

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 22/10

File Number: 5273711

BETWEEN NZ Tramways & Public  
Passenger Transport Employees  
Union (Inc) Wellington  
First Applicant  
AND Tamohou (“John”) Walker  
Second Applicant  
AND Wellington City Transport  
Limited  
Respondent

Member of Authority: Denis Asher

Representatives: Kevin O’Sullivan for the applicants  
Andrew Caisley for the respondent

Investigation Meeting On the papers

Submissions Received By 15 January 2010

Determination: 9 February 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] Mr Walker recently retired. He and his Union seek payment of a retiring gratuity. They say the gratuity, originating as either a council employee regulation

and/or an industrial agreement, carried through to Mr Walker's current terms and conditions of employment set out as they are in a collective employment agreement.

[2] The respondent says the gratuity was not part of his terms and conditions of employment.

[3] Is the gratuity a term and condition of his employment? Is Mr Walker entitled to a retirement gratuity?

### **The Investigation**

[4] During a telephone conference on 31 August 2009 the parties agreed to the Authority determining this problem on the papers and a timetable for filing evidence and submissions. The agreed timetable was then set back as a result of the applicants filing an amended statement of problem.

### **Background and Discussion**

[5] It is common ground that Mr Walker joined the Transport Department of the Wellington City Council (the Council) as a bus driver in 1977. He remained a full time driver until his retirement effective 29 June 2009. By that time his employment had transferred to the respondent company, which now operates the Council's former public transport service.

[6] Mr Walker understands (and argues) that he retained terms and conditions of employment from the time he was employed by the Council and, in particular, that he was entitled to a retirement gratuity "*as set out in my council conditions of employment*" (Mr Walker's statement received on 18 September 2009).

[7] At the time of his retirement, Mr Walker's terms and conditions of employment were set out in the Go Wellington Collective Employment Agreement 2008-2010 (the Collective).

[8] The Collective effectively contains two parts – a main document and another (grandparent) provision enshrining terms and conditions of employment for a group of

eight drivers including Mr Walker as set out in the 1990 Tramways Award (the Award).

[9] Clause 81 of the Collective states that:

*The following employees have elected to remain on the terms and conditions based on (the Award), rather than accept the terms contained in successor 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 (Award) must also be read in conjunction with any legislation changes including amendments to those Acts that have occurred since 1990, i.e. Holidays Act 2003, Employment Relations Act 2000 etc.*

...

*Tamohou Walker*

(emphasis added)

[10] While the Collective does not reproduce the Award it was set out in the preceding Wellington City Transport Limited Stagecoach Wellington Collective Agreement 2005-2008. That collective also provided that Mr Walker's terms and conditions were those set out in the Award and not those contained in the collective.

[11] The Award does not set out or contain or refer to any retiring allowance gratuities or provisions.

[12] The Award does not expressly or impliedly incorporate any other document or regulations setting out additional terms and conditions of employment.

[13] However, and only in this one instance, in respect of sick leave provisions, sub-clause 35 (g) of the Award states:

*The provisions of this clause shall override those of the **Wellington City Council – Wage Employee Regulations** in so far as they relate to sick leave.*

(emphasis added)

[14] By way of a prescribed scale, clauses 79 & 80 of the Collective provide that the Company may make retiring and resignation payments to employees who had continuous service with the Council up to 30 June 1991 or as at 1 July 1991

### **Applicant's Position Summarised**

[15] The applicants say that Mr Walker's terms and conditions were those set out in the Collective, which in turn incorporated the Award, and that employees (including Mr Walker) covered by the Award were thereby also covered by the Wellington City Council (the Council) regulations (the regulations) and/or the Wellington City Council Wage Employee Regulations and the Technical, Professional, Clerical and Other Officers Agreement 1990 (the Council Agreement).

[16] The regulations and Council Agreement set out schedules of retiring payments for long serving employees.

[17] The applicants concede that the retiring gratuity was not expressly included in the Award but say that was because all drivers covered by the Award were, prior to 1991, all local authority employees. In Mr Walker's case he was a Council employee and – it is claimed – he was therefore also covered by the Council Agreement which set out at clause 11 a retiring gratuity schedule: no agreement was ever made to alter this arrangement.

[18] Two former employees, like Mr Walker, who elected to retain terms and conditions of employment prescribed by the Award, were paid the retirement gratuity in 1994 and 2001.

### **Respondent's Position Summarised**

[19] The Company denies that a retirement gratuity is payable pursuant to the Regulations because:

- a. It is not the Wellington City Council and is not bound by any regulations that once may have been applicable to that Council;
- b. The regulations are in any event no longer in force and cannot now form the basis of a legal entitlement.
- c. The regulations are not an express part of Mr Walker's terms and conditions of employment;
- d. The regulations cannot be implied as a term into Mr Walker's conditions of employment because none of the test for implication are satisfied and because the term would fail for want of certainty since none of the parties have been able to find a copy of the Regulations;
- e. The Company was and is not a party to the Council Agreement;
- f. There is no evidence of the applicants ever being a party to the Council Agreement; and
- g. Even if they were the Council Agreement expired on 30 June 1991 and is no longer in force; and
- h. The Council Agreement is not part of the Collective either expressly, by reference or by implication.

[20] The applicant's have not produced a full copy of the Council Agreement: the Company does not have one. The Company endeavoured to produce a full copy of the Council Agreement from the series of published awards and agreements, the "*New Zealand Awards*", vol 90, 1990, part 14. However, the index lists the Council Agreement as "*NFP*", i.e. not for publication.

[21] While a full copy of the Council Agreement does not appear to be available some of it was copied to the applicants' statement of problem: it can be seen from the title of the document and from that portion attached to the statement of problem that it was an agreement between the Council on the one hand and the-then NZ Central

Region Local Government Officers Union on the other. The first applicant and respondent to this action were clearly not parties to the Council Agreement. As there is no evidence Mr Walker was ever a member of the local government offices union it is highly improbable the Council Agreement ever applied to him.

[22] A document produced by the applicants (a memorandum dated 30 August 1988) is notable in that it refers not to payment of a retirement allowance pursuant to the Council Agreement but rather to an entitlement under wage workers regulations.

[23] The Company is unable to locate any records relating to the applicants' claims that retiring gratuities were paid on two prior occasions. It has no knowledge of ever paying retirement gratuities under either the Council Agreement or the Award.

### **Discussion and Findings**

[24] Notwithstanding my personal sympathy for Mr Walker – in light of his longstanding continuous employment and the terms and conditions of employment that he may once have enjoyed, and even what he may have intended by attempting to 'roll over' those terms and conditions of employment – the outcome of this matter is plainly obvious: there is no reference in the Award to any retirement gratuity, either expressly or impliedly.

[25] The Award similarly fails to invoke wage worker regulations and/or the Council Agreement.

[26] As the Award comprises Mr Walker's "*entire agreement*" (clause 81) it inevitably follows that his terms and conditions do not extend to any such provision.

[27] It also follows that the application by the Company of clauses 79 & 80 of the Collective (retiring and resignation gratuities for employees employed prior to 1 July 1991) would be on an entirely discretionary basis, as clause 81 makes clear those provisions are not part of Mr Walker's terms and conditions and, as indicated already, they are not to be found in 'his' Award.

[28] I extend my apologies to the parties for the unanticipated delay in releasing this determination.

**Determination**

[29] The application is dismissed.

[30] Costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**