

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	NZ Tramways & Public Passenger Transport Authorities Employees IUOW (Wellington Branch) (applicant)
<b>AND</b>	Cityline (NZ) Limited t/a Cityline Hutt Valley (first respondent)
<b>AND</b>	Wellington City Transport Limited t/a Stagecoach Wellington (second respondent)
<b>REPRESENTATIVES</b>	Paul McBride for the applicant Andrew Caisley for the respondents
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 11 April, 2007
<b>DATE OF DETERMINATION</b>	16 April, 2007

**DETERMINATION OF AUTHORITY: Preliminary Matter**

**Employment Relationship Problem**

1. In its statement of problem filed on 30 November 2006, and in an amended statement of problem filed on 2 April 2007, the union says the companies have entered into a purported multi-employer, multi-union collective employment agreement (MEMUCA) in breach of the Act. It says there are associated issues as to the validity of the MEMUCA and obligations under it, that the respondents have breached good faith owed to the union, and that the companies acted toward it in a misleading and deceptive manner.

2. The union seeks various declarations including a finding that the MEMUCA is not valid as a collective employment agreement (void *ab initio* – par 4.1 of the amended statement), penalties and costs.
3. In statements of reply received on 20 December the companies say, amongst other things, that the union is not a party to the MEMUCA and has no standing in respect of its application except in respect of the allegation that they, the companies, have not complied with their good faith obligations, which they deny.
4. The companies also say that in any event, under s. 163 of the Act the Authority may not make an order, in respect of a collective agreement, cancelling or varying the agreement or any term in it.
5. There is anyway no factual or legal basis for making the declaration sought by the union.

### **Investigation**

6. During a conference call on 13 March the parties agreed, in the event of mediation not settling the matter, to a one day preliminary investigation in Wellington on 11 April during which the companies' claims about the union's standing would be investigated.
7. This problem was not resolved by the parties during mediation on 4 April 2007.
8. Submissions, including the union's amended statement of problem, were received in advance of the investigation. No evidence was presented.

### **Background**

9. The union represents many of the bus drivers and associated employees employed by the companies in the Hutt Valley (first respondent) and Wellington (second respondent).
10. The union is a party to a current single employer collective agreement (CA) with each of the respondents, namely:
  - a. The Cityline Hutt Valley Tramways Union Collective Employment Agreement, 10 December 2006 – 5 December 2009; and

b. The Wellington City Transport Ltd Stagecoach Wellington Collective Employment Agreement, 2005 – 2008.

11. During 2006 the companies entered into what the union describes as a purported multi-employer, multi-union collective agreement (MEMUCA) with the Hutt Valley Society of Independent Bus Drivers (the HVSoIBD) and the Central Amalgamated Workers Union (the CAWU).
12. The union says it has opposed attempts by the respondents and associated companies in Auckland to introduce similar terms of employment set out in the purported MEMUCA.
13. The union seeks various declarations and orders in respect of what it terms the purported MEMUCA.
14. However, and as is made clear above and by way of a preliminary determination, the parties agreed the Authority would first address what is effectively the companies' partial strike out application.

## **Parties' Submissions**

### **Union's Position**

15. The union says, amongst other things, that the companies are in breach of the good faith owed to it, the applicant, in relation to the purported MEMUCA, including the purported bargaining for the MEMUCA and its subsequent promotion to employees over the CAs to which the union is a party, with a view to undermining those CAs and the union.
16. The purported MEMUCA is invalid as a CA in that, amongst other things, it was entered into in breach of the Act, because its purported coverage improperly transgressed on the coverage of existing CAs between the companies and the HVSoIBD and CAWU, because bargaining could not have been initiated by reason of the existing CAs and Part 5 of the Act, and because of the respondents' failure to meet mandatory requirements for secret ballots in relation to multi-employer bargaining and to advise all employees of such bargaining and to follow any bargaining in terms of the Act.
17. Subsequent to the purported MEMUCA the companies have acted in a misleading and deceptive fashion by, amongst other things, portraying differences between hourly rates without accurately portraying differences in weekly income and by encouraging new

employees to become covered by the purported MEMUCA rather than members of the applicant, and by representing the purported MEMUCA as a valid CA when the companies knew or ought to have known that it had been formulated other than in accordance with the Act.

18. The union asks, amongst other things, that the Authority declare the purported MEMUCA is not valid as a CA, and is void *ab initio* as a CA due to substantial non-compliance with the Act.
19. The union asks the Authority to declare that the companies have acted in breach of good faith toward it and its membership.
20. The union says it has standing to make its application because it is “*affected*” by the companies non-observance or non-compliance with various sections of Part 1 and Parts 3-7 of the Act: s. 137 (4) (a) of the Act.
21. It also says the companies’ lack of standing argument is effectively an application to strike out all but the good faith aspects of the union’s case. The test for striking out is a very high one: *Clark v NCR (NZ) Corporation* unreported, Perkins J, 15 November 2006, AC 62/06.
22. Evidence is being sought by way of discovery from the companies: in the absence of that evidence the Authority is unable to fairly and reasonably conclude that the union’s case as pleaded “... *is so clearly untenable that it cannot possibly succeed ...*” (par 21, *Clark*, above).

### **Companies’ Position**

23. Amongst other things, the companies accept they are seeking a partial strike out application. They say the Authority lacks the jurisdiction to make the declarations or orders sought by the union. That is because, under s. 163 of the Act, the Authority may not make an order cancelling or varying a CA or any term of it. A declaration that the MEMUCA is invalid and is void *ab initio* as a CA is tantamount to cancelling that agreement and therefore contrary to the Act. They ask that that part of the applicant’s claim be struck out.
24. The union is asking in substance that the Authority judicially review the exercise of the statutory powers leading to the making of the MEMUCA and to declare it is and always has been a nullity: that course is solely available by judicial review in the Employment Court as is clear from both ss 163 & 194. It would be a mockery if the union is not entitled to ask the

Authority to cancel the MEMUCA but is entitled to go further and declare it never enjoyed any legal existence.

25. There is anyway no factual or legal basis for declaring the MEMUCA void *ab initio*.
26. In respect of the union's allegations the companies breached their obligations of good faith owed to it, the respondents accept the union has standing to bring the claim but denies there has been any such breach.
27. There have also been no breaches of the Act as claimed and s. 135 of the Act confines the ability to bring penalties for alleged breaches of the Act to "... *any person in relation to whom the breach is alleged to have taken place*" (s. 135 (1) (b) of the Act): the union is not such a person.
28. If the Authority accepts that the union has standing in respect of the requests it has made, then the union parties to the MEMUCA should be given the opportunity to be heard as they are bound by it.
29. The companies say the issues raised by them are not, as the union would put it, technicalities but are instead fundamental matters of standing and jurisdiction.

## **Discussion and Findings**

30. The principles in respect of a strike out application are well-established. The threshold is high, particularly because of the need to demonstrate that the case pleaded is so clearly untenable that it cannot possibly succeed: *Sibly v Christchurch City Council* [2002] 1 ERNZ 476.
31. The jurisdiction is to be exercised sparingly and only in a clear case where a definite and certain conclusion is available. I am satisfied this is such a case. I reach this decision because of the clear and certain effect of s. 163 of the Act:

*The Authority may not, under section 162 or any other provision of this Act, make in respect of a collective agreement an order cancelling or varying the agreement or any term of the agreement.*

32. The union says this section is no obstacle to its request that the Authority declare the MEMUCA void *ab initio*, that is because it is claimed the MEMUCA is not what it purports to be, as it does not meet the various requirements of Part 5 of the Act. In a sense, it does not exist because it is not a true collective agreement.

33. I do not accept that proposition because, were I to meet the union's request, the clear and certain effect would be clearly that of **cancelling** the agreement, i.e. annulling, revoking or voiding it. The validity of the purported agreement is a matter properly tested instead by the application of s. 194 of the Act.
34. I make this finding notwithstanding the absence of evidence claimed by the union that, when to hand, will support its claims: that is because I accept the companies' view that no evidence can void the effect of ss 163 & 194 of the Act. This is a claim "... which is capable of decision on the material before the (Authority) ..." (par 13, *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc*, CA, ERNZ 1053). The effect of this decision of course is not to stop the union pursue its other claims relating to alleged breaches of good faith by the companies.

### **Determination**

35. Consistent with the findings set out above, the companies' partial strike out application is granted.
36. Costs are reserved.

**Denis Asher**

**Member of Employment Relations Authority**