

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN New Zealand Tramways & Public Passenger Transport Authorities
Employees Industrial Union of Workers (Applicant)

AND Wellington City Transport Limited trading as Stagecoach New
Zealand (Respondent)

REPRESENTATIVES Peter Cranney for the Applicant
Jenny Gibbs for the Respondent

MEMBER OF AUTHORITY P R Stapp

**PAPERS PRESENTED IN
ADVANCE** 26 November and 14 December 2004

INVESTIGATION MEETING Wellington, 11 February 2005

DATE OF DETERMINATION 2 March 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a problem of interpretation arising from a dispute. The parties were not able to settle the matter in mediation services provided by the Department of Labour. The parties agreed for the Authority to provide a determination on the papers following written submissions and the opportunity to be heard.

The Fact

[2] The parties are covered by the terms of the Wellington City Transport Limited Stagecoach Wellington Collective Employment Agreement 2002-2005 (“The Agreement”). The rostering arrangements require shifts of 10 or more hours per day. The parties have agreed that the issue for the Authority to determine is what are the “*normal number of hours of work*” that employees who are party to the agreement, would “*normally work*” on a day taken as sick leave.

[3] It is common ground that the provisions of the Holidays Act 1981 (and now the Holidays Act 2003) apply in this instance. The proceedings concern the “*amount*” payable to employees who took special leave under the Holidays Act 1981 (see section 30A (4)).

Summary of Submissions

[4] I summarise the parties’ positions on the problem. The applicant’s position is that the “*amount*” payable is an amount equivalent to the pay at the ordinary rate of pay for the normal number of hours that the worker normally worked on the day. The respondent says that the matter is estopped from proceeding. In the event the matter is determined the respondent says that only 8 hours is payable. It relies upon the terms of the agreement that specify what normal hours are for the employees – being 8 hours (under the terms of sick pay and domestic leave, hours of work, shift operations and overtime).

[5] Both parties agree that section 30A (4) and section 33 (1) of the Holidays Act 1981 (“the Act”) applying at the time are relevant. The relevant provisions at the time were as follows:

30A (4) The worker’s employer shall... pay to the worker for each day on which the worker takes special leave under this section an amount equivalent to the pay for normal number of hours work that the worker normally works on that day

and:

33 No contracting out

(1) Except as otherwise expressly provided by this Act [or by section 42 or section 72(1)] of the Parental Leave and Employment Protection Act 1987], no contract... entered into before or after the commencement of this Act shall have any force or effect to deprive any worker of any right, power, privilege, or other benefit provided for by this Act.

Determination

[6] I am satisfied that there is a dispute and it is unaffected by an estoppel argument. There is no need to comment on this.

[7] I am satisfied that it is permissible to determine the dispute on the agreed issues about the matter put before me. I agreed to reserve leave for the parties if there is an enforcement problem later for any compliance.

[8] This problem is about the normal number of hours that the worker normally works on that day. It is not about the “*normal working day*” under the terms of the agreement. Under the Act the parties are not able to contract out of what the Act requires. In this context the normal number of hours worked cannot be restricted if the hours involve more than 8 under the terms of the agreement they have regularly worked to. This will require individual calculation. In other words, what hours would they have worked on that day had they not taken the sick leave. At the very least the workers must be paid for 8 hours, but if they have worked more on a regular basis or would have been rostered to work more on the day taken off on sick leave they would be entitled to those hours as the hours normally worked. In other words, as provided by the actual shift, the amount of hours worked become the normal number of hours.

[9] I accept that the agreed 8 hour period defined as the “normal working day” sets the basic rate of pay after which overtime cuts in. It does not determine the actual hours payable for special leave I hold.

[10] The Act stands on its own. The words of the Act are paramount.

[11] I leave it now to the parties to work out any entitlements and grant leave for the parties to return to the Authority.

[12] Costs are reserved.

P R Stapp
Member of the Authority