

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Stagecoach New Zealand Limited (Applicant)

**AND** The New Zealand Tramways Union (Auckland Branch) (First Respondent)  
**AND** The Akarana Public Transport Drivers Association (Second Respondent)  
**AND** The NZ Engineering Printing and Manufacturing Union (Third Respondent)  
**AND** National Distribution Union (Fourth Respondent)

**REPRESENTATIVES** Andrew Caisley for the applicant  
Brian Spong and Gary Froggatt for the respondents

**MEMBER OF AUTHORITY** James Wilson

**INVESTIGATION MEETING** 15 April 2005

**DATE OF DETERMINATION** 21 April 2005

**DETERMINATION OF THE AUTHORITY**

**Grounds for facilitation: the legal tests**

[1] The Employment Relations Act, as amended in 2004, provides that where parties to collective bargaining have *serious difficulties in concluding a collective agreement* one or more of the parties may apply to the Authority for assistance, in the form of *facilitation*, in resolving those difficulties. In order to access this assistance, the applicant party(s) must first apply to the Authority for reference to facilitation.

[2] The Act, at section 50C, sets out the grounds on which the Authority may accept reference to facilitation. The section explicitly states that the Authority must not accept a reference for facilitation unless it is satisfied that one or more of the four grounds exist. The grounds listed in the Act are:

- (a) *that ---*
  - (i) *in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and*
  - (ii) *the failure ---*
    - (A) *was serious and sustained; and*
    - (B) *has undermined the bargaining;*

(b) *that ---*

- (i) *the bargaining has been unduly protracted; and*
- (ii) *extensive efforts ( including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:*

(c) *that---*

- (i) *in the course of the bargaining there has been one or more strikes or lockouts; and*
- (ii) *the strikes or lockouts have been protracted or acrimonious:*

(d) *that—*

- (i) *in the course of bargaining, a party has proposed a strike or lockout; and*
- (ii) *the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.*

The Act then defines, for the purposes of subsection 50C(i)(d), what *to affect the public interest substantially* means.

## **Application for facilitation**

[3] Since October 2004 Stagecoach New Zealand Ltd and the Union parties listed above have been attempting to negotiate a new collective agreement to cover bus drivers employed by Stagecoach in Auckland. During this time the parties have met in formal negotiations on some 27 days and the union members have undertaken a number of strikes. Despite these efforts the parties have been unable to reach agreement and Stagecoach have applied to the Authority for the facilitation assistance to help the parties overcome the serious difficulties they have encountered.

[4] In its application for facilitation, Stagecoach has said that they believe that three of the above grounds have been met i.e. the bargaining *has been unduly protracted* (section 50C(1)(b)), there have been *protracted* strikes (section 50C(1)(c)) and a further strike has been proposed that would be *likely to affect the public interest substantially* (section 50C(1)(d)). The combined Unions have indicated that they support the reference to facilitation.

## **The negotiations**

[5] The Combined Unions initiated bargaining on 30 September 2004. The parties first met in negotiations on 28 October 2004 with the first three days of negotiations being dominated by attempts to complete a bargaining process agreement. Over the next few months the parties met on 24 more days. On two days the parties were assisted by a mediator. In early February 2005 the combined unions took a proposed settlement offer to the members for ratification. Unfortunately the bus drivers rejected this offer. During March and early April 2005 the negotiations were punctuated by industrial action including a full 24 hour strike on Monday 4 April 2005. On 8 April 2005 the union negotiators agreed to lift notice of further strike action while the company sought referral to facilitation. At the same meeting the parties agreed to meet for a further three days of negotiations.

## Have the grounds for referral to facilitation been met?

[6] I accept that one of the grounds (that there have been protracted negotiations) has been met. It is my intention therefore to refer the parties to facilitation. However Stagecoach have suggested that three of the available grounds for referral to facilitation have been met and, firstly, I will briefly deal with why I do not accept that the other two grounds have been established.

### *Protracted strikes*

[7] Although there has been industrial action of various forms over the past month, this action for the most part was not a full withdrawal of labour. Staff have “worked to rule” and imposed overtime bans. In addition they have held a series of 4 hour stop work meetings in various depots and held a 24 hour full strike on 4 April. Proposed local (i.e. depot specific) 24 hour strikes proposed for 11 to 14 April were withdrawn when it was agreed that an application for facilitation should be made. While this industrial action may have been disruptive and costly it does not, I find amount to *protracted strikes* as envisaged by section 50C(1)(c).

### *Public interest*

[8] The level of industrial action set out in paragraph [6] above no doubt causes disruption to members of the public who use Stagecoach buses and to those other commuters effected by the disruption to normal traffic flows. This level of disruption will be increased if this matter is not settled and further strikes occur. It is clearly in the public interest that such strikes do not take place. However the Act requires that, to fulfil this ground for referral to facilitation, the public interest must be affected *substantially*. Substantially is defined as:

... *likely to endanger the life, safety, or health of persons; or*

... *likely to disrupt social, environmental, or economic interests and the effect of the disruption are likely to be widespread, long-term, or irreversible.*

The parties have not suggested that any proposed strike action is *likely to endanger life, safety, or health*. The Act clearly envisages a high level of *disruption*. While the proposed strikes will no doubt cause some inconvenience and disruption it cannot yet be said that this disruption is likely to be *widespread, long term, or irreversible*.

### *Unduly protracted negotiations*

[9] If the parties in this dispute had spent the last seven months in inconsequential discussion, even if this discussion had occurred on numerous occasions, I would not find that such negotiations were unduly protracted. In this case, however, I am convinced that the parties have actively engaged in substantial negotiations with every intention of reaching a settlement. They have met on 27 days with a number of these days being prolonged. They are exchanged offers and counter offers and have reduced the number of outstanding matters substantially. In addition to formal negotiations, both with and without the services of a mediator, they have attempted on several occasions to progress the negotiations via informal discussion. Even after the application for facilitation was filed the parties continued their efforts to reach a settlement. . In terms of section 50C(1)(b) of the Act the bargaining has been *unduly protracted*. Despite these *extensive efforts* they have failed to resolve the difficulties that have precluded them from entering into a collective agreement.

**Determination**

[10] In terms of section 50B of the Employment Relations Act, Stagecoach New Zealand Ltd and the Combined Union parties are referred to facilitation in the hope that this will assist them to resolve their difficulties in concluding a collective agreement.

James Wilson  
Member of Employment Relations Authority