

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 221/08  
5120622

BETWEEN                      BRIAN WEBB and BYRON  
   KNIGHT  
   Applicants

AND                              NEW ZEALAND  
   TRAMWAYS AND PUBLIC  
   PASSENGER TRANSPORT  
   EMPLOYEES' UNION  
   INCORPORATED  
   Respondent

Member of Authority:        Alastair Dumbleton

Representatives:            Paul Carrucan, advocate for Applicants  
   Gary Froggatt, advocate for Respondent

Investigation Meeting:      18 June 2008

Determination:              27 June 2008

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**DETERMINATION OF THE AUTHORITY**

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**Outcome of investigation**

[1]     The Authority has investigated employment relationship problems raised by the applicants about the respondent union. The outcome of the investigation is this determination in which, for the reasons given, the Authority declares that in several major respects and as complained of by the applicants, the respondent has failed to comply with its registered rules.

[2]     The Authority determines that in breach of its rules the respondent New Zealand Tramways and Public Passenger Transport Employees' Union Incorporated ("the Tramways Union") has failed for 10 years or more to provide for and maintain a National Council as a part of the governance and management structure the union is required to have.

[3] Further, the Authority determines that contrary to its rules in the circumstances, the Tramways Union purported to conduct disciplinary proceedings against the applicant Mr Brian Webb and as punishment purported to expel Mr Webb from membership in 2007. Under the rules such action may only be taken by the National Council, a body that has been defunct or treated as such by branches of the union since about 1992. Mr Webb's expulsion from the union is declared to be of no effect and he is declared to have remained a member since he joined.

[4] The Authority determines that disciplinary proceedings taken or threatened by the union against the applicant Mr Byron Knight were in the circumstances also actions outside the powers of the Tramways Union under its rules. The purported suspension of Mr Knight even temporarily was of no effect, as it was not an action taken by the National Council in compliance with the rules as required.

[5] The Authority also determines that actions by Mr Gary Froggatt, the President of the Auckland Branch of the Tramways Union, were not in good faith. On several occasions over the last five years or more Mr Froggatt has in writing represented himself as holding the office of National Secretary under the rules when, as he knew, that was not a position he held at those times. His misrepresentation was likely to have misled or deceived members of the union.

[6] The principles the Authority has applied in determining this case include long established law that the rules of a union are a charter or contract between the union and its individual members. The rules as rules of an organisation derive their efficacy from their registration by the Registrar of Unions. Accordingly any amendment of the rules must be carried out in compliance with the rules and must be duly registered as an amendment. No agreement of the members and no general practice by them over any period of time, can alter or dispense with the rules; *Barrett v Ortiz* (1945) 70 CLR 141 at 151.

[7] The rules of the Tramways Union were last amended and recorded by the Registrar of Unions in 1990, under the Labour Relations Act 1987. Since then, in 1991 and 2000, there has been major legislative change affecting unions and collective bargaining, making the rules outdated and long overdue for amendment. Without amending the rules as required, the union has simply dispensed with them in relation to several of the matters complained of by Mr Webb and Mr Knight. Thereby the union breached the rules.

[8] In summary, the Authority has found that the Tramways Union has by its sustained action or inaction put itself into a position from which it is now difficult to move. Although the National Council that is required to be provided under the rules can be disestablished if it is considered to serve no useful function under the successor statutes to the Labour Relations Act, to achieve that result the rules must first be properly amended and that requires there a National Council to give approval to any proposal to amend the rules. Although the Tramways Union can also disestablish itself as a national union in favour of local branches becoming registered as separate unions in their own right, if that is the wish of its members, disestablishment also requires there to be in existence a National Council, which there has not been for many years.

[9] Unless and until there is a National Council there is no ability under the rules for the union to discipline its members, whether by expulsion or less drastic punishment.

[10] The union as a registered employees' organisation will eventually implode at the level of governance and management unless immediate steps are taken to restore its National Council. That will bring back the ability to amend the rules and achieve any restructuring of the union under which the functions and powers of the union may be devolved from national to branch level, if that is the members' desire.

[11] Orders are made at the end of this determination requiring the union to comply with the requirements of the rules governing the conduct of elections in relation to the several National Officer positions of the union and for the restoration of a properly constituted National Council. Directions are given to certain union officers to take action as required under the rules to allow the National Officer elections to take place.

[12] The union is recommended to seek any assistance that the CTU and/or Registrar of Unions may be able to offer to facilitate the actions now required of the union.

[13] Orders are also made restraining the Tramways Union from representing that Mr Webb was at any time an expelled member, and also restraining the union from attempting to discipline him again in respect of the offences for which he was purportedly expelled in 2007.

**Reasons for determination**

[14] The applicant Mr Brian Webb was a member of the Tramways Union on 10 September 2007 when he was notified by the union that he had been expelled from membership. Before then he had been charged with offences against the union and disciplinary proceedings were taken against him expressly under the union's rules.

[15] The applicant Byron Knight was not expelled and has remained a member of the Tramways Union. He was though cautioned or censured following disciplinary proceedings taken against him under the rules.

[16] The respondent Tramways Union was incorporated under the Incorporated Societies Act 1908 on 15 May 1991. It was registered as a union under the Employment Relations Act 2000 on 4 October 2000.

[17] Currently there are about 1200 members of the union, the majority within the Auckland branch. There are also branches at Wellington and Dunedin. The branches were created under the Tramways Union rules and they are not registered separately as unions.

[18] In this investigation the representation of the Tramways Union has been by Mr Gary Froggatt, the Auckland Branch President, who had in attendance with him at the meeting of 18 June 2008 several other officers of the union including Mr Peter Cross, Auckland Branch Secretary, and Mr Perry Davis, Auckland Branch Vice-President. Officers from other branches were not apparently present.

[19] The Tramways Union has a Certificate of Registration as a union. By law that certificate is to be regarded by the Authority as conclusive evidence that the union is registered under the Employment Relations Act 2000 and that its registration was completed in accordance with all requirements of that Act; s 15 of the Act.

[20] In relation to the union's status as an incorporated society, complaints about any breach of the Incorporated Societies Act must be taken up with the Registrar of Incorporated Societies or under the jurisdiction provided under the 1908 Act, which does not lie with the Employment Relations Authority.

**Employment relationship problem**

[21] As well as in relation to the disciplinary action taken or threatened against them, Mr Webb and Mr Knight have made a number of complaints about the Tramways Union and the way that for some time, nationally as well at branch level, it has been conducting its affairs as a union. The statement of problem lodged by them in the Authority is a free and wide ranging discourse on the problems that the Authority has investigated. Mr Carrucan as advocate for Mr Webb and Mr Knight, orally and in writing at various times made equally expansive submissions about how the Authority should deal with those problems by way of orders and other relief.

[22] Aside from declaratory relief, which the Authority gives in this determination, most of the remedies sought on behalf of the applicants were either outside the jurisdiction of the Authority or will not be constructive towards restoring the National Council and correcting the harm done to Mr Webb through his purported expulsion. For example the Authority has no jurisdiction to remove from office any duly elected officer of a union branch, such as Mr Froggatt. Also, some of the complaints raised are to be dealt with internally through the grievance procedures provided to members by the rules.

[23] Section 161 of the Employment Relations Act 2000 gives the Authority jurisdiction to investigate employment relationship problems and make determinations about them.

[24] At material times an employment relationship existed between both Mr Webb and Mr Knight and the Tramways Union, by virtue of s 4(2) and s 5 of the Act which provide that an employment relationship exists between a union and any member of the union.

[25] Under s 161 of the Act the Authority has exclusive jurisdiction to make determinations about employment relationship problems, which are defined as including “*matters related to a failure by a union to comply with its rules;*” s 161(1)(k) of the Act.

[26] Mr Webb and Mr Knight, in their application to the Authority, have in several respects complained about such matters in relation to the Tramways Union and its rules.

[27] The fundamental issue at the heart of the problems raised by Mr Webb and Mr Knight has been whether the governance and management structure formed and maintained by the Tramways Union for the past 15 years or more has accorded with the rules of the union. The question has been whether the Tramways Union operated in breach of its rules by failing to have a National Council and by also failing to carry out elections every four years for the National Officer positions on that council.

[28] Mr Webb has complained that his expulsion from the Tramways Union was carried out in breach of its rules. This flows from his complaint about the failure of the union to have a National Council, as he contends that under the rules only the Council was able to take disciplinary action against a member, including the action of expelling a member.

[29] Further, the complaints of Mr Webb and Mr Knight have been that the Tramways Union, at national level, failed to comply with rules requiring financial statements or returns to be filed annually.

[30] There were also complaints about the financial management of the Tramways Union, particularly within its Auckland Branch. There was a complaint that the Auckland Branch has engaged in usurious and illegal money lending activities and that officers of the branch "*misappropriated*" funds when making certain payments to the Secretary of it, Mr Cross.

[31] Under s 4 of the Act the employment relationship between a union and its member imposes an obligation on both parties to deal with each other in good faith. Mr Webb and Mr Knight have complained that the Tramways Union has breached that obligation which includes a duty not to mislead or deceive or doing anything that is likely to mislead or deceive; s 4(1) of the Act.

[32] When embarking on its investigation the Authority kept in mind s 160(3) of the Act which requires that overall the Authority is to concentrate on resolving any employment relationship problem regardless of how it may have been described. Bringing an investigation to conclusion requires the Authority to establish facts and to make a determination according to the substantial merits of the case, without regard to technicalities; s 157(1) of the Act. In this case, that determination must include declarations as to the rights and obligations of Mr Webb and Mr Knight and the

Tramways Union, particularly with regard to the requirements of the rules of the union.

[33] The parties were put on notice by the Authority during the telephone conference held on 6 May 2008 that the Authority might provide remedies by way of injunction issued against the union in the event that the union was found to have breached any of its rules and if the Authority considered that an injunction was the appropriate way to rectify such breach.

[34] The remedy of injunction is available under s 162 of the Act which expands the jurisdiction of the Authority to include relief that may be given by the High Court or a District Court under any rule of law relating to contracts. This expanded jurisdiction may be exercised “*in any matter related to an employment agreement*”. For the following reasons I consider that the question of compliance by the Tramways Union with its rules is a matter related to employment agreements that Mr Webb and Mr Knight were party to.

[35] At material times Mr Webb and Mr Knight were employed under an employment agreement by Transportation Auckland Corporation Limited, a company which trades under the name Stagecoach Auckland. The applicants remain employed by Stagecoach.

[36] Membership of the Tramways Union was not merely incidental to the employment relationship entered into by Mr Webb and Mr Knight but sprang directly from it as a means for them to seek to have protected and bettered their conditions of employment under employment agreements. The rules of the Tramways Union provide that to become a member of the union a person must be employed or engaged to be employed, and in that regard the complaints made by Mr Webb and Mr Knight about the union are matters related to their employment and to their employment agreements, for the advancement of which they joined the union and became subject to its rules.

[37] Under the Employment Relations Act the express purposes of registration of unions include the giving of recognition to their role in promoting the collective “*employment*” interests of members and also giving unions the right to represent members in collective bargaining; s 12 (a) and (c) of the Act.

[38] The complaints of Mr Webb and Mr Knight extend to the actions of the Auckland Branch President, Mr Froggatt, in relation to negotiating or bargaining collectively in 2005 for an employment agreement covering the branch members. The Authority's investigation has therefore very much been concerned with matters "*related to an employment agreement*" for the purposes of s 162 of the Act and legal remedies available under it.

[39] In concluding its investigation the Authority has found no basis for an attack on the validity of the Tramways Union's registration. The certificate of registration is conclusive evidence that all the requirements of the Employment Relations Act relating to registration were complied with and that on the date of registration the Tramways Union was registered as a union.

[40] There was no application made to the Authority for an order directing the Registrar of Unions to cancel the Tramways Union's registration under s 17(1) of the Act. There was no evidence found or seen by the Authority that since registration in 2000 the rules of the union have ceased to comply with the requirements for registration of s 14(1) of the Act. The complaints in this case have not been about the contents of the rules but the way those rules have been applied or not applied, as the case may be.

[41] The Authority has also found or seen no evidence calling into question the validity of any bargaining carried out at material times by the Auckland branch of the Tramways Union for any collective agreement with any employer. Under the rules branches have expressly been given the power to negotiate collective agreements with local employers and also to have direct dealings with them over matters relating to conditions of employment. The absence of a National Council, as complained of by Mr Webb and Mr Knight, does not raise any issues about the validity of employment agreements entered into by any branch of the union with Stagecoach or any other employer.

## **Mediation**

[42] Before commencing the investigation the Authority considered whether it should direct the parties to mediation under s 159 of the Act. The Authority decided that because there was a fundamental issue about the constitutional governance of the union, there may be difficulty in having in attendance at any mediation persons who

could represent the union at a national level and enter into arrangements acceptable to all branches and their members. In the circumstances mediation was not directed at the outset of the investigation, as it seemed unlikely that mediation would contribute constructively to resolving the employment relationship problems.

### **Rules of the Tramways Union**

[43] The current rules of the Tramways Union are long overdue for amendment, as they no longer reflect the current statutory framework within which the union is operating and seeking to achieve its objectives. The membership may consider that changed rules would serve better the interests of the union and its members.

[44] The rules have not been amended since 1990. They refer to the Labour Relations Act 1987, the legislation of a different era. Since then, the Employment Contracts Act in 1991 and the Employment Relations Act in 2000, have each in opposite ways brought considerable change to the role of unions in employment and to their ability to bargain collectively with employers.

[45] The current rules were recorded by the Registrar of Unions on 20 December 1990 as a “*complete amendment to rules.*” The signature and stamp of the Registrar are on the cover page.

[46] The name and signature of Mr Gary Froggatt, currently Auckland Branch President, both appear on the cover of the 1990 complete amendment. Although the common seal of the Tramways Union affixed to those rules includes the words “*Auckland Branch,*” the rules themselves are expressed to be those of the Tramways Union which is the national union, the entity which became registered.

[47] Mr Froggatt stated on the cover of the 1990 rules amendment that his position was “*National Secretary.*” It was an issue for the Authority in this investigation whether Mr Froggatt had since 1990 remained the National Secretary of the Tramways Union under its rules and, if not, when it was he ceased to hold that position.

[48] In May 1991 some five months after the complete amendment of the rules had been recorded the previous year, the Employment Contracts Act was passed into law repealing the Labour Relations Act 1987. At the same time unions were relegated to the status of incorporated societies and were referred to in the legislation simply as

employees' organisations. Collective bargaining was not expressly promoted by the 1991 Act.

[49] In October 2000 the Employment Relations Act was passed into law, repealing the Employment Contracts Act 1991. Once again legislative recognition was given to the role of unions in promoting their members' collective employment interests and the new statute promoted collective bargaining.

[50] The Registrar's file has on it a letter written by Mr Froggatt in 2000 to the Registrar about rewriting the Tramways Union's rules. It appears that this was written in reply to a letter from the Registrar which he had sent routinely to unions registering under the new legislation, to advise them of the need to amend their rules so that the rules referred to the provisions of current legislation rather than repealed law such as the Labour Relations Act 1987. Mr Froggatt enclosed with his letter to the Registrar a copy of proposed rules which were to be submitted to Tramways Union members for their approval.

[51] Whatever became of that attempt to rewrite the rules following the Registrar's suggestions, the rules were not amended and remain today as they were in December 1990.

[52] As recently as December 2007, for the 102nd annual general meeting of the Auckland Branch of the Tramways Union there was placed on the agenda the item "*Revision of Union Rules.*" A draft of the revised rules was produced for members to consider. Whatever was decided at that most recent AGM, no proposed changes have been forwarded to the Registrar and no change has therefore been made as an amendment to the rules since they were last recorded in 1990.

### **The National Council**

[53] The rules of the Tramways Union provide for a National Council, as follows:

#### **16. MANAGEMENT STRUCTURE**

*The Union shall be governed by:-*

- (a) *A National Council which shall be the highest decision making authority of the Union, subject only to the outcome of a secret ballot of the financial members of the union; and*

- (b) *An unlimited number of authorised Branches of the Union which shall have the authority to establish depot committees.*

[54] The rules provide that the National Council is to meet annually and that every four years it is to elect the officers of the Union. Those officers are the National President, National Vice-President, National Secretary and National Treasurer.

[55] The rules also provide that the National Council is to consist of up to three elected representatives from each branch of the Union, being the Branch President, Branch Secretary, and Branch Vice-President or other officer of the branch as may be elected, as well as any person duly elected a National Officer pursuant to the rules.

[56] Elections for National Officer positions are to take place in accordance with Rule 21(d) as follows:

- (d) *Nominations and voting for National Officers shall be every four years. Only financial members of the Union shall be eligible to nominate candidates for election to National Officer positions. The National Secretary shall call for nominations by notice posted on noticeboards accessible to all members of every Branch, stating the time, manner and conditions for which candidates for election may be nominated. Nominations shall be called at least seven days prior to the date and time set by National Council for the closing of nominations.*

[57] The rules then go on to provide that the National Secretary, after receiving nominations in writing, shall hand them unopened to the Returning Officer at the specified closing time and date for nominations.

[58] Where not more than one valid nomination is received for a National Officer position the Returning Officer shall declare the nominated person to be duly elected. Where more than one valid nomination is received, under the rules an election is to be conducted, which may be by secret ballot.

[59] I find that the management and governance of the Tramways Union under its rules requires the existence of a National Council in addition to any branches of the union that have been established. I find that the National Council is to consist of any persons duly elected a National Officer, in addition to the elected branch representatives of the union. I also find that elections for the positions of National Officer are required to take place every four years under the rules and that there is to

be a meeting of the Council at least annually, in November. Additional meetings may be called as and when required by any of the National Officers.

### **Functions of National Council**

[60] The functions of the Council are set out in Rule 22(a), as follows:

*NATIONAL COUNCIL – the Council shall:*

- (1) *Have the authority to amend the rules of the Union as provided for in rule 44;*
- (2) *Determine the policy of the Union;*
- (3) *Hear and determine any grievances from Branches or members;*
- (4) *Assist and advise Branches on any matter relating to the public transport industry;*
- (5) *Assist the Branches in achieving the objects of the Union;*
- (6) *Discipline members pursuant to rule 12; and*
- (7) *Decide financial matters affecting the Union as a whole.*

[61] By contrast the functions of branches under the rules do not expressly include the authority to amend the rules or to discipline members pursuant to Rule 12 or any other provision. Branches may however require members of the union to comply with the terms of agreements entered into between the union and employers. That particular rule, 22(b)(5) tends to show how closely interwoven are the matters of membership of the union, compliance with its rules and the existence of an employment agreement. As I have previously found, the employment relationship problem between the union members Mr Webb and Mr Knight and the Tramways Union is a matter related to an employment agreement for the purposes of the exercise by the Authority of its jurisdiction under s 162 of the Act.

[62] The particular functions given to the National Council which have been the subject of this investigation are the authority to “*amend the rules of the union*” and to “*discipline members.*”

### **Amendment of rules**

[63] Rule 44 begins by providing that the rules may only be amended in accordance with the procedure of that rule. Any proposal to amend the rules must be made in the

form of a remit to the annual meeting of the National Council. The proposal is to be forwarded to the National Secretary no later than two months before the date of the next annual meeting of the Council. The rule continues on by outlining what the National Secretary must do and how a vote is to be taken on the proposal. Any proposal to amend the rules that is adopted must be forwarded to the Registrar of Unions. In this regard Rule 44 concludes with the following:

- (6) *No amendment shall come into force until the date on which it is recorded by the Registrar.*

[64] As stated earlier, the last rules recorded by the Registrar were a complete amendment dated 20 December 1990.

[65] I find that a branch alone has no ability to amend the rules of the Tramways Union.

### **Disciplinary matters**

[66] These are provided for by Rule 12. A list of “*offences*” is given, and there are penalties set out as follows:

- (2) *The National Council may impose one or more of the following penalties:*
- (a) *Caution;*
  - (b) *Censure;*
  - (c) *Severe reprimand;*
  - (d) *Fine not exceeding \$100;*
  - (e) *Suspension and/or expulsion from membership of the Union.*

[67] Rule 12 continues on to provide that when imposing any penalty the National Council must take into account the nature of the offence in question. Suspension or expulsion from membership is only to be considered in the event of a “*serious offence*” being proven, or where there has been a recurrence of the same offence by the member concerned.

[68] Rule 12 provides that disciplinary proceedings may be commenced by an officer or financial member making a charge against another member in writing, which is to be given to the National Secretary. Any such formal complaint or accusation received by the National Secretary is required to be referred to the National Council. The rules continue on further to provide in detail the way that the National Council is to conduct a hearing to determine the disciplinary proceedings. There are

rights of appeal to a committee, and these may be invoked by notice to the National Secretary.

[69] There is no express provision permitting a branch of the union to exercise any of the disciplinary powers under Rule 12 and there is nothing to imply that a branch has that power, including the ultimate power of expulsion from membership of the Tramways Union as was purportedly imposed on Mr Webb.

[70] Mr Webb was expressly advised in writing by Mr Cross, the Auckland Branch Secretary, that the decision to terminate his membership of the union had been made “*under Rule 12 of the Union Rules.*” That rule was quoted to Mr Webb in detail and he was also provided with a copy of it.

[71] I find that the powers or functions under rule 12 are only to be exercised by the National Council. The rule was not complied with in the case of Mr Webb’s purported expulsion and Mr Knight’s purported temporary suspension.

[72] Mr Webb has clearly been a strong critic of Mr Froggatt and the direction the union has been taken in, especially during negotiations for collective agreements. It may be that Mr Webb acted unreasonably and could fairly be viewed by the union (and Stagecoach management too it seems) as a nuisance and a person who was undermining good relations between the union, its members and the employer. It may be that Mr Webb did offend against the rules. None of that could justify a failure by the union to comply with its own rules when seeking to take disciplinary action against Mr Webb.

[73] It is fundamental that the rules cannot be set aside or disregarded as being inconvenient or inappropriate or out of date, but that they must be amended in accordance with the rules and the change must be submitted to the Registrar for registration before the amendment becomes effective. The rules are a contract between the union and its members and the law has always provided remedies where there has been a breach of contract.

[74] The Authority declares that the expulsion of Mr Webb from the Tramways Union was an action carried out in breach of the contractual right of members under the rules to be disciplined only by the National Council. In purporting to expel Mr Webb, the Auckland Branch assumed a jurisdiction it did not possess and it has breached a contractual right of Mr Webb as a member. As well as the remedy of

injunction, damages are available under s 162 in matters relating to an employment agreement, which I have found this matter is. There is however no claim for damages in this case.

[75] The suspension of Mr Knight must also be declared to have been an act of the union performed without authority under its rules.

**Motion carried at meeting of union on 27 April 1992**

[76] To justify many of its actions that have been complained of by Mr Webb and Mr Knight, the union relies on a motion that was carried at the 52nd Annual General Meeting of the Tramways Union held in Dunedin on 27 April 1992. The minutes record that this was a meeting of the National Council and that Mr Froggatt was present as one of eight officers representing four branches of the union. An item in the minutes reads:

3. *FUTURE OF THE NZ TRAMWAYS UNION*  
*Meeting discussed the options of continuing with a National Union given that a National Award was no longer achievable and that there would be no Government money in the future for travel and award negotiations.*

[77] Discussion on this item before the National Council concluded with the following as recorded in the minutes:

- 3.9 *The future of the Council was then discussed and whether there is a need to meet face-to-face on a regular basis due to the end of our National Award and the introduction of local branch contracts.*

*Moved Tamatea/Baird that due to the high cost of travel, the uncertainty regarding the future of each branch and the lack of funds of smaller branches, the Council will only meet if and when required and that this Council authorises branches to assume all responsibilities and functions of the National Council as provided for under our current rules and that branches be authorised to manage all matters relating to their own branch.*

[underlined by the Authority]

[78] My finding, which is supported by the evidence of Mr Froggatt, is that the National Council did not meet again after April 1992 and that since then there has not been an election held every four years for the positions of National Officer. There has been no election at all held in that time. I find that Mr Froggatt was the last person to

hold office as National Secretary and that, as he said in his evidence, the position lapsed in 1992 or 1993.

[79] I do not consider that while he believed the contrary to be true, Mr Froggatt continued to hold the office of National Secretary from 1992 to date pursuant to rule 21(c), which provides:

- c. *National Officers shall hold their positions subject to these Rules until they die or resign, or their successors are elected, whichever shall first occur, but shall be eligible for re-election.*

[80] I find that holding a position that is “*subject to these Rules*” means holding a position that is subject to all rules including the rule requiring a new election every four years. The rules could not be read as permitting a National Secretary, who has failed after four years to commence the election process, to benefit from that omission by remaining in national office indefinitely until either death or resignation. Rule 21 (c) is qualified I find, if not expressly then by reasonable and necessary implication, by the requirement to have National Council elections every four years and to have annual meetings. The survivors from the 1992 National Council are likely to be very surprised if told they had retained office since then, when they had remained unaware of that for many years.

[81] The meeting minutes of April 1992 record that the National Council purported to assign or delegate its responsibilities and functions under the rules to branches. Mr Froggatt told the Authority that he regards that assignment or delegation as having remained effective for the last 15 years or more.

[82] I cannot agree that such a thing was possible or permitted under the rules of the Tramways Union as they were in 1992 and as they remain now.

[83] While it might be possible during the four year term of a National Council for it to delegate or assign functions or powers, it could not do so in perpetuity so as to bypass or defeat the rule requiring the National Council to be elected or re-elected every four years.

[84] While it might also be possible for a National Council, during the currency of its four year term, to delegate or assign a specific function or power for a particular purpose, doing so could not have the effect of repealing the rule requiring elections every four years.

[85] Amendments to the rules must be made in accordance with Rule 44 and other rules referred to in that provision. It was and remains possible under those rules for the National Council itself to amend the rules, but there is no suggestion in the minutes that this is what the National Council did on 27 April 1992. Even if somehow it had followed the procedure under Rule 44 and other rules to amend the rules so that branches could take over the responsibilities and functions of the National Council, the changed rule could not be effective until recorded by the Registrar. No new or changed rules have been recorded by the Registrar since 1990.

[86] Mr Froggatt also contended that Rule 22(b) had allowed branches to exercise the powers and functions of the National Council, including the function of taking disciplinary action as was taken against Mr Webb and Mr Knight.

[87] Rule 22(b) is as follows:

**22. FUNCTIONS**

...  
(b) **BRANCHES** – shall:

(i) *Have the authority to deal with all matters relating to the Branch, and the Union from the point of view of the Branch;*

...

(iii) *Deal with any matter to achieve the objects of the Union within the law and these rules;*

(iv) *Implement the policy of the Union;*

....

[88] Given the very specific functions and powers expressly conferred on the National Council under rule 22 above, including the power to discipline members, the provisions relating to the functions and powers of the branches expressed only in the most general terms could not be construed as allowing a branch to perform functions such as the amendment of rules and disciplining of members of the union to the point of expulsion.

[89] To determine this part of the employment relationship problem, the Authority declares that the Tramways Union has not acted in accordance with its registered rules for at least the last 10 years or more, in that it has failed to hold elections as required every four years for the several positions of National Officer and it has thereby failed to ensure that the union is constitutionally governed or managed by a National

Council that includes those officers. The National Council has also failed to meet at least annually during the period from 1992 to date.

### **Breach of good faith**

[90] The Authority declares that in purporting to act on behalf of the union Mr Froggatt did not act in good faith when he represented himself to be the National Secretary on several occasions, knowing he did not hold that position. The file of the Registrar of Unions contains returns for each of the years from 2002 to 2007 in which Mr Froggatt has declared his position in the union to be "*National Secretary*." He said in evidence to the Authority that he has not been National Secretary since about 1992 or 1993. There have been no elections since then.

[91] It is not required to be shown that anyone was misled or deceived by Mr Froggatt calling himself the National Secretary when he did not hold that position, or that Mr Froggatt set out to mislead or deceive anyone. It is enough under s 4 of the Employment Relations Act that the representation was one likely to mislead or deceive someone. The Registrar's file is accessible to members of the union and to the public generally and in my view a member reading those returns might well consider that Mr Froggatt was a national officer of a national council that was still in operation up to 2007. I note that in the return most recently filed with the Registrar, for 2008, Mr Froggatt has called himself the "*Acting National Secretary*" but has also affixed a stamp describing himself as "*National Secretary*". As well as misleading, this is confusing.

[92] The actions of Mr Froggatt can be regarded as those of the union, the party to the employment relationship with Mr Webb and Mr Knight and therefore the party obliged to act in good faith. A penalty is available only for deliberate, serious and sustained breaches of good faith, under s 4A of the Act. The union has not however been put on notice by the applicants or the Authority that a penalty was being sought for breach of the duty of good faith. No penalty is therefore imposed.

[93] The remedy sought of removal from office of union officials found acting in bad faith, is not one available to the applicants from the Authority.

**Reporting required by the National Council**

[94] It follows from the failure to provide and maintain a National Council, and as Mr Froggatt confirmed was the case in evidence, that there were no minutes kept of annual meetings held by the National Council after 1992. There were no notices posted on noticeboards calling for nominations for candidates for election to the National Officer positions after 1992. There was no National Account prepared and signed by the National President and other National Officers, as required under Rule 23(e), after 1992 or earlier. There were no annual income and expenditure accounts kept and signed by the National Secretary, as required under Rule 43.

[95] The failure to provide and maintain a National Council has led to many such consequential failures in relation to the requirements for financial and other reporting and recording under the rules.

**Complaints to union made by applicants**

[96] In relation to a particular complaint by Mr Webb and Mr Knight, the Authority finds as a fact that Mr Froggatt did receive from them a written complaint dated 22 July 2005. It was expressed to be made under the disciplinary procedures of Rule 12. Mr Froggatt ignored the complaint, but that is not surprising because it was about him. He was hopelessly conflicted in receiving a complaint while purporting to act as National Secretary, when it was also about him. This is another problem arising from the failure to maintain a National Council, which had it existed could have ensured that a complaint against one of its officers could be dealt with without any conflict of interest.

**Financial management of union and the welfare scheme**

[97] There were various complaints made by Mr Webb and Mr Knight, about matters to do with the financial management of the union and expenditure of its funds.

[98] Some of the complaints related to the operation of a Welfare Scheme or Fund under which the Auckland Branch of the union lends money to members and receives application and service fees in respect of the loans.

[99] I am satisfied that the rules of the Tramways Union expressly provide, at Rule 3(1), that it is an object of the union to establish and operate a welfare, legal aid, credit

and education fund for the benefit of members. There is nothing to suggest that this rule is contrary to law in any way.

[100] There is nothing I have seen to show that the administration of the scheme by the Auckland Branch is in breach of the rules or of any legislation relating to money lending or credit contracts. No one participating in the scheme has complained about it to the Authority.

[101] If Mr Webb and Mr Knight believe that in the way the scheme is being run it takes unfair advantage of members or is a usurious arrangement, they should take that matter up internally within the union through branch management. It can be addressed as an item on the agenda for a branch management meeting. There is a complaints procedure or grievance remedy for members at rule 32(d), which should be followed as a matter of internal management of the union. Alternatively, such matters may be taken up at national level under rule 22 a. (iii) of the rules with the National Council, when that body again exists.

[102] The Authority has not found or seen any evidence that the Auckland Branch or any officer of the Branch, whether Mr Froggatt or anyone else, has “*misappropriated*” any funds as alleged. Mr Webb and Mr Knight simply challenge the way the branch has decided to apply its funds in relation to capitation payments for its CTU affiliation or membership and the reimbursement to Mr Cross of expenses for his telephone use on union business and for buying the Herald newspaper to stay abreast of current affairs.

[103] As discussed with Mr Froggatt during the investigation meeting, there are many problems that will continue to grow while the rules are not updated. One of those may arise for example from the requirement at branch level that no sum exceeding \$10 is to be expended except pursuant to a resolution of the branch or its committee. That may well have become unworkable by now in 2008, and a practice of approving expenditure after the event may not be in compliance with the rules.

## **Remedies**

[104] Mr Carrucan, on behalf of the applicants, submitted that by order of the Authority the Tramways Union should be placed into some form of statutory management under the Registrar of Incorporated Societies Act or the Registrar of Unions. I do not agree and do not consider that the Authority has jurisdiction to

impose that outcome. The role of the Registrar of Unions is a reasonably narrow one under the current legislation, although it was much wider under earlier legislation before the Employment Contracts Act 1991. The Registrar's role is confined largely to the process of registration of unions and does not extend to taking over management of their affairs.

[105] The Authority should interfere only as much as necessary to correct the major defects identified in this case, which are the failure to provide and maintain a National Council and the wrongful expulsion of Mr Webb from the Union. Injunction is the appropriate remedy in cases of this kind, as the courts have confirmed.

[106] In *Prior v Wellington United Warehouse and Bulk Store Employees Industrial Union of Workers* [1958] NZLR 97, the Supreme Court (predecessor of the High Court) held that it could intervene to protect the contractual rights of members under the union rules where, in relation to elections, the union executive had assumed a jurisdiction it did not possess under the rules. An injunction was granted to compel the union to take a postal ballot of its financial members for the election of an officer, where earlier the union had in breach of the rules rejected a nomination for the position.

[107] An injunction may also be granted against a union where a member has been expelled contrary to a fair and reasonable interpretation of the rules, as occurred in *Bonsor v Musicians Union* [1954] 1 All ER 822.

[108] In *Gould v Wellington Waterside Workers' Industrial Union of Workers* [1924] NZLR 1025, the Supreme Court referred to and applied earlier case law upholding the right of a member of a registered union to recover damages from the union for breach of contract, where the plaintiff had been wrongfully struck off the roll of union members. The Court also gave a declaration that the plaintiff had remained a member of the union, and it also granted an injunction restraining the union from representing that the plaintiff was not a member of the union.

### **Restoration of National Council and conduct of election of National Officers**

[109] By way of mandatory injunction, the Authority now orders the Tramways Union to comply immediately with its rules in relation to the requirement to provide a National Council as part of its governance and management structure.

[110] The Union is ordered to comply with the requirements of Rule 21 in relation to the election of officers and to do so in time to allow an annual meeting of the Council to be held in November this year, 2008. Rule 21(d) in particular is to be complied with. Nominations are to be called for by notice posted on workplace and other noticeboards accessible to all members of every branch, stating the time, manner and conditions for which candidates for election may be nominated. The Authority fixes the closing date for nominations to be 30 September 2008 and nominations shall therefore be called for no less than seven days before that date. Rule 21(f) and others, also explain the way in which nominations are to be made and received and handed to the Returning Officer.

[111] The Authority recognises the difficulty that currently there is no National Secretary, the officer charged under the rules with calling for nominations. I do not think this should be allowed to defeat a remedy intended to rectify the problem and allow the Tramways Union to continue in existence until its members should constitutionally decide otherwise.

[112] Under s 221 of the Act a direction is given by the Authority that Mr Peter Cross, Auckland Branch Secretary, and Mr Perry Davis, Auckland Branch Vice-President, are to jointly act as the National Secretary of the Tramways Union and carry out the functions required under Rule 21(d). I direct that they are to appoint a suitable person, such as an officer from the Wellington or Dunedin branches of the union, to be the Returning Officer for the purposes of Rule 21.

[113] Mr Cross and Mr Davis are both to ensure that nominations are called for and the voting is held and completed in time to allow an annual meeting of the National Council in November 2008.

[114] The union should consider approaching the CTU and/or the office of the Registrar of Unions to seek assistance in facilitating the conduct of elections for the National Council. The Authority will bring this determination to the attention of the CTU and the Registrar.

[115] The Authority will consider varying any of the above orders it has made, to allow for any role agreed to be taken by the CTU or Registrar of Unions. The time frame for nominations may also be varied if necessary upon application by the union,

and any further orders that may be necessary for any other reason can be applied for from the Authority by Mr Cross and Mr Davis.

[116] Once the elections have been held and there is a National Council, that body should give urgent consideration to updating the rules by amendment in accordance with the rules.

### **Restoration of Mr Webb as a member of the Union**

[117] As part of its determination the Authority gives a declaration that the expulsion of Mr Webb from the Tramways Union was carried out in breach of the rules and was therefore of no effect. Mr Webb is to be regarded as having remained a member of the union since the date of his purported expulsion in September 2007.

[118] By way of injunction the Tramways Union is ordered by the Authority to restore the name of Mr Webb to the union's roll or list of members and allow to him all of the rights and privileges available to a member. Mr Webb and Mr Knight are both entitled to fully participate in the union, including the forthcoming Auckland Branch elections.

[119] The union is ordered to refrain from representing to anyone that Mr Webb is not a member of the Tramways Union, and the union is not to refer to him as an expelled member.

[120] Further, the Tramways Union is ordered to advise the management of Stagecoach that Mr Webb was not lawfully expelled from the union but has remained a member of it since he first joined. The union is to immediately request of Stagecoach that the employer resume deduction of union fees from the pay of Mr Webb. The union is also to meet the arrears of fees Mr Webb would have paid if his name had not been struck from the roll of members in September 2007.

[121] The Tramways Union is further ordered not to again take any disciplinary action against Mr Webb in relation to the matters for which he was wrongfully disciplined and purportedly expelled in September 2007. By the union's action or inaction in failing to maintain a National Council, there was no ability to discipline Mr Webb at the time of his alleged offences. That ability cannot be reinstated retrospectively upon the restoration of the National Council at some time in the future.

[122] At the time of his expulsion Mr Webb was the elected delegate of the union for the Wiri Depot. The Authority is not aware of whether or how that position has subsequently been filled, but if necessary a determination can be sought as to the rights of Mr Webb to resume that position, or to provide any other appropriate remedy if he is now unable to.

[123] Although he was suspended, Mr Knight was not expelled from the union. No orders are therefore necessary in relation to him in addition to the declaration given that his suspension was in breach of the rules and of no effect.

A Dumbleton  
**Member of the Employment Relations Authority**