

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 136
3090092

BETWEEN NEW ZEALAND TRAMWAYS
 & PUBLIC PASSENGER
 TRANSPORT EMPLOYEES
 UNION INC
 Applicant

AND WELLINGTON CITY
 TRANSPORT LIMITED
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Tanya Kennedy, counsel for the Applicant
 Andrew Caisley, counsel for the Respondent

Investigation Meeting: 6 November 2024

Submissions Received: Up to and including 6 December 2024

Determination: 5 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] New Zealand Tramways & Public Passenger Transport Employees Union Inc (the Union) says it is concerned with how Wellington City Transport Limited (WCT) has been calculating family violence leave, bereavement leave, alternative holiday days, public holidays and sick leave (FBAPS) and how it says it intends to do this in the future. The matter has been ongoing over a number of years but can now be crystallised down to three outstanding issues namely how should FBAPS events be paid, has WCT failed to consult, were Mr Esposito and Ms Gilmer correctly paid in two relevant pay periods.

[2] If the FBAPS is to change from relevant daily pay (RDP) to average daily pay (ADP) the unions says it should be paid at the higher of RDP or ADP.

[3] WCT says that FBAPS should be paid at ADP and the Holiday's Act 2023, s 9, allows them to do this. WCT says that until 7 October 2021, it paid FBAPS events using a relevant daily pay approach based on rostered hours. It, however, commissioned a report from PricewaterhouseCoopers (PWC) which concluded that WCT's calculation approach did not consistently align with the Holidays Act 2003. Remedial action was required and WCT undertook an audit to identify any underpayments that had arisen. It made arrears payments to current and previous staff between 12 October 2011 and 2 October 2021.

[4] WCT says that until 2 October 2021 it paid FBAPS using an RDP approach based on rostered hours (Approach 1). Following the audit, it changed to a new RDP approach based on identifying actual hours (Approach 2) because this requires a change to a manual approach to support the calculations of RDP. It wishes to change to an ADP approach. It believes that this will then put WCT in compliance with the Holidays Act and says that there is therefore no need for the determination requested by the Union.

[5] The Union claims that there has been no consultation with it regarding changes to how FBAPS were being calculated and that it was not informed of the change to Approach 2 and that this failure to consult is a breach of good faith. The Union also says two employees, Mr Esposito and Ms Gilmer, were incorrectly paid and says they should be paid the higher of RDP or ADP and they were not. WCT agrees that the two were not paid correctly, but states that until the issue about how FBAPS should be paid, remedial action cannot be instigated.

[6] The Union seeks the following remedies:

- (a) A determination that since October 2021 FBAPS have been wrongly paid.
- (b) Lost wages.
- (c) A penalty for each breach.

[7] Further, the Union says that as matters have clarified, WCT should pay the higher of RDP or ADP and the determination requested should determine whether, in

light of the collective employment agreement between the parties and s 9 of the Holidays Act, WCT can impose ADP unilaterally.

[8] In essence, the current difference between the parties is that the applicant says the respondent is required to pay the employees at the higher rate of RDP or ADP. The respondent says that having identified issues with how it was calculating RDP, it wishes to reprogramme its payroll system to pay FBAPSs based on ADP approach, which it calls Approach 3. It says it is doing this because of the difficulty in calculating RDP. Accordingly, it could not pay the higher of the two rates because it would not know what an RDP was without calculating it manually. It says it is almost impossible to do this and defeats the purpose of it moving to its proposed new payroll system. It says that it currently is in the difficult position of not moving ahead with the reprogramming because there is no agreement with the applicant.

Discussion

[9] The parties agree that hours of work for bus operators are initially set by a roster which is published 14 days in advance (Rostered Hours). However, for a number of reasons the actual hours of work (Actual Hours) can and often do differ from Rostered Hours. For instance, a bus operator may get caught in a traffic jam or run late because of road works, or run early because of light passenger loads. Even a breakdown can impact on the Rostered Hours.

[10] Currently, bus operators are paid on the basis of Actual Hours worked. They are not paid on the basis of Rostered Hours.

[11] From 3 October 2021, the new system adopted by the respondent was meant to capture the hours an employee would have worked if they had worked on the day concerned by capturing the hours the relief operator worked and then paying the absent operator the same as the relief operator. Although this seemed like a good idea in theory, the respondent says it hasn't worked in practice for a variety of reasons. This is another reason why the respondent considers it should default to ADP. It says if the Union had agreed to this move, the respondent will then run a remediation project for all current and previous employees since 3 October 2021 to work out for each FBAPS events that the employee was actually paid for the day concerned. If they had been paid ADP but there was a shortfall, a remediation payment would be made.

[12] The respondent's view is that it is entitled to pay FBAPS events at ADP for two reasons:

- (a) It is not possible or practicable to determine an employee's relevant daily pay under s 9(1) of the Holidays Act 2003; and
- (b) The employee's daily pay varies within the pay period when the holiday or leave falls.

[13] The Union doesn't agree that it is not possible or practicable to determine an employee's relevant daily pay for the purposes of FBAPS. After all, it says the respondent is currently doing that and it is attempting to put in its new system without appropriate input or consultation with the Union or affected employees.

[14] The Union points out that it is clear from PWC's 21 December 2021 advice¹ that the respondent can run RDP and ADP calculations.

The evidence

[15] Kevin O'Sullivan, gave evidence on behalf of the Union, saying it was not until 19 July 2023 that the Union became aware that a new methodology for calculating FBAPS had been put in place. He says even at that point, the Union was unaware that WCT now wishes to change from RDP to ADP. Further, he said FBAPS were covered in the collective agreement which provided for RDP, not ADP. He quoted various sections in the collective agreement between the parties which required payments for holidays, alternative holidays, sick leave and bereavement leave to be calculated in accordance with s 9 of the Holidays Act 2003 and to be calculated using RDP.

[16] Mr O'Sullivan's view is that both RDP and ADP would need to be calculated to ensure employees were being paid correctly and they should be paid the higher of the two amounts.

[17] Nicky Harrison was the respondent's Human Resource Director. Her evidence was that WCT did have detailed records and it was possible to work out RDP, but it was work-intensive and this itself could create the possibility of errors and was therefore undesirable.

¹ Document Tab 19.

[18] The Union submits that because of the specific references in the collective agreement to RDP, for the Authority to find that WCT was entitled to use ADP to calculate FBAPS payments, would be tantamount to fixing new terms and conditions of employment. However, before I would need to consider that, I first need to be satisfied that s 9A(1) of the Holidays Act was complied with. I am not at all convinced that it is not possible or practicable to determine an employee's RDP under s 9(1). Further, in respect of both 9A(1)(a)(b), there is the contractual term. I would accept that changing the contractual term would be problematic.

Mr Esposito and Ms Gilmer

[19] It is concerning that although WCT acknowledges Mr Esposito and Ms Gilmer have not been correctly paid and are owed monies, that this may not yet be rectified. Both these employees submitted briefs of evidence and they were taken as read. That was not a surprise as I took from WCT's submissions and evidence that it agreed they were owed monies and the issue was how to calculate what was owing. The Union's evidence was that it needed to be certain these two were being paid correctly and could only do so when it understood how WCT calculated the amount owing and provided wage and time records.

Penalties

[20] The Union claims penalties for breaches of good faith. These breaches have come about by an alleged failure to consult with the Union.

[21] I have some sympathy with the Union's position. Consultation has been less than adequate, although I understand WCT's position to be it initiated a review of how payments were being made and it has tried to take steps to ensure compliance with the Holidays Act. Nonetheless, to date it seems consultation regarding these issues has been less than adequate. That said, I do not consider a penalty appropriate as, in essence, one might say the period for consultation has yet to finish. The simple gap between the parties now, is the Union's position that employees should be paid at the higher or RDP or ADP; with WCT's position being it should pay at ADP and to calculate RDP as well, would be duplicating the process and would require extra interrogation of material for little purpose.

RDP is correct approach

[22] The collective agreement between the parties indicates that the proper method of calculation for FBAPS is to use the RDP approach under s 9(1) of the Holidays Act. Further, the evidence before the Authority strongly indicates that WCT are perfectly capable of using that approach. On occasions where an employee's daily pay varies within the pay period when the holiday or leave falls, the collective agreement still requires this to be calculated using RDP. The Union, in reliance on MBIE guidelines, has indicated it is prepared to vary the collective agreement but this would only be on the basis that its member were not disadvantaged and by that it means they would need to be paid at the higher of RDP or ADP.

[23] It is not open for the respondent to say it is not possible or practicable to determine an employee's relevant daily pay under s 9(1) or that the employee's daily pay varies within the pay period when the holiday or leave falls. The collective agreement makes it clear that relevant daily pay was to be the agreed approach. As the applicant points out in submissions, the respondent did not seek PWC advice or consult with the applicant over ways to calculate RDP more accurately and the option of ADP if it were higher than RDP. Also, as Ms Harrison said under questioning, they did have the detailed information to enable them to calculate RDP more accurately and could do this with the Union and affected employees. Ms Harrison's view was that this could be analysed for RDP and would provide a better analysis, but this was onerous. Further, I accept the point as indicated in the MBIE guidance, the employee must not be paid less than the relevant daily pay or average daily pay where applicable.

Summary of orders

[24] Wellington City Transport Limited is to use the relevant daily pay approach under s 9(1) of the Holidays Act 2003 as it is required to do under the applicable collective agreement. If it wishes to change the contractual approach, it will need the consent of New Zealand Tramways & Public Passenger Transport Employees Union Inc.

[25] If it hasn't already done so, Wellington City Transport Limited are to pay Mr Esposito and Ms Gilmer any outstanding monies they were due by incorrect calculation of their entitlements. Again, if it has not already done so, Wellington City Transport Limited is to provide the New Zealand Tramways & Public Passenger

Transport Employees Union Inc with sufficient material for it to be able to ascertain that payments made to these two have been calculated correctly by the employer.

Costs

[26] As this matter has mainly concerned the operation and interpretation of the applicable collective agreement between the parties, the Authority's presumption is that parties will bear their own costs.²

Geoff O'Sullivan
Member of the Employment Relations Authority

² Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5, paragraph 6, available at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>