

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 253/09
5132300

BETWEEN BRIAN WEBB
 Applicant

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

Member of Authority: Alastair Dumbleton

Submissions Received 25 May and 29 June 2009

Determination: 29 July 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] Mr Brian Webb seeks an order requiring the New Zealand Tramways and Public Passenger Transport Employees' Union Incorporated (the Tramways Union) to reimburse costs and expenses he incurred in relation to the Authority's investigation that concluded with the issue of a determination on 29 October 2008 under AA 370/08.

[2] The Authority investigated Mr Webb's claim that Mr Gary Froggatt and Mr Peter Cross had not been eligible for membership of the Tramways Union for many years, despite their names being on the union's roll of members and the payment by them of all the fees required to remain members.

[3] Mr Webb further claimed that the election of Mr Froggatt and Mr Cross to the positions of Branch President and Branch Secretary respectively of the Tramways Union's Auckland Branch in July 2008, was invalid because of their ineligibility to belong to the union. Mr Webb sought a declaration from the Authority that the election of Mr Froggatt and Mr Cross was void. He sought orders requiring the positions held by Mr Froggatt and Mr Cross to be vacated and requiring the union to fill the vacant branch office positions by having a new election conducted according to the union's rules.

[4] Mr Webb also sought a penalty for breaches of good faith with regard to an undertaking allegedly given by Mr Froggatt to the Authority during an earlier investigation meeting, held on 18 June 2008.

[5] Following its investigation the Authority determined that Mr Froggatt, although not employed as a bus driver, had become entitled to belong to the Tramways Union as a result of being elected to its National Council some years earlier. I found that having gained eligibility through election to the Council there was no rule disqualifying Mr Froggatt from retaining his union membership once he was no longer on the Council. I found that Mr Froggatt's membership continued to be affirmed by the union after that time.

[6] From the Authority's findings however Mr Froggatt's membership must be regarded as tenuous, legally.

[7] With regard to Mr Cross, who unlike Mr Froggatt had not been a member of the National Council, the Authority determined that he was not entitled to be or remain a member of the Tramways Union and that accordingly his nomination for the position of Branch Secretary had been invalid. I determined that the Authority's discretion in the circumstances should be exercised in favour of leaving the election result unchanged, but that it was open to Mr Webb to pursue a "grievance" internally with the union in relation to the matter, under the procedure laid down in the union's rules.

[8] As with Mr Froggatt, Mr Cross may have only tenuous legal footing in the union, as the pending challenge to the Court may yet unseat him.

[9] With regard to the alleged breach of undertaking by Mr Froggatt, I found no breach of good faith on his part and therefore no basis for imposing any penalty as had been claimed by Mr Webb.

[10] The Authority found that an additional matter of complaint raised by Mr Webb, in relation to the Tramways Union's Welfare and Loan Scheme, had been disposed of by its earlier determination given under AA 221/08 and that there was no basis for re-investigating it or reopening the investigation.

[11] In the final result no orders or directions of any kind were made or given by the Authority in favour of Mr Webb. With regard to costs I expressed the view that Mr Webb had a strong case in respect of his claim for the recovery of at least some of his costs and expenses, to the extent that they had been reasonably incurred. Mr Webb was invited to apply in writing for an order if the question of costs could not be agreed and the Authority indicated that a timetable would be given for any response from the Tramways Union to be made.

[12] An application for costs by Mr Webb was received by the Authority on 25 May 2009 and served on the union, which was given until 17 June to respond. Its response was not received from counsel Mr Mitchell until 29 June, nearly two weeks after the time fixed by the Authority. No explanation has been given for that failure to comply with the timetabling order made.

[13] Although Mr Webb was not successful in obtaining any of the orders or directions he had sought from the Authority, I nevertheless consider that the particular nature of this case does provide a sound basis for the recovery of a reasonable contribution to costs by him.

[14] The Tramways Union through its officers, including Mr Froggatt and Mr Cross, made a large target of itself over a number of years for just such an application as the one finally brought by Mr Webb. The union continually neglected to revise its rules to take account of the Employment Contracts Act when passed in 1991, and then the Employment Relations Act when passed in 2000. Despite being reminded in 2000 by the Department of Labour's Registrar of Unions of the need to bring its Rules up-to-date so that they reflected current legislation, the union failed to do so and left a situation where serious questions could reasonably be asked about the

election of Mr Froggatt and Mr Cross to their current branch positions. Mr Webb eventually asked those questions.

[15] With regard to the union's conduct the Authority held at para.[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 the Labour/Employment law that occurred in 1991 and 2000.

[16] The determination also referred to a letter from the Registrar of Unions in 2000 urging Mr Froggatt to have the union review its rules and amend them at the next convenient opportunity. Eight years later the Authority found itself having to observe, "*unfortunately nothing was done by the Union and now its repeated neglect of the Rules has caught up with it.*"

[17] In the union's submissions on costs Mr Mitchell has acknowledged the effect of the union's failure to keep its rules up-to-date.

[18] The outcome of the Authority's investigation commenced by Mr Webb should not be viewed in terms of whether or not orders were made in favour of him as an applicant. Costs generally follow the event, but not invariably. Costs are not to be used to punish a party for its conduct.

[19] The union is largely responsible for the investigation becoming necessary. It gave members such as Mr Webb good cause to challenge the elections and the way the union was being governed. Given the outcome of AA 221/08 determined in June 2008, Mr Webb's subsequent application determined in this case should have been no surprise.

[20] I do not consider that there is a basis for an award to Mr Webb of full costs on an indemnity basis, but a reasonable contribution is justified.

[21] Fine analysis of the \$1,843 (excluding GST) costs incurred by Mr Webb is not necessary as it is enough to note that Mr Carrucan's charge out rate of \$35 is extremely reasonable; a tenth of many rates seen by the Authority. I take into account the unsuccessful claim of breach of bad faith and also the continued pursuit of the

Welfare and Loan Scheme matter after it had been determined earlier by the Authority. The union should not have to bear costs in relation to those matters.

[22] I fix costs at half of those actually incurred. Pursuant to clause 15 of Schedule 2 of the Act the Tramways Union is therefore ordered to pay Mr Webb costs and expenses of \$925 (excluding GST) in total.

A Dumbleton
Member of the Employment Relations Authority