

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 103  
5522103

BETWEEN NEW ZEALAND TRAMWAYS  
AND PUBLIC PASSENGER  
TRANSPORT EMPLOYEES  
UNION (INC) WELLINGTON  
BRANCH  
Applicant

AND CITYLINE (NZ) LIMITED  
Respondent

Member of Authority: G J Wood

Representatives: Tanya Kennedy for Applicant  
Gillian Service for Respondent

Investigation Meeting: 17 October 2014 at Wellington

Submissions Received: 17 October 2014

Supplementary Determination: 21 October 2014

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**REASONS FOR DETERMINATION OF THE AUTHORITY**

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[1] At the investigation meeting held under urgency for interim injunctions, I dismissed the applicant's (the Tramways Union/the union) claims against the respondent (Cityline/ the Airport Flyer). As indicated at the investigation meeting I now detail the reasons for my determination.

[2] The union filed interim injunction proceedings with the Authority on 13 October 2014 with the principal aim of stopping Cityline from implementing new rosters on the Airport Flyer service which were to take effect from 19 October 2014. The Authority set the matter down for an urgent substantive investigation on 4 November 2014, some 18 days after the interim investigation meeting of 17 October.



[3] The Tramways Union claim that the roster changes were made without agreement as required, or in the alternative in breach of good faith and/or in breach of the consultation processes in the parties' collective employment agreement and/or with insufficient notice. It also claims that Cityline had breached good faith by failing to provide requested information. In the substantive proceedings the union seeks compliance orders requiring Cityline to comply with its contractual obligations and either revert to the pre-existing roster arrangements or commence proper consultation in line with the parties' 2012-2015 collective agreement.

[4] It also seeks penalties against Cityline for breaches of the collective agreement and of good faith. Cityline denies all of the union's complaints.

### **Issues**

[5] The key issue for determination is whether there should be an interim injunction preventing Cityline from implementing its intended roster changes on 19 October 2014. In doing so the Authority must determine whether or not the union has an arguable case, whether the balance of convenience (including an assessment of the adequacy of damages) supports an interim injunction and whether or not the overall justice of the case favours an interim injunction.

### **Factual discussion**

[6] The relevant portions of the collective agreement relate to hours of work and potentially under clause 8 and the consultation proceedings under clause 47. One relevant part of the hours of work clause (8.1d) states:

...  
(d) *Rosters showing the work of each operator shall be posted in a position easily accessible and conspicuous and shall be applicable on a fortnightly basis and posted by 1pm the previous Wednesday prior to becoming operative. In an emergency, rostered duties may be altered on one day's notice, provided the alteration shall not change the type of shift the worker is scheduled during the week e.g. early, late or day shift. Further changes to shifts are by mutual agreement. The roster shall be six weeks in advance and not subject to alteration during its terms except by agreement.*

[7] I note here that whatever interpretation the Authority might place on clause 8(d) the parties agree that they have operated on and concur with the understanding



that six weeks' notice of roster changes is the minimum. A long held common interpretation should be given effect to by the Authority in most circumstances.

[8] The rosters provided for drivers of the Airport Flyer are generally set down for the next 18 rather than six weeks. Full time drivers such as those on the Airport Flyer run are remunerated for a minimum of 40 hours a week.

[9] Clause 8.5 establishes roster committees as follows:

- (a) *The company shall establish a roster committee consisting of:*
  - (i) *Two representatives of the union;*
  - (ii) *Three operators elected by union members;*
  - (iii) *Other internal or external stakeholders as may be required.*
- (b) *The roster committee shall meet at least quarterly to review the rosters and shifts in operation and to raise any concerns or issues which the staff or company have with those rosters or shifts.*
- (c) *Any information reasonably required by the committee to assist in the review will be provided by the company. Committee members will be required to sign confidentiality agreements.*
- (d) *The committee shall put forward its consensus and divergent views for a decision. The General Manager or Operations Manager will advise the rationale behind the decisions.*
- (e) *The roster committee will look at the development of a process of equitable allocation of overtime for bus operators.*

[10] On behalf of Cityline, Mr John Nesbitt, Senior Duty Supervisor, gave affidavit evidence that when he took over his new position in 2014 he observed that the committee *had not been operating for a while* and therefore he re-introduced it in April 2014. Given the time constraints there was no ability for the union to give affidavit evidence in response and so this point was unchallenged.

[11] It appears that Mr Nesbitt reintroduced the committee in a way that was inconsistent with the collective agreement in that he says that he agreed with a delegate from the union that *attendees would be kept to a minimum and only senior delegates attend*. However on the face of it the collective agreement provides for two representatives of the Tramways Union and it is consistent with freedom of



association that the union would decide for itself who those two members on the roster committee would be.

[12] As the result of the way Mr Nesbitt ran the roster committee as chair, the Tramway's Union's Secretary, the most senior official of the union, was only invited to one roster committee meeting of at least six at which the Airport Flyer roster was discussed. This is one of the major reasons why the union does not accept that it ever agreed to changes to the Airport Flyer roster that Mr Nesbitt developed and implemented.

[13] It was Mr Nesbitt's evidence that what sparked the roster changes were the views of another union's delegate on the committee, who wanted to reduce long breaks for drivers during the weekend and to ensure that the first shift worker to start was also the first shift worker to finish.

[14] Mr Nesbitt did a great deal of work over this issue from June 2014 onwards. He developed a shift roster pattern whereby although long breaks could not be eliminated, a driver commencing the shift earliest in the day would be the first to finish. At the same time he was able to develop savings for Cityline, whereby drivers' hours per week would be reduced by approximately one hour, and income would be reduced by about \$20 per week accordingly.

[15] On 30 July 2014 Mr Nesbitt met with the unions' delegates and gave them copies of the proposed changes to the roster. He also placed a copy of proposed roster on the drivers' notice board and asked for submissions. Five of the drivers, including members of the Tramways Union, responded.

[16] At the one roster committee meeting that Mr O'Sullivan attended on 13 August, Mr Nesbitt's evidence was that those present agreed that he and the union delegate would consider whether a better proposal could be found in the following week. The union considers that it never agreed to the changes and instead wanted input from schedulers from head office. This factual dispute cannot be determined at this stage of proceedings.

[17] Mr Nesbitt determined to go ahead with the roster changes without alteration. On 3 September he arranged for a copy of the new roster to be put on the notice board. It is disputed whether this was put on the notice board where the drivers sign

in or on the notice board in their recreation room, the union believing that the latter was not an appropriate place for such a significant change to be posted.

[18] Between that date and 8 September it was Cityline's evidence that all union members, with the possible exception of one, were contacted directly and given copies of the new roster. It thus appears that one driver may have not received notice within time, the 8 September date being six weeks before the implementation of the new roster, but no issue was taken with that at the investigation meeting, although the union claims that its members were not properly informed until around 24 September.

[19] From 8 September onwards Mr O'Sullivan took the matter up on several occasions at several different levels within Cityline. He had no success in persuading Cityline that it was acting improperly and that the changes ought not to be made, although he believes that Mr Richard Graham, Cityline's Regional Operations Manager Southern agreed on 16 September to put the proposal on hold so that the parties could discuss it further. This was said to be evidenced by a failure to respond to contradict an email Mr O'Sullivan had sent to Cityline noting this undertaking. It was Mr Graham's evidence that he had merely stated that if a better roster alternative could be provided by the union the changes would be postponed. In his opinion at a subsequent meeting on 24 September no alternative roster proposals were put forward by the union, hence negating any undertaking to put the changes on hold as the first necessary condition had not been met. The dispute therefore remains unresolved and can only be addressed in the context of a substantive investigation meeting because the documentation is not conclusive either way.

[20] It was the evidence of Cityline that because of timing issues every pay will have to be manually changed for each worker during the interim period before the Authority can hear and determine the substantive claims between the parties, if an interim injunction were granted. This was challenged by the union, but there was no evidence on the extent to which this was being claimed by Cityline incorrectly.

[21] The union also noted that when major changes had been made to the Airport Flyer rosters in 2012, Cityline had consulted with it and had sought and achieved agreement with the union before implementation. Cityline's response was that that was a different situation because not only were all rosters being changed but five positions were to be disestablished as a result, unlike here.



[22] Clause 47 of the collective agreement provides for a consultative process over the introduction of new technology or major changes to workplace practice. Clause 47 states:

*The parties to this agreement recognise that the introduction of new technology or major changes to the workplace practice have the potential to alter conditions of work. It is therefore acknowledged that prior consultation should take place regarding such changes. To this end the employer agrees:*

- (a) *At the earliest opportunity the employer will prepare and present to the employees and their Unions a preliminary plan for introducing such changes. This plan will address:
  - (i) *An overview of the reasons or factors for the proposed changes;*
  - (ii) *The aims and scope of such changes;*
  - (iii) *The timetable proposed for such changes;*
  - (iv) *The communication process that will be followed;*
  - (v) *Training needs for staff during the changes;*
  - (vi) *Programme for discussion and consultation with employees and the Unions.**
- (b) *A review will be conducted and will conclude a process of consultation as provided for under sub-clause (a)(vi). When a final decision on the implementation of the plan is made it will be presented to employees and the Unions.*
- (c) *Nothing in this agreement shall be used to frustrate the rights of the employer to carry out reviews of its operation and to implement change.*

[23] It is not clear from the evidence whether or to what extent Cityline has failed in its duties of good faith to provide the union with information that it has sought during the process. It is sufficient to note that the Union has not got a lot of the information it had requested from Cityline.

[24] The parties attended mediation but were unable to resolve the matter by agreement or by undertakings. It therefore falls to the Authority to determine the matter.

### **Determination**

[25] The union's case that agreement is required to change rosters is not strong. Clause 8 of the collective agreement, which provides for the employer to make decisions over rostering changes, militates against such construction, as does clause



47. Furthermore the changes to rosters affecting employee's work for about one hour a week, as here, are quite different to the changes in 2012 where a significant number of positions were disestablished.

[26] Similarly the Union's arguments that Cityline was obliged to consult under clause 47 are also not strong, because the changes were not major compared to those in 2012 that the union relies on. I have noted the evidence from the union that the drivers will be significantly affected by reduced pay and having to change their patterns of work, but it is difficult to see how this could be considered as a major change to workplace practice compared with job losses for instance.

[27] By contrast, the union clearly has a strongly arguable case that the way Cityline has chosen to establish and operate the roster committee is in breach of the collective agreement. The clause clearly envisages, consistent with freedom of association, a principle underpinning the Act, that the union will choose its own representatives. Any other interpretation would allow for employers in such situations to undermine the union's internal processes and thus the union itself.

[28] It was also clear that the roster committee has not been established and operated in the formulation provided by the collective agreement. If the parties wished to run a *slimmed down* roster committee as Mr Nesbitt suggested then it is able to effect such a change through a variation to the collective agreement.

[29] In the meantime the union has been excluded from having its secretary as a member of the committee and this is entirely inappropriate if that is what the union wishes to do. It may well have been adversely affected by this because Mr O'Sullivan may have been able to alter the committee's views in some way if properly included as he should have been.

[30] However, the impact of any such change is affected by the fact that the committee's consensus or diversion views go to the General Manager or Operations Manager, who has the right of decision-making, which indicates that the committee has only advisory powers.

[31] There is clearly an arguable case over the adequacy of notice. It is sufficient to note that in most circumstances inadequate notice equates to no notice. That issue can, however, only be properly determined after full evidence, given its complexity and the factual disputes that underpin it.



[32] Thus there is clearly an arguable case over inadequate notice, improper consultation and breach of good faith.

[33] On the balance of convenience test it is clear that union members will be inconvenienced in the interim, i.e. for at least 18 days, by having to change their rosters and the negative personal impact that may have, together with a loss of income. Matters of lost income can be remedied by the Authority and will be done within the next few weeks, should the merits of the case so direct. While any personal inconvenience cannot be immediately rectified, union members have been on notice for many weeks that these changes were to come into effect on 19 October. Thus I accept on balance that damages will be an adequate remedy, particularly for loss of income. Even though many workers do survive week to week, the \$20 per week can be properly recompensed within a short time frame.

[34] While this addresses the need for agreement, and adequacy and notice issues, I also accept that damages will be an adequate remedy for breach of good faith and consultation issues, as these can be dealt with by compliance orders. Similarly it is irrelevant whether penalties are awarded now or later.

[35] The balance of convenience also favours Cityline because of the administrative cost and uncertainty to it. Although any direct costs can be met by the union's undertaking as to damages, on balance I concluded that the balance of convenience favoured Cityline, as to allow the planned changes to take effect would be the least disruptive way, as of 17 October, to deal with the changes occurring on 19 October, which will be addressed by the Authority in a substantive investigation meeting on 4 November and determined soon thereafter.

[36] There is nothing in the overall justice which would alter the above conclusion, i.e. that the balance of convenience favours Cityline. In particular it is unlikely that the union will be able to demonstrate that its agreement is required before any changes to the rostering system as now implemented could have been enacted.

[37] The union's strongest case is that it was not properly consulted (particularly as a result of the improper establishment and operation of the roster committee) or given proper notice. Any resulting failure in consultation is however best addressed by further consultation, which can take place later if necessary. Similarly any deficiency found over required notice can be addressed by subsequent notice.



**Costs**

[38] Costs are reserved.



**G J Wood**  
**Member of the Employment Relations Authority**

