties no longer have the ability to have input. The Authority has only ever fixed terms in one instance: the *Jacks Hardware* case.¹
15. By contrast under the EPA, the terms of a pay equity settlement can be fixed if “a reasonable period has elapsed within which the parties have used their best endeavours to identify and use reasonable alternatives to settle the pay equity claim”. This means parties can request a determination on a pay equity claim due to protracted bargaining, as long as parties have attempted to resolve the issue. This was based on the recommendation of the Joint Working Group on Pay Equity Principles.
16. When the Equal Pay Amendment Bill was being developed, officials advised against including the “reasonable period” and “best endeavours” threshold as it may increase litigation over the meaning of “reasonable period”. We also expressed concerns that parties might try to wait out a period of time to go straight to the Authority, but acknowledged this risk was lower for the proposed clause compared to a set time period, as parties would not know what the Authority would consider a reasonable period for a particular situation.
17. The EPA does not include a duty to conclude, but requires parties to use their best endeavours to settle the pay equity claim in an orderly, timely, and efficient manner.
18. The Screen Industry Workers Bill contains a strict duty to conclude, but does not include any time limits in relation to bargaining. The Authority is able to fix the terms of a collective contract upon the application of a bargaining party if the Authority is satisfied that the parties have made sufficient efforts to resolve the dispute through mediation and facilitation. The

¹ *First Union Incorporated v Jacks Hardware and Timber Limited* [2019] NZERA 374
https://www.employment.govt.nz/assets/elawpdf/2019/3ed68a8864/2019_NZERA_374.pdf

resulting occupation-level collective contract (which would include the terms and conditions fixed by the Authority) will not come into force unless it is ratified by a majority of eligible workers who vote during ratification.

19. The table below provides a comparison of the thresholds for fixing terms and conditions in existing and planned bargaining systems.

Table 1: Threshold for fixing terms and conditions in existing or planned bargaining systems

| Components | Breach of good faith | Effort / processes used to resolve the dispute | Time limit |
|--|---|--|--|
| Employment Relations Act 2000 | <ul style="list-style-type: none"> • Serious and sustained breach of the duty of good faith during bargaining AND • Fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith. | AND: All other reasonable alternatives for reaching agreement have been exhausted. | |
| Equal Pay Act 1972 – pay equity claims | | EITHER: All other reasonable alternatives for settling the pay equity claim have been exhausted. | OR: A reasonable period has elapsed within which the parties have used their best endeavours to identify and use reasonable alternatives to settle the pay equity claim. |
| Screen Industry Workers Bill – occupation-level collective contracts | | Parties have made sufficient efforts to resolve the dispute through mediation and facilitation. | |
| Fair Pay Agreement System (previous Ministerial decision) | | All other reasonable alternatives for settling the dispute have been exhausted. | |

We have considered further the options for including a time limit on bargaining

20. The rationale for including a time limit for bargaining would be to reduce the risk of one side intentionally dragging out the bargaining process, either as a tactical strategy to try to force the other side to agree to less favourable terms and conditions or to delay when an FPA would come into force. Prolonged bargaining is detrimental as it increases uncertainty for sector participants.

21. Whether enabling terms to be fixed due to prolonged bargaining would increase or decrease parties' incentive to reach agreement depends on whether the parties consider terms and conditions fixed by the Authority would result in less or more favourable terms and conditions for them. In their submissions on when terms and conditions should be able to be fixed, workers and worker organisations were generally more supportive of lower thresholds, while businesses were more likely to support a higher threshold or argue that terms and conditions should never be set by a determination.
22. When assessing the options related to a time limit, we considered the following factors:
 - a. Whether it would reduce the risk of protracted bargaining
 - b. Whether it is more or less likely to result in bargained outcome (with terms and conditions fixed by a determination only as a last resort)
 - c. Simplicity / workability
 - d. Consistency with existing or planned legislation.

We continue to recommend no time limit

23. Our recommendation is not to include any form of time period as a justification for fixing terms and conditions (ie, only allow terms to be fixed when "all reasonable alternatives for settling the dispute have been exhausted") as a way to keep the threshold high.
24. We suggest the threshold for fixing terms should be set relatively high for two reasons:
 - a. The intention of the FPA system is to allow employers and workers to create FPAs. We, therefore, consider the proposed FPA system (compared to a system where the an independent body set the terms and condition; eg, an 'awards' based system) is based on the principle that bargaining parties are best placed to reach an agreement that is relevant to their sector, supports growth and is fair for workers. The promotion of collective bargaining is also an objective of the Employment Relations Act 2000. As FPAs apply to the entire sector, there is a risk that if the terms and conditions are being fixed by the Authority, they may not be suitable for the sector and could have unintended consequences.
 - b. Enabling the Authority to fix the terms and conditions of the FPA could be considered a breach of international obligations (as raised by a number of submitters during consultation, including BusinessNZ). One way to mitigate this risk is to limit, as much as practical, when terms and conditions would be fixed.
25. Including a time limit risks discouraging parties from actively engaging in bargaining and dispute resolution processes, decreasing the likelihood of a bargained outcome. This could increase the risk that the resulting FPA has unintended consequences on the sector and that the system breaches international obligations.
26. As the recommended approach focuses on the efforts made to resolve bargaining issues, rather than time taken, there could still be a risk of protracted bargaining. The risk of protracted bargaining could be mitigated, to some degree, by other aspects of the system. For instance:
 - a. The duty of good faith in relation to collective bargaining – We have not yet provided detailed advice on this, but our initial view that it should be based on this duty in Employment Relations Act 2000 (which includes a duty to conclude), with variations where required.

- b. The role of the navigator in supporting bargaining parties – This would include encouraging parties to constructively bargain and to use dispute resolution mechanisms like mediation to resolve issues when needed.
- c. Who bears the costs associated with bargaining – The former Minister agreed that costs would lie where they fall in order to incentivise efficient bargaining, with a small amount of funding provided to support bargaining parties. You have signalled an interest in increasing the amount provided. We will provide advice about the size and approach for this funding in a subsequent briefing. This advice will need to consider the potential impact it could have on parties’ approach to bargaining.

But if a time limit is added, we recommend a “reasonable period and best endeavours” threshold

- 27. In our recommendation we have given greater weight to the importance of achieving a bargained outcome, through only enabling the terms or conditions to be fixed by the Authority as a last resort. If, however, you consider the risk of protracted bargaining should be given greater weight, we recommend the best option is to include an additional alternative threshold where the terms and conditions of a FPA can be fixed once “a reasonable period has elapsed within which the parties have used their best endeavours to identify and use reasonable alternatives” to negotiate and conclude a fair pay agreement. This additional threshold is included in the EPA for fixing pay equity claims.
- 28. Including this additional threshold would allow the Authority or Court the discretion to look at the individual circumstances of each case, to decide whether a reasonable period has passed for those parties to spend in the dispute resolution process. It has less risk of parties attempting to “wait out” bargaining and dispute resolution as it still requires parties to use their best endeavours to resolve the dispute. It could still, however, be perceived as shifting away from a bargained system, as it would allow FPA terms and conditions to be fixed when there were still other avenues the parties could use to resolve the issue themselves (ie all reasonable alternatives have not been exhausted).
- 29. A risk with this option is that uncertainty regarding what is a ‘reasonable period’ could lead to additional applications to the Authority on whether the threshold has been met and increased litigation over whether the ‘reasonable period’ requirement had been met. This could result in further delays before the FPA could come into force, while the Employment Court is considering whether the grounds for the Authority accepting the application to fix the terms and conditions of the FPA met the threshold.
- 30. We also considered the following options, but do not recommend them for the reasons given in the discussion on each. The first two options were suggested by the NZCTU as other possible ways to include a time limit on bargaining in the Equal Pay Amendment Bill (when it was under development).
 - a. **Include a set time limit** – A set time limit would be simple to implement and provide certainty for parties. It would reduce the risk of protracted bargaining through either encouraging parties to achieve an agreement (if they sought to avoid a determination) or by providing an alternative avenue to fix the terms and conditions via a determination. It is not recommended, however, as it may incentive parties to “wait out” the time limit if they consider the fixed terms would be more favourable and would not account for the varying scope and complexity of FPAs. This option is not consistent with other existing or planned bargaining systems.
 - b. **Apply a threshold of “all other reasonable alternatives for settling the dispute have been attempted” (rather than “exhausted”)** – This option would make it easier for parties to access a determination to fix the terms and conditions of an FPA, so would reduce the risk of protracted bargaining. It is not recommended as it creates a

greater risk of parties not actively engaging with dispute resolution processes and would shift the system further away from fixing terms and conditions only as a last resort. It would also be inconsistent with the Employment Relations Act 2000.

- c. **Include the “reasonable period” provision for fixing some terms or conditions of an FPAs by determination, but not when fixing the entire FPA** – This would apply a lower threshold for fixing terms and conditions when the resulting FPA will go to ratification² (as parties will still have a voice on the terms and conditions fixed by the Authority), but retain the higher threshold when there is no opportunity for ratification. This option is not recommended as it would further complicate an already complex system.

Next steps

31. We are preparing a number of other briefings on aspects of the FPA system for you, with the first set of briefings due to you by 11 December 2020.
32. The schedule for the project is set out in the table below:

| Milestone | Date |
|---|----------------------------------|
| Advice on design features requested by Minister | All provided by 11 December 2020 |
| Advice on consequential changes to other design aspects Advice on remaining advice on system issues | All provided by 19 February 2021 |
| Cabinet paper drafted RIA prepared | 12 March 2021 |
| Agency consultation completed and incorporated RIA quality assurance completed Finalised Cabinet paper provided to Minister | 26 March 2021 |
| Ministerial consultation completed (2 weeks) | 29 March to 13 April 2021 |
| Cabinet Committee | 21 April 2021 |

² The dispute resolution process includes a different approach the first time a party requests a determination that only covers a sub-set of disputed terms and conditions. In this situation, the entire FPA (including the terms and conditions set by the Authority) is sent for ratification. If the FPA fails to be ratified, the entire FPA would return to bargaining. If parties are unable to come to an agreement on all topics during the second round of bargaining, the next request for the Authority to set terms and conditions would result in a determination on the terms and conditions for the entire FPA, with no opportunity for ratification.