

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 176/07  
File Number: 5096809

BETWEEN THE NEW ZEALAND TRAMWAYS  
AND PUBLIC PASSENGER  
TRANSPORT AUTHORITIES  
EMPLOYEES IUOW (WELLINGTON)  
BRANCH  
Applicant

AND MANA COACH SERVICES LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul McBride & Tanya Kennedy, Counsel for Applicant  
Bernard Banks & Hugh Fulton, Counsel for Respondent

Investigation Meeting: Wellington 2-3 October 2007

Additional  
Submissions Received: 8 October 2007 from the respondent  
12 October 2007 from the applicant

Determination: 20 December 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The NZ Tramways and Public Passenger Authorities Employees IUOW (Wellington) Branch is a union whose members include some employees of Mana Coach Services Limited (Mana). There is a collective employment agreement covering those employees and Mana Coach Services Limited expressed to apply between 9 November 2005 and 3 July 2007. Pursuant to a bargaining notice, there have been attempts to negotiate a replacement collective agreement. After the investigation meeting but before the date of this determination, the parties reached an agreement resulting in a new collective agreement. Nonetheless the issues raised in this problem remain for determination.

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[2] The initial application to the Authority sought interim and other orders. The application for interim orders was resolved by undertakings following mediation assistance.

[3] As required by s.93 of the Employment Relations Act 2000, the Union gave notice in writing on a number of occasions of employees' intention to strike in support of the bargaining. Mana responded each time by giving Union members a letter referring to the suspension of striking employees. One of the strikes did not proceed but the employees were still not paid. There is a claim for arrears of wages requiring affected employees to be paid in accordance with their rosters that applied before the strike notice was given to the company. For the strikes that did proceed, the Union claims a number of employees were engaged to perform the work of striking employees in breach of s.97 of the Employment Relations Act 2000. In response to the strike notice dated 6 August 2007 Mana sent the suspension letter and other material to the Union members on 6 August 2007. The Union says that this communication is a breach of the bargaining process agreement and the provisions of the Employment Relations Act 2000 concerning good faith during bargaining. There are also other complaints about alleged breaches of good faith.

[4] To resolve these problems, it is necessary to expand on what happened during the collective bargaining before turning to a consideration of the law and its application to the findings of fact. First, though, it is useful to say a little more about those involved.

### **The parties**

[5] Mana operates urban passenger transport services contracted to the Greater Wellington Regional Council, school services contracted to the Ministry of Education and various charter and tour services. Mana has depots at Paraparaumu, Porirua and Newlands. The contracted routes operate from particular depots. There are currently about 160 staff spread around the three depots. Historically, a portion of the staff belonged to the Central Amalgamated Workers' Union. There is a collective agreement recently concluded between Mana and that Union and there have been earlier collective agreements, contracts and awards.

[6] Kerry Waddell is now a director of Mana but prior to July 2006 was the Managing Director. That change occurred when the Waddell family sold their shares

in the business. Geoffrey Norman is Mana's Chief Executive Officer, having been in that position since 30 April 2007. Marau Russell is the Human Resources Manager with responsibility for managing bargaining processes. He is vastly experienced in that role, having worked for the Wellington Regional Employers' Authority and EMA before joining Mana as an employee. Rod Goldsworthy is the Depot Supervisor of Mana's Kapiti depot at Paraparaumu. It is his job to roster drivers to cover scheduled services and charter work.

[7] Phillip Griffiths is the Secretary of the Tramways Union, a position he has held since 1987. David Rangi is employed by Mana as a driver based at the Porirua depot. He is also the Union's delegate at that depot. Reiner Tribbe is employed by Mana as a driver based at the Paraparaumu depot. He is part of the Union's bargaining team.

### **Commencement of the bargaining**

[8] The Tramways Union first negotiated a collective agreement in 2005 following membership recruitment that saw it with about 50 members or approximately 30% of the workforce. Prior to the expiry date of this first collective agreement, the Tramways Union gave Mana a notice to initiate bargaining for a new collective agreement. On 23 May 2007, the parties signed a bargaining process agreement. That agreement includes a description of the negotiation process and arrangements for communication to interested parties during the bargaining. The agreement also requires a party to indicate to the other party any concerns about breaches of good faith to enable those to be remedied or explained.

[9] There followed a number of bargaining sessions, including some involving the Mediation Service. Agreement was not achieved. Mana's eventual position was a choice of two wage increase options with other amendments to the previous collective agreement having been agreed. One option involved specified wage increases applying at different points during the term of the proposed agreement. The second option involved larger wage increases coupled with drivers relinquishing an entitlement to an extra week's annual leave after five years' service. These two options were rejected by the Tramways Union. By this time, employees could lawfully strike in support of their bargaining so a decision was made to call a strike. On 18 July 2007, the Tramways Union wrote to Mana giving notice of a strike on 20 July 2007 starting at midday and ending at 11.59pm. Mr Griffiths sent this to Mr

Russell by fax and email. There is no dispute that it was received by Mana on 18 July 2007.

[10] Mana responded to the notice of strike by drafting a letter dated 18 July 2007.

It reads:

*Dear*

***NOTICE OF SUSPENSION***

***Employee on strike***

***Pursuant to s.87 of the Employment Relations Act 2000***

*Your action in refusing to work constitutes strike action as defined in s.81 of the Employment Relations Act 2000.*

*In view of this Mana Coach Services Limited is suspending you, and all other employees participating in strike action, from your employment. You are hereby advised that effective from 12 noon until 11.59pm on Friday 20 July 2007 you are suspended from your employment with Mana Coach Services Limited unless of course you are prepared to continue work during this period in which case this notice will not apply to you. If you are prepared to continue work would you please advise Operations staff immediately. This suspension will last until you resume your normal duties.*

*This action by Mana Coach Services Limited is pursuant to s.87 of the Employment Relations Act 2000. In terms of this section, your suspension will have the following effects:*

- *For the duration of your suspension, no remuneration by way of salary, wages, allowances or other emoluments, will be payable to you.*
- *On resumption of your employment, your service shall be deemed to have been continuous for the purposes of any rights and benefits that are conditional on continuous service.*

*Yours sincerely*

*Geoff Norman*

***CEO***

[11] This letter was delivered to each Tramways Union member at their depot. Included with this letter was a two page document produced by Mana reporting on the negotiations. That document describes the impasse, lists the two options offered by Mana and refers to the suspension notice. Next, under the heading *Availability*, it says:

*If you are available to continue work during this period would you please advise Operations staff immediately – in no case later than 5pm today Thursday 19 July 2007.*

[12] Mana had distributed directly to Tramway Union members an earlier report dated 4 July 2007 on the state of negotiations at that point. It is common ground that

there was discussion between the negotiators before 4 July and 19 July 2007 to the effect that the company would distribute a report. Mr Russell's evidence (which I accept) is that the 4 July 2007 report was not specifically approved by the Union nor was there any criticism subsequently. I find further that the 19 July 2007 report was not approved specifically by the Union nor was there any subsequent criticism or complaint.

[13] The Tramways Union responded to these communications by sending a letter dated 21 July 2007 to Mr Russell. The letter conveys an offer to settle the agreement, advises that it has legal advice that the suspension notices are unlawful and asks for a response by 2pm Tuesday, 24 July 2007. In the meantime, solicitors acting for the Tramways Union had sent a letter dated 20 July 2007 to Mana asserting that the suspensions were invalid, referring to *Wellington District Woollen Mills IUOW v. Feltex Carpets (NZ) Ltd* [1978] ACJ 59 and commenting that the workers were entitled to be paid. Mr Russell responded on 24 July 2007 and received further correspondence from the solicitors dated 26 July 2007.

[14] The Tramways Union called a second strike for 27 July 2007 from 5am until 9.30am. As before, notice was given to Mana in a letter dated 25 July 2007 sent to the company by fax and email. As with the earlier strike, Mana issued a similar suspension notice dated 26 July 2007 to each Union member. The wording on this notice was adjusted to try and clarify that the suspension would take effect from the commencement of the strike unless the employee continued working. Employees were asked to advise Operations staff by no later than 3.30pm on Thursday, 26 July 2007 if available to work during the strike.

[15] A third strike was called for 1 August 2007 from 2.30pm until 6.30pm. The Tramways Union gave notice dated 31 July 2007 by sending a letter by fax and email. Mana then gave each Union member a notice dated 1 August 2007 similar to the previous suspension notices. Soon after deciding to give notice of the third strike, the Tramways Union made a decision to cancel that strike. However, the cancellation decision was not communicated to Mana until about 2.20pm on 1 August 2007, just before the scheduled commencement of the strike. Mr Griffiths suggested in evidence that he was not able to advise of the cancellation any sooner because of other commitments. However, it is clear that a tactical decision was made to give notice of the cancellation at the last minute. That was intended to cause disruption to Mana.

[16] As with the earlier strikes, Mana changed the rosters of Union members who had not advised of an intention to work during the proposed strike. Mr Rangī, for example, had been rostered to work shift 20 from 1205-1640 hours then 1745-2250 hours on 1 August 2007. After the strike notice was issued, his roster for that date changed to shift 17 working from 1855-0010 on 2 August 2007. Because he did not check the roster when he finished work on 31 July 2007, Mr Rangī did not learn of this roster change until he arrived at the Porirua depot on 1 August 2007 shortly before midday. Mr Tribbe had been rostered to work from 0625-1135 hours and then 1350-1830 hours on 31 July 2007 and 1 August 2007. He worked the morning part of this roster on 1 August but his afternoon roster was changed so he was not then rostered to work. Due to the notified strike, Mana reduced services from Kapiti. Mr Tribbe and others who had originally been rostered for the afternoon work, congregated in the lunch room shortly before 2.30pm. Mr Goldsworthy, believing the strike to be proceeding, went to evict these drivers. Mr Tribbe told him that the strike had been cancelled so Mr Goldsworthy went to make inquiries. Despite receiving confirmation of the cancellation of the strike, Mr Goldsworthy did not go back to the drivers in the lunch room. Those drivers remained on site for part or all of their originally rostered shifts. They were not called upon to perform any work although some non-driving work was available.

[17] A fourth strike was called commencing 12.30pm on 7 August ending 12.30pm on 8 August 2007. Written notice of this strike was given to Mana on 6 August 2007. This strike proceeded. As well as circulating a suspension notice to Union members as with the earlier strikes, Mana also included a copy of a letter to the Tramways Union and a document setting out in table format details of options for settlement of the bargaining. The letter reads as follows:

*6 August 2007*

*Mr Phil Griffiths  
Secretary  
Wellington Tramways Union  
P O Box 6287  
WELLINGTON*

*Dear Phil,*

**RE: AGREEMENT NEGOTIATIONS**

*Given that you are not prepared to resume negotiations as proposed, free of all preconditions, we therefore formally advise that our*

*options 1 and 2 so far offered will remain on the table for your members' consideration up to and including 4pm Wednesday, 8 August 2007.*

*If option 1 or option 2 is not acceptable both options will be withdrawn and replaced with new offers. Please see attached new options 3 and 4, both of which take into account industrial action costs incurred to date by the company and have therefore been adjusted accordingly.*

*There is still the option of either retaining or foregoing the additional week's annual leave and except for the term, hourly rates and alternative holiday the essence of these new options is basically the same as previously offered by the company. In keeping with the summaries previously distributed, the attached has also been supplied to each of your delegates and your members.*

*We believe we have no other options but to take the step because to date unfortunately, there has been no constructive input at all from you which would have allowed meaningful talks to continue. We are available at any time to discuss informal negotiations the new options we have put forward for consideration if indeed options 1 and 2 are ultimately withdrawn. It is our recommendation that we do so in mediation.*

*Would you please acknowledge receipt of this letter.*

*Yours sincerely,  
Geoff Norman  
CEO*

*cc Dave Rang, Bill Porteous, Rainer Tribbe*

[18] Options 3 and 4 had rates of pay between 10 and 50 cents per hour less than the rates offered in options 1 and 2. The replacement options also provided for the second and third year increases to come into effect later than was the case with options 1 and 2.

[19] As indicated on the copy of the letter circulated to Union members on 6 August 2007, the letter and the attached table were also sent by fax and email to the Tramways Union. This happened, at best, shortly before the material began to be distributed to Union members at the three depots. Mr Russell's evidence is that this material is similar in kind to that circulated earlier in July without any complaint from the Union. He also says that Union members thought that Mana had been unresponsive to its bargaining obligations so Mana had to put its version to be clearly understood. Mr Russell further says that the Union had been dragging the chain from mid-July, not answering Mana's and the mediator's attempts to resume negotiations. These are the reasons given by Mr Russell for Mana's direct communication with

Union members. Mr Norman's evidence is it was decided to write to the Union and copy the letter to Union members because Mana had been unable to make contact with Mr Griffiths. He also says that the strategy of giving the 6 August 2007 material directly to Union members was discussed with Mana's Board. That meeting, on Ms Waddell's evidence, must have been before 4 August and was possibly on 2 August 2007. I will return later to the point about Mana's reasons for circulating the 6 August 2007 material directly to Union members.

[20] Five of the remaining members at the Newlands depot resigned from the Union on or after 7 August 2007 and they all worked during the strike. The Tramways Union says the proper inference to be drawn was that this was caused by Mana's strategy of communicating directly with the Union members. Mana, on the other hand, points to some indications in the resignation letters and the communication between Mr Russell and one of the drivers to say that the resignations arose from members' frustrations over poor communication from the Tramways Union. I accept the evidence of Mana on this point.

[21] The Tramways Union solicitor wrote to Mana on 7 August 2007. That letter repeats the earlier criticism about the suspension notices and complains that the communication directly to Union members on 6 August 2007 breached the bargaining process agreement and s.32(1)(d) of the Employment Relations Act 2000. In response, Mana indicated its intention to refrain from withdrawing the original two offers to allow for further consideration. Subsequently the parties participated in mediation without resolving their bargaining dispute or the issues for decision in this determination. However, as noted above, the bargaining is now concluded.

### **The suspensions**

[22] Section 87 of the Employment Relations Act 2000 deals with suspension of striking employees. It starts *Where there is a strike, the employer may suspend an employee who is party to the strike*. The following subsections regulate the duration of any suspension and its legal effect on the employment relationship. Relevantly here, employees who are suspended are disentitled to pay. This is an important provision because a strike is not only a cessation of work disentitling employees to their wages: see for a recent example *Postal Workers Assn v NZ Post Ltd* 23/7/07 R Arthur (member) AA215/07. That case makes the point that an employer cannot

backdate the disentitling effect of a suspension even though the employer was not at first aware of the existence of the strike.

[23] The point for the applicant is that there was no strike in existence when Mana gave each letter to employees, only a notice that there would be a strike in the future. It follows that there was no statutory power to suspend the employees when Mana handed out the letters so they cannot be disentitled to pay in reliance on the suspensions. Because employees presented themselves for work in reliance on the rosters in place before the 31 July 2007 strike notice they should be paid accordingly.

[24] The argument for Mana is that the Act does not prescribe when a notice of suspension can be given nor does it even require a notice although there must be some communication concerning the fact of and the statutory basis for any suspension: see section 89 of the Employment Relations Act 2000. All that is required is the existence of a strike before there can be a valid suspension. The letters all were clear that a suspension only arose if the recipient actually commenced striking.

[25] The arrears claims relate only to 1 August 2007. It is common ground that there was no strike that day, its withdrawal having been communicated shortly before the intended commencement. It follows that Mana cannot rely on the letter advising of its intention to suspend employees who actually went on strike for not paying affected employees. Mana points out that all employees were paid in accordance with the rosters posted soon after notice of the 1 August 2007 strike was given. The question of arrears must be resolved by considering whether Mana could lawfully make those roster changes. The answer is clear enough for any employee engaged as a full-time employee in accordance with the applicable collective employment agreement. Those persons are entitled to payment of at least 40 hours each week, with ordinary hours not exceeding 8 per day worked on 5 out of the 7 days in the week. Irrespective of any roster changes, they must be paid at least for that time since there was no default on their part to entitle Mana to make a rateable deduction. Clause 9.13 of the agreement requires the employer to display a roster in a conspicuous place. There is also company handbook referred to in the employment agreement as binding. That says that rosters are posted 3-4 days in advance *opera[ting], as closely as possible, to the 6 month roster matrix*. There may be changes to that roster resulting from *charter work, annual leave, sick leave, bereavement leave etc and other driver absences from work .... Driver Supervisors*

*will, where practicable, notify and highlight changes that occur at short notice.* Reading the collective agreement and the handbook together, I find there was no right for Mana to change the rosters of striking full-time employees from that posted 3 or 4 days before 1 August 2007. It follows that full-time employees must be paid for the rosters set prior to the notice of strike dated 31 July 2007 together with payments for time actually worked during that week.

[26] The collective agreement provides for part-time employees. They are regularly engaged to do set hours per day or week but are not employed on a full-time basis. There is nothing in the collective agreement or the company handbook to lead to the conclusion that they should be treated any differently to the full-time employees regarding rosters. Accordingly I find that part-time employees must be paid for the rosters set prior to the notice of strike dated 31 July 2007 together with payments for time actually worked during that week.

[27] There is a further category of employee (casual employees) but there were none amongst the affected employees.

[28] For the respondent it is argued that the statutory scheme regarding the giving of notice of strikes applicable here means that the employees cannot unilaterally renege from their notice. The situation is analogous to the provisions regarding notice of strikes or lockouts in essential industries. I am unaware of any decision of the Courts or tribunals over the years that a strike or lockout notice once given cannot be unilaterally withdrawn. The giving of notice even accompanied by an unannounced intention not to act on it can be part of the theatre of bargaining. It is not for the Authority to judge the morality or even the efficacy of industrial tactics. The Act does not expressly prevent a party from unilaterally withdrawing a notice and I do not accept that such a prohibition arises by necessary implication.

[29] There is a further submission that employees should be denied any *fiscal reward* arising from the tactic of giving then withdrawing strike notice because of equity and good conscience and good faith. The point about good faith is answered by whether a strike (or lockout) is lawful: see sections 80(a) and 85 of the Employment Relations Act 2000. The strikes in question were all lawful. Both points are also resolved by *Bell v Broadly Downs Ltd* [1987] NZILR 959 which held that contractual (in this case) or statutory rights cannot be defeated by reference to equity and good conscience.

[30] Finally, it is submitted that the strike began each time when notice was given. That cannot be right. There is in a case such as the present one a statutory obligation to give not less than 24 hours notice of a strike. If a strike is deemed to start when notice is given, a party could never comply with that statutory obligation. Further, there are two parts to the definition of a strike. There must be some action (or inaction) falling within the specified limbs which is the result of some agreement or combination. A strike occurs only when both aspects are present. That is why the Employment Court's injunctive jurisdiction is expressed to include *threatened* strikes: see sections 80(c) and 99(1)(a) of the Employment Relations Act 2000 for example.

[31] I find that the full-time and part-time drivers are entitled to payment for 1 August 2007 in accordance with their rosters as posted immediately before the strike notice dated 31 July 2007, together with payment for work actually performed that day. There could be some difficulty with that because Mana may not have retained a copy of that roster. However leave is reserved if there is any difficulty or lack of agreement in respect of any affected individual.

#### **Suspensions in breach of good faith?**

[32] It is submitted that the suspension letters delivered to union members amount to a breach of good faith. To some extent the submission is based on an analysis of the text of the letters. I accept the point made by the respondent that the intention of the letters is to be derived from the words they use. The letters use moderate language to say that notice of a strike has been received; that any striking employee is suspended; that suspended employees are not entitled to wages but retain continuity of service; and that any employee willing to continue working despite the strike should contact Mana's operations staff. There are some immaterial variations in the wording of each of the letters. There is nothing in this that is misleading or deceptive or likely to be so.

[33] The second limb of the argument is that giving employees advice of suspension before the commencement of a strike is misleading or deceptive because the law requires the existence of a current strike before an employer's right to suspend arises. On this analysis Mana repeatedly and knowingly breached good faith because it had pointed out to it the applicant's view of the law that there needed to be an active strike before any suspension.

[34] The Union refers to *Wellington District Wollen Mills etc IUOW v Feltex Carpets NZ Ltd* [1978] ICJ 59. That case dealt with the suspension of non-striking employees. The employer knew one section of its workforce would strike on the Friday and on the Thursday told non-striking employees they were suspended as of 4.30 pm Thursday. At that time there was only a threatened strike. For that reason, the Arbitration Court held that there was no valid suspension. The present case concerns suspension of striking employees but the wording is materially identical and there is no other reason to apply a different meaning to the relevant words. This situation is closer to *Bickerstaff v Healthcare Hawkes Bay Ltd* [1996] 2 ERNZ 680 where there was an invalid suspension of striking employees at a time when they were not currently on strike. Accordingly, Mana did not validly suspend any of the employees.

[35] Accepting that Mana's suspensions were not valid does not make its actions a breach of good faith. The statutory requirement is to act in good faith and not to do anything to mislead or deceive each other or that is likely to do so. Good faith connotes honesty, openness and absence of ulterior purpose or motivation: see *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239. The letters were circulated openly. The description in the letters, summarised above, about the receipt and effect of each strike notice was accurate even given the invalidity of the suspensions. No-one could be or was misled or deceived by the content of the letters. There is no reliable evidence to support a finding that Mana persisted with circulation of the letters knowing of the invalidity of the suspensions for any ulterior purpose. Accordingly I do not accept that there was any breach of good faith arising from Mana's circulation of the invalid suspension notices.

### **Communications during bargaining**

[36] This complaint is about Mana circulating to union members a copy of its letter of 6 August 2007 to the Union and the attachment setting out the bargaining options. This is said to be a breach of section 32(1)(d) of the Employment Relations Act 2000 and the bargaining process agreement. Section 32(3)(b) of the Act makes the parties' bargaining process agreement relevant to determining whether there has been a breach of statutory good faith behaviour by one of them. The agreement itself however does not have contractual force: see *AMI Insurance Ltd v Finsec Inc* [2003] 1 ERNZ 518. The relevant part of the agreement reads:

*Communication*

*The parties may agree on a statement or process reports during negotiations to interested parties. This shall not prevent either party making comment to interested parties or public comment but such communication must be factual and not breach the requirements of section 32(1)(d) of the Employment Relations Act 2000. When representing the other party's position, claims or counter claims an accurate account must be provided. A copy of any communication, either verbal or written must be provided to the other party prior to release.*

[37] *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 1 ERNZ 37 is a case dealing with communications from an employer to employees in the midst of bargaining between the employer and the employees' union. The Court of Appeal confirmed that section 4(3) of the Employment Relations Act 2000 is subject to section 32(1). The Court went on to hold that section 32(1)(d) prohibits an employer communicating with its employees (during bargaining) only where such communications amount to negotiation with those employees without the union's consent or they undermine or are likely to undermine the bargaining or the union's authority.

[38] In this case, it is alleged that there was a breach of good faith by communicating without consent, bypassing the union and undermining the union and the bargaining. It is not specifically alleged that the communication amounted to negotiating directly or indirectly with the employees.

[39] There is no suggestion that the Union actually consented to the 6 August 2007 letter being circulated directly to Union members. There is an argument that the union impliedly consented because it did not object to the earlier communications but I do not accept that submission. Those earlier communications summarised what had already occurred in the bargaining between the Union and Mana. The 6 August 2007 letter was of a different character. It conveyed new proposals, being a deadline followed by a reduced offer. The following things did not happen before the 6 August 2007 communication. There was no opportunity for the Union to consider and respond. The Union had no opportunity to accept the proposals or offer an explanation for not accepting them. Assuming they would not have been accepted, there was no opportunity for the parties to work together to identify barriers to agreement and give further consideration to their respective positions. These things had all been done before the earlier communications in accordance with the

statements in the bargaining process agreement designed to promote orderly collective bargaining.

[40] There was evidence on behalf of Mana about why the letter was sent directly to Union members. Mr Norman spoke of difficulties attempting to contact the Union prior to sending the letter to the Union and circulating it to employees. Mr Marau also criticised the Union's failure to respond to attempts to resume negotiations. However the decision to circulate the proposal directly to Union members at the same time as raising it with the union was discussed by Mana's Board. At that time there was recent correspondence both with the Union and its solicitors. If there had been some genuine failure by the Union to re-engage in bargaining one would have expected Mana to raise that in correspondence. The communication strategy was Mana's response to the disruption caused by the strikes. It was not borne out of the Union's failure to re-engage in negotiations but was a calculated attempt to bypass the Union, undermine its authority and undermine the bargaining that had occurred with the Union. I find that the communication was a breach of good faith. I will return later to a remedy.

### **Regressive bargaining**

[41] Under this heading the Union seeks to have the Authority condemn Mana's bargaining position as conveyed in the 6 August 2007 communication as a breach of good faith. The essence of the argument is that by withdrawing its existing offer following a short period of time and replacing that with an offer of lower wage increases, Mana engaged in regressive bargaining in breach of the Act's good faith requirements. Mana's conduct through the bargaining is described as intransigent compared to the Union's willingness to explore alternatives. No doubt Mana could convey the Union's conduct in a similar way.

[42] The claim is essentially tactical arising in the context of (then) incomplete bargaining. However, I do not accept that there was any breach of good faith by Mana except as otherwise specifically identified in this determination. Mana gave no commitment to leave open for indefinite consideration the package containing options one and two so it was entitled to withdraw the offer. The replacement offer was inevitably seen as provocative and was probably intended that way. However, bargaining is a robust process where parties attempt to persuade or force others to change positions. That is what happened here.

**Discrimination**

[43] Late in the piece, the Union made submissions about discrimination. As counsel for Mana properly pointed out, this had not been raised in a timely manner so as to allow evidence to be brought. I agree with counsel that the point should be disregarded.

**Performance of striking employees' work**

[44] Penalties are sought for alleged breaches of section 97 of the Employment Relations Act 2000 which constrains an employer's ability to use substitute labour lawfully to perform the work of striking or locked out employees. Mana provided passenger transport services during the strikes by using employees who did not heed the strike call, using other drivers from the same depot who did not belong to the Union, using drivers from other depots who did not belong to the Union, using casual drivers (including Ms Waddell), and using mechanics.

[45] There is no complaint about the lawfulness of Mana using non striking drivers from the same depot but it is submitted that Mana's use of drivers from other depots amounts to a breach of section 97 of the Act. It is said that (for example) the Newland's driver routinely works from the Newlands depot only, not from the Kapiti depot some 35 kilometres away. In *Finau and ors v Southward Engineering Company Ltd* 25 July 2007, Colgan CJ, Shaw and Couch JJ, WC 17/07 the Employment Court held that the phrase *the work of a striking or locked out employee* is based on the concept of what may properly be said to be the work which an employee normally performs. That comprises tasks that the employee regularly or routinely performs in the course of their employment, the key being what the employee actually does as a matter of practice. If the work to be performed can be so described, it would be their own work and not the work of a striking employee.

[46] The evidence establishes that drivers generally work from the one depot. Drivers sometimes accept work from other depots when there is a driver shortage or extra demand but that could not be described as work that they regularly or routinely perform. Given that finding, it cannot be said that drivers normally based at another depot were performing their own work rather than that of striking employees when they worked from a different depot on the days of the strikes. It follows that Mana could only lawfully use such drivers during the strikes with the agreement of those

drivers: see section 97(3)(c) of the Employment Relations Act 2000. However, there is no evidence to indicate an absence of consent so this aspect of the complaint cannot succeed.

[47] Depot mechanics were used to drive contracted routes during each of the strikes. Ms Waddell's evidence is that mechanics, administrative and supervisory employees with appropriate licences at all depots have undertaken contracted driving duties for more than 20 years. They do so whenever there is a shortage of drivers. On that basis, it cannot be said that driving duties are not part of their own work. On the *Finau* analysis that means that the work performed by the mechanics is not caught by section 97 of the Act. In any event, there is no evidence that there was any absence of consent on the part of these existing employees. Accordingly, this aspect of the complaint cannot succeed.

[48] There remains a complaint about the use of casual employees to do the work normally done by the striking drivers. That includes Ms Waddell whose evidence is that she was engaged as a casual employee in respect of several strike days. Although a director of Mana, Ms Waddell was not also an employee in the lead up to the strikes.

[49] Several casual employees worked during the strike on 20 July 2007. Mr Goldsworthy's evidence is that there were three casual employees employed to cover the work that would otherwise have been done by striking employees. These casuals together with a Mr Patterson and a Mr Wells were similarly employed for 27 July 2007. Mr Wells had never worked previously for Mana. Some of these people were also used on 1 August 2007 but because the strike did not proceed there can be no breach of section 97 arising. Several casuals were also used on 7 August 2007.

[50] The collective agreement specifies that for casual employees, *...there exists no implied continuity of employment and ... each engagement shall be treated as a separate engagement. Upon the completion of each engagement, six percent of total gross taxable earnings shall be paid for the purposes of annual holiday entitlement.* Various benefits that accrue as a result of continued service are said not to apply to casual employees. Casuals not covered by this agreement are bound by similar provisions.

[51] Mana submitted that the employment relationship for casuals subsists in a dormant state between their specific engagements and on that basis they must be

regarded as already employed by Mana at the time of each strike. Reference is made to several clauses in the collective agreement. For example, Mana must first advertise fulltime vacancies internally and existing part-time and casual drivers are entitled to apply and have an explanation of why any application is declined. That approach would mean that almost everyone who ever worked for Mana as a casual driver would fall within section 97(3)(a) of the Act, it being most unlikely that such casual employment had ever been formally terminated by either party. If Mana is right about the employment relationship subsisting in a dormant state between specific engagements, the dormancy must also mean that such an employee cannot be regarded as *already employed* for the purposes of this section. The phrase *already employed* denotes a sense of currency that is excluded by the express contractual terms in this case. The situation is quite different from the casual employee in *NZ Engineering, Printing and Manufacturing Union v The New Zealand Herald* 24/6/02 J Wilson (member) AA190/02.

[52] It follows that, in respect of these casuals, Mana did not comply with section 97 of the Employment Relations Act 2000 and is liable for a penalty. There are a total of six casuals including Ms Waddell employed at different times during the strikes.

### **Remedies**

[53] There is the finding above about arrears of wages with leave reserved. There is also a claim for a penalty for unlawful deductions or the breach of employment agreement represented by the failure to pay wages to the affected employees. No penalty should be imposed in the circumstances. The position taken by Mana that rosters were changed and employees who belatedly did not strike were not paid because they were not rostered to work means that the problem was more that of a dispute than anything else. Mana's position was tenable although not made out in the end. It would not be appropriate to impose any penalty.

[54] There is a finding that the 6 August 2007 communication was a calculated attempt to bypass the Union, undermine its authority and undermine the bargaining that had occurred with the Union. It was therefore a breach of section 32(1)(d) of the Employment Relations Act 2000. That makes it a breach of section 4(1) of the Act as well. I find that this was not a sustained breach of good faith by Mana. However, it was intended to undermine bargaining and the employment relationship between

Mana and the Union. Section 4A(b)(i) and (iii) of the Act renders Mana liable to a penalty.

[55] The bargaining and the relationship overall were not overshadowed by the breach of good breach represented by the 6 August 2007 communication. I should also note that Mana resiled from the intentions expressed in that letter and reinstated the earlier offer. These are mitigating factors. However, it must be borne in mind that the breach comprises intentions that to some degree were achieved and is conduct that is inimical to the promotion of orderly collective bargaining. In these circumstances I impose a penalty of \$2,500.00 to be paid to the Crown.

[56] There is a finding that Mana breached s.97 of the Act. A global penalty of at least \$4,000.00 is sought by the Union. That impresses as a modest penalty for the use of a number of casual employees over several strikes in breach of the Act. Accordingly I order Mana Coach Services Limited to pay to the Crown a penalty of \$4,000.00.

[57] Various compliance orders and declarations are sought. To the extent not already dealt with above, those remedies related to the unresolved bargaining and are no longer required or appropriate now that the parties have concluded a new collective agreement.

[58] Costs are reserved.

#### **Final comment**

[59] The determination of this matter was delayed by personal events that interrupted my consideration of the evidence and submissions. I apologise for any inconvenience caused by the delay.



Philip Cheyne  
Member of the Employment Relations Authority

