

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 78  
3136870

BETWEEN NEW ZEALAND TRAMWAYS  
AND PUBLIC PASSENGER  
TRANSPORT EMPLOYEES'  
UNION, WELLINGTON  
BRANCH INCORPORATED  
AND 17 OTHERS LISTED at  
ANNEX 1  
Applicants

AND WELLINGTON CITY  
TRANSPORT LIMITED  
First Respondent

AND CITYLINE (NZ) LIMITED  
Second Respondent

Member of Authority: Michael Loftus

Representatives: Tanya Kennedy, counsel for the Applicants  
Andrew Caisley, counsel for the Respondents

Investigation Meeting: 5 and 6 April 2022 in Wellington

Submissions Received: At the investigation with further information up to and  
including 20 May 2022

Determination: 13 February 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This claim involves both a dispute and personal grievances with the applicants claiming that:

- (a) The second respondent, Cityline (NZ) Limited (Cityline), has breached s 236 of the Employment Relations Act 2000 (the Act) and attempted to

unilaterally impose a variation to the collective agreement between it and the first applicant (the Union) which would detrimentally affect various members. That claim was originally filed as part of another application in the Authority but withdrawn to be part of these proceedings.

- (b) Both respondents (Cityline and Wellington City Transport Limited (WCTL)) are in breach of the employment agreement each has with the Union and thereby unjustifiably affected the Union's members to their disadvantage by:
  - (i) Unilaterally reducing the member's (Airport Flyer drivers/operators) work hours and therefore earnings from around April 2020;
  - (ii) Ceasing the Airport Flyer operation without consultation or payment of redundancy compensation as of 27 November 2020; and
  - (iii) Unlawfully changing the drivers' home depots in December 2020.
- (c) Both respondents are guilty of sustained and ongoing breaches of the collective agreement which are in effect repeats of the above claims without the link to a personal grievance.
- (d) Both respondents are in breach of the duty of good faith by virtue of failing to be active and constructive in establishing and maintaining a productive employment relationship.
- (e) That four of the applicants, having resigned, have been constructively dismissed.

[2] The respondents are of a view they have done nothing that triggers an obligation to consult under either the Act or respective collective agreement. In any event they say they have in fact consulted.

[3] Both respondents add the Union's member applicants were not, and never have been, employed in the role of Airport Flyer driver. In the respondent's view they were operators (drivers) who could be engaged in such capacity anywhere in the respondent's business. It therefore follows none of the member applicants have at any time been

redundant. The respondents add, however, that even if they were Airport Flyer drivers, then they were offered suitable alternative employment as drivers.

[4] The constructive dismissal claims are denied for similar reasons.

### **This Determination**

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[6] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

### **Employment Relationship Problem**

[7] The Union is registered in terms of the Act and has a number of members employed by the two respondents. Its Secretary is Kevin O’Sullivan.

[8] The second to eighteenth applicants were, in the Union’s view, employed as ‘Airport Flyer drivers’ by one of the two respondents and its members were covered by a collective employment agreement to which it was a party. The Cityline agreement covers employees engaged by it in “Hutt Valley region”. The WCTL agreement covers those engaged it in the “Wellington City area”

[9] Each driver is allocated a home depot which is the place he or she normally signs on and off for work. If a driver starts or finishes at a different depot they are paid travel time. This issue has previously been discussed in the Authority, as have others relevant to this dispute.<sup>1</sup> That aspect of the determination that was challenged (namely whether or not Cityline employees could be required to work in Wellington City) was upheld by the Employment Court in a decision that included comment about the concept of ‘home depot’ which is important here.<sup>2</sup>

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<sup>1</sup> *New Zealand Tramways and Public Transport Passenger Employees’ Union v Cityline (NZ) Limited and Wellington City Transport Limited* [2018] NZERA Wellington 30

<sup>2</sup> *NZ Tramways and Public Transport Passenger Employees’ Union v Cityline (NZ) Limited* [2018] NZEmpC 156

[10] Each of the respondents is a duly registered company providing public transport services to Greater Wellington Regional Council (GWRC). Both are part of the New Zealand Bus Group of Companies (NZ Bus) which provide public bus transport services in Auckland, Wellington, and Tauranga.

[11] Most of the services they provide are publicly funded. In Wellington's case this is through agreements with Greater Wellington Regional Council via the Public Transport Operating Model (PTOM), a competitive tender process, but some of their services are purely commercial and do not attract public funding. Particular to this claim is the service providing transport to and from Wellington Airport (the Airport Flyer).

[12] In order to deliver their services, whether publicly or commercially funded, both respondents employ drivers who are known as operators. Their terms and conditions were governed by two collective employment agreement – one with each of the respondents which, for the purposes of this dispute, both had a term of 15 October 2018 to 17 October 2020.

[13] Four of the applicants were employed by WCTL with the rest, including all of those claiming to have been constructively dismissed, employed by Cityline which was historically responsible for the service.

[14] As a consequence of PTOM, and with effect from mid-2018, the respondents lost a significant portion of their publicly funded services. They had previously provided almost all such services in the region but subsequent to the 2018 PTOM process that reduced to about 30% of the services. As a result, the respondents undertook major restructurings.

[15] The restructuring saw a reduction in the number of home depots, with Cityline reducing the number of depots it operated from five to two (Eastbourne and Waterloo) and there were a number of redundancies. At the time Cityline advised the Authority that:

Cityline calculates that once the new contracts are implemented at will, in addition to the Airport Flyer drivers, we'll only require 28 operators, all of whom will work from the Eastbourne depot. That is an increase on the 20

currently employed at Eastbourne, but the other four depots were closed and redundancies must ensue.<sup>3</sup>

[16] Cityline also determined who would be made redundant on a depot by depot basis and that decision was upheld by the Authority.<sup>4</sup> Central to that determination was the fact employees were required to have a home depot meaning their positions were depot based. When required to work temporarily from another depot a transport allowance was payable.

[17] On this basis Cityline refused to consider any Airport Flyer drivers for redundancy as the service they provided was ongoing and this was approved of by the Authority and reflected on by the Court. Drivers rostered to work on the Airport Flyer were, at the time, treated separately from other drivers as incumbents of a specific role and affected individuals had that confirmed by letter dated 7 May 2018.

[18] In early 2020 the respondents' businesses were impacted by the Covid-19 pandemic. In particular for current purposes, there was a dramatic reduction in air travel which had a significant effect on patronage on the Airport Flyer services.

[19] By that time the Airport Flyer drivers were operating from a depot at Petone which opened when Waterloo closed. With covid the state of Petone became an issue and on 18 March Mr O'Sullivan wrote:

Given the very basic facilities at Petone especially the lack of hot running water and the current crisis and MOH guidelines requiring basic hygiene (hot water) we may require the Airport Flyer service to operate from Eastbourne or Kilbirnie. Can you please let me know urgently what plans are in place to deal with this matter.

[20] It was accepted by all who gave evidence that Petone was substandard and with the Airport Flyer no longer operating due to the government's covid mandates it was closed. This was advised on 20 April 2020 as was the fact affected staff would be moved to Kaiwharawhara, a depot operated by WCTL.

[21] The Union says this was done without consultation. It also says the collective agreement(s) did not enable Cityline to change the employees' home depot to Kaiwharawhara and, as a result, they retain Petone as their designated home depot and should be paid travel time on that basis.

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<sup>3</sup> Above n 1 and referred to at [5] and [6]

<sup>4</sup> Above n 1 at [21]

[22] Here I note that not only do both parties agree Petone was substandard, the drivers who answered questions about it conceded Kaiwharawhara was a better option to work from than either Eastbourne or Kilbirnie, at least when the situation was potentially temporary as a result of the government's covid mandate orders which negated any need for the airport flyer. Mr O'Sullivan also conceded he did not think about Kaiwharawhara as an option as he thought it had insufficient room.

[23] Advice Petone was to close was followed with letters to each affected employee dated 5 June. It stated the variation under which the move to Kaiwharawhara occurred had been agreed and would be affective from 14 June. It also referred to the travel allowance and the rules that would apply to its payment. In closing the letter advised NZ Bus looked forward to each drivers "confirmation and acceptance of these variations". It then said "If you choose to accept these variations, please sign the declaration to this effect on both letters and return the duplicate to us".

[24] The Union's position is this was never agreed or ratified and in doing so it points to clause 51 of the collective agreement which provides any variation shall be in writing having been agreed by the company, the Union, and the majority of employees to whom the variation applies.

[25] On 11 June the union wrote referring to a constructive meeting the day before along with further discussions that morning. In a brief mention of variations the letter states:

Any variation to the CEA must be done by the Company and the Union not by individually writing to members. If you want to put a proposal to us along the lines suggested in those letters, we will consider and get back to you in a timely manner.

[26] While the Union says there was no response NZ Bus (the respond companies parent) replied that day saying it thought there had been agreement in principle and that had been confirmed in writing earlier in March and April.

[27] The Union came back saying

There's no real issue with the Cityline variation other than the fact that the way you have gone about it is in breach of the collective and the law. You can't approach individuals who are on a collective and then ask them to sign a collective. It has to be done by the Union on behalf of the members concerned ... My proposal simply seeks to tidy up the process and keep it in line with the law.

[28] On 16 June NZ Bus sent further correspondence in the form of meeting notes which recognise issues remained. They record the Union considered the letters to individual members invalid and any variation had to be signed by the Union. They also record existing arrangements will continue to apply notwithstanding the fact that by then the drivers were already based at Kaiwharawhara.

[29] The Union view was repeated in an email the following day, 17 June.

[30] On 3 July it was announced the Airport Flyer service would resume though only between the Airport and Wellington railway station. It would not continue to the Hutt Valley as before and both the hours and frequency were significantly reduced. This had been heralded at a presentation the previous day which was attended by the Union.

[31] The response was that a number of issues, including the proposed variation, were now before the Authority.

[32] Further discussion occurred which led to NZ Bus again putting the proposed variation to the Union by letter dated 14 July 2020. The letter does ends with the comment “We look forward to your confirmation and acceptance of these variations” along with a signature block for Mr O’Sullivan.

[33] The reply came on 27 July when Mr O’Sullivan wrote concerning “Further unlawful actions”. Included therein was a reiteration of his concern over attempts to vary terms and their entitlement to travelling allowances. He also challenged the significant reduction in work and suggested that when combined the issues gave rise to a potential redundancy situation as the current situation did not amount to suitable alternative employment. He said the situation gave rise to personal grievances for unjustified disadvantage and advised the drivers were now working under protest while resolution was explored.

[34] The Union complains there was no response though that is debatable. By then lawyers representing both the Union and the respondent’s were in communication over a variety of issues.

[35] At a meeting between NZ Bus and the Union on 6 November it was announced the Airport Flyer operation would cease and the drivers engaged on Metlink (regional publicly funded) work from Eastbourne. NZ Bus announced that given current vacancies there would be no redundancy.

[36] The Union complains this was again done without consultation, constituting a breach of both the applicable collective agreements and the duty of good faith. The Union held a meeting with its members and then wrote to the respondents' on 19 November challenging both past events and those proposed for the future. The Union complained there was no response but that is not correct – it came on 25 November.

[37] As already said the respondents' took the view cessation of the Airport Flyer service did not impact on its drivers or create a redundancy situation. That is because both respondents had a shortage of drivers. Each had continued ongoing employment for all of its drivers and were continuing to advertise vacancies. Both expected that situation to remain for a considerable time.

[38] On 15 December 2020, the respondents emailed each driver on NZ Bus letterhead asking for feedback on a proposed change to each ones home depot on the basis Petone no longer existed. It was proposed the bulk would go to (remain at) Kaiwharawhara, though some would be assigned to Eastbourne. It was proposed this would take effect from 1 January 2021 and the letter gave drivers until 21 December to respond.

[39] The Union responded via its lawyer on 18 December raising concerns and asking for more time to respond given Christmas. The response came on 22 December reiterating the view the employees were drivers and that clause 17.3 of the Cityline collective allowed their depot to change. Given that and the fact the delay sought was till late January the request was declined and Cityline would confirm the reassignments of depots.

[40] It is the Union's position that the respondents' then proceeded to unilaterally enforce the change which the drivers accepted, again under protest.

[41] In January 2021 mediation occurred but it failed to resolve the issue. As a result, the majority of drivers have continued to work their new duties under protest however four resigned, hence the claims of constructive dismissal.

[42] With respect to the home depot issue, it is the respondents' position that having a non-existent home depot is an anomaly that made no sense. It was only natural they would attempt to remedy that. In saying that, they do not accept that the only reason

for changing home depot is an employee request. That is because in their view, clause 17.3 of the Cityline collective agreement specifically anticipates employees can be permanently transferred from one depot to another, either on the basis of their own application or otherwise.

### **Analysis**

[43] At a case management conference it was agreed that this investigation be limited to the question of liability. Remedies, if due, can await further investigation if the parties cannot resolve the issue between themselves.

[44] Before proceeding further, I will quickly deal with the first claim; namely that the respondents have breached s 236 of the Act. Their response is that is a section they cannot breach as all it does is enable an employee to appoint a representative and then requires that representative establish their authority to act. I agree.

[45] It is the respondents' submission that "At the heart of these proceedings is a claim for redundancy payments by 14<sup>5</sup> employees who:

- (a) Are not redundant; and
- (b) Have ongoing employment:
  - (i) with the same employer;
  - (ii) in the same role;
  - (iii) on the same collective agreement terms and conditions,at all material times." <sup>6</sup>

[46] Again, I agree though it is here the disagreement arises with the key point being whether, as the respondents submit, the drivers, having been employed as drivers, remained in that same role. The alternate, as the Union contends, is there was a specific role of "Airport Flyer driver".

[47] The largest group of affected drivers are the eleven engaged under the Cityline collective agreement and transferred to Kaiwharawhara. For these drivers I conclude the answer is a change such as that imposed here cannot occur unilaterally.

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<sup>5</sup> That was the number of member applicants in the original statement of problem which was subsequently amended

<sup>6</sup> Closing submissions at [1]

[48] First and despite the respondents' contrary protestation the letters of appointment, or at least those I have seen, state the driver has been appointed to the airport flyer (though the actual words used differ – 'Flyer Block', 'Hutt Airport Flyer' and 'Block Airport Flyer'). To that I add the fact that during the events of 2018 Cityline chose to ringfence the Flyer drivers and exclude them from the restructuring on the grounds they both occupied a specific position that was not affected and were still required. At the time I agreed.

[49] To that I add the fact the evidence shows there were other factors that differentiate the airport flyer work from regional council funded work. Amongst others they required class four licences which are not necessary for a lot of the other work and had a different and far more predictable roster structure. I also note appointment is not dependant on seniority as is the case for other rosters and they are excluded from the work allocation process when there was a rescheduling. It follows I conclude that notwithstanding evidence the Airport Flyer drivers did perform some PTOM work, they were primarily employed as airport flyer drivers and that is a specifically designated role.

[50] The second key factor is custom and practice which dictates that once on a roster drivers do not just have their duties changed and here I note evidence I received in the 2018 dispute between the same parties that:

It is also common ground that once an operator has been allocated a specific roster actual practice is his or her home depot will only change at the operator's behest and by virtue of the operator requesting a different roster. As Mr O'Sullivan, the Union's Secretary, conceded, it may be contractually possible for the employer to permanently reassign an operator to another roster and depot but this does not occur in practice.<sup>7</sup>

[51] Here it should be noted in that dispute to have had the employer capable of unilaterally changing rosters would have been advantageous to the outcome the Union sought. Again, these employees have been allocated a specific roster – the Airport Flyer and while it was conceded it might be contractually possible to relocate them custom and practice has effectively removed that right. It is well established custom and practice can amend an employment agreement and that is what I conclude has occurred here and, in my view, it had definitely removed the right to reallocate absent consultation which was lacking here. Telling, which the evidence shows is what

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<sup>7</sup> Above n 1 at [17]

occurred here, is not consulting and the respondents' witnesses accept there was no consultation on the issue prior to June by which time the change had already occurred, at least temporarily at that stage.

[52] Third, and importantly for this group, are the comments of the Court when considering a challenge to the part of my 2018 determination which dealt with the question of working in Wellington city itself. The Court said:

The coverage clause in the Valley Flyer collective agreement does not, on its face, prevent Cityline drivers from undertaking Wellington City Region trips. Its inclusion of "employed...in the Hutt Valley region" is descriptive of where Cityline operates and employs drivers, and is consistent with drivers having a Hutt Valley depot as their "home depot", but the clause does not prohibit drivers from carrying out their duties outside the Hutt Valley.<sup>8</sup>

[53] Kaiwharawhara is not in the Hutt Valley and cannot be considered a Hutt Valley depot. It is a Wellington depot operated by a different legal entity and covered by a different collective agreement. To make it a home depot for Cityline drivers could only occur as the result of an agreement following consultation and would, on the face of it, require either an agreed change of employer (Cityline to WCTL) or variations to the Cityline collective agreement. Neither occurred (and here I note that in saying that the Union is correct that a variation needed to be agreed, ratified and in writing – that did not occur).

[54] The only other possible alternative would be to continue paying travel allowances but that did not occur either.

[55] Turning now to the two Cityline drivers who were transferred to Eastbourne. Whilst the issue regarding their new place of employment being outside the coverage of the collective does not arise the first two impediments discussed above do. Again, they were explicitly engaged as Airport Flyer drivers and, second, custom and practice prevents a change without either the employees request or, at a bare minimum, proper consultation prior to the respondents attempting to exercise their rights regarding transfer. Again, neither occurred.

[56] That then leaves the four WCTL employees who, prior to the cessation of the airport flyer service, were based at the Kilbirnie depot and there they remain. Again, and for the same reasons as the Cityline drivers, I conclude they were engaged as

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<sup>8</sup> Above n 2 at

Airport Flyer drivers. That was a specific role with that being confirmed by evidence that the Wellington drivers affected by these changes had their earnings reduced considerably - \$75,000 per annum to \$45,000 which raises questions as to whether the alternate work imposed upon them was reasonable. The answer, I conclude, is no given such a significant effect on earnings.

[57] The other factors discussed with the Cityline employees do not apply to these applicants but the conclusion they were in a specific role is sufficient.

[58] Now to apply the above conclusions to the claims as lodged.

[59] The first claim was that the respondents' had breached their obligations when they first reallocated the drivers to Kaiwharawhara in April. With that I do not agree for two reasons. The first is that the cessation of Airport Flyer work was necessitated by the covid pandemic and the government's response to it. Put simply there was no air operation and no one was flying. The respondents' were required to cease all non-essential operations though I note they raise concerns that guidance in this regard was scant. In the circumstances and given there were no flights I conclude it was open to them to conclude the airport flyer cease at the time. The second point is the evidence shows that the drivers were paid their allowances for the transfer to Kaiwharawhara at the time meaning the transfer was, at least then, permissible under the collective.

[60] Turning to the other two claims – namely that the respondents' could not decide to cease the Airport Flyer operation in November and nor could it arbitrarily change driver's depots thereafter. It follows the above conclusions about the drivers status being Airport Flyer drivers means the answer to both points is no – in doing these acts the respondents were in breach.

[61] Here I note that in submissions the Union introduced the concept of actions before and after June but that is not what was originally pleaded. It was the acts which were the culmination of events post June, when a limited Airport Flyer service recommenced, that were the alleged breaches and that is the approach I apply.

[62] As to the lack of good faith I note these parties have, in recent years, generated a disproportionate amount of work for the Authority. A lot, or at least that I have been involved in, appears to have been the result of an inability to work together. The duty of good faith, which as a crucial element includes a duty to communicate effectively,

falls on both parties and I must conclude both have fallen short in this regard. As one simple example I note virtually all witnesses accepted Kaiwharawhara was the best option, yet the posturing prevented this occurring. I do not consider the events that occurred constitute a breach of good faith on the part of the respondents but simply a continuation of the behaviour of both parties for some time.

[63] Turning now to the constructive dismissal claims. In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>9</sup> the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[64] In *Wellington etc Clerical Workers etc IUOW v Greenwich*<sup>10</sup> the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[65] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicants to convince me that is the case. There must also be a causal link between the employer's conduct and the tendering of the resignation<sup>11</sup> and the possibility of resignation should be foreseeable.<sup>12</sup>

[66] The problem here is that this claim was advanced as what was in effect a class action. There was little or no evidence about the individual circumstances of the four affected employees and, furthermore, the issue wasn't addressed in submission. What little evidence I had suggested the employees concerned left not because they were 'forced out' but because they had found alternate employment they felt better met their needs

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<sup>9</sup> (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

<sup>10</sup> (1983) ERNZ Sel Cas 95; [1983] ACJ 965

<sup>11</sup> *Z v A* [1993] 2 ERNZ 469

<sup>12</sup> *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[67] Putting aside the fact it is not my job to declare people should be dismissed I conclude, given the evidence before me, there was no constructive dismissal. I do so for three reasons.

[68] First the breach(s) must be repudiatory. While I have concluded two essential acts of the respondents were in breach of their contractual obligations, the majority of employee applicants continued to work, albeit under protest and awaiting the outcome of their claims. This must lead to a conclusion the breaches were not repudiatory.

[69] It must also lead to a conclusion resignation was not foreseeable – the majority did not consider it an option. The Union was stating, I again add, the drivers will comply with your demands, albeit under protest – it did not suggest the breaches are so significant they will resign.

[70] Third the admittedly deficient evidence I have strongly suggests the trigger for the resignations was the sourcing of alternate employment and not the breaches. Given the two points above, and lacking any contrary evidence, this is easy to accept.

[71] The constructive dismissal claims therefore fail.

### **Conclusion**

[72] For the above reasons, and given this determination addresses liability only, I conclude:

- (a) The Respondents are in breach of their contractual obligations by:
  - (i) Deciding to cease the Airport Flyer operation in November 2020;
  - (ii) Reassigning the depot of those affected in December.
- (b) The Respondent's are not in breach with respect to their decision to temporarily cease the Airport Flyer operation in April; and
- (c) The Respondents did not constructively dismiss those employees who claim they did.

[73] As already said this determination deals only with liability. The parties are now encouraged to discuss these conclusions, if necessary with the assistance of a mediator, and are encouraged given the fact the Airport Flyer is once again operating, to reach a conclusion.

[74] Should they fail to do so then obviously they may return to the Authority for a determination regarding remedies.

[75] Costs should, I consider, be dealt with, if required, after the conclusion of a determination regarding remedies (if required).

Michael Loftus  
Member of the Employment Relations Authority

Annex 1 – APPLICANTS

New Zealand Tramways and Public Passenger Transport Employees' Union  
Wellington Branch Inc. (First Applicant)

Dennis O'Connor (Second Applicant)

Karen Rose (Third Applicant)

Michael Payne (Fourth Applicant)

Kevin Burrows (Fifth Applicant)

Michael Lane (Sixth Applicant)

Stephen Tamatea (Seventh Applicant)

Vili Likio (Eighth Applicant)

Tearai Pureau (Ninth Applicant)

Ronald Reddy (Tenth Applicant)

Alan Baker (Eleventh Applicant)

Rajendra Pillay (Twelfth Applicant)

Nigel Hutchinson (Thirteenth Applicant)

Thomas Meparathu (Fourteenth Applicant)

Damian Dunn (Fifteenth Applicant)

Gregory Matheos (Sixteenth Applicant)

Caroline Kinnaird (Seventeenth Applicant)

Suaki Fili (Eighteenth Applicant)