

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 119
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: T Kennedy for Applicant
 G Service for Respondent

Investigation Meeting: 4 November 2014 at Wellington

Submissions Received: 7 November 2014

Determination: 25 November 2014

DETERMINATION OF THE AUTHORITY

[1] My earlier determination, following an interim injunction application in this matter [2014] NZERA Wellington 103, refers. There is little point in repeating the content of that determination. I accordingly adopt as part of this determination my findings in the factual discussion between paras [6] and [23] of that determination with the following amendments and additions.

[2] I determine that the relevant period of six weeks' notice that was expected by both parties to be given to the drivers should have been given on or before 7 September, not 8 September. Six weeks' notice includes the day on which it is given, so it is acceptable in terms of the parties' practice for someone to be given

notice of something on a Sunday that is going to occur in six weeks' time on a Sunday.

[3] In re-establishing the roster committee Mr Nisbet (Cityline's Senior Duty Supervisor on the Airport Flyer) was not aware of and subsequently did not consider the requirements of the collective agreement relating to membership of the committee.

[4] At a meeting in April with delegates of the three unions operating at Cityline, Mr Nisbet indicated that he wanted to keep attendees to a minimum and that only the three senior delegates, one for each union, would attend along with him. This was, as now accepted, in breach of the collective agreement.

[5] However, at the first meeting held on 8 May, Mr O'Sullivan, as union secretary, was in fact in attendance. One of the issues raised was about the long breaks in the middle of shifts on the Airport Flyer during the weekend.

[6] The next meeting was set for June 2014. Mr O'Sullivan clearly knew about that meeting because he wrote to Mr Nisbet on 11 June stating

I have next Thursday for the roster committee meeting 11am to 12.30pm. Can you please cover our delegates to attend. Are there any depot specific rostering issues? (I don't know if you want to deal with the Eastbourne issue or leave it to a separate meeting).

[7] Mr Nisbet responded on 11 June stating

I have no specific roster issues. I have asked some of the Airport Flyer staff to see if they can reduce any longish breaks in the weekend at no extra cost. To date I have not heard from them. ... Unfortunately, I will not be arranging for your other delegates to attend. The purpose of the roster committee is to have it basic with just senior delegates attending from each union. If there are any specific depot issues then I can look at that depot delegate attending.

[8] While I accept that was an honest answer at the time, the fact is that before the date of that meeting Mr Nisbet had become aware, through his own efforts, that in excess of \$28,000 per year could be saved by deferring the start time for drivers until such time as they were required to attend to their driving duties. In Mr Nisbet's words

When the shifts were put in place last year, it was a rush job and the shifts were basically made to 8 hours a day.

[9] This had led to some drivers on the weekend basically waiting in a depot on pay for up to 1.5 hours before their bus left. Mr Nisbet was aware that 8 hours pay per shift was not required under the collective agreement, simply pay for 40 hours per week for full time drivers.

[10] Mr Nisbet ended his email to his manager, Mr Richard Graham, with the following

I intend to present these facts at today's roster meeting, but except a kick-back from the unions.

[11] However, despite Mr Nisbet's knowledge that there would be *kick-back* from the unions, and of Mr O'Sullivan's request a week earlier of whether there were significant issues to be dealt with at the roster committee meeting, he did not inform Mr O'Sullivan of that fact. I am confident that Mr O'Sullivan would have attended the roster committee meeting had he known an issue of this magnitude was to be discussed. Mr Nisbet had no reasonable explanation for why he failed to inform Mr O'Sullivan of these developments. Mr Nisbet accepted that his relationship with Mr O'Sullivan was *cool*.

[12] Furthermore, Mr Nisbet did not raise his findings at the meeting. Instead he went into discussions with Cityline's lead roster scheduler/designer to see what alternatives to his own proposal there were to save money for the company and maintain viable shifts for the employees. The feedback he received was that there was no way of making such cost savings without reductions in working hours. The material the scheduler relied on when modelling options on his computer was never provided to the union. Unfortunately, when the union asked for them some months later, such options had already been deleted from the scheduler's computer.

[13] Mr Nisbet duly tabled his proposal at a roster committee meeting of 30 July. Mr O'Sullivan was not invited. Mr Nisbet presented a copy of the proposed rosters and draft shift cards. He asked one of the delegates to place the roster on the drivers' room noticeboard, which he did. The draft was accompanied by a notice written by another union's delegate seeking feedback on the proposal. The roster was subsequently replaced a week or two later with an updated proposal, because there were a number of glitches with the first one.

[14] In the course of early August Cityline received five submissions opposing the changes on the grounds that there was less income to be earned and due to inconvenient changes to the hours of work.

[15] The next meeting of the roster committee was held on 13 August and Mr O'Sullivan was in attendance. Mr Nisbet presented an updated roster, which had the correct times and shifts together with new weekend shift cards. It was noted that there would be significant savings to the company and that each driver would lose approximately \$1,100 per year gross in wages. Mr O'Sullivan asked if a meeting of all affected drivers could be held to explain the changes, but there was no response from Mr Nisbet.

[16] Mr O'Sullivan wrote directly to the lead scheduler about the Union's *disquiet about the new draft Airport Flyer shifts* and asking for him to be involved before a final decision was made. The reply noted that these were matters for other managers, but that *it should be no problem for us to run a few proposals once we've been tasked from operations.*

[17] Subsequently the scheduler confirmed that large breaks during the weekends could not be avoided without, at least, a long term design project.

[18] Before the next meeting Mr O'Sullivan was involved in, Mr Nisbet had a meeting with the Tramways Union senior delegate, a driver with significant experience (including roster design), about whether he could come up with a potential roster that would work better for both parties. However, the delegate later confirmed that he could not do so without increasing the costs to Cityline.

[19] Matters were not advanced at a meeting with Cityline, called by the union on 21 August, even though Mr O'Sullivan was granted the opportunity to discuss the issues privately with Cityline's roster scheduler. As a result Mr Nisbet decided to implement the proposal without alteration.

[20] A meeting was held by Mr Nisbet with the Tramways Union senior delegate on 3 September where Mr Nisbet indicated that his proposal was the best one and the Tramways senior delegate agreed with him. I do not accept that the delegate was misled in any way and he did agree with the proposal. Such an agreement could not bind the union, however, particularly as Mr O'Sullivan was not present at the meeting.

[21] Cityline management then went to inform all of the drivers with a view to ensuring that they were given six weeks' notice of the change. While this process should have been completed by 7 September, it was not for all staff, including one witness who was a Tramways Union member. The union itself, however, clearly had at least six weeks' notice of the changes through its senior delegate.

[22] All employees were informed by notice on the roster noticeboard, as opposed to the noticeboard upstairs in the drivers room, within the period required for posting under clause 8.1(d) of the collective agreement.

[23] While I accept that Mr O'Sullivan was left with the impression when meeting with Mr Richard Graham, Cityline's Regional Operations Manager Southern, that the changes would be put on hold for further discussion, I conclude that Mr O'Sullivan was mistaken in his genuine perception. I prefer Mr Graham's evidence that the changes would be postponed if the union could come up with an alternative that was acceptable to Cityline. This is consistent with its actions throughout.

[24] Despite all Mr O'Sullivan's subsequent efforts to have the decision rescinded or put on hold, this did not occur. Hence these proceedings.

The collective agreement

[25] The collective agreement has several relevant definitions of its full time "employees", which are those employees *normally paid on the basis of a 40 hour week*. "Roster" is defined as *a key showing an employee's weekly working days on, and days off*. A "shift" is defined as *the duty rostered to an employee on any particular day*.

[26] Clause 8 defines the hours of work. Clause 8.1(a) states

The daily hours for employees shall not exceed 11 hours, to be worked in a maximum of 14 hours including meal breaks. The hours worked will be in accordance with the Transport Act 1962 and amendments.

[27] The ordinary hours of work for full time drivers is 40 per week to be worked on any five days in any week Sunday to Saturday, both days inclusive.

[28] Clause 8.1(d) states

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, eg 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 term except by agreement.

[29] Clause 8.5 provides for roster committees. It states that

- (a) *The company shall establish a roster committee consisting of:

 - (i) *2 representatives of the union;*
 - (ii) *3 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.*

[30] Clause 9 deals with allocation of work and reinforces the point that it is Cityline who determines the allocation of work, as is consistent with clauses 8.1d and 8.5d.

[31] Clause 10 deals with minimum payments per week and provides that if a full time employee is required to work less than 40 hours per week their pay shall be made up to 40 hours per week.

[32] Clause 12 deals with overtime and penal rates. Clause 12.1 states

- (a) *Time worked in excess of 4 hours per day or 40 hours in any one week shall be paid for time and a half of ordinary rate as per clause 5.*
- (b) *Overtime within a roster shall be worked as required by the company. Additional overtime shall be worked where reasonably required by the company and where reasonably able to be undertaken by the employee.*

[33] The redundancy clause deals with notice and compensation, but not consultation.

[34] There is, however, the consultation clause, clause 47, which is comprehensive in its procedure and relevantly provides:

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...

Determination

[35] Given the comprehensive framework for the setting of hours and payment for Cityline drivers contained in the collective agreement, it is clear that the union's agreement is not required where Cityline seeks to change roster arrangements. Most importantly, even where employees are required to work in excess of 40 hours a week, as many drivers do on the Airport Flyer, that is overtime within a roster and is to be worked as required by Cityline.

[36] Thus in the collective agreement if there are changes to shifts within a roster system that involve working overtime hours, drivers cannot refuse to undertake overtime. The union has agreed that its members will work such overtime as provided for within a roster. Furthermore, rosters are to be set by the employer and the sole constraints to that within the collective agreement appear to be clauses 8.1 and 12.1b. Clause 8.1 provides that hours are not to exceed 11 within a 14 hour stretch and must not be in breach of the Transport Act. If additional overtime is sought then, pursuant to clause 12.1b, drivers are only required to work overtime where it is reasonable for them to undertake it and it is reasonably required by Cityline.

[37] Once the roster is posted, and the roster must be for at least the next six weeks, then it cannot be altered except by agreement. This is another constraint on Cityline's ability to roster its staff. Otherwise it is entitled to roster as it sees fit. This is then reinforced by the provisions of clause 8.5 whereby the roster committee operates to provide feedback to Cityline, but any consensus or divergent views of the committee are then forwarded to the general manager or operations manager for their decision on what, if anything, should occur. Not only does this reinforce the fact that union agreement is not required to change rosters, but also provides the appropriate forum for consultation over the operation of roster and shift systems. At no point is union agreement to roster changes envisaged as necessary.

[38] The union has consistently argued that the matter should be dealt with under clause 47 consultation. There is no reason why clause 8.5 providing for roster committees or clause 47 over consultation should be seen as one subordinate to the other, in either direction. I accept that both can live with each other within the collective agreement.

[39] However, for clause 47 to apply there must, in this case, have been a major change to the workplace practice which has the potential to alter conditions of work. In this regard, I prefer the arguments of Cityline that this was not a major change to workplace practice. The collective agreement provides for the employer to set rosters subject to constraints outlined above. It also provides for a forum, the roster committee, within which the rosters and shift operations can be reviewed and monitored. This provides a specific form of consultation, which the parties have clearly contemplated to operate on an ongoing basis, because rostering and shift issues are an ongoing issue for Cityline and the drivers. I am reinforced in this decision by the fact that the changes to rosters, while having an impact on hours of work for a number of staff and also on their income, are minor compared to significant changes over which the consultation provisions have been used in the past, such as where a review was undertaken and five positions were disestablished. By contrast rosters are reviewed and changed regularly.

[40] The next issue is whether Cityline consulted appropriately. There is no doubt that Cityline had not properly established the roster committee, which is its responsibility, not the union's, see clause 8.5a. Cityline now acknowledges that. However, in terms of context, I accept that Mr Nisbet re-established the roster

committee on his own initiative and that he did not deliberately fail to follow the provisions in the collective agreement, because he did not know Cityline's responsibilities. Similarly, the union never challenged the makeup of the roster committee until the course of these proceedings.

[41] I note at this point for the benefit of the parties that Mr O'Sullivan was right in June to seek to have delegates involved in the process, but that in actual fact the union had not had elections to vote on its three operator delegates to the committee, on top of its two representatives, who presumably would have been Mr O'Sullivan and the senior delegate involved throughout, but that is properly a decision for the union following an approach from Cityline to establish the committee.

[42] I note also that it is for Cityline to establish the committee and that it is to consist of other internal or external stakeholders as may be required. I accept the view of Cityline over the view of the Tramways Union that representatives of the other two unions validly constitute internal stakeholders. Whether or not they are required to be represented under the clause will depend on whether or not members of those other unions are involved in any roster issues to be addressed by the roster committee. If they are, then it makes sense that they are justly internal stakeholders who may be required to form part of the committee, as they may be impacted in their employment by any resulting roster changes.

[43] It is not clear who other external stakeholders may be, but in terms of other internal stakeholders one would have thought that the roster scheduler would be another potential internal stakeholder who might be on the committee, as may other Cityline supervisors and management.

[44] Finally here, it appears that the positions of general manager and operations manager no longer exist, leaving it up to the parties to make the roster committee structure work by agreeing who equivalent replacement manager or managers may be. In the alternative, it is open to the parties if they can reach agreement on an alternative structure, to do so under the variation clause.

[45] I have already concluded above that six weeks' notice was not given to all affected staff. However, the collective agreement does not provide for such. The collective agreement simply provides for fortnightly rosters to be posted by 1pm the previous Wednesday prior to becoming operative for the next six weeks in advance.

The provision of six weeks' notice is a matter of custom and practice between the parties and any breach is not a breach of the collective employment agreement.

[46] While Cityline did use what it saw as the roster committee to consult over the changes Mr Nisbet was proposing to the airport Flyer rosters, the issue not so much about failing to consult but whether it consulted properly and in doing so whether it breached the union's freedom of association and Cityline's obligation to recognise the representative of the union, or otherwise breached its duties of good faith to the Tramways Union.

[47] The above issues relate to the way Mr Nisbet established and ran the roster committee and in particular Mr O'Sullivan's role or lack thereof in the operation of the committee, especially given it was not properly constituted in the first place.

[48] The union is a party to the collective agreement and is entitled to represent its members in relation to any matter involving their collective interests.

[49] The obligations of good faith under s.4 include one party not directly or indirectly doing anything to mislead or deceive the other or that is likely to do so. It requires the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative. A penalty can only apply, however, if the failure was deliberate, serious and sustained or was intended to undermine the collective agreement.

[50] In this case I find that there was adequate consultation with the union, particularly given that the union senior delegate agreed with the proposed changes. Such agreement was not necessary, however, and is therefore irrelevant to my determination, even if the agreement had been binding on the Tramways Union.

[51] I accept that consultation was sufficient in the circumstances, albeit that the roster committee was not established properly pursuant to clause 8.5. This is because the union members had adequate notice of the proposed changes and the ability to comment on them, as did the delegate. Mr O'Sullivan, although primarily through his own efforts, had the ability to attend at least two formal meetings with Cityline and have other discussions with Cityline management.

[52] However, the focus of the Tramways Union through Mr O'Sullivan has been to oppose the changes on the basis that the union's agreement was required (which it

was not) and/or that consultation pursuant to clause 47 was required (which it also was not). Furthermore, the Tramways Union has been unable to provide any alternatives to the company's proposal that provide savings to the company, and Cityline is entitled to pursue savings as an employer, provided it does not breach the collective employment agreement.

[53] In these circumstances it would be inappropriate to make a compliance order, which is a discretionary remedy, to require Cityline to revert to the old roster system. The major breach by Cityline, apart from the composition of the roster committee, dealt with below, was the failure to provide notice to at least one of its union member drivers. That however is a breach of custom and practice, not the collective agreement, and therefore not amenable to a compliance order in favour of the union.

[54] I decline also to make a compliance order against Cityline to properly constitute a roster committee on the basis that it has undertaken to do so and the union has not sought such a compliance order.

[55] Finally, there is the matter of breaches of good faith. I do not accept that Mr Nisbet misled the union delegate over the course of the consultation process and he was always clear, with one exception, about the direction he wished to take the committee over reducing costs in the Airport Flyer roster.

[56] I also accept that the union was provided with sufficient information to assess this matter, although it would have been preferable to have allowed access to the union of the roster scheduler's computer generations before they were wiped. Similarly, I have found that there was no undertaking made to Mr O'Sullivan to postpone the changes to the roster.

[57] I conclude that there was a breach of good faith, however, by Mr Nisbet in not informing Mr O'Sullivan of changes to his view that there were no issues to be discussed about Airport Flyer rosters, when he knew there were before the meeting and did not advise Mr O'Sullivan of this change of view. Similarly Mr Nisbet did not invite Mr O'Sullivan to the first key meetings where the issue of potential changes to the roster were raised.

[58] Mr Nisbet had no valid reasonable explanation for not informing Mr O'Sullivan of these changes of approach by him and not inviting him to some meetings. In the context of Mr Nisbet's *cool* personal relationship with Mr

O'Sullivan and Cityline's knowledge that Mr O'Sullivan is *the face of the union* I conclude that these were actions designed to mislead or deceive or likely to mislead and deceive the union in the build up to the roster changes Mr Nisbet was promoting. I do not consider, however, that these breaches by Cityline were serious and sustained or intended to undermine the collective agreement. However, I do so only the basis that Mr O'Sullivan was never excluded directly from the meetings as opposed to not invited, and that at all times the union was involved through its senior delegate.

Observation

[59] This determination should issue as a strong warning to Cityline in two areas. First, it should not, through its managers, attempt in any way to minimise the role of the union in its workplace, that role being legitimised by its statutory rights and through its collective employment agreement, particularly as such an approach is almost certain to be self-defeating in the long run. Second, Cityline needs to more carefully consider its obligations under the collective agreement, such as its duty to properly establish a roster committee.

Costs

[60] Costs are reserved.

G J Wood
Member of the Employment Relations Authority