IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 98
5449381

	BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION (INC) WELLINGTON BRANCH First Applicant
		GLORIA DAUE Second Applicant
	AND	WELLINGTON CITY TRANSPORT LIMITED trading as "GO WELLINGTON" Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Tanya Kennedy, Counsel for Applicants David Gould, Advocate for Respondent
Investigation Meeting:	18 June 2014
Submissions Received:	27 June and 18 July 2014 for the Applicants 11 July 2014, amended 27 August 2014, for the Respondent
Determination:	8 October 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] When Gloria Daue retired from fulltime work with Wellington City Transport Limited trading as "Go Wellington" (WCTL) in November 2013 she received a retiring gratuity of 26 weeks' pay. That was the maximum level payable for her 34 years of service.

[2] The payment she received was calculated on the basis of a 40 hour working week at her ordinary hourly rate of pay. Ms Daue's union, the New Zealand Tramways and Public Passenger Transport Employees Union Inc. Wellington Branch (the Tramways Union), says this is wrong. It raises a dispute over how WCTL interprets a week's pay. It also seeks monetary remedies for Ms Daue comprising the difference between the payment she received and the payment it says she should have received, plus interest. Ms Daue was joined as a party, by agreement, in the course of the investigation meeting.

[3] WCTL says it routinely calculates payments made to employees who are paid the retiring gratuity on the same basis it used for Ms Daue's payment. Its rationale is that a full-time employee is guaranteed a minimum of 40 hours per week and those are the hours that are certain. It says its method of calculation has never previously been challenged. The employer further says it is not obliged to make any payment to an employee with qualifying service because retiring gratuities are discretionary.

[4] In accordance with its obligation under s. 129 (2) of the Employment Relations Act 2000 (the Act), the Tramways Union has confirmed that the other union party to the collective agreement, the Manufacturing and Construction Workers Union (Wellington Branch), has been notified of the dispute.

The retiring gratuity

[5] The gratuity applies only to those WCTL employees who were employed by the Wellington City Council before 1 July 1991. This is made clear in the relevant collective agreement, the Wellington City Transport Limited Go Wellington Collective Employment Agreement 2013–2016 (the collective agreement).

[6] It appears the retiring gratuity provision has been unchanged since its introduction in 1991.[1] Clause 71 of the collective agreement provides as follows:

> **Retiring gratuities for employees employed prior to 1 July 1991**
>
> On retirement of any employee who had continuous service with Wellington City Council up to 30 June 1991, the Company may pay to that employee by way of a gratuity, an amount calculated in accordance with the following scale:

[1] WCTL's submissions referred to one amendment but provided no evidence of it. There was no indication that the purported amendment had any relevance to this dispute.

> Three weeks' pay increasing by one week for each additional year's service after ten years until a maximum of 26 weeks' pay is reached after 33 years' service.
>
> In lieu of payment by way of gratuity, an employee on retirement shall have the option of taking special leave on full pay in accordance with the above scale and on the same conditions.

The parties' views of the dispute

The Tramways Union says the retirement gratuity should reflect the pay employees normally received during their employment. It should be based on the greater of 40 hours a week at the employee's applicable hourly rate or the employee's average weekly earnings over the previous 12 months.

[7] It was Ms Daue's evidence, supported by Mr O'Sullivan, that she did not have the choice to work a standard 40 hour week during her employment. Her average hours of work were 47 over the last 12 months of her employment. Mr O'Sullivan said employees could express a preference for weekday shifts, and those shifts would be allocated on the basis of seniority. Weekend shifts were treated differently and were on a rotating basis. While Ms Daue could express a preference, she could not influence where her shifts fell within the roster. A shift was between eight and nine hours long and its placement in the roster influenced the rate of pay that would apply.

[8] Ms Daue's average weekly pay over the 12 months before she retired was $1,022.39 gross. WCTL calculated her gratuity on the basis of a weekly pay of $710.40, being 40 hours at her ordinary hourly rate of $17.76. The Tramways Union calculates that, if Ms Daue's retirement gratuity had been based on her average weekly pay, she would have received an additional $8,111.77.

[9] The methodology used to calculate the retirement gratuity had not been a matter of dispute between the parties until Ms Daue's retirement. The Tramways Union says this does not mean it previously accepted WCTL's basis for calculating the payment. It was unaware of it because earlier recipients of the gratuity appear not to have queried how their employer calculated it. The union was alerted to the employer's practice only when Ms Daue raised the issue.

[10] Jason Brown's evidence was that, in his four years as Payroll Manager for WCTL, the company had consistently applied the same approach to calculating retirement gratuities for fulltime employees as it did with Ms Daue. He thought that

had been the approach taken by the employer since 1991 although he had no evidence to support that opinion. Eight employees including Ms Daue had been paid the retiring gratuity while he had been Payroll Manager. Approximately 40 current employees would be eligible to be considered for the retiring gratuity when their employment terminated.

[11] In Mr Brown's view the employer was justified in adopting a 40 hour week basis for payment because of the discretionary nature of the gratuity. He noted it was not a statutory entitlement as, for example, were payments for annual holidays and sick leave. There was therefore no requirement for the payment to be calculated in accordance with the Holidays Act 2003. He also referred to the ordinary hours of work for fulltime employees being stated as 40 per week in the collective agreement[2].

[12] In his written evidence Mr Brown said that if the retiring employee was part-time the number of weeks' pay on the retiring gratuity scale was multiplied by the average hours worked for the preceding four weeks at the employee's applicable pay rate. When questioned about this, Mr Brown said the company used average earnings over the last 4 weeks of a retiring part-time employee's employment or, in some situations, the last 52 weeks of employment. He did not regard that as being anomalous with the way the retiring gratuity was calculated for fulltime employees.

Submissions of the parties

[13] Both parties made helpful and comprehensive submissions. I shall refer to some, but not all of these, below. Counsel for the applicants, Tanya Kennedy, cited well known cases[3] regarding the appropriate approach to the interpretation of provisions of a collective agreement. She set out the applicable principles of interpretation as summarised by Judge Ford in *Progressive Meats Ltd*[4]:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.

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[2] Clause 9.2 (a).

[3] Including *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317; *Vector Gas Limited v Bay of Plenty Energy Ltd* [2010] NZSC 5; *New Zealand Meat Workers Union of Aotearoa Inc v Affco New Zealand Ltd* [2011] NZEmpC 32; *NZ Air Line Pilots Association Inc v Air New Zealand Ltd* [2012] NZEmpC 88; and *Progressive Meats Limited v Pohio & Ors* [2012] NZEmpC 103.

[4] *Progressive Meats Limited v Pohio & Ors*, above n3, at [29].

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (*See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945)

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC 191,201:

> ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

[14] Applying the principles to the current situation, Ms Kennedy submitted the correct interpretation of a week's pay for the purposes of the retiring gratuity must be the pay normally received by the employee during employment. She noted that fulltime bus drivers regularly work more than an 8 hour day, 40 hour week, and therefore are regularly paid more than 40 hours a week at ordinary pay. Their pay

varies according to both the number of hours they work, and when those hours are performed, as some hours attract overtime or penal rates.

[15] In Ms Kennedy's submission, a calculation solely based on standard hours (40 hours for a fulltime worker, 20 hours for part-time) at the ordinary hourly rate of pay will result in a lesser sum than the employee would normally receive for a week's work during their employment. It will also result in a lesser payment than the employee would have received while on sick leave, annual leave or bereavement leave. In her view this would be inconsistent with the collective agreement and would lead to a result that did not make sense.

[16] Ms Kennedy observed that the respondent's approach to calculating the retiring gratuity for a part-time employee was inconsistent with its approach to calculating the grant for fulltime workers. WCTL calculated the payment for a part-timer on the greater of a 20 hour week or an averaging of hours over the past 4, or 52, weeks of employment.

[17] She also submitted the relevant issue was not the discretionary nature of the retiring gratuity, as WCTL had noted in support of its stance. The discretion applied to the initial decision whether or not to pay the gratuity. Once the employer had decided in favour of paying it, it was bound to apply the scale for payment specified in clause 71 of the collective agreement. In her view the real issue was over the interpretation of a week's pay which was not defined in the collective agreement.

[18] Ms Kennedy noted in submissions that the Tramways Union reserves the right for other members to challenge the calculation of their retirement gratuities, in accordance with s. 131 of the Act.

[19] David Gould, representing WCTL, disagreed with Ms Kennedy's analysis. He also cited the well-known principles of interpretation, submitting their application supported the employer's approach to the calculation of the retiring gratuity. WCTL denied it was obliged to calculate a week's pay as "average weekly earnings". That was a concept governed by the Holidays Act which, in Mr Gould's submission, had no application to the discretionary retiring gratuity. He noted clause 71 did not use the language of the Holidays Act, and submitted that the union's interpretation was not supported by the plain and ordinary meaning of the words used in the clause.

[20] A fulltime employee was guaranteed a minimum of 40 hours a week and this, Mr Gould submitted, was what should be used, and had in the past been used, as the basis of WCTL's calculation of the retiring gratuity. Mr Gould referred to WCTL's redundancy payments clause at clause 60(c) of the collective agreement:

> Employees employed by Wellington City Transport subsequent to 5 March 1992 will, if declared redundant, be entitled to four weeks' notice of redundancy payment made in lieu, four weeks' pay for the first year of current continuous service and two weeks' for every full year employed and pro-rata for incomplete years.

[21] In submissions he said the parties did not utilise formulae from the Holidays Act for calculating such payments. WCTL provided no evidence relating to the manner of calculation of redundancy payments or whether any redundancies had taken place that would warrant such payments.

[22] Additionally Mr Gould also asserted WCTL's discretion extended beyond the decision whether or not to grant the retiring gratuity. It also encompassed how the payment should be calculated. In his submission, WCTL had the discretion to pay the gratuity as it saw fit and that discretion was fettered only in respect of the number of weeks factored into the calculation. WCTL exercised its discretion by using 40 as the fixed number of hours for calculation of an employee's retiring gratuity. That was multiplied by the employee's applicable hourly rate. The sum of that calculation would be multiplied by the relevant number of weeks as determined by the employee's service, subject to the cap set out in clause 71.

[23] In Mr Gould's view the Authority would be exceeding its jurisdiction if it were to adopt the interpretation sought by the Tramways Union. He asserted such an interpretation "rewrites the bargain between the parties" and, if the Authority were to reach the conclusion sought by the union, that would fix a new term in the collective agreement. The Authority is expressly excluded from doing that by s. 161(2)(b) of the Act.

[24] The WCTL submissions noted that the language of the collective agreement differed among various leave and payment provisions, with those governed by the Holidays Act referring to the relevant statutory formula. The long service leave provisions were contained in clause 14 of the collective agreement for operations staff (including bus drivers) and clause 31 for workshop staff. Long service leave was a contractual, not a statutory, entitlement. Where, as with operations staff, the payment

was to be based on average weekly earnings that was specifically referred to in the clause.

[25] Mr Gould noted the contrast between the parties' express agreement to use the Holidays Act definition of "average weekly earnings" in clause 14 and their silence in clause 71 concerning the calculation of the retiring gratuity. He submitted that, if the parties had agreed to use average weekly earnings for the calculation of the gratuity, they would have expressly stated so in clause 71, as they did in the long service leave provisions of clause 14.

Discussion

[26] I agree with Mr Gould that the employer has the discretion whether or not to make a retiring gratuity available to an employee with the requisite service. That is evident from the wording of clause 71 and I do not understand it to be disputed by the Tramways Union or Ms Daue. I disagree with him that WCTL has the discretion, once it has decided in favour of paying the gratuity, to determine the basis of the calculation for that payment, or to pay it as it sees fit. Nothing in the words of clause 71 suggest that such a further discretion exists.

[27] The plain meaning of the words of the clause in my view is that, if WCTL has exercised its discretion to pay the gratuity to a retiring employee, it must apply the formula specified in clause 71. The question, which is a matter of interpretation not discretion, is how a "week's pay" is to be calculated for that purpose.

[28] I see some merit in Mr Gould's submission that if the parties had intended "a week's pay" to have been based on an employee's average weekly earnings they would have expressly stated that in the clause as they did with long service leave in clause 14, another contractual, non-statutory provision. However, while that omission is a factor for consideration, I do not regard it as determinative of the matter. It could equally be argued that the clause does not state the calculation of an employee's pay is to be based on the employee's ordinary, or minimum, weekly hours of work.

[29] Past practice is a factor but, again, not one I consider to be determinative for two reasons. Firstly, because WCTL's evidence of past payment practice extended only as far as Mr Brown's tenure as Payroll Manager, which was 4 of the 23 year history of the retiring gratuity payments. His opinion regarding what had happened earlier was unsupported by data. Secondly, I accept the Tramways Union's evidence

that it was unaware of the basis used by WCTL to calculate the retiring gratuity until Ms Daue raised a question about the issue.

[30] No evidence was provided of the purpose of the retiring gratuity during the investigation meeting and Ms Kennedy invited me to disregard Mr Gould's submissions on that matter. I have considered them but am not persuaded that the purpose, as noted by Mr Gould to be recognising an employee's service over time, supports WCTL's stance regarding the manner of payment of the gratuity. His argument included that it was unnecessary to pay a retiring employee on the same basis as an employee who was taking leave with the intention of returning to the workplace and that it was contrary to the purpose of the retiring gratuity to do so.

[31] Mr Gould also submitted the average weekly earnings formula was subject to manipulation and an employee could take on extra shifts or work overtime to increase their gross earnings over a 12 month period. The inference to be drawn from that submission is that employees in their last 12 months of employment could increase their retiring gratuities by such means.

[32] I do not find this submission to be compelling. The first part of his argument implies that the quantum of weekly pay is a matter of lesser importance for an employee who is permanently leaving the workplace, and thereby foregoing regular wages, than for one who is taking leave with the intention of returning to work. I cannot see the logic in that proposition.

[33] The fact that an employee is transitioning from weekly wages to no wages suggests to me the payment would be at least as important as an annual holidays payment for an employee who intended to resume work following the holiday. I doubt whether the recipients of the retiring gratuity would share their employer's view of the diminished importance of the payment. Although the payment is discretionary, it is nonetheless an agreed provision in the collective agreement. I also note that, where an employee elects to take special leave in lieu of the retiring gratuity payment, clause 71 refers to their doing so on "full pay". If it had simply referred to "pay" that may have assisted Mr Gould's argument.

[34] The second part of Mr Gould's submission, regarding manipulation by an employee of his or her average weekly earnings over 12 months, rests on no more

than a possibility and an assumption, for neither of which there is any supporting evidence.

[35] How would the "reasonable person" interpret clause 71 and the meaning attributed to the calculation of a week's pay by WCTL? That person would of course have "all the background knowledge" referred to above by Judge Ford in *Progressive Meats*. The clause has been in existence for more than two decades, with no change, or at least with no change relevant to the current dispute. No evidence was presented regarding the situation of the parties at the time. However, I consider the background knowledge of the reasonable person would include an awareness of the hours of work provision of the collective agreement and an understanding of how the provision operated in practice.

[36] The hours of work clause provides the ordinary hours of work to be 40 per week, expressed to be "not less than 8 hours per shift to be worked in 5 days of the week from 0520 hours to 0100 hours Sunday to Saturday, both days inclusive"[5]. The clause provides an employee with a minimum number of hours but leaves open the prospect of the employee's actual regular hours of work being greater than 40 per week.

[37] Counsel for the applicants compiled a table of the actual number of hours worked over the last 12 months of their employment before retirement by 8 WCTL employees (1 of whom was a part- timer)[6]. The source of the information was payroll data provided by the respondent. Even without analysing in depth the average number of hours worked on a weekly basis by the fulltime employees, it was immediately obvious from the table that it was uncommon for a fulltime employee to work a 40 hour week.

[38] A closer analysis of the hours worked revealed that average hours for each of the 7 fulltime employees ranged from 41 to 51 per week over the last 12 months of their employment. Ms Daue averaged 47 hours of work per week in her last 12 months of employment.

[39] I find a reasonable person with knowledge of the collective agreement and how it operates in practice would expect an employee's pay for purposes of the

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[5] Above, n2.
[6] Tab 6 of the parties' Joint Bundle of Documents.

formula in clause 71 to relate to the wages the employee actually received during employment. They would not interpret the words of the clause to mean "pay" would be based on a minimum number of hours of work that the employee normally exceeded and rarely, if ever worked. Nor would they interpret "pay" to be based on a notional minimum weekly pay that the employee rarely, if ever, received.

[40] Turning specifically to Ms Daue's situation, a reasonable person with the relevant background knowledge would not expect her retiring gratuity of 26 weeks' pay to be based on a 40 hour week, given that she had exceeded 40 hours in each of the 52 weeks leading up to her retirement. They would not interpret clause 71 to mean Ms Daue's payment should be calculated at $710.40 per week when her normal pay was consistently higher than that and her average weekly earnings over the last 12 months of her employment exceeded that sum by more than $300.

[41] The absence of any definition of "pay" in clause 71 does not give WCTL the licence to interpret it, for the purpose of calculating the retiring gratuity, in a way that results in employees being paid for fewer hours and lesser remuneration than during their employment. Mr Gould orally acknowledged that the 40 hour a week worker no longer really existed. I take from that he recognises fulltime hours of work are likely to exceed 40. Where the length of shifts is stated to be between 8 and 9 hours, and fulltime employees work 5 days of the week, that is a sensible concession[7].

[42] The use of average weekly earnings over the last 52 weeks of employment provides a rational and pragmatic basis for calculating a week's pay for those retiring employees who regularly work longer than the minimum number of hours specified in the collective agreement and regularly receive wages higher than those calculated in accordance with WCTL's current practice. I find the use of that method would provide the result a reasonable person would expect from the retiring gratuity clause.

Determination

[43] For the reasons given above I find the correct interpretation of "pay" as used in the formula of clause 71 of the collective agreement is the greater of:

a. 40 hours per week for a fulltime employee (20 hours for a part-time employee) at the applicable rate of pay; and

[7] Clause 9.2 of the collective agreement.

b. the employee's average weekly earnings for the 12 months before retirement.

[44] Ms Daue's retiring gratuity was incorrectly calculated. Wellington City Transport Limited is ordered to pay Ms Daue the sum of $8,111.77 gross, being the difference between the correctly calculated amount of $26,582.17 and the amount it paid her in November 2013, being $18,470.40. Interest is to be paid at the rate of 5% from November 2013 to the date of payment.

Costs

[45] Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority