

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 70
5350922

BETWEEN NATIONAL UNION PUBLIC
EMPLOYEES INC
Applicant

AND THE CHIEF EXECUTIVE OF
THE MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: P R Stapp

Representatives: Andrew McKenzie, Counsel for the Applicant
Robert Foitzik, Counsel for the Respondent

Investigation Meeting: 18 January 2012 at Wellington

Submissions by: 10 February 2012

Determination: 29 June 2012

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] NUPE has made a claim for a travelling allowance under the terms of a collective employment agreement on behalf of its members employed by the Chief Executive of the Ministry of Social Development (MSD) at MSD's Rotorua Youth Justice Residence (Te Maioha o Parekarangi (Te Maioha)). In other words, it has posed the question as to whether all the NUPE members employed at Te Maioha get the transport allowance under clause 9.2 (b) and/or (c), or whether or not some of them get the allowance.

[2] MSD denies the claim. It contends that it has the right to exercise its discretion to apply the criteria under the terms of the collective agreement. If any of

the criteria do not apply it does not have to pay. Further MSD claims that clauses 9.2 (b) and/or 9.2 (c) do not apply in the current circumstances. This is because the elements of the clauses 9.2 (b) and/or 9.2 (c) have not been met. My reasons for this follow.

The issue

[3] This is a dispute as to whether or not NUPE members employed at Te Maioha get the allowance under clause 9.2(b) and/or (c) or whether or not some of them get the allowance.

The background

[4] NUPE is a registered union under the Employment Relations Act 2000. NUPE is a party to a collective employment agreement with the Chief Executive of the Ministry of Social Development. When the statement of problem was lodged in the Authority on 17 July 2011 the collective employment agreement, although it had expired, continued in force for a period of 12 months and still had some time to run. The collective agreement then expired and a new collective employment agreement has commenced and is currently in force.

The collective agreement

[5] Clause 9.2 of the collective agreement remains the same. The clause reads as follows:

9.2 Transport assistance

Employees whose hours of duty are such that they cannot use the public transport that is available during normal working hours and must therefore make alternative arrangements to travel to and from work are to be paid an allowance (which will be updated with the Motor Vehicle Allowance) in the following circumstance:

- (a) *In the four main centres (Auckland, Wellington, Christchurch and Dunedin);*

The Ministry shall pay transport assistance at standard rates to shift workers and roster workers (or other employees in special categories) who are required to travel to and from work at times when public transport which is available during normal working hours is not available, (Normal working hours' means between 8.00am-5.00pm).

- (b) *In other cities:*

Eligibility for the allowance may be extended to shift workers and rostered workers (or other employees in special categories) who work in other cities. To qualify, the city must have a public transport system such as operates in the four cities- i.e. there must be a public passenger transport network operating over the whole or major portion of the city. Each case will be decided on its own merits.

Cities currently recognised under this provision are:

- *Invercargill*
- *Timaru*
- *New Plymouth*
- *Nelson/Richmond*
- *Rotorua*
- *Gisborne*
- *Palmerston North*
- *Whangarei*
- *Hamilton*
- *Wanganui*
- *Hastings*
- *Napier*

***Note:** A city will not qualify if the only public transport is a commuter service operating between the city and locations outside the city, eg NZR Road Services.*

(c) *In certain situations:*

Where an institution is located of necessity away from a population centre and is not served by public transport, the Ministry may extend eligibility for the standard transport assistance allowance to Employees who travel to and from work at the institution. This provision does not apply to depots, branch offices or other work sites but only to institutions such as rural prisons where there is evident difficulty recruiting significant numbers of staff locally.

[6] The clause is in four parts. First it provides under the preamble for a transport allowance. Second it applies to the main centres. Third it extends to other cities. Four it applies when there is no public transport. Under each provision certain elements have to be satisfied. Clause 9.2 applies in specified circumstances because of the words “...*in the following circumstances:*”. I am satisfied that this means sub clauses 9.2 (a) and 9.2(b) and 9.2 (c) can be considered separately on their own.

Te Maioha Youth Justice Residence

[7] Te Maioha Youth Justice Residence is located six kilometres from Rotorua. It is built on land leased by MSD from an Iwi Trust. The facility has approximately 98 employees, including youth workers, night attendants, kitchen staff, administration staff and clinical team staff (case leaders). A number of the employees are from the local area; that is from around Rotorua. Other employees travel to work from as far as Tauranga, and when the facility was opened new employees were appointed from other MSD facilities elsewhere.

Eligibility for transport assistance

[8] The matter of the transport assistance was allegedly discussed at the time the first recruitment of staff took place. It is common ground that all applicants were advised that they had to organise their own transport to and from work. It is less clear whether or not there was any reference made to there being travel assistance available where there was no public transport. It is common ground that the closest bus stop to the facility is more than 3km away.

[9] It is also common ground that the issue of the transport assistance was raised at some point when Mr David Paitai youth worker and NUPE site delegate mentioned casually his opinion that transport assistance should be paid to employees employed at Te Maioha and that the matter would be taken up by the union. Since then this has become a matter involving NUPE making a claim for its members employed at Te Maioha to receive the transport assistance under the collective agreement.

The Authority's investigation meeting

[10] The evidence at the Authority's investigation meeting for NUPE came from Mr Paitai who is employed as a residential youth worker at Te Maioha. He is also NUPE's site delegate and represents approximately 50 of the rostered care team employed at the youth facility. He had previously been employed at Te Puna Wai o Tuhinapo (Youth Justice South) in various roles from 28 August 2006. He changed his job when offered employment at Te Maioha. He had previously been paid transport assistance and assumed he would get it in his new role.

[11] He claims that during the recruitment phase he was never informed that he would no longer receive transport assistance, but he assumed that his salary package would remain the same (which would include the transport assistance that he was previously receiving). Mr Paitai ceased to receive the transport assistance on commencing at Te Maioha. He says that it was at a meeting a month after starting where all employees were informed that the transport assistance would not be paid at the facility. He further says that they were informed that the PSA collective agreement would apply.

[12] Mr Paitai's complaint is that people employed at other MSD residences not serviced by public transport receive the transport assistance for various reasons. He says he believed that the above payment must have related to a grand parenting arrangement in regard to those facilities. This is not a factor in my decision because the clause needs to be interpreted in regard to the plain meaning of the words and Mr Paitai has not produced in any direct evidence to assist in the point he has made.

[13] MSD says that the transport assistance has never been paid at Te Maioha since it was set up. Mr Robin Carey, Manager HR Policy and Reporting, claimed that when the matter was taken up with him he looked at the clauses, consulted internally in the department, and a decision was re-made that the transport assistance would not apply for the staff employed at the Rotorua Youth Justice Centre. It was his evidence, along with Mr John Kirton, Residence Manager, that –

- (a) Staff had to organise their own transport.
- (b) There was no public transport available and no recruitment difficulties.

[14] Thus, MSD claims that this meant that the transport allowance would not apply. NUPE attempted to challenge Messrs Cary and Kirton on recruitment at Te Maioha.

[15] MSD has responded that Clause 9.2 (b) did not apply because Rotorua had a public transport system and the facility was not served by the transport system because the nearest bus stop is 3 kilometres away. It claims that clause 9.2 (c) does not apply because there are no recruitment difficulties.

Determination

[16] The matter involves the question as to whether or not employees at the facility and who are members of NUPE should receive a transport assistance allowance, either under clause 9.2 (b) and/or clause 9.2 (c).

[17] Initially this dispute was focused solely around the application and operation of clause 9.2 (c). However, the Authority has also been asked to consider entitlement under clause 9.2 (b) in the context of the evidence received at the Authority's investigation meeting.

[18] I have no hesitation in saying that the starting point is the provision for a transport assistance allowance provided for in the NUPE Child Youth and Family collective employment agreement. There is an entitlement if any of the criteria under both subsections of the clause apply. The preamble provides for the allowance. The preamble infers that employees are not able to use the public transport system that is available. The next provision provides for the transport allowance applying in the main centres. A further provision applies to the cities that the clause has been extended to include. The last sub clause applies where by necessity a institution is located away from a population centre and no public transport is available. This means that all the clauses: 9.2 (a), 9.2 (b) and 9.2 (c) stand alone and must be read in the context of the preamble. However, under each of clauses: 9.2 (a), 9.2 (b) and 9.2 (c) there are elements that must be satisfied.

[19] The first clause 9.2 (a) provides for the allowance to apply, but only to the main centres. That is not relevant here. Second, clause 9.2 (b) extends the allowance to certain named cities. This includes Rotorua city. Thus in the case of clause 9.2 (b), including Rotorua City, MSD is consistent in declining the application of the clause because the facility is not in Rotorua city. Although Rotorua city does have a public transport system for MSD to apply the clause, the public transport system does not operate in the area where the facility is located outside of Rotorua city. In fact the bus stop is apparently 3 kilometres away and the facility is 6 kilometres south of the city. Thus it is correct that the allowance can be declined under clause 9.2 (b).

[20] Clause 9.2 (c) provides for what is termed "*certain situations*". This refers to where an institution is located of necessity away from a population centre and is not served by public transport. Therefore the sub clause is a separate provision to 9.2 (a)

and/or (b). There are factors to be satisfied in 9.2 (c) to make a successful claim under this sub clause. For instance any discretion to be applied includes consideration of any difficulties in recruiting significant numbers of staff locally. That does not apply in the current situation where employees were appointed without any difficulty and no apparent existing difficulties. Also, the institution has to be located of necessity away from a population centre. Mr Carey decided that under the discretion the facility was not one that was required to be where it was located because it was built by a close arrangement with the Iwi Trust on its land, and the first employees at the time it was established did not receive any allowance because they were required to get to work and home by their own means. Even if it is interpreted that the institution is located of necessity away from a population centre there has to be evidence of a difficulty recruiting significant numbers of staff locally. Although NUPE challenged MSD on recruitment at Te Maioha NUPE's evidence was primarily based on opinion without any direct evidence. MSD's evidence has been given by the managers' responsible for the facility and that they say there was no recruitment issue with an explanation about that. Having regard to Mr Kirton's evidence I hold that there is no *evident difficulty recruiting significant numbers of staff locally*.

[21] For completeness it is common ground that the facility fits the requirement: "*an institution such as rural prisons*". Mr Carey agreed that the facility could be described as: "*an institution such as rural prisons*", although it was clearly named quite differently.

In conclusion

[22] This means: first the clause provides for a transport allowance (s 9.2) to apply. Provision is made for an allowance under 9.2 (a) in regard to the main centres. It is common ground that 9.2 (a) does not apply in the current situation. Second: although there is provision for a transport allowance the application of clause 9.2 (b) and 9.2 (c) means that any decision is discretionary so long as any of the criteria under each of the two sub clauses apply. This is because the word "may" is integral to the application of both sub clauses. Thus, MSD is permitted to exercise discretion. I hold that in this case the following applies:

- (i) That each clause (9.2 (a), 9.2 (b) and 9.2 (c)) are applied as separate provisions for any entitlement to a travelling allowance.

- (ii) That the provision for “*Employees whose hours of duty are such that they cannot use the public transport that is available during normal working hours...*” implies pre-existing arrangements. There are no pre-existing arrangements involving public transport at Te Maioha.
- (iii) That Te Maioha is outside Rotorua City where the public transport system does not apply because the bus stop is 3 kilometres away.
- (iv) That Te Maioha is 6 kilometres south of Rotorua. Therefore as the facility is outside Rotorua City the allowance can be declined.
- (v) That the facility is not an institution located of necessity away from a population centre.
- (vi) That the employees from the first intake upon the establishment of the facility were never required to “*make alternative arrangements to travel to and from work*” because there was never an issue the allowance would not apply at the time they were employed there, and that they were responsible for getting to work and home under their own arrangements from the start.
- (vii) The word “*may*” provides for discretion that has applied in this instance under clause 9.2 (b) and 9.2 (c) ie that Te Maioha is outside Rotorua City, and is 6 kilometres from Rotorua and there is no immediate bus stop to use; and there have been no recruitment difficulties.

[23] MSD was permitted to decline the claim for transport allowance under clause 9.2 (b) and 9.2 (c). The claim is dismissed.

[24] Costs are reserved.