

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 143  
5390269

BETWEEN THE RAIL AND MARITIME  
TRANSPORT UNION INC  
Applicant  
  
A N D KIWIRAIL LIMITED  
Respondent

Member of Authority: P R Stapp  
  
Representatives: Geoff Davenport, Counsel for the Applicant  
Peter Chemis, Counsel for the Respondent  
  
Investigation Meeting: 11 September 2012 at Wellington  
  
Submissions By 12 October 2012  
  
Date of Determination: 19 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This employment relationship problem is a dispute as to the interpretation, application and operation of a collective employment agreement; and claim of a breach of good faith from the Rail and Maritime Transport Union Inc (RMTU). The application has been opposed by KiwiRail Limited and it denies all the claims.

[2] By agreement a full investigation meeting was arranged instead of an interim hearing. In the mean time arrangements and undertakings apply between the parties.

[3] I am satisfied that the other employer parties to the MECA involved in this matter have been notified. The matter is fact specific to the RMTU and KiwiRail. Mr Chemis is acting for all the MECA employers.

[4] The employment relationship problem centres on a restructuring and KiwiRails's decision to create 6 new team leader positions at level 5 and exclude them from the coverage of the RMTU and KiwiRail collective employment agreement.

### **The issues**

[5] Both parties have different approaches to the issues in this matter. Essentially the employment relationship problem is whether the team leader role set out in the statement of problem is within the coverage clause of the RMTU-KiwiRail MECA. KiwiRail has created 6 team leader positions that it says are not covered by the MECA. I agree with the RMTU that this issue is at the centre of the employment relationship problem. The employees concerned and those whose employment will be impacted by the changes are currently members of the union and whose current jobs have coverage under the MECA. This includes an issue about the meaning of clause 7 in the MECA. Kiwi Rail has decided that the new team leader roles in the future will be covered by individual employment agreements. This leads to the following issues:

- (i) Are the newly created team leader positions covered by the MECA?
- (ii) Does the meaning of *managerial exclusion* in clause 7 of the collective employment agreement have any relevance?
- (iii) Is there any relevance as to the negotiation of the collective employment agreement in 2010?
- (iv) What evidence will be of use in interpreting the collective employment agreement?
- (v) Whether the omission of the words “...positions above MR level 23... which would otherwise come under the provisions of scale 1” has some bearing in the matter.
- (vi) Also there are matters relating to: scale 1; the terms and conditions for customer services supervisors (CSS

positions); subsequent conduct; team leader roles, and delegations (recruitment and dismissals).

- (vii) Was KiwiRail’s response to the RMTU in regard to the issues of concern over coverage for the 6 team leader positions a breach of good faith?

### **The facts**

[6] The Rail and Maritime Transport Union Inc (RMTU) is a registered trade union representing approximately 3,016 members around the country. Two thousand eight hundred and eighty six (2,886) of the members are covered by a multi-employer collective agreement (MECA).

[7] At KiwiRail there are currently approximately 159 team leaders who are RMTU members and covered by the MECA. In addition to these 159 members, there are a further 78 “gangers” in KiwiRail Networks who are team leaders. This is a total of 237 RMTU members covered in roles of this kind under the MECA.

[8] KiwiRail Limited is a state owned entity providing rail and other related transport services nationally. One of the areas of operation within KiwiRail is the “Trans Metro KiwiRail Passenger Group”. This operates commuter train services in the Wellington region.

### **The MECA**

[9] The RMTU and KiwiRail are two of the parties to a multi-employer collective agreement: the KiwiRail and Rail and Maritime Transport Union Multi-employer Collective Agreement 1 July 2010 – 30 June 2012 (the MECA). It remains in force post 30 June 2012 pursuant to s 53 of the Employment Relations Act 2012. Clause 7.1 of the MECA states the following:

*This collective agreement applies to all employees of the employer parties to this agreement who are or become members of the Rail and Maritime Transport Union except for the following:*

- *Managerial positions responsible for recommending and/or approving appointments and dismissals which would otherwise come under the provisions of Scale 1;*
- *Policy, sales, executive support functions, ON TRACK infrastructure field engineers and planners;*

- *Human Resource roles;*
- *Sea-going maritime employees.*

[10] The coverage clauses since 2000 drew the line at:

*“...positions above MR level 23... which would otherwise come under the provisions of scale 1”.*

These words were removed in the 2010-2012 (collective). There was no evidence presented as to why this occurred, although submissions have been made by the RMTU. The omission of the words is a matter for assessment as to what the change means to the clause. KiwiRail says that this drew no line and excludes any managerial position. KiwiRail says that there is no basis for the union’s attempt to exclude all but senior managers.

### **The restructuring within passenger services**

[11] On or about 1 June 2012, KiwiRail issued a consultation document to staff and to the RMTU. (The “Trans-Metro KiwiRail Passenger Group Consultation Document Trans-Metro Structural Review 1st June 2012” (the consultation document)). The document proposed the disestablishment of some roles, and the creation of others. It did not address at all the issue of whether the proposed new roles would be within coverage of the MECA. In other words, the consultation document did not provide the union with this important item of information.

[12] Within the proposed restructure a number of purportedly new categories of Team Leader roles would be created, namely;

- (a) On-board team leader,
- (b) Operations team leader,
- (c) Operations team leader (Platform),
- (d) Collections team leader,
- (e) Out-stations team leader,
- (f) Wellington team leader.

[13] The RMTU General Secretary, Wayne Butson, informed the manager of Trans-Metro, Mr Scott Brooks that the issue of coverage was of serious concern to the union. Mr Brooks told Mr Butson that the team leader roles would be individual employment agreement (IEA) roles. Mr Butson at the time adamantly opposed this, and on 25 June 2012 sent Mr Brooks an email expressly recording that the RMTU disputed the team leader positions being included in IEAs.

[14] On 25 June, Mr Butson sent Mr Brooks an email expressly recording that “*the RMTU disputes the team leader positions being deemed as IEAs*”. On 26 June 2012, Mr Brooks responded stating that the respondent’s initial thoughts were focussed on an IEA but that further thought would be given to the issue and that: “*I will advise as soon as possible*”. Contrary to that assurance and without any further response or advice to the RMTU, KiwiRail issued its final decision document. The RMTU says this was a breach of good faith because nowhere in that document and any communication to the RMTU was the issue of coverage responded to by KiwiRail. Mr Brooks in his evidence at the Authority’s investigation meeting accepted that there was a delay in responding and said that this was because he was going away on holiday. His evidence was that he departed for holiday on 10 July. In the time as the decision maker Mr Brooks was able to review all of the feedback and complete the decision document before he left, but was not able in the same time frame to respond to the RMTU over the concern on coverage. The RMTU says that Mr Brooks had enough time to respond before going away given he made a decision. There was no response from KiwiRail to the RMTU position until 20 July. Mr Butson expressly raised the issue again at a meeting in mid-July addressing the current wage talks. He says he asked KiwiRail to respond to the RMTU request. He also raised his complaint that the decision document did not have any decisions in it about the issue. Even if Mr Brooks was away, other managers of KiwiRail were not, including Ms Clark, the HR Manager. Mr Brooks accepted that the email sent by Ms Clark 20 July 2012 was KiwiRail’s response. That response stated that the issue of whether the roles would be IEA or CEA was being left “*open for discussion with the individual employees*”.

[15] In particular Ms Clark’s response on behalf of KiwiRail stated:

- a. *That the issue of whether the roles were to be IEA or CEA was being left “open for discussion with the individual employees”; and*

- b. *“We are looking to advertise these roles next week”.*

[16] The RMTU says that KiwiRail refused and/or failed to provide the confirmation sought by the union that the team leader roles would be covered under the MECA.

[17] On 20 July 2012, Ms Clark’s response was criticised by the RMTU. It considered that its role, authority, and right to be centrally involved in issues over coverage had been undermined by KiwiRail.

[18] On 20 July 2012, Mr Butson replied making it clear to KiwiRail that the team leader roles were within MECA coverage and that the issue of coverage could not be dealt with on an individual basis as Ms Clark had contended. He requested confirmation that the team leader roles would be covered by the MECA and sought this confirmation by the close of business that day. There was no response received from KiwiRail to that request.

[19] On Monday 23 July 2012, the RMTU instructed its solicitors to write to the respondent over the issue of coverage and to alert KiwiRail that proceedings would be filed in the Employment Relations Authority if confirmation sought was not provided.

[20] On 23 July 2012, KiwiRail’s lawyers responded providing the following information without providing confirmation:

*KiwiRail’s current position is that these designations are not covered by the MECA. However, as requested by Wayne Butson, it is reconsidering its position and will revert to you shortly... it will, however, be advertising these roles shortly... Should you wish to issue proceedings in the meantime, we are authorised to accept service.*

### **The team leader roles and whether they fall within coverage**

[21] It is the RMTU’s claim that the team leader roles fall within coverage of the MECA:

- i. The roles are already senior roles and leadership roles.
- ii. The roles are not and have not been treated by the parties in the past to the MECA as “management positions” falling outside coverage.

- iii. The team leader roles have been accepted as part of the coverage and exist in numerous parts of KiwiRail's business.
- iv. The structural charts do not support the positions being managerial positions.
- v. The RMTU claims are clearly, as a matter of record, not managerial positions. The proposal does not fit in line with the documents providing HR delegations.

[22] This issue has arisen out of a restructuring proposal. The KiwiRail thinking behind the restructure was to create a new layer of management. The development of the proposal and through most of the consultation process KiwiRail did not turn its mind to the coverage issue. However the union did alert KiwiRail to the issue of coverage.

[23] KiwiRail says it was not aware that the proposal would create a coverage issue. KiwiRail contends that it did not intend to create a coverage issue and coverage played no part in its thinking around the proposed restructuring. It only became an issue when it was raised by the RMTU. KiwiRail accepts that it did not respond as quickly as it could have to the issue, which in part was because the manager responsible for the restructuring (Mr Brooks) was away at the time. When the issue was escalated by the RMTU, it was escalated within KiwiRail and legal advice was sought. Prior to KiwiRail responding to RMTU's concerns, proceedings were issued by the RMTU.

[24] The RMTU is seeking permanent determinations:

- a. That the team leader roles in question are within MECA coverage;
- b. That the respondent cannot address the issue of MECA coverage on an individual or case by case basis as it has said it can do presently;
- c. A finding that KiwiRail's response to the RMTU was not consistent with good faith;

[25] Both parties are seeking costs to be reserved.

### Coverage of the team leader roles

- [26] The team leader roles are covered by the MECA I hold. This is because:
- (i) That under the MECA the parties have not excluded team leaders from coverage.
  - (ii) That team leaders have been expressly included in the MECA across KiwiRail's business.
  - (iii) That KiwiRail's witnesses accepted that current employees in team leader roles are "on the CEA".
  - (iv) That the uncontested evidence of the RMTU witnesses involving employees in roles who are to be covered will have much to lose if they are excluded from coverage.
  - (v) That there has never been any agreement to exclude the team leader positions.
  - (vi) That although KiwiRail has purported to call the positions "*managerial positions*" there are numerous factors that do not support that contention:
    - (a) That there is no definition of managerial position in the document. It does not mean that team leaders are included in such a category and thus excluded from coverage.
    - (b) That the background to the wording used relates to more senior positions especially taking in to account delegations.
    - (c) That clause 7.1 where the absence of the words "above MR 23" does not mean that junior roles such as the proposed new team leader can be excluded. This is because the words "above MR 23" were not viewed as central and

necessary in terms of the meaning of the clause when several collective agreements in different parts of the business were brought together in one MECA in 2010. The words of clause 7.1 had not been applied by the parties to exclude team leader roles from coverage in the past.

There are team leader roles that remained in coverage when changes were made previously.

- (d) That the proposed positions are junior to senior managers and provides additional support to senior managers in front line services. The proposed positions do not fit the background reasoning to exclude managerial positions from coverage.
- (vii) That it is not likely that the delegations will reach below 4 levels of managers above the team leaders.
- (viii) That the new team leader role is set at level 5 in line with the customer services supervisor role, which also falls within coverage. The functionality of the roles with any “management” duties is consistent and under existing coverage.
- (ix) That remuneration is not a defining factor for the roles to exclude the team leader from coverage. The comparisons are different for a start and refer to “total remuneration” while excluding penal payments and overtime payments which are paid to employees under the MECA.
- (x) That the power to delegate already exists and can not be used to erode coverage.
- (xi) That assistance has previously been provided in *Denbee v United Group Rail (NZ) Ltd (formerly Alstom Transport New Zealand Ltd)* ERA Wellington WA14/06, 7 February 2006.

- (xii) That there are mechanisms to cope with acting up arrangements.
- (xiii) That the statutory arrangements assist having regard to s3(a) ii of the Act that makes provision to promoting collective bargaining.

[27] Thus I hold that KiwiRail has an obligation to discuss the matter with the union and to negotiate coverage since the positions are already covered under the MECA.

### **The breach of good faith issue**

[28] The breach of good faith issue is a question of KiwiRail accepting it could have responded more quickly (as Mr Brooks conceded in evidence). There are a number of alleged breaches:

- a. Failure to respond in a timely way;
- b. Failure to adhere to an express assurance given by Mr Brooks;
- c. The actions of KiwiRail is simply proceeding with its decision making without addressing the concerns raised;
- d. The inadequate and improper response when it eventually arrived.

[29] I agree with the RMTU that Kiwi Rail has breached each of the above. First it did not respond in a timely way to Mr Butson. Indeed an assurance given to him was not met until he approached KiwiRail again, and then on 20 July the decision had been made. Mr Brooks' absence is not a defence given he set about to review and make decisions on the final decision document before he went away. Also there were other managers available, and indeed Ms Clark did finally respond on behalf of KiwiRail.

[30] Second Mr Brook's assurance to respond was not fulfilled. This was a breach of an undertaking and as such was a breach of good faith.

[31] Third KiwiRail's action to proceed with its decision making and not to engage further with the RMTU once the coverage issue had been raised without addressing the union's concerns was a breach of good faith too.

[32] Finally KiwiRail's response was wholly inadequate. It had an obligation to deal with the union over the issue of coverage as the union had raised it and it had an impact on its members covered by the MECA, because of the creation of new team leader roles that KiwiRail wanted to exclude from coverage. As such KiwiRail's response to leave it to the people selected in the team leader positions and purportedly covered by IEAs was a breach of good faith. Furthermore as the issue was of KiwiRail's making it was not adequate for it to leave it to the union to invoke proceedings to resolve the problem, when it could have done so itself and after at least discussing it more fully with the union. Instead KiwiRail's action can be interpreted as a take it or leave it proposal, or for the union to take legal proceedings. That approach is not a substitute for meaningful communication, I hold. I am supported in that:

- i. The RMTU is a party to the MECA.
- ii. Coverage is an important component of the MECA. This was acknowledged by KiwiRail. It had been told how important the RMTU considered it.
- iii. S 4 (4) (b) of the Act includes any matter arising under or in relation to a collective agreement while it is in force.
- iv. The issue related to the collective agreement and as such required KiwiRail to act actively, constructively, responsively and to communicate to maintain a productive relationship.

[33] Thus, I hold that KiwiRail has breached the obligation of good faith. However it is not a sustained breach, but was deliberate given Mr Brooks' omission to respond and the inadequate response when it was made.

[34] I hold that it is not appropriate to impose financial penalties against KiwiRail because I want to encourage the parties to help resolve the employment relationship problem. Indeed the parties have their agreed arrangements in place with undertakings and the status quo to apply waiting on the Authority's determination. Also I am required to assist to support successful employment relationships and the good faith obligations that underpin them. In this regard there remains the need for

the parties to further communicate and respond with each other on the issues. Thus penalties will not assist in this instance, I hold.

**Outcome**

[35] I hold that the 6 team leader positions are covered by the MECA.

[36] I hold that KiwiRail has not acted in good faith.

[37] This is not a matter for a penalty.

[38] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority