

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 71
5453828

BETWEEN NEW ZEALAND TRAMWAYS
 AND PUBLIC PASSENGER
 TRANSPORT EMPLOYEES
 UNION WELLINGTON INC
 Applicant

AND WELLINGTON CITY
 TRANSPORT LIMITED (GO
 WELLINGTON)
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Tanya Kennedy for the Applicant
 David Gould for the Respondent

Investigation Meeting: On the papers by way of submissions from the parties

Determination: 27 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is the second preliminary determination in a dispute brought by the New Zealand Tramways and Public Passenger Transport Employees Union Wellington Incorporated (the Tramways Union) against Wellington City Transport Limited (Go Wellington) (WCTL).

[2] In my determination of 22 December 2014¹ I found the Authority had no jurisdiction to award the remedies sought by the Union against WCTL. Subsequently the Tramways Union filed an amended statement of problem including amended remedies.

¹ [2014] NZERA Wellington 136

[3] WCTL has filed an application to dismiss the proceedings as frivolous or vexatious pursuant to clause 12A of Schedule 2 to the Employment Relations Act 2000 (the Act). It says this is essentially the same claim, including the same relief, as the Authority has already found to be outside its jurisdiction to award.

[4] The parties agreed in the course of a telephone conference that WCTL's application would be determined on the papers once submissions had been filed by each party in accordance with an agreed schedule.

Background

[5] My first preliminary determination traversed the background to this dispute and I will not repeat it here in full. Suffice to say the dispute concerns payment for additional work the Tramways Union claims its members are required to perform as a result of WCTL introducing an enhanced safety inspection for buses. The union says bus drivers are required to undertake a more extensive vehicle inspection that takes ten minutes to perform while they are paid for only a five minute inspection. It initially asked the Authority to recognise its claim and increase the time paid for vehicle inspections from five to ten minutes.

[6] WCTL's view is that bus drivers are accorded sufficient time under the provisions of their current collective agreement to sign in and conduct the required safety inspection. It also has the view that the Authority does not have jurisdiction to provide the remedies sought by the Tramways Union.

[7] In my first preliminary determination my finding was that I had no jurisdiction to award the remedy as it was then formulated by the Tramways Union. Under the Act the Authority does not have jurisdiction to fix new terms and conditions of employment other than in certain specified circumstances, none of which were applicable to the current situation².

The remedies sought by the Tramways Union

[8] I reproduce below, verbatim, the remedy sought by the Tramways Union in its original statement of problem for the Authority:

A determination that the Respondent

² Section 161 of the Act.

Recognise the Applicants claim and increase the time paid to operators for the inspection of their vehicle from 5 minutes to 10 minutes.

Awarding costs of, and incidental to this claim.

[9] In its amended statement of problem the Tramways Union asks the Authority to resolve the problem as follows by determining (again verbatim):

- *The respondent cannot unilaterally require the drivers to undertake 10 minute vehicle inspection.*
- *If the employee agrees to complete the 10 minute vehicle inspection they must be paid for the 10 minutes working time (not 5 minutes) at the appropriate rate of pay.*
- *It is inconsistent with the collective agreement and/or Wages Protection Act and/or Minimum Wage Act to pay 5 minutes working time for the 10 minutes working time now taken for a vehicle inspection.*
- *The respondent is required to provide employees with the time and pay for 10 minutes at the applicable rate of pay for each 10 minute vehicle inspection carried out by the employee.*
- *Wage arrears – yet to be determined.*
- *Costs.*

Issue

[10] The issue for determination is whether the Tramways Union's amended application to the Authority should be dismissed as frivolous or vexatious.

Relevant law

[11] Clause 12A of Schedule 2 to the Act provides:

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
- (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[12] In *Creser v Tourist Hotel Corporation of New Zealand & Ors*³ the then Chief Judge considered an application to dismiss proceedings on the basis of their being frivolous and vexatious and an abuse of process. In the course of his judgment

³ [1990] 1 NZILR 1055

Goddard CJ referred to an earlier case in which he had considered the dismissal of a claim on the grounds that it was frivolous and trivial.⁴ He had observed that a frivolous case was one:

"..which it is impossible to take seriously. A trivial case is one in which the plaintiff is relying on an empty technicality or can at most secure a result devoid of importance, so that it can be truly said that he or she is trifling with the Court in initiating the proceeding in the first place."

[13] In *Creser* the Chief Judge added:

"..to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived."

Submissions of the parties

[14] Mr Gould, representing WCTL, submits that the matters pleaded in the Tramways Union's amended statement of problem are materially the same as those initially pleaded and determined by the Authority. He describes the union's lodging of an amended statement of problem as an abuse of process and as frivolous and vexatious. Essentially, in his submission, the Authority has already determined the jurisdictional issue and the amended statement of problem is an attempt to have a second "go" at obtaining orders against WCTL.

[15] He says the core of the claim is the order that is sought for WCTL to pay Tramways Union members more for the work they are performing than is specified in the collective agreement. In his view this is simply an attempt to relitigate the same matter the Authority has already determined to be outside its jurisdiction and the union is again attempting to have the Authority fix new terms and conditions of employment.

[16] Ms Kennedy, representing the Tramways Union, submits the issue is more complicated than described by Mr Gould and is neither frivolous nor vexatious. She says the matter concerns the interpretation of the collective agreement. This includes determining the existing rights of the employees under the agreement, and/or the

⁴ *NZ (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc IUOW & Ors* (unrep, 23/11/89, WLC 111/89) at p 7.

Wages Protection Act and/or the Minimum Wage Act. These are matters within the jurisdiction of the Authority. Ms Kennedy asks the Authority to dismiss WCTL's application to dismiss the proceedings brought by the Tramways Union.

Discussion

[17] I agree, in part, with Mr Gould. The amended statement of problem is indeed a second attempt by the Tramways Union to pursue its concerns over the changes made to vehicle inspections that its members have been asked to accommodate. However, that is not a valid reason for dismissing the union's application. The question in the first preliminary investigation was whether the Authority had jurisdiction to award the remedy sought by the Tramways Union. It was not whether the union had raised valid concerns over the interpretation, application or operation of the collective agreement.

[18] The collective agreement provides a specific provision for vehicle inspection by bus drivers⁵. For reasons based on safety (referred to in more detail in my earlier determination) WCTL has introduced a new inspection regime which the Tramways Union says has doubled the time taken by drivers to complete their vehicle inspections. The union says the drivers are required to accommodate the new regime under the existing payment provisions.

[19] I view the issue raised by the Tramways Union on behalf of its bus driver members as a legitimate one for investigation. Its application is neither "*a result of a patent or glaring error of law*" nor "*entirely misconceived*". As I have already observed, the Authority has no jurisdiction to vary the terms and conditions of the existing collective agreement in this situation. Those remedies sought by the union that entail the payment of an additional five minutes per day to its affected members fall within that category.

[20] The difficulty in the Tramways Union's first application was that the remedy it sought for the dispute it had raised required the variation of a term of the collective agreement and was therefore outside the Authority's jurisdiction to award. In the amended application, while some of the remedies the Tramways Union seeks still come within that category, others do not.

⁵ Clause 9.1(d), Wellington City Transport Go Wellington Limited Collective Employment Agreement 2013-2016

[21] Matters involving the interpretation of the collective agreement and determining the existing rights of employees covered by it, for example, fall squarely within the Authority's jurisdiction. Determining the rights of employees under minimum wages and wage protection legislation similarly comes within that jurisdiction. I find the changes made by the Tramways Union to the remedies it is seeking have resolved the jurisdictional issue that previously impeded further consideration of the union's application.

Determination

[22] The application by WCTL for dismissal of the Tramways Union's application is dismissed. A telephone conference is to be convened for the purpose of progressing and scheduling the union's application.

Costs

[23] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority