

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC19
ARC 85/08**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF a challenge to objection to disclosure

BETWEEN BRIAN ALEXANDER WEBB
 Plaintiff

AND NEW ZEALAND TRAMWAYS AND
 PUBLIC PASSENGER TRANSPORT
 EMPLOYEES UNION INC
 Defendant

Hearing: 5 March 2010
 (Heard at Auckland)

Appearances: Paul Carrucan, advocate for plaintiff
 No appearance for the defendant

Judgment: 9 March 2010

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B S TRAVIS

[1] The plaintiff has applied for a rehearing regarding disclosure and verification in relation to an interlocutory judgment I gave on 15 September 2009. It is the plaintiff's contention that the disclosure and verification which was to be provided by the defendant needed to extend to such documents that established the continuous payment of union fees by Peter Cross and Gary Froggatt, whose election to office in the defendant union has been challenged by the plaintiff.

[2] Counsel for the defendant filed a memorandum on 24 December 2009 advising that the defendant did not seek to be heard in relation to the application and would abide the decision of the Court. The defendant, however, noted that it did not

accept the allegations contained in either the application or the affidavit of the plaintiff in support but did not want to incur further expense in relation to it. The defendant intends to defend the substantive proceedings.

[3] Mr Carrucan in his submissions, observed that the determination of the Employment Relations Authority dated 29 October 2008, which is the subject of a non de novo challenge, made certain findings which are expressly challenged in the plaintiff's amended statement of claim, filed on 24 April 2009.

[4] The first two paragraphs of the Authority's determination which are the subject of an express challenge, read as follows:

Employment relationship problem

[1] Mr Gary Froggatt and Mr Peter Cross are financial members of the New Zealand Tramways and Public Passenger Transport Employees' Union Incorporated ("the Tramways Union"). Mr Froggatt became a member in 1965 and Mr Cross in 1977.

[2] Their membership of the union is recorded on a roll, they have to date paid all the required fees to belong and they have been issued a union card. The union has affirmed their membership and held them out to be members.

[5] In the plaintiff's notice requiring disclosure, documents relevant to this aspect of the challenge were sought in the following terms:

- i Banking records that show the continuous deduction of union subscriptions from both Peter Cross and Gary Froggatt and the subsequent credit or deposit to the Tramways Union bank accounts for each of those subscriptions.
- ii Documents that show that Gary Froggatt and Peter Cross are financial members of the Tramways Union.
- ...
- vii Such documents that show Gary Froggatt and Peter Cross remained financial members of the union from 1990 to 2008 and continuously paid their union fees.

[6] In the course of the hearing on 14 September 2009 of the challenge to the defendant's objection to disclose those and other documents, I noted the advice from Mr Mitchell that documents (i) and (ii) had been provided by the defendant. He also

advised that such documents that show Messrs Froggatt and Cross remained financial members of the union and paid their union fees in 2008 have been produced.

[7] In my interlocutory judgment (No 2) I directed that the defendant provide verified disclosure listing those documents that are available for inspection, those which were the subject of legal professional privilege and describing the current location of documents which were once in the possession of the defendant in terms of the rulings that are encapsulated in this judgment.

[8] Mr Mitchell for the defendant had taken the position, which I upheld, that the principal issue between the parties was whether Messrs Froggatt and Cross were entitled to be members of the defendant union and whether they were entitled to hold their current branch positions to which they were elected in 2008.

[9] However, in light of Mr Carrucan's submissions and the challenge to the findings of the Authority set out above, disclosure should not be limited to proof of financial membership of Messrs Froggatt and Cross in 2008.

[10] On 28 October 2009 the defendant filed an affidavit of documents of the defendant sworn by Mr Froggatt.

[11] I am informed by Mr Carrucan that the document numbered 5 in the First Part, being an ASB printout dated 20.07.08, purported to show deposits made by Messrs Froggatt and Cross. The affidavit however, did not deal with any earlier financial records which would prove the financial membership of Messrs Froggatt and Cross in preceding years.

[12] In light of the submissions made to me by Mr Carrucan and the references to the Authority's findings which are expressly challenged and, insofar as those findings may be relevant to the 2008 election, I consider that the plaintiff is entitled to the disclosure of the documents referred to in paragraphs (i), (ii) and (vii), for the period from 1990 until 2008 which show that Messrs Froggatt and Cross have continuously paid their union fees.

[13] I appreciate that financial records that far back may not necessarily be held by the defendant union, but if that is so this will need to be verified by an officer of the defendant by way of affidavit which will explain why the documents no longer exist and disclosing those documents that are in the possession, custody or control of the defendant in the classes I have numbered as i, ii, and vii.

[14] Such affidavit should be filed and served within 28 days from the date of this judgment.

[15] The present application is adjourned and may be brought on again if the plaintiff is not satisfied with the defendant's compliance on the matter of disclosure.

[16] If the plaintiff is satisfied by the verified list of documents then the matter may be called over for a fixture.

B S Travis
Judge

Judgment signed at 3.30pm on 9 March 2010