IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 233
3066012

	BETWEEN	MADELINE LAMONT AND THOSE OTHER LISTED IN SCHEDULE A Applicants
	AND	RITCHIES TRANSPORT HOLDINGS LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Peter Cranney and Oliver Christeller, counsel for the Applicants Fiona McMillan, counsel for the Respondent
Investigation Meeting:	19 February 2020 at Dunedin
Submissions Received:	At the Investigation Meeting with further input up to and including 17 March 2020
Date of Determination:	17 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants claim they have been discriminated against given their status as members of First Union Incorporated.

[2] The respondent, Ritchies, denies that is so.

Background

[3] The applicants are both employees of Ritchies and members of First Union. They are engaged as bus drivers with their terms and conditions of employment being set by individual employment agreements. Each is, or at least was at the time of the investigation meeting, paid $18.25 an hour.

[4] On 18 May 2018 the union initiated bargaining for what was intended to be its first collective employment agreement with Ritchies. Settlement is yet to be reached which means members remain on individual employment agreements.

[5] In the intervening period Ritchies concluded negotiations with the Amalgamated Workers Union (AWUNZ) which also represents company employees. The agreement provided for a series of three increases to the hourly rate with the second of those seeing a move from $19 to $19.80 on 22 July 2019.

[6] Here it should be noted First Union also complains Ritchies delayed its bargaining and when it did occur made offers inferior to those agreed with AWUNZ. Ritchies attributes the delay to the Union, saying it both cancelled bargaining sessions then failed to agree replacement dates. That said, and while both parties commented on this, it is not a matter I need address to determine the claims before me.

[7] As events transpired Ritchies chose to raise the value of AWUNZ's second increase to $20 and apply it as of the earlier date of 24 June 1919. Ritchies also decided that as well as AWUNZ members this increase would be offered to non-union members it employed.

[8] On 26 June First Union requested its members wages be similarly increased. It also advised failure to agree would constitute discrimination on the grounds of union membership. The letter also asked that back-pay applied to the first increase for AWUNZ members be given to First's members.

[9] Ritchies replied on 2 July refusing the request. It also pointed out various differences between the two arrangements including the fact First's imitation had only sought a twelve month term and the amount sought was significantly greater than that agreed with AWUNZ as applicable as of 23 July 2018. That said the claim was soon reduced to $19 as agreed with

AWUNZ. Ritchie's also recorded *It is important to note that AWUNZ have indicated that they are not prepared to pass on their negotiated rate to First Union*.

[10] As of the date of the investigation meeting the issues remained unresolved and the wage differential remained.

Discussion

[11] As already said the applicants each claim to have a personal grievance given they have been discriminated against in their employment as a result of their status as members of First Union.

[12] A person is considered to have been discriminated against when by reason of either the grounds specified in s 105 of the Employment Relations Act 2000, the Act, or their involvement in the activities of a union, their employer:

> refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances.[1]

[13] There is no dispute the applicants are being paid less than their colleagues. Similarly there is no dispute the applicants and their colleagues have substantially similar qualifications and skills and are employed in substantially similar circumstances.

[14] That raises the question of whether or not this is by reason of their involvement in the activities of their union and there can be no doubt the applicants can be considered to have been so involved by virtue of their current membership and s 107(2)(a) of the Act. This then places the onus on Ritchies given s 119(2) states that while rebuttable, the starting point is the alleged discrimination did occur. That said there is an exception, namely:

> Despite section 104, an employee is not discriminated against in that employee's employment simply because the employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer by reason of the employee being a member of a union.[2]

[1] Section 104(1)(a) of the Employment Relations Act 2000
[2] Section 106(4) of the Employment Relations Act 2000

[15] So the question is essentially whether or not the pay differential is attributable to the union membership as the applicants argue or not as Ritchies says. Ritchies prime argument is the pay differential is attributable to the fact negotiations remain ongoing.

[16] In arguing the exemption cannot apply the Union submits that none of the requirements of s106(4) is met as the differential was not by reason of the employee being a member of a union as the increase was paid to all others be they a new start, an AWUNZ member and, most pertinently, a non-member. In both the case of a new start and a non-member the differential cannot be attributed to their union membership and, by implication, the stipulation of terms and conditions negotiated by that union.

[17] As the union put it:

> *The wage increase paid to all new starts and to AWUNZ members was not paid "by reason of the employee(s) being a member of a union".*
>
> *It was paid regardless of union membership. Some were members of AWUNZ, some were not in any union, and some were new starts. Union membership was not relevant, except to exclude First Union.*

[18] Ritchies, having referred to the Supreme Court's decision in *McAlister v Air New Zealand Limited*[3](as, I would add, did the applicants), submitted:

> [The applicants] need to show that union membership was a material reason for why they did not receive wage increases. It is submitted that union membership is not a material reason for why they have not received wage increases, the material reason for the difference in wages is that bargaining for a collective agreement has not yet concluded.

[19] It is argued:

> The Respondent is not treating the Applicant's differently to other employees - it is engaging in negotiations regarding the terms and conditions of employment, like it did with all other employees. The only difference between the employees is that final agreement on the collective agreement has not been reached. There has been no disparity of treatment.

[20] It therefore follows the exemption in s 106(4) applies.

[21] The problem with this approach is it is not supported by the evidence, especially with respect to non-union recipients. As is repeated in the submissions the approach relies on an

[3] *McAlister v Air New Zealand* [2009] NZSC 78; [2009] ERNZ 410

assumption both AWUNZ and non-members negotiated.[4] The evidence does not support a conclusion that occurred. With respect to AWUNZ, and while the initial increases were negotiated, there is no evidence of negotiation in respect to the decision to increase to $20 and bring the applicable date forward. With respect to non-members there is no evidence of what could be called real negation whatsoever.

[22] What the evidence shows is that is that a radio message was broadcast to staff on the morning of 20 June advising pay would be increased for all drivers and asking that they approach their supervisors. A text sent to a First Union delegate shows an expectation the approach to supervisors was simply to *sign something*. It was at a staff meeting held later that day that staff discovered First Union members were not included purportedly by reason of the ongoing negotiations.

[23] It does not take an expert in this field to recognise no employee is going to reject an unfettered offer of a pay increase and it is difficult to conclude simply making such an offer is negotiation in the real sense.

[24] It is here a second problem arises and that is the acceptance by one of Ritchies managers that at least two employees who left First union then received the increase. Indeed the evidence is one of those defections occurred on the morning of the offer and another was discussed in evidence. In other words one could get the increase by ceasing to be a member of First Union which, I conclude, confirms people were precluded from accessing the increase solely because of their continued membership of First Union.

[25] There is then an argument Ritchies was effectively precluded from passing the AWUNZ settlement to those who it was proposed be covered by another collective. It is argued that *as AWUNZ has indicated that they do not wish to pass on their negotiated wage rates to First Union*[5] the refusal to pass is condoned by s 59C of the Act as it would constitute a breach of the duty of good faith Ritchies owed AWUNZ.

[26] This argument also fails to convince. First, and as already said, $20 per hour was never negotiated with AWUNZ. Second, and more importantly, had Ritchies passed the increase s 59C says the duty of good faith would only be breached if there was evidence it did

[4] Paragraphs [20] and [21] of the respondent's submissions
[5] Paragraph [22] of the respondent's submissions

so with a view to undermining the AWUNZ agreement. There was no such evidence if only because that which I did receive would suggest that was the last thing Ritchies wished to do.

[27] Finally Ritchies also refers to s 106(5) which states s 104 must be read in conjunction with s 9(3). Essentially the argument is the Act does not prevent a collective agreement containing terms that recognise benefits which arise out of the relationship on which a collective agreement is based.

[28] That argument I disregard for two reasons. First there is no allegation of preference (s 9) and the argument is undermined by virtue of Ritchies having passed the increase to non-members. That means it is no longer a benefit arising out of a collective agreement or by virtue of a relationship on which a collective was based.

[29] Given the presumption and for the above reasons, especially the conclusion an increase was passed to non-members without real negotiation, I conclude First Union members were deprived of the increase primarily because of their union membership. It was, using the words of the Supreme Court in *McAlister*, a material ingredient and as a result they were discriminated against.

[30] With respect to remedies, and while the applicants originally sought wages lost as a result of the discriminatory practices; compensation pursuant to s 123(1)(c)(i) and other benefits they might reasonably have expected (s 123(1)(c)(ii)), they now say *amount and quantum should be reserved for further submission and/or evidence if that is needed*.[6]

[31] Ritchies says that if remedies were to accrue they would effectively include the setting of terms and conditions and the Authority is precluded from doing that, at least in the circumstances of this case.

[32] Both parties have alluded the fact this dispute has its origins in issues linked to bargaining. It is definitely an issue which still has the potential to be resolved that way and the parties indicted, both through submission and statements made at the investigation, that remains a possibility. As an agreed resolution is preferable and both parties approach to remedies allows that to be attempted I leave the issue at this stage though leave is reserved for them to return for a determination should that prove necessary.

[6] Paragraph [24] of the applicant's submissions

Conclusion and Orders

[33] For the above reasons I conclude the applicants were, as claimed, discriminated against due to their status as members of First Union Incorporated.

[34] The question of remedies (resolution) is initially left to the parties though leave is reserved for them to return for a determination if that proves necessary.

[35] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority