

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 150/09  
5155438

BETWEEN                      NEW ZEALAND  
   TRAMWAYS AND PUBLIC  
   PASSENGER TRANSPORT  
   EMPLOYEES' UNION INC  
   Applicant

AND                                WELLINGTON CITY  
   TRANSPORT LIMITED  
   Respondent

Member of Authority:      P R Stapp

Representatives:            Kevin O'Sullivan Advocate for the Applicant, and  
   Guido Ballara, Counsel assisting the Applicant  
   Andrew Caisley, Counsel for the Respondent

Investigation meeting:     On the papers

Submissions received by:  17 September 2009

Determination:                7 October 2009

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1]     The New Zealand Tramways and Public Passenger Transport Employees' Union Inc has claimed that eight of its members are entitled to an increase on allowances as a result of a settlement of a collective employment agreement.

[2]     The employer, Wellington City Transport Limited, runs its business as Go Wellington. It contended that the employees are not entitled to the increase on the allowances being claimed.

[3] The union has advised another union party to the collective employment agreement of the dispute pursuant to s 129 (2) of the Employment Relations Act (letter dated 4 May 2009 produced).

### **The facts**

[4] Wellington City Transport Limited and the New Zealand Tramways and Public Passenger Transport Authorities Employees' Industrial Union of Workers (now the New Zealand Tramways and Public Passenger Transport Employees' Union Inc), are parties to the Wellington City Transport Limited Go Wellington Collective Employment Agreement (the collective employment agreement). The current collective employment agreement in force is dated 2008-2010.

[5] Eight of the Union's members are employed by Wellington City Transport Limited under the terms of that collective employment agreement. They are covered by the collective employment agreement and have protected terms and conditions from an expired Wellington City Council Public Transport Workers "award", called the Tramways Award 1990. My research shows an 'award' was last registered in 1987 (BA 87, p7761 document 646). Both parties have referred to the 1990 document, and they have helped locate a copy and a copy of the appendix in the collective employment agreement that prescribed the protected terms. It appears that the document signed off was a voluntary collective agreement (VCA) under the Labour Relations Act and continued under the Employment Contracts Act. I will refer to that agreement, as the parties have, as "the Tramways Award". There is no dispute over the existence of that document.

[6] On 2 October 2008, Wellington City Transport Limited and the Tramways Union (and the Manufacturing and Construction Workers' Union) signed off terms of settlement from a meeting held in mediation on the same day. The terms of settlement included the following:

*The parties have agreed that all rates in the document will be increased by 7.5% for year one (with back pay for the period from May 2008 plus 3.5% on all rates for the second eleven months plus)... plus \$300 as a one off payment...*

[7] The provision embodied in the collective employment agreement reads as follows:

*The following employees have elected to remain on terms and conditions based on an expired 1 April 1990 Tramways Award, rather than accept the terms contained in successive documents. The terms will be held by those individuals on a personal to holder basis as their entire agreement and in place of the terms and conditions elsewhere in this Collective Agreement.*

*However, the expired Tramways Award must also be read in conjunction with any legislative changes including amendments to those Acts that have occurred since 1990 i.e. Holidays Act 2003, Employment Relations Act 2000, etc.*

*Chris Ashton  
Morris Dawson  
Eneliko Fatialofa  
Tasi Kalolo  
William Leaupepe  
Tum Ama Patea  
Michael Scott  
Tamohou Walker*

### **The Union's claim**

[8] The group of eight have continued to insist that their terms and conditions be based on the expired Tramways Award and the current collective employment agreement contains the clause dealing with that small group, and their terms and conditions are embodied in the collective employment agreement under clause 81.

[9] First, the Union has relied on the application of ss.56 and 61 of the Employment Relations Act 2000 to support the application of the increase.

[10] Second, the Union says that the respondent's notice of 13 March 2008 initiating bargaining and the bargaining process agreement signed off by the parties prior to the negotiations clearly encompassed the eight members of the union concerned.

[11] Third, the union says that during negotiations no mention was made by the respondent of any facts or information supplied which would have led it to believe the eight members were not covered by the collective employment agreement where they were represented at the negotiations and locked out, along with other employees, who were covered by the collective agreement.

[12] Finally, the union is seeking a determination that the respondent must pay the eight members of the union concerned a 7.5% increase on their allowances backdated to May 2008. The union is also seeking costs incidental to this claim.

### **The company's position**

[13] The company says that the eight employees have no entitlement to the 7.5% increase on allowances being claimed. It says that the terms and conditions for the eight drivers have been locked in a time capsule under clause 81 (referred to under the employer's terms of settlement offer above as clause 93. I will refer to it as clause 81.). The company says it has a preference for the collective employment agreement to apply to all employees and it hopes that eventually the 1990 Tramways Award drivers will have retired, or that the gap between the collective employment agreement and the Tramways Award will have increased sufficiently to persuade the last of the drivers to change over their terms and conditions.

[14] The expired Tramways Award was set out in full in appendix 1 of the expired collective employment agreement. The terms of the current collective employment agreement now say that the eight employees "*have elected to remain on the terms and conditions based on an expired 1 April 1990 Tramways Award, rather than accept the terms contained in successor documents*". The terms are those terms that are in the expired Tramways Award, which were referred to in Appendix 1 of the previous collective employment agreement. The terms of settlement applying increases to pay and allowances related to the collective employment agreement and not the Tramways Award..

[15] The company says that the eight elected to remain with the Tramways Award provisions and as a result their terms are those of the award which govern their employment, including their pay entitlements. It was submitted that the Authority is not able to import implied terms because of the plain meaning and lack of any ambiguity in clause 81. As such the terms of settlement as an associated document would not assist in determining the meaning.

[16] Finally, the company did voluntarily pay out a sum over and above the eight drivers' entitlements but says that was a discretionary payment.

**The issues**

[17] This is a matter for interpretation of clause 81 of the 2008-2010 collective agreement.

[18] As a result, are the eight employees entitled to the 7.5% increase on allowances?

**Determination**

[19] It is my decision that the eight employees are covered by the terms of the expired Tramways Award under the coverage of the collective employment agreement because clause 81 is contained in the collective employment agreement. Also, their coverage under the collective employment agreement is confirmed by clause 81 in regard to the work and positions held by the relevant individuals under the Tramways Award. Also the eight were included in the initiation of the bargaining and they were represented during the negotiations and that the collective employment agreement, containing clause 81, was signed off by their representative.

[20] I hold that clause 81 is clear and unambiguous.

[21] The eight drivers have agreed to exclude themselves from the terms contained in the collective employment agreement other than clause 81. This conclusion is supported by the plain meaning of the words: "*The terms will be held by those individuals on a personal to holder basis as their entire agreement and in place of the terms and conditions elsewhere in this Collective Agreement...*". As such by agreeing to be covered by the terms and conditions based on the award they have no entitlement to the terms and conditions in the collective agreement and that must include any increases on allowances. I cannot imply from clause 81 that any allowances in the Tramways Award are increased under a provision of that clause where none exists. I agree that the eight drivers have accepted to hold on to their terms and conditions under the Tramways Award which are locked in and are held personal to the holder in place of the terms and conditions elsewhere in the collective employment agreement. Therefore I hold that the words in the terms of settlement that "*the parties have agreed that all rates in the document will be increased by 7.5%...*" would not apply to the Tramways Award. Indeed I agree that as such the terms of settlement as an associated document do not assist in determining the meaning.

[22] Furthermore, the company has progressively increased the rates in the collective employment agreement, but not for the 1990 Tramways Award drivers, and this supports my conclusion. The Tramways Award rates have, however, been increased to comply with the minimum wage, and other legislative changes have been made to comply with changes, for example in the Holidays Act. Also, the company made a discretionary payment in early March 2009 over and above the actual entitlements, in an attempt to resolve the dispute. That decision does not commit the company to pay the increases in allowances.

[23] S.56 of the Employment Relations Act 2000 has no impact because s56 relates to the application of the collective agreement for enforcement.

[24] S 61 of the Act is not applicable because the eight employees are covered by the collective employment agreement and their terms are contained under clause 81 of that collective employment agreement. In terms of contractual interpretation, the language and meaning of clause 81 is clear and does not imply a pass-on. Clause 81 is part of the collective employment agreement. The workers are covered by the collective employment agreement by specific internal provisions, not 'additional' provisions.

[25] Rather than permitting superior entitlements, clause 81 of the collective employment agreement specifically excludes the application of superior entitlements to the employees choosing to remain bound by the terms and conditions in the old award.

[26] In conclusion the union's claim cannot succeed and the eight employees are not entitled to the pass-on.

[27] Costs are reserved.