

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 357/09
5280907

BETWEEN TRANSPORTATION
 AUCKLAND CORPORATION
 LIMITED
 First Applicant

And

CITYLINE (NEW ZEALAND)
LIMITED
Second Applicant

AND NZ TRAMWAYS & PUBLIC
 PASSENGER TRANSPORT
 EMPLOYEES UNION INC
 First Respondent

And

THE AKARANA BUS
DRIVERS ASSOCIATION
Second Respondent

And

THE NATIONAL
DISTRIBUTION UNION
Third Respondent

And

THE NZ AMALGAMATED
ENGINEERING PRINTING
AND MANUFACTURING
UNION INC
Fourth Respondent

Member of Authority: Dzintra King

Representatives: P A Caisley, Counsel for Applicants
 H White, Counsel for Respondents

Investigation Meeting: 8 October 2009

Determination: 8 October 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants, Transportation Auckland Corporation Ltd and Cityline (New Zealand) Limited, have applied for facilitation regarding the collective bargaining currently occurring between the applicants and the respondents.

[2] The parties met for negotiations in May, June and July and an offer for ratification was taken to the members at meetings held in early August. Ratification did not take place.

[3] The parties have also mediated on a number of occasions in September.

[4] On 4 September 2009 the respondents issued a strike notice on receipt of which the applicants notified the unions of their intention to undertake a lockout commencing on 9 September.

[5] The parties attended further mediation and a further offer was put to the membership of the unions at a stopwork on 11 September. The offer was rejected and the parties returned to mediation.

[6] On Sunday 4 October the unions served a strike notice for a strike commencing on Thursday 8 October 2009 at 4.30am. The strike action was a work to rule. On Monday 5 October the applicants served a lockout notice for a lockout commencing at 4.00am on 8 October 2009. Both notices are of indefinite duration.

[7] The applicants apply for facilitation on the basis of s 50C (1) (d). The grounds provided are that in the course of bargaining a party has proposed a strike or lockout and that the strike or lockout would be likely to affect the public interest substantially.

[8] Section 50C (2) provides that the public interest is likely to be affected substantially if the strike or lockout is likely to disrupt social, environmental or

economic interests and the effects of the disruption are likely to be widespread, long-term or irreversible.

[9] The applicants say that the industrial action is likely to disrupt social and economic interests and the effects are likely to be widespread.

[10] The unions do not oppose a referral to facilitation: their stance is “relatively neutral”.

[11] The unions dispute that the effects of the industrial action will seriously disrupt the public and say that the requirements of 50C (1) (d) are not able to be met.

[12] The purpose of facilitation is set out in s 50A which provides that:

(1) The purpose of sections 50B to 50I is to provide a process that enables 1 or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties

[13] In *McCain Foods (NZ) Ltd v SFWU Nga Ringa Tota Inc* [2009] ERNZ 28 the Chief Judge observed that:

[61] Parliament intended to permit referrals to facilitation in circumstances where parties have ‘serious difficulties’ in concluding a collective agreement. Section 50A, although expressed as being a purpose section, sets the standard and the reference to ‘difficulties’ in s 50B must be read as serious difficulties... consistently with s 50A.

[14] Facilitation, therefore, is only to be provided when there are serious difficulties not the ordinary difficulties that arise in the context of collective bargaining. In *NZ Meat Workers & related Trades Union v Crusader Meats NZ Ltd* 24/5/07, L Robinson (member), AA157/07, the Authority said that the threshold for reference was very high, that the circumstances must be extraordinary to warrant the

Authority's intervention and the section was framed in terms of a presumption against facilitation unless certain circumstances were met.

[15] The criteria are that the industrial action must be likely to affect the public interest substantially. Something that is likely is something that may happen with considerable certainty or without much doubt; something that is reasonably to be expected. Likely means probable rather than possible.

[16] The applicants say that they rely on the fact that 80,000 people use their services and a disruption to the normal transportation facilities used by those people will, ipso facto, result in the likelihood of a substantial disruption of social and economic interests. They also point to the geographical scale of the action.

[17] It is not enough that the public interest may be affected: it must be affected in a substantial manner. Substantially means to a great extent or degree, considerably, significantly, extensively, in a major fashion.

[18] It is likely that people not being able to use public transport will result in people not being able to get to their places of work. People may lose income and employers may lose business and have diminished profits. People being unable to use public transport for recreational purposes would cause inconvenience and may have economic effects on suppliers of recreational facilities and effects on people's satisfaction with life.

[19] The wording of s 50C (2) (b), which refers to effects that are likely to be widespread, long-term, or irreversible, indicates that a significant and major effect is contemplated.

[20] The extent of the industrial action clearly affects the impact on the public. Had this been a situation where the unions had given strike notice of work to rule I would not have found that the public interest would be affected substantially. The lockout notice, which is of indefinite duration, clearly has the potential to have significant and detrimental effects.

[21] Having found that notice of strike and lockout has been given and the public interest is likely to be substantially affected the parties are referred to facilitation.

Costs

[22] If the parties are unable to agree the matter of costs, the applicants should file a memorandum within 28 days of the date of this determination. The respondents should file a memorandum in reply within 14 days of receipt of the applicants' memorandum.

Dzintra King

Member of the Employment Relations Authority