IN THE EMPLOYMENT COURT
WELLINGTON

WC 23/07
WRC 12/07

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NZ TRAMWAYS & PUBLIC PASSENGER TRANSPORT AUTHORITIES EMPLOYEES IUOW (WELLINGTON BRANCH) Plaintiff
AND	CITYLINE (NZ) LTD T/A CITYLINE HUTT VALLEY First Defendant
AND	WELLINGTON CITY TRANSPORT LTD T/A STAGECOACH Second Defendant

Hearing: 30 July 2007
(Heard at Wellington)

Appearances: Paul McBride, Counsel for the Plaintiff
P A Caisley, Counsel for first and second Defendants

Judgment: 19 September 2007

JUDGMENT OF JUDGE C M SHAW

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[1] The NZ Tramways and Public Passenger Transport Authorities Employees IUOW (Wellington Branch) (the Tramways Union) has challenged the validity of a purported multi-union multi-employer collective agreement entered into between the first defendant, Cityline (NZ) Ltd t/a Cityline Hutt Valley (Cityline), and the second defendant, Wellington City Transport Ltd and two workers' organisations. It says that by promoting this collective agreement known as the Wellington Urban Bus

Collective Agreement (WUBCA) the defendants are undermining both the Tramways Union and its own collective agreement with the companies.

[2] The union applied to the Employment Relations Authority for a number of declarations including that the purported collective agreement is not valid and is void *ab initio*. The defendants responded that the Authority could not make such an order.

[3] The Authority heard argument on that issue as a preliminary point and held that s163 of the Employment Relations Act 2000 (the Act) was determinative because it does not allow the Authority to make an order cancelling or varying a collective agreement or any term of it. The Authority said that if it were to meet the union's request, the clear and certain effect would be clearly that of cancelling the agreement and that the validity of the purported agreement is a matter properly tested instead by way of an application for review under s194 of the Act.

[4] The plaintiff has challenged that determination. The parties agree that whatever the outcome of this challenge there are other aspects to the statement of problem in the Authority that will need to proceed to an investigation in any event.

The facts

[5] The parties submitted an agreed statement of facts from which the following is extracted.

[6] The defendants are associated bus companies. One operates out of the Hutt Valley and the other out of Wellington. The plaintiff is a union registered in 2000. It represents bus drivers and other employees of the defendants and is a party to current single employer collective agreements with each defendant.

[7] The actions of two other entities have given rise to this dispute although they are not parties to these proceedings. The Hutt Valley Society of Independent Bus Drivers Inc (SOB) was registered under the Employment Relations Act 2000 as a union and was a party to a current collective agreement with Cityline dated 11 December 2005 to 8 December 2007. The SOB was dissolved as an incorporated

society in July 2006 but this dissolution was revoked on 6 December 2006. The second entity is the Central Amalgamated Workers Union (CAWU) which was registered pursuant to the Employment Relations Act 2000 on 9 October 2000. It has members across a range of industries and became involved in representing staff at Cityline in 2006 in circumstances which gave raise to the matters in dispute.

The issue

[8] The history of the various collective arrangements between the parties and the other two unions is only background to the single issue for the Court: whether the Employment Relations Authority has the jurisdiction under the Employment Relations Act 2000 to declare whether a document is or is not a collective agreement.

The legislation

[9] There are a number of sections in the Employment Relations Act 2000 which are relevant. This case turns on the effect of s163 which provides:

> *The Authority may not, under section 162 or any other provision of this Act, make in respect of a collective agreement an order cancelling or varying the agreement or any term of the agreement.*

[10] The Court is similarly limited by s192(1) although it has the additional power to suspend some aspects of the agreement and direct the parties to reopen collective bargaining.

[11] Section 161(2) provides:

> *Except as provided in subsection (1)(ca), (cb), (d), (da), and (f), the Authority does not have jurisdiction to make a determination about any matter relating to—*
>
> *(a) bargaining; or*
>
> *(b) the fixing of new terms and conditions of employment.*

Submissions

[12] For the defendants, Mr Caisley made three main submissions:

1. A declaration by the Employment Relations Authority that the WUBCA has never had legal effect would effectively cancel the collective agreement and this is prohibited by s163.

2. The Employment Relations Authority is prevented by s161(2) from making any determination relating to bargaining and a declaration of invalidity would effectively interfere with bargaining.

3. The union has an alternative remedy in a judicial review under s194 by which the Court could scrutinise the powers and functions of the parties to the collective agreement to decide if they were exercised properly. Only in this way could a court of competent jurisdiction determine whether the WUBCA is properly a collective agreement.

[13] For the plaintiff, Mr McBride submitted that if an agreement is found to be void then it has never had any legal effect. If, as alleged, the collective agreement was not formed under the statutory process and does not meet statutory requirements it is open to question and argument whether it is a collective agreement in terms of the Act. It is arguable that it was void *ab initio* as a collective agreement from the outset.

[14] It is the essence of the plaintiff's case that the declaration sought is very different from asking the Authority to vary or cancel a document which has the status of a collective agreement.

Discussion

[15] A collective agreement is an instrument created under the Act. It is defined by s5 as an agreement that is binding on one or more unions and one or more employers and two or more employees.

[16] An "applicable collective agreement" is defined as a collective agreement that is binding on the relevant union and employer in relation to a specified employee.

[17] In contrast, an individual employment agreement means an employment agreement entered into by one employer and one employee who is not bound by a collective agreement that binds the employer.

[18] The use of the words "bound" and "binding" in these sections about collective agreements suggests that, once entered into, a collective agreement has full and final legal effect unlike an individual employment agreement which may be varied under s61(2)(b).

[19] This is confirmed by Part 5 of the Act which provides for ratification (s51) and defines when a collective agreement comes into force and expires (s52). The form and content of a collective agreement is prescribed by s54. Section 54(1) specifies that a collective agreement has no effect unless it is in writing and is signed by the parties. Section 56 stipulates who is bound by a collective agreement and who may enforce it. Significantly, s56(1) refers to a collective agreement "*that is in force*".

[20] The scheme of this part of the Act is therefore that a collective agreement must comply with statutory requirements in order to come into force and is only then binding and enforceable. At that stage, pursuant to s163, it cannot be varied or cancelled.

[21] The legislative history of s163 and s192(1) assists in the interpretation of the extent to which the Authority's and the Court's powers in relation to collective agreements is circumscribed by them.

[22] Section 25 of the Employment Contracts Act 1991 provided:

> *The fact that a contract has been entered into in contravention of any of the provisions of this Part of this Act or that an act which contravenes any of the provisions of this Part of this Act has been committed in the course of the performance of any contract shall not—*
>
> *(a) Make that contract illegal; or*
>
> *(b) Except as expressly provided in this Act, make that contract or any provision of that contract unenforceable or of no effect.*

[23] In *O'Malley v Vision Aluminium Ltd (No 2)*[1] the Employment Court held that:

> *Were it not for the provisions of s 25 of the Act considered conjunctively with s 23, I would unhesitatingly conclude that a purported collective employment contract which, according to its tenor, was of infinite duration – because it contained no provision for expiry – was void and of no effect as a collective employment contract. I would so construe such a contract because of its fundamental non-compliance with the Act.*

[24] The Court of Appeal has also held that, in spite of non-compliance with certain sections of the Employment Contracts Act, s25 left the character of the collective contract intact.[2]

[25] The Employment Relations Act 2000 has no equivalent to s25 and s163 had no exact equivalent in the Employment Contracts Act. This indicates that the legislature intended that the restraints of s25 referred to in *O'Malley* no longer applied. They were replaced with the more focused limitation in ss163 and 192 concerning what could happen to a properly concluded collective agreement.

[26] I conclude that the purpose of s163 and s192(1) is to prevent the Authority or the Court from interfering with a collective agreement that is in force. This is in accord with the Act's purpose of promoting collective bargaining and with the Part 5 purpose of the promotion of orderly collective bargaining. If a collective agreement is in force it cannot be cancelled or varied under the law relating to contracts and can only be varied by the process of collective bargaining.

[27] I accept Mr McBride's submission that if a document is not correctly formed under the statutory process and does not meet the statutory content requirements it is open to question whether it is in fact a collective agreement in terms of the Act. It is therefore possible that a collective agreement could be held by the Court or the Authority to be void, without legal effect, and unenforceable if the grounds are properly made out. If this were the case, then the question of cancellation or variation does not arise.

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[1] [1992] 2 ERNZ 660 at 682

[2] *Fletcher Construction New Zealand Ltd, Dillingham Construction Inc and Ilbau Gesellschaft (T/a Fletcher Dillingham Ilbau Joint Venture) v New Zealand Engineering Printing & Manufacturing Union Inc* [1999] 2 ERNZ 183

[28] Mr Caisley's submission that the matter should be dealt with by way of judicial review is answered by the privative provisions in s184(1A) of the Act:

> *No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—*
>
> *(a) the Authority has issued final determinations on all matters relating to the subject of the review application between the parties to the matter; and*
>
> *(b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and*
>
> *(c) the Court has made a decision on the challenge under section 183.*

[29] In this case the matter before the Authority is an application for a declaration. The result of this judgment means that the Authority may continue with that matter and an application for review can only be initiated once any right of challenge has been exhausted.

Conclusion

[30] A request for a declaration as to whether a document is or is not a collective agreement in terms of the Act, is not a request to cancel the agreement. There can only be one of two outcomes. Either it is a collective agreement in terms of the Act or it is not. If it is not then it is void and of no effect. If it is found to be a valid collective agreement it cannot be cancelled or varied.

Costs

[31] These are reserved. In the absence of agreement between the parties, the plaintiff is to file a memorandum as to costs within 21 days of this judgment. The defendants have 14 days to reply.

C M Shaw
JUDGE

Judgment signed at 3.00pm on 19 September 2007