**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 95
5443854

BETWEEN	ADAM MARTIN Applicant
AND	WELLINGTON CITY TRANSPORT LIMITED t/a "GO WELLINGTON" Respondent

Member of Authority:	P R Stapp
Representatives:	Tanya Kennedy, Counsel for Applicant Gillian Service, Counsel for Respondent
Investigation Meeting:	20 August 2014 at Wellington
Submissions Received:	20 August 2014
Determination:	6 October 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem about a bus driver's seat, headrest and complaints about a hurt and strained neck. In essence the matter is to do with the allegation that it took Wellington City Transport Limited too long to address the complaints made by Mr Martin and that it omitted to take all reasonable and practicable steps to ensure Mr Martin's health and safety in employment.

[2] Adam Martin also claims that he was stood down from regular duties on 24 July 2013 after raising health and safety issues with his employer Wellington City Transport Limited ("Go Wellington" and/or "NZ Bus" and/or WCTL) without any consultation. Mr Martin claims Go Wellington's failure to take reasonable and

practical steps to make him safe in his employment and a breach of good faith was unjustified, and disadvantaged him in his employment resulting in less earnings.

[3] Mr Martin has claimed $6,718.26 arrears of wages being the differential between his average earnings prior to being stood down and what he received after being stood down on 24 July 2013. He says he was given an assurance that there would be no change to his pay. He is claiming $10,000 compensation for hurt and humiliation. Both parties are seeking costs. For completeness there are no penalties claimed.

[4] Wellington City Transport Limited (Go Wellington and/or NZ Bus and/or WCTL) denies all Mr Martin's claims.

Issues

[5] What is the cause of action associated with the personal grievance claim?

[6] Did Go Wellington take all reasonable and practicable steps to protect Mr Martin's health and safety in employment?

[7] Has Go Wellington breached its obligation of good faith?

The facts

[8] NZ Bus Limited is the parent company of Wellington City Transport Limited and employs around 1,650 bus drivers in 11 different depot locations. All drivers except in the Upper Hutt and Lower Hutt depots regularly operate what are called "ADL" type buses (diesel buses) as part of their regular duties. More than 1,300 drivers drive the ADL buses. Those buses all have the same configuration in terms of seat and headrest type. It has been operating in service for nearly three years in New Zealand.

[9] The design of the Alexander Dennis Limited (ADL) buses is fit for purpose and first introduced into the New Zealand bus fleet in Auckland in June 2011. The ADL bus was introduced for the first time in Wellington in December 2012. By this time the ADL buses had been in active service for NZ Bus in the same configuration for about 18 months. There are now 343 buses of the type in active service across New Zealand in the fleet owned by NZ Bus Limited.

[10] Mr Martin has been employed by WCTL since 7 June 2011 as a bus operator (driver). He is a member of the Wellington branch of the New Zealand Tramways Union and covered by a collective employment agreement which came into effect on 15 January 2013 and expires on 16 January 2016 (the collective employment agreement – document 1). That agreement makes provision for an operator in the following terms:

> *"Operator" is an employee employed to drive a bus and collect fares. The duties of an operator can include any work to be performed other than driving duties as part of their normal rostered shift, but shall be limited to sweeping out, refuelling, washing, associated clerical duties and earth-testing trolley buses. Operators required to undertake refuelling, washing or earth testing duties will be provided with appropriate protective clothing".*

[11] Mr Martin had been driving for Go Wellington for approximately one and half years before the ADL was introduced in Wellington. The first time he drove an ADL bus was during training at the end of 2012. He says he had issues with the bus seat and in particular the seat's headrest and the beeps and whistles with the controls from the start.

[12] In, on or about 20 December 2012 (document 3) Mr Martin raised a concern about a sore neck from the ADL headrest. He says that there was no action taken by Go Wellington in regard to his complaint. He exaggerated his evidence on this point. He requested not to drive the ADL buses due to the discomfort he says he was experiencing. Also he says he requested to have the bus changed mid-shift when he was designated to drive an ADL or whenever he was hot-seating (relief driving). He says he eventually avoided wherever possible using ADL buses, and says he would endeavour to take his regular bus to use. He says this was condoned.

[13] It seems that there were arrangements put in place for Mr Martin not to be issued with an ADL bus. This was because it was known that he would refuse to drive ALDs on the grounds of health and safety. This was an action taken by the bus despatcher and apparently the arrangement worked well for a period of time. From 24 July 2013 Mr Martin says he was taken off the road and placed on alternative duties and he says he was promised he would not lose any wages. He claims the decision to put him on alternative duties was out of the blue with no warning. He claims this was done until a solution to the problem of the ADL headrest was found. WCTL's only

witness Mr Matthew Rule, the health and safety manager says that he knew about it, but was not directly involved in the decision, but that it related to Mr Martin's well being given his complaints.

[14] Mr Martin accepts that WCTL arranged for a workplace assessment and this occurred first on 5 August 2013 from an outside provider. That action was not opposed by the Union. Indeed Mr O'Sullivan, the Union branch secretary, at least attended one assessment. The assessment involved a site visit from a physiotherapist/vocational therapist on 19 August 2013, who also checked out the bus. The matter was followed up on 22 August 2013 and a trial was agreed for Mr Martin to try and use a lumbar support on a short drive, but he did not find it helpful. More feedback was provided by the vocational therapist on 24 October 2013. Another review was conducted by the same person later in October 2013 and a trial of a "back friend". A "back friend" is a support used on the seat. The trial was introduced at the initiative of WCTL. The vocational therapist upon request from WCTL set about to make arrangements for the "back friend" trial.

[15] In October 2013 WCTL made an enquiry of VTNZ and received information that the headrest had to remain fitted if the headrests had been fitted for compliance that had been given.

[16] In November 2013 Mr Martin's hours were changed again, he says. He was required to help with peak time refuelling and washing buses.

[17] There were two "back friend" trials but they did not work out for Mr Martin. This involved Mr Martin completing forms every day until he decided he did not wish to continue trialling the "back friend", as it was not working. Another trial occurred but did not work out.

[18] On 6 December 2013 the Tramways Union raised a personal grievance on behalf of Mr Martin (document 19). The personal grievance raised (amongst other things) is verbatim as follows:

> "...
>
> *This letter therefore serves to formally raise a breach of good faith and a personal grievance on behalf of Adam, of unjustified actions to his disadvantage including failing to undertake reasonably practicable steps to*

protect his health & safety in relation to the driver's seat of the ADL buses, failing to act in good faith in relation to the driver's seat of the ADL buses, failing to act in good faith in relation to the introduction of the buses and his concerns, and the wage loss he has incurred while the company continues to fail to address the issue.

…"

[19] WCTL did not reply to the letter and nor was it followed up the union, except that the Union put WCTL on notice of further action if nothing was done in a fixed timeframe. The matter was then lodged in the Authority by the Union, and a statement in reply from WCTL followed. The statement of problem referred to the claim as follows:

> "1.1 *The matter of lost income after the applicant was stood down from his regular duty after raising health and safety concerns.*
>
> *1.2 The matter of compensation for hurt and humiliation suffered by the Applicant.*
>
> *1.3 Breach of good faith and obligation to provide a safe work place."*

[20] In 2.4 of the statement of problem the applicant's outline of the facts included:

> *"On 6 December 2013 (Document 4) a personal grievance was raised and the Applicant sought wage arrears, compensation for hurt and humiliation, reinstatement to his driver role on a bus without a headrest or if a head rest one that could be properly adjusted."*

[21] In December there was further contact with VTNZ that confirmed the head rest could be removed. On 24 January 2014 the headrests were removed.

[22] The parties attended mediation, and it now falls on the Authority to determine the matter.

Determination

[23] The personal grievance as it was raised occurred during the time the issue about the head rest was live and had not been resolved. Indeed Mr Martin was still working on alternate duties in his role according to the definition of operator under

the collective employment agreement. The headrest was still an issue for him at the very least. After the personal grievance had been raised and before the statement of problem was lodged in the Authority (11 March 2014) a decision was made by WCTL to remove the headrest from all buses once VTNZ's advice had been corrected. The headrests were removed on 24 January 2014.

[24] The matters associated with Mr Martin's claims form the background in the matter and are not separate grievances. I am supported in this conclusion by Mr Martin's request for a holistic sum of compensation and he has not requested separate compensation sums.

[25] It was open to WCTL to consider alternative duties for Mr Martin and the assigned duties came within the role of the operator pursuant to the collective employment agreement. Mr Rule in his evidence and Ms Service in her submissions tried to provide an explanation for the omission of any consultation in regard to the decision. I accept Mr Martin's evidence that he was not consulted about being put on alternative duties, although he cannot have it both ways. Although WCTL has not adequately explained what it did I accept that it was acting to look after his health and safety in terms of putting him on alternate duties as part of his role while the seat was causing him neck pain and since he was constantly complaining.

[26] There has been a lengthy amount of time since the matter was first raised by Mr Martin and the Union on 20 December 2012. I accept the situation was difficult for WCTL. This has been explained by the matter involving essentially only Mr Martin in regard to neck complaints. Also WCTL has explained that it had to consider the size of the fleet and numbers of other drivers employed and their health and safety. In addition, there was an assessment made by WCTL of the hazard risk of the ADL buses in its national fleet based on the technical information and the scale of any hazards when only a few drivers were complaining and the headrest complaint related to Mr Martin only. In such a situation WCTL would not have been acting reasonably if it did not consider all the implications for solutions where essentially only one driver was involved by the end of the time. It was not the case that nothing was happening. Part of the time involved Mr Martin working under an arrangement that was agreeable to him (and the Union), albeit he was frustrated and inconvenienced and he had become impatient. There was no earlier complaint from the Union (Mr Martin's representative) about the time involved. I note Mr Martin did

not raise a separate personal grievance about the change to alternative duties at the time (24 July 2013) this occurred. I accept it was a criticism of the company at the time, but I can only presume Mr Martin and the Union decided to try to get a resolution to the seat headrest problem as a health and safety matter. WCTL engaged an outside provider to assess the situation involving Mr Martin. There is conflicting evidence about whether or not he fully co-operated in the options being put to him by the consultant. The fact is that WCTL took reasonable and practicable steps to address his complaint over the time. This involved the assessments, and options to provide relief for the problem Mr Martin was having; including having him undertake alternate duties pursuant to the terms of his employment agreement. There is no suggestion this was in breach of the terms, except about how it was implemented by WCTL. Mr Martin's evidence of being required to do dirty and/or unpleasant work does not establish that he was required to do work contrary to his employment agreement. I accept Mr Rule's explanation of the categorising of the complaint and assessment of the hazard as it applied to Mr Martin individually and the NZ Bus position overall, when Mr Rule consulted others in regard to the matter. Mr Martin's issue in context involved the buses of 300 other drivers in circumstances where only 4 drivers had formally raised other difficulties about the ADL buses. It was entirely permissible for such a consideration to be made by Mr Rule. Finally Mr Martin has raised complaints about what was said to him by other people at work. These are background and do not go to the core of the employment relationship problem with his employer given he continued to work and that he is now back driving.

[27] Further, it has been claimed that WCTL's failures to: remove the headrest; contact VTNZ; and check the VTNZ web site in regard to the regulations on removing the headrest, meant that not all reasonable and practicable steps were taken at the time. As it transpired WCTL discovered that it was permissible to remove the headrest from the seat. It has now removed them from all ADL buses in the fleet, essentially to resolve one person's employment relationship problem. WCTL got wrong advice at first, which was corrected. Although Mr Rule would have preferred to approach VTNZ he says he was acting on instructions from his superiors that WCTL's action was sufficient at the time, and this was based on the information from VTNZ that the headrest had to remain fitted.

[28] The failure of WCTL to pursue that option earlier in hindsight was not best practice, and I hold that this was an inadequate response because of the confusion

about the removal of the head rest. However, VTNZ's advice was corrected. WCTL's omission to contact VTNZ earlier was not therefore fatal, I hold, and as such fails to establish a personal grievance as raised. The information provided from VTNZ supports WCTL's explanation and that it acted when the correct information was provided later. Even in the event of a breach of good faith WCTL has explained its position in the matter and its omission was not wilful and/or deliberate.

[29] Mr Martin's claim that there was no consultation on the introduction of the bus type is misconstrued (see paragraph [17] above). I say this because the personal grievance claim relates to Mr Martin personally and he is covered by the collective employment agreement to which the Union is a party. If the union had any issue about lack of consultation on the decision to introduce the bus type then this would have had to be a matter for enforcement of the collective employment agreement in regard to the consultation provisions. There is no suggestion of a dispute of this nature and the Union is not a party to this aspect of Mr Martin's claim. The case has not been established that WCLT had to consult Mr Martin on such a decision personally, or even that it failed to consult the union, as Mr Martin was represented by his Union under the coverage and enforcement of the collective employment agreement. The Union apparently did not complain.

[30] The claim for unjustified action disadvantage is dismissed. This means that the claim for lost wages and compensation must be dismissed. Even if Mr Martin was successful this would not have meant that he would be entitled to lost wages. He has not established any arrangement reached to maintain his "average earnings" as the basis of any continuing payment for work. His employment agreement permits alternate duties (that were provided for his own health and safety) and he is paid under such an arrangement under the terms of the collective employment agreement. He was reliant on overtime as a discretionary part of his income on the rosters and availability of extra work if it was available. He could not have earnt such money while he was on alternative duties for his own health and safety. I have to add for completeness that the claim was referred to in the statement of problem as an "arrears" matter (presumably under s 131 of the Act) as distinguished from the reimbursement of lost wages. This is not an "arrears of wages" matter at all, because Mr Martin accepted that he has been paid correctly for the work he has done and had no dispute in regard to the pay records produced by WCTL. No discrepancies in his

pay have been identified and certainly not quantified either by Mr Martin and/or Mr O'Sullivan and Ms Kennedy. That part of the claim is dismissed.

[31] I hold that Mr Martin was entitled to pursue his complaints as he did and that he had a genuine problem, but his complaints about the ADL buses became negative, probably out of annoyance and frustration. There is the apparent conflict between himself and the vocational therapist on the timing of the trials that she suggested and that she set about to develop for his benefit. He rejected the trials being of any help as a personal reaction. In reaching this conclusion I have had regard to his written messages reporting how he felt and the range of issues he raised.

[32] Finally I would say that this employment relationship problem could have been resolved with better communication and responses between the parties, reaching an agreed understanding on a timetable of action and developing a clearly outlined course of action.

Conclusion

[33] Mr Martin's claims are dismissed.

Costs

[34] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority