

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 136
5453828

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

AND WELLINGTON CITY
 TRANSPORT LIMITED (GO
 WELLINGTON)
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Kevin O’Sullivan, Counsel for Applicant
 David Gould, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 5 August and 8 September 2014, from the Applicant
 1 September 2014, from the Respondent

Determination: 22 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns a preliminary matter relating to the jurisdiction of the Authority to award remedies sought by the New Zealand Tramways and Public Passenger Transport Employees Union (the Union) in a dispute it has brought against Wellington City Transport Ltd (Go Wellington) (referred to here as WCTL).

[2] It was agreed between the parties that the jurisdictional issue would be determined by the Authority on the papers. Both parties made submissions setting out their respective positions.

Background

[3] The dispute filed by the Union on 28 March 2014 concerns payment for additional duties required to be performed following a change to workplace practice. It stems from a more consistent approach taken by the New Zealand Transport Agency (NZTA) and the New Zealand Police Commercial Vehicle Investigation Unit (CVIU) to applying s.115 of the Land Transport Act 1988. That section empowers enforcement officers to direct that a vehicle must not be used on the road if certain safety standards are not met.

[4] In 2013 the greater consistency of approach taken by the two agencies resulted in a number of buses in the New Zealand Bus fleet, mostly in Wellington, being ordered off the road after failing safety inspections.

[5] The Union says WCTL was given a three month period by NZTA and CVIU in which to remedy the situation with its bus fleet. WCTL then implemented a new bus check for drivers to complete that was an enhancement on the previously required safety inspection. The Union claims the new check takes 10 minutes to complete if performed in accordance with revised NZTA guidelines.¹

[6] It claims bus drivers are being required to undertake 10 minute vehicle inspections but are only being paid for 5 minute vehicle checks under the terms of their collective agreement. It asked the Authority to determine that WCTL recognise the claim and increase the time paid to operators for the inspection of their vehicles from 5 to 10 minutes.

[7] The current collective agreement between the parties, which is in force until 16 January 2016, provides only 5 minutes for pre-trip vehicle inspection.² According to the Union 5 minutes is insufficient for drivers to complete the vehicle check WCTL now requires of them.

[8] The Union says its request to WCTL to increase the time allowed to complete the daily bus check to 10 minutes to align with the new NZTA guidelines was declined. It seeks a determination from the Authority that WCTL recognise its claim

¹ "Roadside Inspection Guidelines for Heavy Vehicles", NZTA (2013).

² Clause 9.1(d), Wellington City Transport Go Wellington Collective Employment Agreement 2013-2016

and increase the time paid to bus operators for the inspection of their vehicles from 5 minutes to 10 minutes.

[9] WCTL rejects the Tramways Union's claim. It says the time currently provided to bus operators under the collective agreement provisions for signing in and carrying out pre-journey inspections allows sufficient time for a driver to complete both those tasks. It goes further and says that a driver can comfortably complete both the sign in process and the pre-journey bus check in 10 minutes total time.

[10] In the event the Authority finds the Union to have a valid claim for additional bus inspection time, WCTL counter-claims that changes to the sign-in process have shortened the time taken to complete that activity, and an adjustment should be made shortening the time paid in respect of the sign in.

[11] The parties had attended mediation without success before the dispute was brought to the Authority. In the course of a telephone conference to discuss the progress of the matter I identified an opportunity for the parties to explore a pragmatic resolution of the matter and directed them to further mediation. Their efforts proved fruitless.

[12] In a subsequent telephone conference WCTL raised the current jurisdictional issue. In its view s.161(2) of the Employment Relations Act 2000 (the Act) prevents the Authority from providing the remedy sought by the Tramways Union. The relevant part of the section, which lists the matters over which the Authority has jurisdiction, provides as follows:

Except as provided in sub-section (1)(ca), (cb), (d), (da), and (f), the Authority does not have jurisdiction to make a determination about any matter relating to –

- i. bargaining; or
- ii. the fixing of new terms and conditions of employment.

Issue

[13] The sole issue for determination is whether the Authority has jurisdiction to provide the remedy sought by the Tramways Union.

Submissions of the parties

[14] Mr O'Sullivan, in his submissions for the Tramways Union, focussed primarily on the substantive matter of the dispute rather than on the jurisdictional issue. I shall refer to some, but not all, of his submissions.

[15] He compared the previous 13 point checklist he said operators were required to complete in their pre-journey bus inspections with the 49 point checklist introduced in July 2013. He also correctly noted that under the collective agreement signing on and inspection of vehicles were different activities with separate time allocations.

[16] Mr O'Sullivan submitted WCTL could not unilaterally require drivers to undertake a 10 minute vehicle inspection and asked the Authority to determine that, if employees agreed to complete those inspections, they must be paid for the 10 minutes of working time at the appropriate rate of pay. In his view it was inconsistent with the collective agreement to pay employees for 5 minutes of working time when the inspection they were undertaking took them 10 minutes to complete.

[17] In Mr O'Sullivan's view this was not an issue about seeking to vary the collective agreement "but to interpret it and any additional terms and conditions that have been agreed". He referred to s. 61(1) of the Act which provides that:

The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are –

- i. mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and
- ii. not inconsistent with the terms and conditions in the collective agreement.

[18] He raised a series of questions including whether the employees had agreed to undertake a 10 minute vehicle inspection; if so, what the terms of that agreement were and whether the payment of 5 minutes working time for a 10 minute vehicle inspection was inconsistent with the collective agreement. If it was inconsistent, Mr O'Sullivan asked whether the respondent was required to pay 10 minutes for each vehicle inspection. In his view these questions related to the determination of existing rights, which was a matter within the Authority's jurisdiction.

[19] Mr O'Sullivan claimed that WCTL was attempting to vary (by shortening) the 10 minute time allocated for "signing on" in the collective agreement by saying employees could complete both the bus inspection and the signing on requirements within the total 15 minutes provided for those duties in the collective agreement.

[20] In his submissions Mr O'Sullivan also appeared to broaden the scope of the dispute by introducing matters not raised in the statement of problem, including an issue of wage arrears. Such matters are not relevant to the jurisdictional question raised by WCTL which is the focus of this determination.

[21] Mr Gould succinctly set out WCTL's position as follows:

- (a) *The time agreed by WCTL and Tramways to complete the vehicle inspection was recorded in clause 9.1(d) of the 2013 – 2016 Collective Agreement;*
- (b) *The relief sought by Tramways requires the Authority to fix new, or vary existing, terms and conditions of the Collective; and*
- (c) *The appropriate mechanism to alter this is negotiating a variation to the Collective or raising the issue in the next round of bargaining.*

[22] Mr Gould submitted the legislative framework within which the Authority operates supported WCTL's position in this matter. He noted the starting point as being the definition of *employment relationship problem*. This is defined in s.5 of the Act as:

A personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

[23] He noted s.101 of the Act relating to personal grievances, disputes, and enforcement. Section 101 refers to the object of Part 9 of the Act as being:

- (d) To ensure that the role of the Authority and the Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than to fix terms and conditions of employment.

[24] Mr Gould submitted the distinction between interpretation and fixing terms and conditions was given further recognition by s.161(2) of the Act, referred to above.

[25] In Mr Gould's submission the Tramways Union is asking the Authority to vary the provisions of clause 9.1 (d) of the collective agreement by extending the 5 minutes provided for the inspection of vehicles to 10 minutes.

Discussion

[26] The collective agreement, which came into force on 15 January 2013 and continues in force until 16 January 2016, contains a specific provision that allows 5 minutes for operators to carry out "the inspection of their vehicles". The new vehicle check comprising a 49 step inspection requirement was introduced in July 2013, six months after the commencement of the collective agreement.

[27] I have no evidence that the Union was aware of the impending new requirements at the time the parties were bargaining and no reason to believe it had the opportunity to negotiate an extension to the time allowed for the inspection.

[28] A subsequent event in the form of the new NZTA guidelines has resulted in employees being required to carry out an enhanced pre-journey bus inspection check. From the union's perspective employees are now being asked to carry the additional burden imposed by the new safety checks without commensurate compensation. From the employer's perspective, it is obliged to comply with legal requirements for the safe carriage of passengers and is expected to implement the enhanced safety checks.

[29] In this situation one might hope common sense would prevail and the parties would be able to agree arrangements to facilitate the new checking requirements. That could occur for instance by way of an agreed variation to the collective agreement. It is unfortunate that this has not happened.

[30] In submissions the Tramways Union says that the dispute is a matter of interpretation of the collective agreement. I disagree and note there is a divergence between the Union's statement of problem and its submissions.

[31] Having asked the Authority for a determination that WCTL recognise its claim and increase the time paid for vehicle inspections from 5 to 10 minutes, the Union now says this is a matter of interpreting the collective agreement and determining the existing rights of the employees covered by it. These are two different matters, the first of which is not within the jurisdiction of the Authority and the second of which

is, but is not what has been sought as a remedy in the statement of problem as currently formulated.

[32] The collective agreement has a specific provision for the amount of time allocated to bus operators for the inspection of vehicles. The remedy sought by the Union would entail overriding that specific provision and replacing the "5" minutes allowed with "10" minutes. That would entail varying a current term or condition of the collective agreement by imposing a new term. Such an action does not fit within any of the specified exceptions of s. 161(2) of the Act and I agree with WCTL that it is not within my jurisdiction to do it.

Determination

[33] The remedy sought by the Tramways Union as currently formulated in its statement of problem is not within the jurisdiction of the Authority to award.

Costs

[34] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority