

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 35/08
ARC 69/08**

IN THE MATTER OF an application for leave to challenge
 determinations of the Employment
 Relations Authority out of time

BETWEEN BRIAN ALEXANDER WEBB
 Intending Plaintiff

AND THE NEW ZEALAND TRAMWAYS
 AND PUBLIC PASSENGER
 TRANSPORT EMPLOYEES' UNION INC
 Intended Defendant

Hearing: 17 September 2008
 (Heard at Auckland)

Appearances: Paul Carrucan, Agent for Intending Plaintiff
 Simon Mitchell, Counsel for Intended Defendant

Judgment: 18 September 2008

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The question now for determination by the Court is whether Brian Webb should have leave to challenge, out of time, two related determinations of the Employment Relations Authority. Mr Webb is a member of the intended defendant that I will call the Tramways Union. Mr Webb and a colleague took to the Authority their concerns about the lawful conduct of the union's internal affairs as an incorporated society. In its first determination issued on 27 June 2008 the Authority made a number of directions. Included among these were that Mr Webb's purported expulsion from union membership in September 2007 was unlawful.

[2] The Authority granted an injunction requiring the Tramways Union to restore Mr Webb's name to the union's roll or list of members and to allow him to be entitled to all the rights and privileges of membership. There were a number of associated orders in Mr Webb's favour that I do not need to detail here for the purposes of this decision.

[3] Pertinently, also, the Authority granted mandatory injunctions requiring compliance by the union with its rules and, in particular, to the revival of its National Council. The Authority required compliance with rule 21 of the union's rules for an annual meeting of the National Council to be held in November 2008. Preceding that, there were directions by the Authority for an election to the National Council, the dates of various significant events in that process, and the like. Recognising its finding that there was, in law, no National Secretary of the Tramways Union, the Authority directed that Messrs Peter Cross and Perry Davis, respectively then the Auckland Branch Secretary and the Auckland Branch Vice-President of the Tramways Union, were to act jointly in the office of National Secretary of the Tramways Union and to carry out the electoral functions under rule 21(d). Messrs Cross and Davis were directed to appoint a Returning Officer and there were other relevant orders made.

[4] No challenge to that determination was brought within time or at all before the Authority issued a further determination on 1 August 2008. That was a result of the union's application (that was successful) to the Authority to vary the electoral timetable. Mr Carrucan for the intending plaintiff says that Mr Webb then raised with the Authority his concerns about aspects of its earlier determination but was unsuccessful in persuading it to accommodate his concerns as it had the union's.

[5] Mr Webb was, however, not entirely unsuccessful on that second application to the Authority to vary its timetable. The Adjudicator refused the union's application for a particularly tight timetable and acceded to Mr Webb's request that the greatest possible time be allowed for each of the steps in the electoral process leading to a meeting of the union's National Council on the last day possible under the rules.

[6] Mr Webb then, on 4 August, applied in writing to the Authority to reopen its investigation. The Authority dealt with that application at a telephone conference call on 29 August, indicating that it would consider Mr Webb's application to reopen its investigation on or about 3 October, but indicating to Mr Webb that if he was dissatisfied with the position, he should bring proceedings in this Court.

[7] To complete the picture, Mr Webb has made another application to the Authority although, this time, in relation to the lawfulness of Auckland branch office holding. That application began with what was described as a request for urgency and injunctive relief to postpone the National Council electoral and remit process. The Authority dealt with this at a telephone conference call on 12 September and issued a further determination on 15 September. The Authority declined to suspend or otherwise modify the National Council electoral process then and now under way.

[8] The Authority's amended electoral timetable set out at paragraph [19] of its second determination of 1 August means that nominations for election to the union's National Council closed on 22 August 2008 and that the postal ballot to elect Council members closed last Saturday, 13 September. Members of the National Council have now been elected and their announcement was due yesterday. The next element of the Authority's electoral timetable is that remits to be submitted to the National Council's annual general meeting can be tendered from 14 September until 30 September. Finally, the Authority directed that the union's AGM is to be held on 30 November.

[9] I deal first with the circumstances of the intending plaintiff's lateness and explanations for this. The Authority's first determination was issued on 27 June 2008. The 28 day period within which the intending plaintiff could have challenged by right expired on about 28 July. A further period of about 5 weeks and 3 days then elapsed until the application for leave was filed in this Court on 5 September.

[10] In the case of the 1 August determination, the application for leave was filed about 4 or 5 days after the expiry of the 28 day period for doing so as of right.

[11] No real or at least convincing explanation for these delays is offered by Mr Webb. That is in itself fatal in respect of the first delay of more than 5 weeks. But even in the case of the second delay which is shorter, I would have expected Mr Webb to have moved to challenge not merely immediately before the expiry of the 28 day period, but soon after the Authority's determination was issued. That is because the electoral process directed by the Authority was running. Commonsense would dictate that any move to halt or modify it would stand a greater chance of success if brought earlier rather than later. But even assuming Mr Webb's entitlement to wait until the end of the 28 day period before challenging, the onus on him to explain reasonably any further delay, even a few days, is crucial but absent in this case.

[12] Mr Carrucan submitted that Mr Webb should now be permitted the indulgence of delay because the union had, on several occasions, not met timetable directions made by the Authority. He said these omissions had been overlooked in that forum. Here, however, the delay is in breach of a statutory provision that is mandatory. While the Authority is entitled to control its own procedure and may, for good reason, excuse defaults by parties, where a mandatory statutory time limit is not met, good and well-known grounds for doing so must be established by the party in default. There can be no necessary trade-off between these different delays in different forums.

[13] I turn next to the strength of any challenge that Mr Webb might be permitted to bring, at least to the extent that the merits can be assessed at this stage. Mr Carrucan had a lengthy opportunity to persuade the Court of the merits of Mr Webb's substantive case at yesterday's hearing.

[14] I have to say that Mr Webb's case, or at least the presentation of it, is not easy to understand although I do not wish to be seen to be too critical of Mr Webb or his agent Mr Carrucan. It appears to rely heavily on such broad and amorphous objectives of the Employment Relations Act 2000 as disclosure of information and equalisation of unbalanced power between the union and some of its members, as upon legal principles.

[15] Mr Webb contends that in addition to finding in his favour as the Authority did in its first determination, it erred by failing to promulgate a detailed regime for dissemination of its determination and reasoning among rank and file union members and, in particular, by allowing alternative rule change strategies to be developed by rank and file members within branches. This alleged failure is said to be linked to the significant imbalance of power between the union, on the one hand, and some of its disaffected members (including Mr Webb) on the other.

[16] Mr Carrucan's submission was that the Authority erred in not providing a means for a positive rebalancing of this relationship. Mr Carrucan also says that the Authority erred by not directing the establishment of a working party to assist members in branches to prepare drafts of new rules for the union.

[17] I accept that the Authority's objectives should include restoration of employment relationships including those between unions and their members, and an attempt to ensure informed democracy in union electoral and governance processes. However, Mr Webb does not advance a strong argument that the Authority's determinations should be set aside because it failed to achieve these aims in the way in which its decisions may have been implemented.

[18] The Authority has set in train a process for adherence by the union to its rules and that will include opportunities for rule revision the need for which is unquestioned. I think the expressed fears of both Mr Webb and Mr Carrucan (who are both standing as candidates for national office in the union) are exaggerated and perhaps unfounded. For example, Mr Carrucan invited the Court not to rely on the assurance of the union's Returning Officer, Helen Kelly, President of the NZCTU, that information statements prepared by candidates had been sent out with ballot papers to union members. Ms Kelly had so deposed on oath and, indeed, by the time of yesterday's hearing the voting process had concluded. Mr Carrucan, for himself and on behalf of Mr Webb, was nevertheless distrustful of the Returning Officer's and the union's compliance with its rules. There were other similar examples. There is clearly a low level of trust and confidence in the union by Messrs Webb and Carrucan despite the significant victories they have had in challenging its conduct of its affairs.

[19] Mr Carrucan appeared unwilling to accept that the union will now be very careful to comply with its legal obligations as an incorporated society following a detailed and public criticism of it by the Authority which has upheld many of Mr Webb's claims against his union. One answer to Mr Carrucan's stated fear of intimidation and coercion of union members by the union, irrespective of the truth or otherwise of these serious allegations, must be the powerful incentive of an individual's preparedness to bring and prosecute successful proceedings against the union as Mr Webb did. I think it is more probable that the union will now act soberly and cautiously rather than rashly, unlawfully and vindictively as Mr Carrucan fears.

[20] The final relevant issue is that of prejudice to the intended defendant and others. This has been established on affidavit evidence given for the intended defendant that has not really been challenged. Starting at the far end of the time scale, the union's rules provide that its National Council must meet annually. While it is true that it may elect to meet more frequently than annually, the members' protection provided by the rules lies in the fact of at least one annual meeting. This must be in November. Unless there is a meeting of the union's National Council in November 2008, there is no requirement for such a meeting for another 11 months. The holding of this meeting of the National Council is a very significant event in the union's democracy. Important decisions can and must be taken. That will be particularly so in 2008 because of the need to deal with such important concerns as the adoption of modern and relevant rules and the establishment of current and accurate accounts and other financial records.

[21] Unless the Authority's timetable to that 30 November meeting operates unimpeded, the interests of the union, and of its members generally, will be affected adversely in that important democratic events will be delayed significantly.

[22] There are other more tangible concerns. There has been substantial time and money put into the electoral process directed by the Authority that may be lost if that process cannot take its course.

[23] Those prejudices to others will be greater than any to Mr Webb arising from the refusal of his application for leave. He has already brought, and will have considered by the Authority in early October, other challenges to the lawfulness of the union's conduct of its affairs. Contesting the election of ineligible candidates or the unlawful adoption of policies or the like can still be done by Mr Webb or other members. But to be effective, any late challenge to the determinations of the Authority already made will require at least a postponement of the current electoral process and that will be prejudicial to the union and many of its members.

[24] This was a clear case for the refusal of an extension of time within which to challenge the determinations of the Authority.

[25] At my suggestion and at the end of the hearing, Mr Mitchell for the union gave the following undertaking to the Court about disclosure to union members of the decisions of the Authority and its reasoning. The union undertakes to place on union notice boards at depots where members are employed a notice advising that copies of the Authority's determinations in this litigation are available to members on request from the union's office or pursuant to an arrangement that it undertakes to make, from the New Zealand Council of Trade Unions, via an e-mail address to be provided or by a telephone number to be provided.

[26] This will ensure that interested members can read for themselves what the Authority found and its reasons for doing so. Although at least one of the Authority's determinations is relatively lengthy, I think that is preferable to summaries prepared by the parties themselves which will, almost inevitably, be criticised as being incomplete and/or biased.

[27] Whilst Mr Carrucan agreed with the method of availability set out above, he submitted that a headnote summary of the determinations prepared by the Authority for publication on the Department of Labour's website would be a better way of informing interested union members. Such summaries are, however, prepared for legal and human resources practitioners and tend to emphasise the legal outcomes and the Authority's reasoning. There are other parts of the Authority's

determinations that should be available to members so that, put succinctly, more may be better than less because more will be complete.

[28] The union's undertaking to provide these methods of disclosure weighed with me in exercising my discretion against granting the leave sought by Mr Webb.

[29] Although I do not wish to be thought to be too critical of Mr Carrucan, who is a lay person, he nevertheless persisted in representing Mr Webb against advice from the Court that he should seek professional legal assistance to do so. It was wrong for Mr Carrucan to have sworn the affidavit in support of the application to extend time for challenging, purporting in some parts to speak on Mr Webb's behalf as his advocate but in other parts referring to his own discussions with union members. I was not aware, until I read the Returning Officer's affidavit, that Mr Carrucan is also a candidate for office in this controversial election. Unless there are good reasons to the contrary, the Court will expect to hear in an affidavit from an applicant such as Mr Webb himself.

[30] The plaintiff's application for leave to challenge the determinations of the Authority out of time must be and is refused.

[31] Costs are reserved. I record that the hearing occupied a period of about 2.5 hours yesterday.

[32] If either party seeks costs, application should be made by memorandum filed and served within 2 months of this judgment, with the respondent to any such application having a further period of one month to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 11.45 am on Thursday 18 September 2008