IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 159
3048112

	BETWEEN	NEW ZELAND TRAMWAYS & PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION WELLINGTON 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:	On the papers
Submissions Received:	25 February 2019 from the Applicant 25 February 2019 from the Respondent
Date of Determination:	19 March 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] New Zealand Tramways & Public Passenger Transport Employees Union Wellington Inc (the Union) has applied to the Authority asking it to accept a reference for facilitation in respect of its ongoing bargaining for a collective agreement with

Tranzurban Hutt Valley Limited and Tranzurban Wellington Limited (collectively Tranzurban).

[2] Tranzurban have opposed the application.

[3] The Union has also applied for disclosure of certain documents from Tranzurban, which it says are relevant to its application for facilitation. This determination deals with the application for disclosure.

Reference to facilitation

[4] I set out the basis for the Union's application for a reference for facilitation as it informs the question of what documents may assist my investigation into the application.

[5] The Union's application for a reference to facilitation is made on three grounds[1]:

(a) Tranzurban have failed to comply with the duty of good faith, such failure being serious and sustained and having undermined bargaining.

(b) The bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

(c) In the course of bargaining there has been one or more strikes and the strike has been acrimonious.

[6] The allegations that support these grounds include:

(a) Tranzurban refused to bargain with the Union, after the Union had initiated bargaining. Tranzurban only agreed to bargain some four months later after the Union lodged an application in the Authority.

(b) Tranzurban then failed to commence bargaining in line with its agreement, taking four months to agree a bargaining process agreement.

[1] Secton 50C of the Employment Relations Act 2000.

(c) Tranzurban failed to advise its staff of the commencement of bargaining.

(d) Tranzurban has undermined the Union by meeting a union representative[2] and persuading him to act contrary to the Union's interest when speaking to members and other Tranzurban employees.

(e) Tranzurban released a newsletter to all of its staff in which it accused the Union of hype and trying to drive a wedge between employees and Tranzurban management.

(f) A strike occurred on two occasions, which was acrimonious and included Tranzurban using a strike breaker.

[7] Tranzurban denies these allegations. It says either the events either did not occur as alleged or if they did occur, the Union is taking them out of context; the events that did occur do not represent a breach of good faith, unduly protracted bargaining or an acrimonious strike.

[8] In order to resolve the factual disputes and consider the significance of the events that did occur I have already held an investigation meeting and taken evidence from two witnesses. I have also had various documents lodged with the application and the witness evidence. However, the Union seeks for Tranzurban to disclose further documents, as it believes these documents are relevant to the issue of good faith.

Application for disclosure

[9] The Union's application for disclosure is for Tranzurban to disclose documents relating to or dealing with bargaining that are held by Tranzurban management (being Kevin Snelgrove, Paul Snelgrove, Renee Snelgrove, Natalie Cobden and Marilyn Watson) and Tranzurban's bargaining agent, Paul Weaver, including any correspondence or communications between any of these people.

Disclosure in the Authority

[2] It appears this Union member was not officially a delegate but was representing the Union in a delegate capacity.

[10] There is no disclosure regime set out in the relevant regulations or the Employment Relations Act 2000 (the Act) relating to the Authority's power to require documents to be produced.

[11] Sections 157 and 160 of the Act provide the basis for the Authority's power to investigate a matter, which includes its powers to call for evidence when investigating.

[12] The Employment Court has specifically acknowledged that ss 160(1)(a) and 160(2) of the Act empower the Authority to direct disclosure.[3] How I exercise this power is not directly prescribed in the Act but the provisions relating to the Authority's investigatory function are instructive on this.

[13] The Authority is an investigative body, as the Member in this matter I must establish the facts in order to make a determination on the case, and I should do so on the substantial merits of the case without regard to technicalities. In carrying out my role, as it relates to a request for documents to be provided, I must comply with the principles of natural justice, promote good faith behaviour and generally further the object of the Act. Overall, I must act as I think fit in equity and good conscience.

[14] In carrying out my investigatory powers, I may call for evidence and information from the parties or any other person and I may take into account such evidence and information, which in equity and good conscience I believe, is fit for me to do so.

[15] The guidance from ss157 and 160 of the Act coupled with the investigatory powers and the obligations I have to discharge in investigating indicates that I can call for information to be provided on a fairly broad basis.

[16] Therefore, the Authority's power to direct that documents be provided is potentially far wider ranging than the power of other bodies regulated by disclosure regimes such as the Employment Court or the High Court.

[17] In terms of how wide the power to call for documents is, I take some guidance from the only prescriptive provision in relation to evidence being clause 5 of Schedule 12 of the Act pertaining to witness summons. That clause provides that the Authority

[3] *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138 at [84].

may require any person to produce to it any books, papers, documents, records or things in that person's possession or under that person's control *in any way relating to the matter*.

[18] The other matters of relevance are the Evidence Act 2006 and the Employment Court Regulations 2000. Matters in the Authority are not subject to the Evidence Act nor are they controlled by the Employment Court Regulations. However, the Evidence Act is instructive. In addition, the general desirability of having consistency between the Authority and the Employment Court in dealing with documentary evidence means the Authority should apply some of the principles of the Employment Court Regulations. The result is that the Authority should apply the generally accepted principles of privilege, from the Evidence Act and the Employment Court Regulations, to the disclosure of documents.[4]

[19] Considering all of the observations made above, the question of producing documents for the purposes of an Authority investigation meeting turns on:

(a) Whether the documents in question at least relate to the matter being investigated – as a minimum the documents should potentially assist me in investigating the matter and establishing the facts to enable me to make a determination;

(b) Whether, balancing equity and good conscience and natural justice, calling for the documents is appropriate. This includes considering: (i) the practicality of producing documents; (ii) the cost involved; (iii) whether disclosure would be too onerous; (iv) whether disclosure would produce too much information so as to be unwieldy and unhelpful; and (v) whether the request is actually a fishing expedition; and

(c) There are some restrictions on what can be disclosed relating to privilege.

[20] Applying this rationale to the Union's request for disclosure, I conclude that the request is too wide and it needs to be restricted to documents that at least relate to the allegations in the application or would assist me in resolving those allegations.

[4] *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138

And the disclosure obligation needs to be appropriate considering the practical requirements such as the scope of work required, the amount of documents likely to be produced and the cost.

[21] In this regard my view is the following documents should be disclosed, subject to my further comments on the application of privilege, are documents that are held by Kevin Snelgrove, Paul Snelgrove, Renee Snelgrove, Natalie Cobden, Marilyn Watson and Paul Weaver, including any correspondence or communications between any of these people, which relate to:

(a) Tranzurban's decision to commence bargaining or not and the steps it took to advise staff once bargaining had commenced.

(b) Any discussion of Union activities with [member], including any documents discussing the approach to be taken and why, any notes on the discussion and any documents reporting back on discussion or the subsequent staff meeting.

(c) The strike, including action to cover striking workers and what might be done to mitigate the effects and impact of any proposed strike.

Privilege

[22] Regulations 37 – 52 of the Employment Court Regulations 2000 set out the framework for mutual disclosure and inspection of documents for matters in the Employment Court. Regulation 44 sets out the grounds on which a party may object to the disclosure of documents.

Legal professional privilege

[23] One of those grounds is set out at regulation 44(3)(a), which provides that a party may object to disclosing documents that are subject to legal professional privilege.

[24] In *Yu v Zespri International Ltd*[5] the Employment Court noted that there are two heads of legal professional privilege covered by regulation 44(3)(a). These are legal advice privilege, which protects communications between lawyers and their clients for the purposes of giving or receiving advice, and litigation privilege, which

protects communications between a client or their lawyer and third parties for the purposes of litigation.[6]

[25] It is clear that any Tranzurban internal communications, communications with Paul Weaver or documents created to assist with obtaining or giving advice pertaining to bargaining are not privileged under the first head of legal professional privilege, as none of the individuals involved are lawyers and providing advice in line with the Lawyers and Conveyancers Act 2006.

[26] However, the second head of legal professional privilege extends to communications created for the purposes of litigation and it does not matter if the documents are part of communications between parties and non-lawyers so long as litigation is contemplated and the document is created for the dominant purpose of preparing for that litigation.[7]

[27] Based on my conclusion in paragraph [18], I accept that this litigation privilege applies in this matter and Tranzurban need not disclose documents that have been produced as part of preparation for litigation between it and the Union.

Public interest privilege

[28] A second ground for objecting to disclosing documents under the Employment Court Regulations is at regulation 44(3)(c). This provides that a party can object to disclosing documents where disclosure would be injurious to the public interest.

[29] Tranzurban says this public interest extends to protecting documents containing bargaining strategy and it relies on two Employment Court decisions to support this, *Julian v Air New Zealand Ltd* and *Kaikorai Service Centre Limited v First Union Incorporated.* [8]

[30] In *Julian* the Employment Court considered "public interest" in terms of regulation 52(3)(c) of the Employment Court Regulations 1991 (now repealed), which had the same wording as regulation 44(3)(c), and the Court said:[9]

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[5] *Yu v Zespri International Ltd* [2017] NZEmpC 146.
[6] *Walker v Delta Community Support Trust* [2014] NZEmpC 187.
[7] *Yu v Zespri International Ltd* [2017] NZEmpC 146 at [74].
[8] *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 88 (EmpC); and *Kaikorai Service Centre Limited v First Union Incorporated* [2018] NZEmpC 83.
[9] At 89

> The "public interest" referred to in reg 52(3)(c) is not the interest of the whole community in all matters, but is clearly intended to be the interests of more than the immediate parties to a particular dispute. The public interest is that of the public or community engaged in bargaining about, negotiating, and settling employment contracts. Such persons have a justified and legitimate interest in their strategies, as evidenced in documents between themselves and between them and their bargaining agents and advisers, being privileged from disclosure in litigation before contracts are settled or negotiations otherwise concluded.

[31] The application of "public interest' in *Julian* has been criticised for extending public interest to cover essentially private matters. The suggestion being that there is little or no public interest harmed if communications between an advisor and a party are disclosed.

[32] The Employment Court in *Kaikorai* discussed the criticism of *Julian* but concluded that the end result was understandable:

> [25] Despite what was said about *Julian* in *Lloyd*, the decision is open to criticism as having extended what was conventionally seen as falling within the ambit of "public interest" by widening its application into areas which, at least initially, are essentially private disputes. The end result of *Julian* is, perhaps, understandable for the reason identified by Mr Oldfield; the desirability of allowing parties some degree of confidence in the privacy of documents or communications created for the purposes of bargaining. It would be undesirable if parties in bargaining were incentivised to issue proceedings to gain an insight into the other party's plans (there is no suggestion this approach is being taken here).

[33] The Employment Court then went on to say that whilst it did not endorse the decision in *Julian*, it concluded there is privilege attaching to documents that contain information about bargaining strategy:

> [26] The circumstances in which this application came before the Court meant that extensive argument about the ambit of reg 44(3)(c) and the meaning of "public interest" did not occur. However, I accept that both parties are entitled to maintain a claim of privilege for documents created for the purposes of bargaining, containing either directly, or indirectly, information about the strategy intended to be used. In a sense this approach is pragmatic because it leads to a similar outcome as was achieved in *Julian* but should not be taken as endorsing the decision itself. This approach means that the objection will be upheld in relation to bargaining strategy documents.

[34] I conclude, based on *Julian* and *Kaikorai*, that there is a public interest in protecting information about bargaining from disclosure and therefore any such documents should not be disclosed by Tranzurban.[10]

Conclusion

[35] Subject to paragraph [37], I direct Tranzurban to disclose documents that are held by Kevin Snelgrove, Paul Snelgrove, Renee Snelgrove, Natalie Cobden, Marilyn Watson and Paul Weaver, including any correspondence or communications between any of these people, which relate to:

(a) Tranzurban's decision to commence bargaining or not and the steps it took to advise staff once bargaining had commenced.

(b) Any discussion of Union activities with Tuala Faafiti, including any documents discussing the approach to be taken with Mr Faafiti and why, any notes on the discussion and any documents reporting back on discussion or the subsequent staff meeting.

(c) The strike, including action to cover striking workers and what might be done to mitigate the effects and impact of any proposed strike.

[36] Disclosure can be made either by listing the documents and serving this list on the Union which can then request copies of any documents it wishes to see or by simply providing copies of all documents to be disclosed to the Union if that is easier for both parties.

[37] Tranzurban can apply the privilege I have accepted as applying in this case, being litigation privilege discussed in paragraphs [23] – [27] and public interest privilege discussed in paragraphs [28] – [34].

[38] If Tranzurban applies this privilege, it can withhold from disclosure any documents it believes are privileged but it must provide a list of the documents

[10] In my view, this public interest is not just about protecting the strategy during bargaining as the Court in *Julian* suggests and the Court in *Kaikorai* accepts is the desirable outcome; rather it is the public interest in preserving confidential communications created in the context of obtaining advice on collective bargaining. See *Lloyd v Museum of New Zealand Te Papa Tongarewa (No. 2)* [2003] 2 ERNZ 685, where "public interest" was applied to preserve confidential communications, given in the context of communications between a member of a union and the union for the purposes of the seeking and giving of advice on employment relationship problems, which the Court said was in accordance with the broad principles espoused by the Employment Relations Act 2000.

withheld to the Union. This list should identify the nature of the document and the privilege being applied. If the Union believes Tranzurban has not complied with its disclosure obligations then it can apply to the Authority for it to consider the document. [11]

Costs

[39] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority

[11] Noting that in *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZEmpC 138 at [84], the Employment Court stated that the decision as to whether a documents is privileged rests with counsel but in if there is a challenge to that decision then the Authority may inspect the document to determine if it is privileged.