

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 620  
3048112

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

A N D TRANZURBAN HUTT VALLEY  
LIMITED  
First Respondent

AND TRANZURBAN WELLINGTON  
LIMITED  
Second Respondent

Member of Authority: Peter van Keulen

Representatives: Simon Meikle, counsel for the Applicant  
Daniel Vincent, counsel for the Respondent

Investigation Meeting: 26 February 2019 and 23 August 2019

Submissions Received: 26 February 2019, 23 August 2019, 12 September 2019,  
19 September 2019 and 15 October 2019 from the  
Applicant  
26 February 2019, 23 August 2019, 11 September 2019,  
13 September 2019 and 17 September 2019 from the  
Respondent

Date of Determination: 30 October 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] New Zealand Tramways and Public Passenger Transport Employees Union Wellington Branch Inc (the Union) has applied for a reference to facilitation in respect

of collective employment agreements it is negotiating with Tranzurban Hutt Valley Limited and Tranzurban Wellington Limited.

### **Events giving rise to this application**

[2] In July 2017, Tranzurban Hutt Valley and Tranzurban Wellington won the contract to provide bus services in the Wellington and Hutt Valley regions from July/August 2018 onwards.

[3] On 8 November 2017, the Union wrote to Tranzit Coachlines Limited<sup>1</sup> advising it that the Union's members employed by NZ Bus and Mana Coach Services looked forward to transitioning to Tranzit and the Union wanted to negotiate a collective agreement with them for these members who would become employees of Tranzit.

[4] In January 2018, Tranzurban Hutt Valley and Tranzurban Wellington started employing bus drivers.

[5] On 29 January 2018, the union initiated bargaining with Tranzurban Hutt Valley and Tranzurban Wellington.

[6] On 2 February 2018, Tranzit Group Limited wrote to the Union advising it that Tranzurban Hutt Valley and Tranzurban Wellington did not have any employees and for that reason, it declined the request to commence bargaining.

[7] In response to that, on 19 February 2018, the Union lodged an application in the Authority seeking to compel Tranzurban Hutt Valley and Tranzurban Wellington to commence bargaining.

[8] On 28 May 2018, the Union and Tranzurban Hutt Valley and Tranzurban Wellington settled the 19 February application; the notices sent by the Union on 29 January 2018 were deemed effective from 15 March 2018 and the parties commenced negotiation over a bargaining process agreement.

[9] On 28 August 2018, the Union and Tranzurban Hutt Valley signed a bargaining process agreement.

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<sup>1</sup> Tranzit Coachlines (Wellington) Limited, Tranzurban Hutt Valley Limited and Tranzurban Wellington Limited are all wholly owned subsidiaries of Tranzit Group Limited.

[10] There was further bargaining between the parties in September 2018 and a mediation was held.

[11] The Union says that during the course of collective bargaining in September 2018, the directors of Tranzurban Hutt Valley and Tranzurban Wellington persuaded a then Union delegate to act on their instructions and encourage members to leave the Union. He also advised employees that the Union's collective agreement would have a detrimental effect on Tranzurban Hutt Valley and Tranzurban Wellington.

[12] The Union says Tranzurban Hutt Valley and Tranzurban Wellington failed to advise staff of the commencement of bargaining and then when it did, on 25 September 2018 it expressed adverse views of the Union accusing it of "trying to drive a wedge between you and our family".

[13] The Union also says the bargaining meeting during this time were completely unproductive as the representatives for Tranzurban Hutt Valley and Tranzurban Wellington were unprepared and only advanced the position that they wanted a collective agreement based on their existing individual employment agreements. In contrast, the Union wanted Tranzurban Hutt Valley and Tranzurban Wellington to adopt the NZ Bus collective agreement.

[14] Some progress made was on 27 September 2018, when the Union and Tranzurban Wellington signed a bargaining process agreement.

[15] Then the Union members went on strike on 25 October 2018 and 30 October 2018.

[16] Then the parties bargained on 31 October 2018 and 5 December 2018 but were unable to conclude a collective agreement. In the 5 December bargaining meeting there was some discussion about a location and hours of work clause but this was not progressed by Tranzurban Hutt Valley and Tranzurban Wellington despite them offering to draft provisions for the collective agreement.

[17] The Union then lodged its application on 6 December 2018.

### **The Union position**

[18] In its application, the Union said Tranzurban Hutt Valley and Tranzurban Wellington actions in connection with the Union delegate were a complete breach of good faith and an attempt to undermine bargaining and the authority of the Union.

[19] The Union believes Tranzurban Hutt Valley and Tranzurban Wellington are hostile to it, evidenced by its stance expressed in the announcement of bargaining on 25 September 2018. It said Tranzurban Hutt Valley and Tranzurban Wellington have refused to bargain and when they did, nothing was achieved, they were openly hostile and against collective bargaining. The Union said bargaining had been unduly protracted as a result and despite extensive efforts, those difficulties remained and precluded the parties from concluding the collective agreements.

[20] The Union also said the strikes were acrimonious because of Tranzurban Hutt Valley and Tranzurban Wellington actions - the Union alleged that Tranzurban Hutt Valley and Tranzurban Wellington hired outsiders to work.

### **Tranzurban Hutt Valley and Tranzurban Wellington's position**

[21] In their response to the application by the Union, Tranzurban Hutt Valley and Tranzurban Wellington said the application for facilitated bargaining was premature and more time was needed for bargaining including with a mediator. They said collective bargaining had only been underway for six months and only five meetings had been held.

[22] Tranzurban Hutt Valley and Tranzurban Wellington said the strikes were not acrimonious. In fact, they said they supported their staff by providing breakfasts and having additional team members on site. They also say there was a small uptake and the strikes had little or no effect, so the strikes ended abruptly.

[23] Tranzurban Hutt Valley and Tranzurban Wellington also denied the allegation that they failed to act in good faith.

### **Further developments after the application was lodged**

[24] I investigated the application on 27 February 2019. As part of that investigation, I was asked to deal with disclosure issues that had arisen between the parties. I issued a preliminary determination dealing with the disclosure issues on 19

March 2019.<sup>2</sup> As a result, further documents were disclosed and then a further investigation meeting was scheduled for 23 August 2019.

[25] Prior to that investigation meeting, the parties attended mediated bargaining sessions on 2 May 2019, 21 June 2019 and 23 July 2019.

[26] Following the investigation meeting, the parties attended further mediated bargaining sessions, on 13 September 2019 and 15 October 2019.

[27] The updates I received on progress at the mediated bargaining sessions, both in the investigation meeting on 23 August 2019 and subsequently, indicated that the parties made considerable progress.

[28] However, the last update I received from the Union outlined that the parties were unable to conclude the collective employment agreements and remained unable to agree on fundamental terms.

[29] So, notwithstanding that the parties have one further mediated bargaining session scheduled I will determine the application for a reference to facilitation.

### **Reference to Facilitation**

[30] The Authority must not accept a reference for facilitation unless it is satisfied that one or more of the grounds in s 50C(1) of the Act exist.

[31] The grounds in s 50C(1) of the Act provides:

#### **50C Grounds on which Authority may accept reference**

- (1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:
  - (a) that—
    - (i) in the course of the bargaining, a party has failed to comply with the duty of good faith in [section 4](#); and
    - (ii) the failure—
      - (A) was serious and sustained; and
      - (B) has undermined the bargaining:
  - (b) that—
    - (i) the bargaining has been unduly protracted; and

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<sup>2</sup> *New Zealand Tramways & Public Passenger Transport Employees Union Wellington Inc v Tranzurban Hutt Valley Limited and Tranzurban Wellington Limited* [2019] NZERA 159.

- (ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

(c) that—

- (i) in the course of the bargaining there has been 1 or more strikes or lockouts; and
- (ii) the strikes or lockouts have been protracted or acrimonious:

(d) that—

- (i) in the course of bargaining, a party has proposed a strike or lockout; and
- (ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

[32] The application is advanced by the Union on the grounds set out in ss 50C(1)(a) - 50C(1)(c) of the Act.

### **Analysis of application**

#### *Good faith*

[33] Based on the evidence I heard in the first investigation meeting I am not satisfied that Tranzurban Hutt Valley and Tranzurban Wellington have acted as alleged in relation to the union delegate, or if they did that this amounts to breach of the duty of good faith that is serious and sustained and has undermined bargaining.

#### *Protracted or acrimonious strike*

[34] Based on the evidence I heard in the first investigation meeting I am not satisfied that the strikes that took place were either protracted or acrimonious.

#### *Bargaining unduly protracted*

[35] I believe the ground set out in s 50C(1)(b) of the Act is arguable based on the evidence I heard in both investigation meetings and the updates I have received (which are not in dispute in terms of recording what has occurred). I will analyse the evidence and legal arguments to determine if I should order facilitation as requested.

[36] In terms of this ground, Counsel for Tranzurban Hutt Valley and Tranzurban Wellington says it is not merely a case of analysing the grounds set out in s 50C(1)(b) of the Act, but rather I must be satisfied of other elements set out in s 50C of the Act.

[37] Counsel says this is the approach adopted by the Authority previously, based on an analysis of ss 50A - 50C of the Act.<sup>3</sup> Counsel's summary of the position is that before I can accept a reference to facilitation I need to be satisfied that:

- (a) The parties are having serious difficulties in concluding a collective agreement - s 50A(1) of the Act;
- (b) There are one or more matters relating to bargaining that may be referred to the Authority for facilitation - s 50B(1) of the Act;
- (c) Facilitation would assist in resolving difficulties in concluding the collective agreement - s 50B(1) of the Act;
- (d) Bargaining has been unduly protracted – s 50C(1)(b)(i) of the Act; and
- (e) Extensive efforts (including mediation) have been made to resolve the difficulties – s 50C(1)(b)(ii) of the Act.

[38] I will consider these elements in light of what has occurred both before the application for a reference to facilitation was lodged and after.

[39] It appears to me that the parties have been through two distinct stages in their bargaining.

[40] First, the period from November 2017, when the Union attempted to initiate bargaining, until 6 December 2018, when the Union lodged its application for a reference to facilitation. This period represented a time of little progress where it appears to me that Tranzurban Hutt Valley and Tranzurban Wellington prevaricated and avoided meaningful engagement. The Union did little to assist, making unreasonable demands from the outset – the first collective agreement it tabled was by its own admission unrealistic, representing the “gold standard” in collectives.

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<sup>3</sup> *New Zealand Tramways and Public Passenger Transport Employees Union Dunedin Inc v Invercargill Passenger Transport Limited* [2013] NZERA Christchurch 106.

[41] I believe both parties were guilty of obstructive behaviour and little was achieved. In fact, the only progress appears to be because of an application by the Union to the Authority that Tranzurban Hutt Valley and Tranzurban Wellington commence bargaining. By the time the Union made its current application, for a reference to facilitation, there was not even a draft collective agreement or a list of claims that the parties were negotiating over.

[42] The second period, in contrast, appears to have been more constructive. This period ran from the first investigation meeting on 27 February 2019 until now. The parties held bargaining meetings, which whilst fraught still produced some results. A draft collective agreement that the parties would negotiate over was agreed and some bargaining occurred over a key provision relating to hours of work.

[43] After the second investigation meeting on 23 August 2019 further progress was made. The parties bargained through email exchanges and then mediated bargaining. A list of claims was produced prior to the mediated bargaining on 15 October 2019, of which 14 were agreed, 8 were close to agreement and 4 remained outstanding. Unfortunately, after the mediated bargaining sessions on 15 October 2019, the parties were in disagreement on fundamental terms. Therefore, I am satisfied that the parties are having serious difficulties in concluding their collective agreements.

[44] I am also satisfied that there are now, one or more matters that can be referred to the Authority for facilitation. I am not sure this was the case prior to the second investigation meeting but further bargaining has progressed to the point of establishing what is in issue and what the parties need to negotiate further.

[45] Based on my review of bargaining to date and what I know of facilitation, I have no doubt that facilitation would assist in resolving the difficulties the parties are having.

[46] I am satisfied that the bargaining has become unduly protracted. The Union has been attempting to bargain since November 2017. As I have already outlined the parties adopted approaches to bargaining that were problematic, unproductive and antagonistic, then when they began engaging constructively progress has been positive but unsuccessful in terms of concluding bargaining.

[47] I am also satisfied that extensive efforts, including bargaining meetings, ongoing correspondence, mediations, strike action and Authority applications have failed to resolve the difficulties that have prevented the parties from agreeing their collective agreements.

[48] I believe there remains a level of mistrust and scepticism between the parties based on the behaviour in the first period of bargaining and this is undermining the bargaining. Attempts at bargaining in the second period have seen some results but ultimately the parties remain apart on, what the Union describes as, fundamental issues. I believe it is appropriate to refer the parties to facilitation given my view of the relationship dynamics and because I believe facilitation will assist the parties to conclude their collective agreements.

[49] And, based on my analysis the grounds set out in ss 50A - 50C of the Act are met.

[50] It follows that I accept the reference to facilitation.

### **Conclusion**

[51] I have concluded that the grounds under s 50C(1)(b) of the Act are established. The bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties.

[52] For these reasons, I accept the reference for facilitation and, as required by s 50D of the Act, another Member will provide facilitation of the collective bargaining.

### **Costs**

[53] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority