

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 36
3027011

BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION First Applicant
AND	NIGEL HUTCHINSON AND CHRISTOPHER MORLEY Second Applicants
AND	TRANZIT GROUP LIMITED First Respondent
AND	TRANZURBAN WELLINGTON LIMITED Second Respondent
AND	TRANZURBAN LOWER HUTT LIMITED Third Respondent
AND	TRANZURBAN UPPER HUTT LIMITED Fourth Respondent
AND	UZABUS LIMITED Fifth Respondent
AND	MADGE COACHLINES LIMITED Sixth respondent

Member of Authority: M B Loftus

Representatives: Simon Meikle, Counsel for Applicants
Gerard Dewar, Counsel for First, Second, Third and
Fourth Respondents
Alastair Hall, Counsel for Fifth and Sixth Respondents

Investigation Meeting: On the papers

Submissions Received: 20 April 2018 from Applicants
27 April 2018 from First, Second, Third and Fourth
Respondents

Nil from Fifth and Sixth Respondents given confirmation they are no longer party to the proceeding provided on 30 April 2018

Determination: 3 May 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for the removal of proceedings to the Employment Court. It is made by the applicants and opposed by the respondents.

Background

[2] On 19 March 2018 the applicants filed a claim alleging the respondents were in breach of various statutory obligations with respect to bargaining.¹ An amended Statement of Problem was lodged on 9 April 2018.

[3] The claims flow from changes made to the way public passenger transport is provided in the area controlled by the Greater Wellington Regional Council. In particular the Council has conducted a process which will soon see a change to the providers of various services and result in the respondents providing a number of services others previously provided. They will also see those other companies shedding a significant number of staff, particularly bus drivers who are members of the first applicant, the New Zealand Tramways and Public Passenger Transport Union (the Union).²

[4] The changes will also see the respondent companies seeking to employ and the Union is hopeful a number of its displaced members can fill those positions. The pleadings also suggest the Union hopes to recruit other employees of the respondents' who are not currently members.³

[5] To facilitate what it sees as the inevitable move of some members to the new providers (the current respondents) the Union has attempted to initiate bargaining so as to have an applicable Collective Employment Agreements in place when the

¹ File number 3026453

² See, for example, *New Zealand Tramways and Public Passenger Transport Union v Cityline (NZ) Ltd & Ors* [2018] NZERA Wellington 30

³ Amended Statement of Problem at [13]

respondents start providing the new services. At least as at the time of filing those approaches had been rebuffed primarily on the grounds the Union currently has no members employed by any of the respondent companies. Indeed the second, third and fourth respondents say that as newly incorporated subsidiaries of the first respondent they do not yet have any employees and cannot therefore be considered employers.⁴

[6] On 26 March 2018 the applicants followed the initial application with one seeking removal of the substantive proceedings to the Employment Court. That application was opposed by the Respondents. It is the removal application which is addressed in this determination.

[7] Finally, and on 30 April the Applicant confirmed they are in discussions with the fifth and sixth respondents and by doing so had addressed the concerns raised in the substantive application. As a result the fifth and sixth respondents are no longer party to the either this nor the substantive proceeding and the parties confirmed there is no issue as to costs between them.

Determination

[8] As already said this determination deals with an application for the removal of proceedings to the Employment Court. For that to occur one or more of the criteria in s 178(2) of the Employment Relations Act 2000 (the Act) must be met.

[9] Section 178(2), provides:

The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[10] The removal application relies on sections 178(2)(a) and (b) and argues there are both important questions of law and the nature and urgency of the matter means public interest requires its removal.

⁴ Respondent's submission at [4]

[11] With respect to the questions of law the applicants say there are two. The first is whether or not the Union has a right to initiate bargaining with the respondents. The second, which may in some ways be considered ancillary, relates to promises the respondent is alleged to have made to the Regional Council that it will offer employment to the second applicants and asks whether or not they can enforce the promises.

[12] With reference to *Johnston v Fletcher Construction Company Ltd*⁵ it is argued the questions being posed will likely be decisive of the case or some important aspect there-of as well as being of broad effect or significance in employment law.

[13] In particular it is to be argued, at least in respect of the first question, that s 18(1) of the Act does not limit the Union's right to represent its membership's collective interests to matters involving their current employer(s). Similarly it is to be argued no such restraint exists in relation to the ability to initiate under s 41(1).⁶

[14] It is also argued, and while not express this clearly relates to the second questions, that issues of contract privity will arise and answering these will raise issues of disclosure.⁷ Here it is alleged the Regional Council has been less than co-operative and the suggestion is the Court's powers will overcome this obstacle. With respect to urgency, and while not said, I am aware from another case the possible employment these issues relate to could, in some instances, commence as early as June.

[15] The four respondents who remain party to the dispute are not convinced by these arguments and continue to oppose the removal application.

[16] In particular it is alleged the original application was premature and *the Authority has been kept in the dark of key matters* and not been told of issues which are significant to the question of transfer.⁸ It is also argued there is no significant question of law and no urgency.

[17] Issue is taken with some of the factual allegations and in particular those to which the second questions apply. Issue is also taken with the fact there is no guarantee the second applicants will even be affected employees who might yet be

⁵ [2017] NZEmpC 157 at [22]

⁶ Applicant's submission at [15] and [16]

⁷ Above n 5 at [17] (twice)

⁸ Above n 4 at [2]

eligible to *transfer* if that is indeed a right they have. On this, and having recently determined relevant issues in this regard, I agree. The outgoing service providers who the respondents are to replace are yet to finalise their redundancy selection process.⁹

[18] Reference is also made to an arrangement the parties are alleged to have agreed last September which would inform them about possible differences in the terms of employment which might cover staff should they switch from the previous employers to one of the respondents and facilitate discussion between the parties to this dispute. It is said this process remains incomplete with a draft report having only been distributed in late March. It is suggested initiation of bargaining should have awaited the completion of this process.¹⁰

[19] With respect to the privity argument reference is made to the relevant law which, it is submitted, means there is not even a question of law. That may or may not be the case but at least at this point it appears irrelevant. The argument the second question should be elevated to the Court centred on the issue of discovery (though should the first question warrant removal it is inevitable the second will go as the Court, having been seized of part of a case, should as a matter of expediency get it all).

[20] The discovery issue fails to convince. While the Authority does not have powers of discovery in the conventional sense it does have the power, once it has embarked upon an investigation, to require the production of material it considers relevant to the question(s) posed. That power extends to persons who are not parties to the dispute.¹¹ The issue of what transpired between the respondent's and the Regional Council can, if relevant, be addressed by the Authority and does not require the Courts powers as argued.

[21] The other two points argued as justifying removal are the existence of an important question of law and urgency. Again neither argument convinces me removal is warranted.

[22] The first, and prime, question is one of statutory interpretation. The Act either allows or precludes the initiation of bargaining in circumstances such as those that

⁹ Refer n 2 above

¹⁰ Above n 4 at [9], [10] and [11]

¹¹ Section 160(1)(a) of the Act.

exist here. Statutory and/or contractual interpretation is, to use a phrase, the Authority's bread and butter. It is part of the Authority's regular function.

[23] Nor does the urgency argument convince despite my comments about timeframes of which I am aware. The simple fact is there is nothing that precludes employees displaced from their positions with the current service providers seeking and obtaining employment with one or other of the respondents in the absence of a collective agreement. They can move on individual terms. Indeed, and should current members do so while retaining their present union membership, it may well enhance the Union's bargaining power. That is something I suggest the respondent's consider from a practical, if not legal, perspective.

[24] Finally I note the issues about which one or the other party alleges I have not yet been properly appraised relate to the factual context. Aside from the fact this appears to be a question of statutory interpretation, the establishing of facts is part and parcel of the Authority's normal business.

Conclusion and costs

[25] For the above reasons I decline to remove the substantive claim to the Employment Court. The parties will soon be contacted so as to make arrangements to progress that claim.

[26] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority