IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 51/10
5277449

	BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION INC First Applicant
		DAVID JOHN DUFFELL Second Applicant
	AND	MANA COACH SERVICES LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Kevin O'Sullivan for the Applicants Angela Walker for the Respondent
Investigation Meeting:	Determined on the papers
Submissions Received:	By 12 February 2010
Determination:	19 March 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a dispute about whether Mr Duffell is entitled to higher pay than that provided for in the union's collective employment agreement with the respondent (Mana), due to him having previously signed an individual employment agreement with Mana that had a higher hourly rate of pay.

[2] The issues for determination are whether or not, when Mr Duffell moved into the coverage of the collective employment agreement, his previous individual employment agreement lapsed; and if not, whether the provisions of that individual

employment agreement are inconsistent with the terms of the collective agreement when it comes to his hourly rate of pay.

The Facts

[3] Mr Duffell started work with Mana as a driver on 17 September 2007. At that point, he was covered by the terms and conditions of the collective agreement, under s.63 of the Act, for the first 30 days of his employment, even although he was not a member of the union.

[4] Mr Duffell subsequently became party to an individual employment agreement, which appears to be a standard agreement entered between non-union members and Mana, with effect from the pay week commencing 10 October 2007. That document noted that the agreement was an individual employment agreement and stated in clause 2 under the heading *Coverage*:

> *2.1 This agreement shall cover the employment of a passenger transport driver only who has elected not to be a party to a Collective Employment Agreement entered into between the Company and a union who is employed by Mana Coach Services Limited. This agreement shall otherwise exclude all other employees of the company.*

[5] The comprehensive agreement also dealt with wages and allowances, amongst a number of other things.

[6] On 9 December 2008, Mr Duffell accepted a variation to his individual employment agreement, increasing his hourly rate to $17 as from 3 December 2008. There was no evidence of any lack of opportunity for Mr Duffell to take advice on the proposed variation, which he accepted.

[7] The only variations were to the hourly rate and the term, of which only the hourly rate has any significance to this case. In essence, the relevant wages clause stated:

> *11.1 Parties to this agreement have agreed to the following variation.*
>
> *The basic hourly rate of pay for all employees covered by this agreement, effective from **3 December 2008** shall be **$17.00** for each hour worked.*
>
> *Such rate shall be increased, backdated effective from **31 March 2010** by the CPI (consumer price index)*

> *percentage applicable for the 12 month period ended 31 March 2010.*
>
> *The rates aforementioned shall be in full satisfaction for the performance of all work carried out by an employee and shall cover all circumstances and conditions whatsoever or however arising inclusive of all future entitlements in recognition of redundancy.*

[8] Paragraph 11.2 of the original agreement provides for other allowances. It states:

> *In addition to the basic hourly rate prescribed in subclause 11.1 of this agreement, only the following additional allowances shall be paid where applicable:*

[9] The clause then goes on to set out allowances for overnight stays, meal reimbursement, commentaries, after midnight urban services, renewal of a P licence, being a trainer and a cleaning allowance.

[10] With effect from some time in February 2009, Mr Duffell chose to join the union and come under the collective agreement between the union and Mana. The collective agreement covered drivers employed by Mana who were members of the Tramways Union.

[11] Clause 5 of the collective agreement is headed P*revious Terms and Conditions* and provides:

> *This agreement shall supersede all other terms and conditions of employment, whether written or not, that may have existed prior to becoming a party to this agreement.*

[12] In a similar way to the agreement applying to Mr Duffell previously, his wages and other allowances were set out in one clause, namely clause 12 *Wages* which states:

> *12.1 Except as otherwise provided in the Addendum to this agreement, the basic hourly rate of pay for all employees covered by this agreement, effective from 3 October 2007 shall be $16.00 for each hour worked. Such rate shall be increased, effective from 2 April 2008 to $16.50 and effective from 1 April 2009 to $17.00. The hourly wage rates provided in this sub-clause and in the Addendum to this agreement are paid in full satisfaction for the performance of all work carried out by an employee and shall cover all circumstances and conditions whatsoever or however arising; inclusive of all future entitlements in recognition of redundancy.*

> *12.2 Other allowances.*
>
> *In addition to the basic hourly rate prescribed in subclause 12.1 of this agreement, only the following additional allowances shall be paid where applicable...*

[13] The collective agreement then goes on to provide for the same sorts of matters dealt with in the individual employment agreement that Mr Duffell had previously signed.

[14] Mr Duffell left the employment of Mana at the end of May 2009 and seeks a compliance order requiring Mana to pay him the sum of $120.90 gross in lost income, as a result of his pay being reduced when he joined the union.

The Law

[15] The issue of inconsistency was dealt with by the Court of Appeal in *NZ Meat Processors etc IUOW v. Alliance Freezing Co (Southland) Ltd* [1990] 2 NZILR 1071 where it was held at 1077:

> *Whether a contractual provision is inconsistent with an award provision involves comparing the two. The Oxford English Dictionary (2nd ed) definition of "inconsistent" is: "not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous". In short, it is whether the two provisions can live together as terms of the contract of employment …*
>
> *… where there is a true inconsistency, where the contractual provision and the award cannot stand together, the award must prevail whether the result received is favourable or unfavourable to the particular worker.*

Determination

[16] The employment arrangements between Mana and its staff clearly operate between union and non-union members as for each type to exclude the other. It is clear both from the collective and the individual employment agreements covering Mr Duffell at different times that those agreements exclude non-union employees and union employees respectively. Simply put, the structure of these employment arrangements mean that any employee covered by the standard form individual employment agreement can not, at the same time, be covered by the collective, and

vice-versa. Therefore, I conclude that when Mr Duffell became a union member his individual employment agreement became null and void.

[17] That therefore means that once Mr Duffell joined the union he was only employed under the terms of the collective employment agreement and he has therefore been properly paid.

[18] I do not therefore need to go on to determine whether or not Mr Duffell's individual employment agreement was inconsistent with the collective agreement and do not do so. I incline to the view, however, that because of the proximity of the sub-clauses about pay and allowances and the use of the words *shall* in clause 12.1 and *only* in clause 12.2, combined with the dictionary definition of *basic* in relation to pay meaning without additions or extras, that the individual employment agreement, had it still remained in force, would have been inconsistent with the collective employment agreement and therefore unenforceable.

[19] I therefore dismiss the applicants' claims.

Costs

[20] Costs are reserved.

G J Wood
Member of the Employment Relations Authority