IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 106/09
5145612

BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGERS TRANSPORT EMPLOYEES' UNION INC First Applicant
AND	DANNY XIE Second Applicant
AND	WELLINGTON CITY TRANSPORT LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Kevin O'Sullivan for the Applicants Andrew Caisley for the Respondent
Investigation Meeting:	On the papers
Submissions and Information Received:	By 10 August 2009
Determination:	11 August 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Pursuant to the parties' collective employment agreement the union and Mr Xie claim reimbursement of legal expenses incurred by Mr Xie in defending a charge brought against him by the New Zealand Police. In the alternative, the applicants claim that the respondent, Wellington's bus company known as Go Wellington, is required to indemnify him, under common law, for defending himself against charges bought while he was acting as its agent.

[2] Go Wellington claims that the nature of the offence Mr Xie was charged with takes it outside the terms of the collective employment agreement and that it has no common law liability.

[3] **The Facts**

[4] Clause 24 or 25 of the parties' collective employment agreement (depending on the applicable year) states:

> ***Legal Fees***
>
> *When operators are on duty and driving a company vehicle, the company, when it is a driving-related prosecution, will pay legal fees of operators who successfully defend any charge brought against them.*
>
> *If the company believes legal fees are getting out of hand, in consultation with the Union, alternative practices will be asked to quote for the work.*

[5] Mr Xie is a bus driver who was charged by the Police with indecent assault, following a complaint by a woman passenger on Mr Xie's late night bus. The allegation was that Mr Xie had groped her early one morning when she was the only one on the bus. She did not remember a lot of what had happened because she was drunk, according to the Police.

[6] Mr Xie was charged by the Police. He obtained legal representation to defend himself against the charge. Subsequently, after discussion with defence counsel and with the victim, the matter was withdrawn, which was, in terms of the wording of the collective agreement, a successful defence against the charge.

[7] Mr Xie incurred legal costs of $2,776.25 in defending the charge and he and the union have sought reimbursement of that sum.

[8] Go Wellington first became formally aware of this charge when receiving the claim from the union on 28 July 2008. Go Wellington declined to pay the sum sought because the charge was not *driving-related*. However, Go Wellington was prepared to consider sharing the cost equally. That proposal was unacceptable to the union and the parties have been unable to resolve their differences, despite attending mediation.

Determination

[9] The collective agreement applies to more than just operators, such as employees in the workshop and garage, yet clause 24/25 is in a section of the agreement limited to operators. Operators are defined as employees employed to drive a bus and collect fares. The protections of the clause are further limited to operators who are on duty and driving a company vehicle, so it does not apply to all workers covered by the collective employment agreement and to all operators' duties.

[10] The clause is further limited by the provision that the prosecution must be driving-related. In the context of the other limitations in the clause, can it be said that the prosecution here was driving-related? Mr Xie's defence is that he acted within the terms of his employment as a driver by assisting the passenger off the bus, not indecently assaulting her, a charge that he successfully defended.

[11] The wording *driving related* refers to the word *prosecution*, which follows it immediately. For the protection of the clause to apply the prosecution must therefore be a prosecution for a driving-related offence. Indecent assault is not a driving offence. The offence alleged here could only be said to be driving-related in the sense that Mr Xie's behaviour was related to his duties as an operator, as it is clear that an operator helping a drunk passenger could, as here, later be accused of taking advantage of their state and committing an offence. However, if the clause was meant to cover offences such as indecent assault, it need not contain the phrase *when it is a driving-related prosecution*. The clause could simply have said: when operators are on duty and driving a company vehicle, the company will pay legal fees of operators who successfully defend any charge brought against them. This would clearly cover indecent assault charges when an employee is going about their duties other than driving the bus, such as helping drunken passengers off it. It follows, therefore, as a matter of interpretation of the parties' collective contract, that a prosecution or charge of indecent assault is not covered by clause 24/25 of the collective employment agreement.

[12] While I accept, as submitted, that the term *relating to* should be given a general and far reaching interpretation, it does not override the express construction of the clause as analysed above. This is because otherwise the relevant section would not be needed. Rather the phrase *relating to* would cover a wide array of offences related to driving, up to and including manslaughter (not ordinarily a driving offence)

if the Police were so minded to charge an operator in any particular extraordinary set of circumstances. It does not, however, cover offences such as indecent assault, which would otherwise mean that the phrase as a whole would be of no meaning, as the prosecution was not *driving related*.

[13] The obligations of employers and other principals to indemnify their employees and agents flow from the common law proposition taken from the law of agency that *... the principal* [is] *to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, include in the reasonable performance of the agency*, 1(2) Halsbury's Laws of England (4th ed reissue) para.123.

[14] This provision was analysed in *F v. Attorney-General* [1994] 2 ERNZ 62 at 68, where it was stated:

> *This rule extends, by the application of the principles of equity, not merely to payments actually made by the agent for the principal but also to the full amount of the liabilities incurred by the agent:* Halsbury's *para.124. Both* Halsbury *and* Chitty *say that such rights can be excluded or modified by the express terms of the contract between principal and agent.*

[15] The Court went on to note that there was no such express exclusion in that case. In this case, however, clause 24/25 could have no other purpose other than to modify the common law as to indemnification. As I have already concluded that Mr Xie's claim is not covered by the collective employment agreement he therefore can not be covered by any common law rights.

[16] I therefore dismiss the applicants' claim.

Costs

[17] Costs are reserved.

G J Wood
Member of the Employment Relations Authority