

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 370/08
5132300

BETWEEN BRIAN WEBB
 Applicant

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

AND NORM HOLLEY
 Second Respondent

Member of Authority: Alastair Dumbleton

Representatives: Paul Carrucan, advocate for Applicant
 Simon Mitchell, counsel for Respondents

Investigation Meeting: 3 and 21 October 2008

Determination: 29 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Gary Froggatt and Mr Peter Cross are financial members of the New Zealand Tramways and Public Passenger Transport Employees' Union Incorporated ("the Tramways Union"). Mr Froggatt became a member in 1965 and Mr Cross in 1977.

[2] Their membership of the union is recorded on a roll, they have to date paid all the required fees to belong and they have been issued a union card. The union has affirmed their membership and held them out to be members.

[3] Their eligibility to belong to the union has now been challenged by Mr Brian Webb, another member. He claims that Mr Froggatt and Mr Cross do not come

within the occupational coverage of the membership rules of the union and that they are therefore ineligible to belong to it.

[4] Mr Webb further claims that the most recent Auckland branch elections held by the union in July 2008 were invalid, insofar as Mr Froggatt and Mr Cross were permitted to stand for and then be elected to the positions of Branch President and Branch Secretary respectively.

[5] Mr Webb brought his challenge to the Authority on 4 August 2008 in the form of an employment relationship problem, which he asked the Authority to investigate and resolve.

[6] As to the Authority's jurisdiction, there is no dispute about the existence of an employment relationship as defined by the Employment Relations Act 2000 between Mr Webb and the union. Under s 4(2) and s 5 of the Act, an employment relationship exists between a union and any member of the union.

[7] Mr Webb has at all material times been a member of the Tramways Union. Although he was purportedly expelled by the union in March 2007, that action was later held by the Authority to have been contrary to the rules of the union. Mr Webb's immediate reinstatement to membership was ordered by the Authority in its determination given on 27 June 2008, under AA 221/08.

[8] Under s 161 of the Act the Authority has exclusive jurisdiction to make determinations about employment relationship problems. In relation to union affairs such problems are defined as including, at s 161(j) "*matters about whether a person is entitled to be a member of a union*", and at 161(1)(k) "*matters related to a failure by a union to comply with its rules.*"

[9] Mr Froggatt and Mr Cross were employed as bus drivers when they first joined the union, but many years have now passed since that was their occupation. Mr Froggatt has been employed as an official of the Tramways Union since 1974 and now only drives a bus when helping Scouts or doing other voluntary work. Mr Cross has been semi-retired since 1994 and now works unpaid as an officer of the union.

[10] Mr Froggatt over a period of about 30 years and Mr Cross over about 16 years, have been elected and re-elected to the union's Auckland branch executive and now

once again hold positions after the most recent elections. In separate elections in September 2008, Mr Froggatt was elected National Secretary of the Tramways Union, a position on the union's National Council established under its rules. There is no challenge by Mr Webb to his election to that particular office and it is only the last Auckland branch elections he complains about.

[11] Mr Froggatt and Mr Cross were also on the National Council at times up until about 1994, when the councillors suspended further governance of the union by the council. In those earlier times Mr Froggatt had been elected to the council, whereas Mr Cross was a member *ex officio* as an officer of the Auckland branch.

[12] Mr Webb has asked the Authority to resolve this particular employment relationship problem by giving a declaration that in 2008 when the Auckland branch elections were held, Mr Froggatt and Mr Cross were excluded from membership of the union by its rules and that although "financial" they were not legitimately members then.

[13] Further Mr Webb has sought a declaration that the recent election of Mr Froggatt and Mr Cross to Auckland branch office positions of President and Secretary was not in compliance with the union's rules and that the election with regard to those positions was therefore void. Mr Webb has sought orders requiring the branch positions currently held by Mr Froggatt and Mr Cross to be vacated, and requiring the union to fill the vacancies by having a new election, in the way provided by the rules.

[14] Mr Webb also seeks penalties for breaches of good faith, particularly with regard to an undertaking allegedly given by Mr Froggatt to the Authority during an investigation meeting on 18 June 2008.

Mediation

[15] Mediation between the parties has not been undertaken and was not directed by the Authority. This was because I concluded mediation would not constructively assist them to resolve the particular problem in this unusual case in which the entitlement of members to belong to a union has been questioned and orders have been sought declaring a union election void. Given the diversity of the parties and of others indirectly involved and also the recent history of the relationships, it seemed unlikely the problem could be resolved by agreement in this case.

Auckland branch elections

[16] The recent Auckland branch elections took place from July 2008, when nominations were called for, until 6 August 2008 when the votes were counted and the results posted on union notice boards by the returning officer Mr Norm Holley.

[17] For the position of Branch President the nominations of Mr Froggatt, Mr Webb and another person were received by Mr Holley. When the votes were counted Mr Froggatt had gained 324 votes, Mr Webb 131 and the third nominee 67.

[18] Mr Holley duly declared the result on 6 August, confirming the election of Mr Froggatt to the position of Branch President.

[19] For the position of Branch Secretary the nominations of Mr Cross and one other person were received. When the other nominee withdrew, Mr Holley declared Mr Cross elected on 21 July 2008.

[20] Mr Webb was the successful candidate for another branch position he had been nominated for, Wiri Depot Delegate.

Rules for election to branch office of the Tramways Union

[21] Rule 33 e. of the Tramways Union's registered rules provides for an election of branch officers to be held every four years.

[22] Rule 33 f. (ii) requires that any candidate for election is to be "*a financial member*" of the union. The rule also requires that nominations for any candidate shall be signed by two "*financial members eligible to vote.*"

[23] Mr Holley's evidence to the Authority was that upon accepting the request of the union for him to act as Returning Officer, he checked the nominations against a list of members. The list had been kept by the main employer of Auckland branch members, Stagecoach New Zealand Ltd (now New Zealand Bus). It had been created by the employer for the purpose of recording deductions made from each employee's pay of their union fees, for remittance to the union. Because they were no longer employed as bus drivers, the names of Mr Froggatt and Mr Cross did not appear on the Stagecoach/NZ Bus payroll list.

[24] Mr Holley said that he did not sight a list of members that the union itself had kept. It seems that from his long association with Mr Froggatt and Mr Cross, when their nominations were received Mr Holley had no reason to doubt that they were financial members and he accepted in good faith that they were.

[25] From information supplied by the union and Mr Holley, and from evidence given by Mr Froggatt and Mr Cross, the Authority is satisfied that both were financial members of the Auckland branch when nominated to stand for election. A list of members kept by the union has their names on it, and I accept that they had been paying membership fees and that they were up to date with those. They were therefore “financial” when nominated.

[26] Mr Holley produced to the Authority the nomination forms he had received for Mr Froggatt and Mr Cross with regard to the positions they were elected to. The forms and the union’s list of members satisfy the Authority that in both cases the nomination was made by two financial members of the union. Rule 33 was therefore complied with in that Mr Froggatt and Mr Cross as candidates for the branch election were financial members of the union.

[27] The fact that their names were on a members’ list and they had paid their union fees, did not of itself mean that their acceptance to membership and continuation of that membership had been in accordance with all the rules of the union. The fundamental question is whether Mr Froggatt and Mr Cross were entitled in any way to be members of the union in the first place.

Eligibility for membership of The Tramways Union

[28] There is no dispute that on any interpretation of R 6 the union’s membership rule, Mr Froggatt and Mr Cross do not fit within it. Although with some variations and qualifications, the rule in essence covers employed bus drivers, which Mr Froggatt and Mr Cross have not been for many years.

[29] I reject the submission of counsel for the union Mr Mitchell that sub-clauses (a) and (b) of R 6 are to be read conjunctively, so that members have to be bus drivers but also have to be employed in that occupation by a city council or other local authority. Sub-clause (a) expressly refers to employment with a public passenger transport company while (b), disjunctively in my view, refers to the situation where such a company is owned by a local authority.

[30] Mr Webb's challenge to the election of Mr Froggatt and Mr Cross as Auckland branch officers is based on the proposition that only the classes of persons prescribed by R 6 may legitimately become members of the Tramways Union. Mr Webb contends that the scope of membership is confined by that rule and that it can be applied to limit entry to membership of the union. He contends that compliance with the rule is mandatory not discretionary on the part of the union.

[31] As in law the rules of a union are a contract between member and union, Mr Webb clearly has a legal interest and may seek remedies available in law to a contracting party.

[32] Rule 6 is prescriptive and on its face draws reasonably clear parameters of eligibility for membership of the union. Although the description of the employees intended to be covered by it is preceded by the words "*shall include*," suggesting that the eligibility criteria are non-exhaustive, the rule also contains limiting words such as "*other than*" and "*excluding*."

[33] When the rules were last amended, in 1990, statutory labour law required that unions were not able to have membership rules that overlapped with those of other unions. The exclusions and qualifications found in the rules are undoubtedly for that purpose, to recognise the particular occupational coverage of other existing unions, such as those covering local body employees, cleaners and engineering trades.

[34] It is clear from R 3 the objects rule of the union, that the membership rule is aligned to a particular occupation, or to coverage of a particular industry or enterprise, and refers to persons employed in that occupation or industry.

[35] The honorary life membership provisions at R 10 expressly refer to R 6 as a rule defining eligibility for membership of the union;

Any honorary life member may continue as such, notwithstanding subsequent non-eligibility for membership in terms of the union's membership rule.

[36] For the union counsel Mr Mitchell submitted that its membership rules, while they have been registered by the Registrar of Unions, no longer operate to exclude persons from membership who do not fit the definitions given. Mr Mitchell's submission is that the membership rules must be read in the context of the legislative provisions which applied when the rule was last renewed or updated.

Labour Relations Act 1987

[37] Updating of the rules last occurred some 18 years ago in 1990, when the statute in force was the Labour Relations Act 1987. Mr Mitchell submits that the precision in the drafting of the membership rule was required under that statute so that the rule demarcated the various occupations covered by different unions.

[38] I accept that in December 1990 when the union's rules were last amended and recorded, they were to be interpreted and applied according to the legislation current at that time, the Labour Relations Act 1987. That Act is expressly referred to at places in the rules.

[39] The Authority also accepts that under the 1987 Act the Tramways Union could negotiate an award or collective agreement only on behalf of persons eligible to belong to the union, as defined by its membership rules. Also, any award or collective agreement negotiated was required by law to contain a coverage clause defining the occupation the award or agreement applied to.

[40] For the purposes of the 1987 Act there was a clear statutory link between award coverage and union membership. There was also a clear statutory purpose under the Act for defining eligibility for membership of a union.

[41] As Mr Webb's problems are all to do with what has happened in 2008, any proper construction of the rules must take account of legislative changes in the intervening years since 1987.

[42] Unfortunately the Tramways Union's rules were not updated for those changes and the problems that have recently come before the Authority and that have concerned Mr Webb and others and also the Tramways Union itself, are almost entirely the result of the union's failure to keep its rules current, especially after the two changes to labour/employment law that occurred in 1991 and 2000.

Employment Contracts Act 1991

[43] Upon repeal of the Labour Relations Act, under s 185 of the Employment Contracts Act every union became an incorporated society under the Incorporated Societies Act 1908. Significantly, every union did so “*with its current rules.*”

[44] Therefore in 1991 the Tramways Union’s rules that had last been registered in 1990 became the rules of an incorporated society for the purposes of the Incorporated Societies Act.

[45] Under s 6 of the 1908 Act incorporated societies must have rules that set out who can be members, how they become members and how they stop being members. Rule 6 the union’s membership rule, R 7 the admission to membership rule, and R 8 which expressly prevents membership of the union outside the scope of the membership rule upon cessation of employment, clearly meet the requirements of s 6 of the 1908 Act. Those rules cannot be read as having become redundant upon the repeal of the 1987 Act, as Mr Mitchell submitted was the case.

Employment Relations Act 2000

[46] Upon repeal of the Employment Contracts Act, pursuant to s 13 of the Employment Relations Act an incorporated society that was entitled to be registered as a union could apply for registration. Provided the society’s rules were not contrary to law, not unreasonable, not unfairly discriminatory or unfairly prejudicial, and provided they were democratic, it was entitled to registration as a union.

[47] There is no dispute that the Registrar accepted the application made by the Tramways Union for registration under the 2000 Act. The rules registered by the Registrar remained the same as they had been in 1990, including R 6 the membership eligibility rule.

[48] The Registrar of Unions wrote to Mr Froggatt on 4 October 2000 confirming the registration but also warning that some of the rules, although they had been registered, were inoperative because of the repeal of the Labour Relations Act. Significantly, the rules the Registrar drew attention to in this regard did not include R 6, R 7, R 8 or any other rule relating to eligibility to belong to the union.

[49] In his letter the Registrar also urged Mr Froggatt to have the union review its rules and amend them at the next convenient opportunity, and he offered his

assistance in that regard. Unfortunately nothing was done by the union and now its repeated neglect of the rules has caught up with it.

[50] It is clear from reading a combination of R 6 and R 8 that the intention of the union in 2008 is that those eligibility rules are to be enforced and applied as current registered rules of the union. Therefore not just anyone can join the Tramways Union but only those persons who come within the rules.

[51] It follows that I do not accept as correct the view of both Mr Froggatt and Mr Cross that the union can admit anyone it likes to membership or, as a corollary to that, reject anyone it likes from membership. I do not accept that the rules can be read as conferring upon the union an absolute discretion as to who may or may not be admitted to membership. The dangers of arbitrariness in following the rules are obvious. In this regard there is no need to look further than how Mr Webb was expelled from the union in 2007.

Entitlement of Mr Froggatt and Mr Cross to belong to Tramways Union

[52] Under the rules a member of the union upon finishing employment as a bus driver, as Mr Froggatt and Mr Cross each did some years ago, becomes subject to R 8 which requires membership of the union to end “*on the cessation of employment.*” If that rule applies in the way contended by Mr Webb, both Mr Froggatt and Mr Cross became disqualified from membership by operation of it. That is unless any other rule allowed them to become or remain members independently of the occupational eligibility rules.

[53] Rule 10 makes provision for the election of honorary life members, but that recognition has yet to be given to either Mr Froggatt or Mr Cross.

[54] Membership of the union can also be acquired by any person elected to its National Council, whether employed then as a bus driver or not. Rule 21 provides for the election of National Officers to the positions of President, Vice-President, Secretary and Treasurer. Any person, whether a member of the union or not, is expressly eligible to stand under R 21 a., which also provides;

Upon election, National Officers shall, if not already, become financial members of the union.

[55] I reject the submission of Mr Carrucan for Mr Webb that membership acquired under R 21 is to “*the union*” as a different entity from one of its branches. The branches are the union, not entities separate from it.

[56] Mr Froggatt was elected most recently a National Officer in September 2008. Although he then became eligible to belong to the union his entitlement cannot be applied retrospectively back to the time of the branch elections.

[57] Mr Froggatt has been elected to the National Council previously. He held office at least up until April 1992 when minutes show that the Council met in AGM. The Authority has recently found (in AA 221/08) that the Council then purported to disband itself indefinitely.

[58] The Council did not meet again after 1992 and consequently over the next 15 or so years the union continuously failed to comply with its rules requiring an AGM and the election of National Officers every 4 years. An election has finally been held recently. As a result of the action taken by Mr Webb the Council is to meet again in AGM at the end of November 2008.

[59] The Authority determined in AA 221/08 that Mr Froggatt did not continue to hold the office of National Secretary after the expiry of the 4 year term for which he was elected, particularly when there was a repeated failure by the union to conduct new elections for the National Officer positions. Rule 33(d) expressly provides that continuation in office shall be “*subject at all times to the provisions of the Rules of the Union*” which required the union to have annual council meetings and elections to council every 4 years. Those rules were deliberately ignored.

[60] As I have not changed my view of R 33(d) in this case, I therefore do not consider that R 21 continued to apply to Mr Froggatt from 1992 right up until the most recent elections held 16 years later, entitling him to membership during all that time. I reject Mr Mitchell’s submissions to the contrary,

[61] There is however no rule of similar effect to R 8, expressly providing that when membership has been acquired under R 21 it must cease if the member is no longer a National Officer for any reason. From 1992 to 2008 after ceasing to be National Secretary, as I have previously found was the case, Mr Froggatt continued to pay his union fees and the union continued to recognise him as a member.

[62] I find that there was no breach by the union of its objects rules in allowing Mr Froggatt to remain a member. To the contrary, his work was clearly necessary and valuable for achieving the objects of the union and its branches. There is no evidence of Mr Froggatt having taken improper advantage of the situation where he remained a financial member of the union after his position of National Secretary lapsed.

Determination – Mr Froggatt

[63] The Authority determines that at the time of the 2008 elections for the Auckland branch of the Tramways Union, Mr Froggatt had no entitlement under R 6 and R 8 to belong to the union. This is because he was not employed as a bus driver (R 6) and his employment as a bus driver had ceased some time ago (R 8).

[64] I find that under R 21 Mr Froggatt became entitled to belong, and did belong, to the union. This was following his election to the National Council quite a few years prior to the 2008 branch elections, probably in about 1988 or 1989. I find that the rules did not expressly disqualify him from continuing to hold that membership after he ceased holding the position of National Officer. His membership was affirmed by the union over that period.

[65] Although the rules are not clear about the continued entitlement to membership in this situation I do not consider that there is enough doubt for the Authority to intervene and declare that Mr Froggatt was ineligible to be nominated. I find that he was an enrolled member (R 7) and a financial member of the union when nominated and elected (R 33).

[66] I determine that Mr Froggatt should not be directed to vacate the office of Branch President, and the Tramways Union should not be directed to conduct a new election for that position.

Determination – Mr Cross

[67] Mr Cross is in a different situation as he has not been a National Officer elected to that position under the rules. Although a member of the council, Mr Cross held that position *ex officio*, as an elected branch representative. If not already a member, R 21 did not permit him to become one by sitting on the National Council.

[68] The eligibility of Mr Cross for membership of the Tramways Union is therefore only provided by R 6 and, as already held, Mr Cross did not meet its requirements at the time of his nomination for the position of Auckland Branch President. I determine that under R 6 and R 8, Mr Cross is not entitled to be or to remain a member of the Tramways Union and that that was the situation when he was nominated for the position of Branch Secretary Auckland.

[69] In considering what the Authority should do about that it weighs with me that despite being ineligible to belong to the union Mr Cross, like Mr Froggatt, has been a financial member for a number of years. The union has accepted him as such, outside of its rules. It could not have been a secret among other Auckland branch members that he has not driven a bus as an employee for many years, as his dismissal from that job when he last held it was widely reported in the newspapers in 1993 and 1994.

[70] As with Mr Froggatt, the continued membership of Mr Cross has not breached the objects of the union, and there is no evidence of self interest lying behind his continued membership in the circumstances, irregular as they may be.

[71] It is relevant that this is not a case where a person has been rejected or expelled from membership of the union and is seeking to have his or her entitlement to belong established, so as to be able to join. In this case another member of the union has challenged the right of Mr Cross to be a member and to stand for office in branch elections.

[72] I agree with the submissions of Mr Mitchell that whatever the scope of the Authority's powers may be to intervene in union elections, those powers are discretionary and do not have to be exercised even when it is established there has been a failure by a union to comply with its rules.

[73] Although I find that the union has departed from its rules by permitting Mr Cross to become or to remain a member after he ceased being employed as a bus driver, in the circumstances I consider that Mr Webb should pursue the complaint he has as a "grievance" within the rules. Under R 22 a. (iii) a grievance can be raised by him as a member with the National Council when it meets in November. The Council may decide whether for any reason to remove Mr Cross from membership and hold a new election for the Auckland branch position he currently holds.

[74] I determine that no directions should be given by the Authority to Mr Cross or the Tramways Union about his membership and election.

Undertaking given by Mr Froggatt

[75] I find that Mr Froggatt has not breached the undertaking given by him to the Authority at the investigation meeting of 18 June 2008. I accept that he undertook to delay the branch elections pending the release by the Authority of its determination of the matters then under investigation. That is what happened, enabling Mr Webb to stand in the elections as a result of being reinstated by the Authority to membership of the union. His late nomination was accepted. I accept that Mr Froggatt was not asked and did not give a specific undertaking that the union would do nothing to disadvantage Mr Webb in the elections.

[76] There was no breach of good faith in this regard and therefore no basis for imposing any penalty as claimed by Mr Webb.

Welfare and Loan Scheme complaint

[77] Also able to be submitted by him as a grievance to the National Council is Mr Webb's complaint about the Welfare and Loan Scheme operated by the union.

[78] I confirm directions given on 24 September 2008 that the Authority has determined not to investigate that particular complaint because;

- it has already been investigated and determined under AA 221/08 of 27 June 2008,
- it is arguably not, or not yet, an employment relationship problem, as no participant in the scheme has complained about it, and
- it should be dealt with under the union's internal grievance procedure, pursuant to R 22. a. (iii) and R 32. (d).

Summary of determination

[79] No orders are made or directions given by the Authority.

Costs

[80] Mr Webb has sought costs in relation to this application and the earlier one determined in June under AA 221/08. If his advocate Mr Carrucan was engaged on a fee paying basis then, given the result in both cases, Mr Webb has a strong case in respect of the present and the previous application for the recovery of at least some of his costs and expenses, to the extent they were reasonably incurred.

[81] Costs are reserved to allow the parties an opportunity to attempt to settle the question themselves. Mediation may assist them in that exercise. If costs cannot be agreed Mr Webb may apply in writing for an order and a timetable will be given for any response from the union to be made.

[82] Mr Holley may also seek costs if any have been incurred by him in this investigation.

A Dumbleton

Member of the Employment Relations Authority