

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 63
5565269

BETWEEN	FIRST UNION INCORPORATED First Applicant
AND	NEW ZEALAND TRAMSWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION INCORPORATED Second Applicant
AND	PHILIP MORGAN & ORS Third Applicants
AND	PERRY DAVIS & ORS Fourth Applicants
AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED AND CITYLINE (NZ) LIMITED TRADING AS NZ BUS Respondent

Member of Authority:	Vicki Campbell
Representatives:	Peter Cranney and Grace Liu for Applicants Richard McIlraith and Kylie Dunn for Respondent
Investigation Meeting:	18 November 2015
Further Information Received:	24 November 2015
Submissions Received:	1 and 7 December 2015 from Applicants 1 December 2015 from Respondent
Determination:	1 March 2016

DETERMINATION OF THE AUTHORITY

- A. The consultation process followed by Transportation Auckland Corporation Limited and Cityline (NZ) Limited together trading as NZ Bus when it promulgated new rosters in June 2015 breached its consultation obligations under the collective agreement.**
- B. Transportation Auckland Corporation Limited and Cityline (NZ) Limited together trading as NZ Bus is ordered to comply with its consultation obligations under the collective agreement by ensuring it provides adequate and sufficient time for consultation to ensure the Unions and its members are able to participate fully in the consultation process.**
- C. The new rosters, set out a new “schedule” of the days of the week on which employees would be required to work, and was a re-scheduling of the previous rosters. Promulgating the new rosters 4.5 weeks in advance of the commencement date of the new rosters was not a breach of the collective agreement.**
- D. Transportation Auckland Corporation Limited and Cityline (NZ) Limited together trading as NZ Bus has breached its obligations of good faith by not meeting its duty to consult as envisaged by section 4 of the Employment Relations Act 2000.**
- E. Transportation Auckland Corporation Limited and Cityline (NZ) Limited together trading as NZ Bus is ordered to pay a penalty of \$10,000 into the Authority within 28 days of the date of this determination which will then be paid to the Crown.**
- F. Costs are reserved.**

Employment relationship problem

[1] This determination deals with an application for compliance orders and penalties against Transportation Auckland Corporation Limited and Cityline (NZ) Limited together trading as NZ Bus (“NZ Bus”).

[2] The First Union Inc. (First Union) and New Zealand Tramways and Public Passenger Transport Employees Union Inc. (Tramways Union) are parties to a collective agreement with NZ Bus. The third applicants are members of First Union and the fourth applicants are members of Tramways Union.

[3] The applicants claim NZ Bus has breached:

- a) the terms of the collective agreement; and
- b) its statutory obligations of good faith.

[4] The applicants seek compliance orders and penalties for the breaches of the employment agreement and a declaration that NZ Bus has breached its obligations of good faith. The applicants ask that any penalties be paid to the applicants rather than to the Crown.

[5] NZ Bus denies all claims.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the applicants and NZ Bus but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[7] Auckland Transport owns the Auckland transport networks, sets the parameters for the use of these networks and licenses operators to service the infrastructure. NZ Bus is one of these operators.

[8] The key terms of the use of the network are determined by Auckland Transport. Auckland Transport decides all bus routes and all bus timetables

(frequency/timing of bus routes). NZ Bus is advised of routes and timetables and uses these to develop schedules.

[9] NZ Bus employs 1,100 bus drivers in Auckland with approximately 1,000 of those employees being members of one of the two unions.

[10] NZ Bus operates out of eight depots in Auckland:

- (a) Glenfield
- (b) Orewa
- (c) Panmure
- (d) The City
- (e) Onehunga
- (f) Roskill
- (g) Wiri
- (h) Swanson

[11] Each driver is allocated a “badge” which is a number identifying their work, namely the “duties” they are to perform. A “duty” is a period of work allocated to a bus driver within the Roster. The Roster is a collation of all the rostered duties to be worked at a NZ Bus Depot.

[12] In April 2015, Auckland Transport made a decision to make changes to run times and some timetables in the Auckland region. Auckland Transport provided NZ Bus with run time and capacity analysis information that informed the resulting changes to run times and timetables. During the following four weeks, NZ Bus spent time finalising the run times and timetables as well as the commercial arrangements with Auckland Transport and developing the duties to meet those run times and timetables.

[13] On 8 June 2015, NZ Bus called meetings to consult about the new work rosters. Those meetings were scheduled for later that same day. At the meetings, NZ Bus advised the unions of the proposed changes to rosters and that any feedback was required by no later than Friday, 12 June which was four days later. There was no indication prior to the meetings of what the meetings on 8 June were about and even

when inquiries were made by the union delegates, the answers from NZ Bus were vague.

[14] After a number of requests an extension to the consultation period was granted to 16 June 2015. On 18 June 2015 NZ Bus formally promulgated the new rosters which were to take effect from 19 July 2015.

The collective agreement

[15] Consultation is clearly important to the parties. In the collective agreement there are a number of references to the requirement of the parties to consult on various matters including a requirement that the parties set up consultative processes that provide mechanisms for greater communication. The agreement also requires the parties to promote and maintain mutual trust and cooperation to ensure a safe and healthy working environment.

[16] Clause 6.2 of the collective agreement sets out the parties' commitment to communicating regularly and effectively on all matters concerning employees and provides for the establishment of effective consultative mechanisms.

[17] Clause 6.3 provides for the setting up of consultative processes to provide mechanisms for greater communication to assist in bringing about consistent and sustainable change in the workplace. In particular the clause provides for the establishment of consultative working groups on issues as are agreed between the company and unions, how the membership of the working groups will be determined and the training of those involved in the consultative working groups. The parties have agreed that the process of consultative groups is to provide the opportunity for employee representatives and employees to work in partnership with the Company prior to the company making a decision on an identified issue.

[18] Clause 14 sets out the terms the parties have agreed to in relation to the ordinary hours of work. At clause 14.3, the parties have agreed that before any significant change is proposed to hours of work by either the company or employees (for example, 4 x 10 work days), the company will consult with the unions and affected employees.

[19] As well as the obligations under the Health and Safety in Employment Act 1992, the collective agreement specifically provides for the company to take all

practical steps to ensure the safety of employees while at work and in particular to provide and maintain for employees a safe working environment.

Issues

[20] The issues for determination are whether:

- (a) NZ Bus has breached the collective agreement and if so, what, if any, penalty should be awarded?
- (b) NZ Bus has breached its statutory obligations of good faith?
- (c) If a penalty is awarded should the whole or part of the penalty be paid to the third and fourth applicants.

Breach of collective agreement

[21] The applicants claim NZ Bus breached the collective agreement by the manner the new roster was promulgated. In particular the applicants claim the new rosters were promulgated:

- (a) without compliance or sufficient compliance with the consultation and communication obligations set out in the collective agreement; and
- (b) in breach of the contractual obligation to provide at least six weeks' notice of any roster change.

Consultation process

[22] In *Toll NZ Consolidated Limited v Rail and Maritime Union Inc*¹ the Employment Court emphasised that parties who are being consulted should have a reasonable opportunity to give their views so that an effort can be made to accommodate their views.² Consultation requires the imparting and receipt of information and argument with an open mind, so as to realistically influence the outcomes.³

¹ [2004] 1 ERNZ 392.

² *Ibid* at page 417.

³ *Auckland City Council v NZPSA* [2003] 2 ERNZ 386 (CA) at page 394.

[23] The Employment Court has previously held that unions must be provided with adequate information and have adequate time “to analyse it, digest it, and communicate it to members so that they could either instruct the union to make submissions or make intelligent submissions themselves”.⁴

[24] In May 2015 NZ Bus met with some, but not all, depots to discuss the new duties it had developed as a result of the run times and timetable changes. I am satisfied that minor changes were made to the duties to be applied at the City depot and that Mr Nieuwdorp, a bus driver and assistant delegate at the City depot had an opportunity to comment on those changes.

[25] The evidence from Mr Nieuwdorp was that NZ Bus did not indicate at the time of the changes to the duties, that there would also be changes to the rosters. In any event, the evidence has established that not all depots were consulted about the changes in duties prior to the new rosters being developed.

[26] NZ Bus met with staff and union delegates on 8 June 2015 to commence consultation about the proposed new rosters. After being shown the proposed rosters on 8 June 2015, Mr Nieuwdorp raised some concerns with the rosters. In particular, he asked if there was any way of spreading out the weekend duties as drivers would not be able to see their families for five or six weekends in a row and he was also concerned that the new rosters eliminated all of the fixed rosters and created long driving hours for weekend duties.

[27] Mr Nieuwdorp also inquired as to whether union delegates would be given time off work to review the new rosters and to consult with the drivers. This request was declined. Mr Nieuwdorp had previously been involved in a consultation process where a similar request for paid time to consult with members had been approved.

[28] At the investigation meeting, Ms Claire Neville, Regional Operations Manager, Northern, told the Authority that it was up to the union delegates to manage union business in their own time. Ms Neville was clear with the Authority that it was not up to her how the delegates consulted with their members and that they were required to do so in their own time. She said in making that decision, she took into account the ability of the union to represent the views of their members.

⁴ *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378 at page 395.

[29] When the union delegates raised concerns about there being only three days in which to consult, Ms Neville explained it was a long process and that the three days was an adequate timeframe and that in her view they did not need any more time.

[30] Following the end of the consultation process and after the feedback that was able to be given to NZ Bus had been received, NZ Bus proceeded with the proposed new rosters and advised the delegates that if any individual was still unhappy with the new rosters they were to advise NZ Bus.

[31] On the evidence presented by the union delegates at the Authority's investigation meeting, I am satisfied that feedback was able to be provided in the limited time available and that in a small number of individual cases, changes to the proposed rosters were made to accommodate those individuals. However, other feedback dealing with concerns about health and safety issues does not appear to have been taken seriously by NZ Bus and was taken no further. Mr Nieuwdorp's evidence was that if the union delegates had been consulted more thoroughly, the health and safety issues he raised may have been addressed by NZ Bus.

[32] Mr Nieuwdorp gave evidence explaining to the Authority the concerns the union held about health and safety. During the brief consultation period Mr Nieuwdorp raised concerns that under the new rosters a driver would work 10 or 11 hours on a day, have a 10 hour break and then return to work the following day.

[33] In support of his evidence, Mr Nieuwdorp pointed the Authority to the City roster and highlighted the duties, which requires a driver to commence at 7.26am on a Sunday morning and finish at 7.02pm that evening. The driver then returns to work to commence at 5.55am the following day, Monday morning. On the Sunday the driver works a total of 10 hours 36 minutes.

[34] In the same City roster, the roster requires the driver to commence work at 6.20am and finish at 6.02pm that same day, being a total working time of 10 hours 58 minutes. The driver returns to work the following morning at 7.40am and works until 7.01pm being a total of 10 hours 21 minutes. After finishing work at 7.01pm the roster requires the driver to return to work and commence duties at 5.50am the next morning finishing at 3.02pm.

[35] In other examples, again in the City roster, Mr Nieuwdorp pointed me to the situation where a person would commence at 9.01am and finish at 8.25pm in the

evening and commence work the following day at 7.05pm in the morning on a split shift. Mr Nieuwdorp's final example was of a driver commencing on a Saturday at 11.03am and finishing at 10.55pm and commencing work the following morning at 9.13am with a finish time of 8.22pm.

[36] It was Mr Nieuwdorp's evidence that these shifts were a health and safety issue for the drivers and this should have been addressed during the consultation process but the time frames set by NZ Bus did not allow proper consideration of the issues or discussions to occur.

[37] Of concern to the drivers was the ability for them to spend time outside of working hours with their families especially in light of the finishing and start times of the new rosters and in light of the change from partial or fully fixed rosters to fully rotating rosters. A rotary roster is a roster which continually changes with employees working different days each week. A non-rotary roster is a fixed roster which, as its name suggests, does not change.

[38] At the investigation meeting, Ms Neville accepted that the changes put in place in July 2015 to all rosters would affect a number of employees who were not at that time working full rotary rosters.

[39] Ms Neville accepted in her oral evidence that this was a significant change for those employees. Ms Neville provided me with a table showing the number of employees who would be affected by the change and who would move from partial rotary or fully fixed rosters to full rotary rosters. A total of 107 employees were directly affected by the change. The impact of moving from even a partial rotary roster but certainly from a fixed roster to a full rotary roster would as confirmed by Ms Neville, to be a significant change for those 107 employees. In that situation it was incumbent on NZ Bus to ensure its consultation processes were robust allowing for informed feedback from all of those employees affected by the change.

[40] NZ Bus failed to undertake a thorough consultation process. NZ Bus imposed a very short timeframe of initially four days but then extending it to 8 days (which included a weekend) and in doing so denied the applicants of the right to be adequately consulted. The delegates had no opportunity to properly analyse the proposed roster changes or consult with its members about the issues associated with

the changes to full rotary rosters or the implications regarding health and safety concerns.

[41] NZ Bus submitted that the changed rosters were not a significant change to hours of work requiring consultation. I do not accept that submission which is contrary to Ms Neville's oral evidence at the investigation meeting. At least 107 employees would have their hours of work changed significantly when they were required to change from a partial rotary roster or fixed roster to a full rotating roster. The submissions from NZ Bus fails to recognise the significant change those employees would experience in their personal lives.

[42] My comments regarding the life style implications is informed by the fact NZ Bus has agreed through schedule F of the collective agreement that an analysis of employee preferences in relation to working hours and work/life balance would be undertaken by conducting depot by depot employee surveys to establish varied rosters and duties to suit different employee and company needs. This schedule to the collective agreement indicates an intention to take into account work/life balance issues. This was not addressed by NZ Bus during the consultation period despite concerns being raised about the number of sequential weekends drivers would be required to work under the new rosters.

[43] I accept the evidence of NZ Bus that it advised the Unions in late 2014 of its intention to move to fully rotary rosters. However, that notification was not given in the spirit of consultation. Indeed there is no evidence that any further discussions about this proposed change was undertaken.

[44] Further, on 25 May 2015, NZ Bus entered into consultation with two union delegates over what Mr Nieuwdorp considered to be "minor duty changes" to the duties at the City depot. During that consultation the Union delegates were provided with two hours paid time off work to review the new duties and to consult with the drivers. Mr Nieuwdorp's uncontested evidence is that there was no mention during that consultation period that the altered duties would give rise to a complete rescheduling of the rostered duties.

[45] I find there was a degree of consultation and that feedback was provided to NZ Bus and taken into consideration with changes being made to the rosters. However, the issues raised by Mr Nieuwdorp at the Authority's investigation meeting could not

be fully explored by NZ Bus' and the Unions because the unions were not provided with a proper opportunity to digest the information, analyse it and communicate it to members.

[46] I find the consultation process followed by NZ Bus when it promulgated new rosters in June 2015 breached its consultation obligations under the collective agreement.

Failure to post rosters six weeks in advance

[47] Clause 14.5(b) of the collective agreement requires rosters to be posted on roster boards 6 weeks in advance of the week the roster is to be worked. Clause 14.5(c) provides for rosters to be posted a minimum of four weeks in advance in special circumstances. The special circumstances include changes to timetables or re-schedules of public transport network.

[48] It was common ground that the new rosters were published by NZ Bus on 18 June 2015 and would be effective 4.5 weeks later from 19 July 2015.

[49] The Unions say the new rosters were a complete rewrite of previous rosters requiring 6 weeks advance notice, while NZ Bus says the new rosters were a rescheduling and fell under clause 14.5(c) requiring only four weeks advance notice.

[50] The collective agreement does not define the terms "rewrite" or "reschedule". Roster is defined as a "...*schedule showing in advance the days of the week on which employees shall be required to work*". [my emphasis]

[51] The new rosters, set out a new "schedule" of the days of the week on which employees would be required to work, and was a re-scheduling of the previous rosters. Promulgating the new rosters 4.5 weeks in advance of the commencement date was not a breach of the collective agreement.

Breaches of good faith

[52] The applicants claim that NZ Bus breached its statutory obligations of good faith when it promulgated the new roster.

[53] The duty of good faith applies to matters arising under or in relation to a collective agreement while the agreement is in force.⁵ The duty of good faith requires employers to consult about employee's collective employment interests including the effect on employees of changes to the employer's business,⁶ and a proposal that might impact on the employer's employees.⁷

[54] The applicants say NZ Bus ought to have responded positively to its requests for more time to consult Union members and to enable them to prepare a proper and informed response to the proposal. I agree. The refusal by NZ Bus to provide enough time during the consultation period for the delegates to analyse the new rosters, digest the information, and communicate it to NZ Bus employees in a way that they could provide informed feedback was a breach of good faith.

[55] Further, NZ Bus's stance that the consultation by delegates of union members was union business and should be carried out in the delegates own time is contrary to its obligations to be active and constructive in maintaining a productive employment relationship.⁸ The Union members were NZ Bus employees and it was NZ Bus's duty to ensure all its employees were involved in the consultation process.

[56] By not meeting its duty to consult as envisaged by section 4 of the Act, NZ Bus has breached its obligations of good faith.

Remedies

[57] I have found NZ Bus has breached the terms of the collective agreement and its duty of good faith when it failed to undertake meaningful consultation with its employees prior to the promulgation of the new rosters in June 2015. The applicants are entitled to a consideration of remedies for these breaches.

[58] I have found the claim that NZ Bus did not comply with clause 14.5 of the collective agreement has not been established and I can be of no further assistance to the applicants in this matter.

⁵ Employment Relations Act 2000, section 4(4)(b).

⁶ Ibid, section 4(4)(c).

⁷ Ibid, section 4(4)(d).

⁸ Ibid, section 1(A)(b).

Compliance Order

[59] In the statement of problem the applicants seek a compliance order requiring the respondent to discontinue the promulgated roster, to reinstate the previous roster, and to comply with the collective agreement in relation to any future roster changes.

[60] In submissions the applicants have asked the Authority to instead make a declaration and to issue a compliance order requiring sufficient time be made available for future consultations depending on the subject matter and the nature of the consultation at issue.

[61] It is not appropriate for the applicants to use submissions to amend their claims. However, the new rosters have now been in place for more than six months and in that time many employees would have adjusted their lifestyles to fit with the new rosters. It will be difficult in these circumstances to ask everyone to upheave their lives and require the company to revert back to the previous rosters.

[62] Even if I were to undo what has been done by ordering that the new rosters be discontinued and the old rosters reinstated, a consultation process undertaken in accordance with the collective agreement may or may not result in the same outcome.

[63] I intend to deal with the matter pursuant to section 137(2) of the Act which allows the Authority to order a person to do or cease to do any specified activity for the purpose of preventing further non-observance or non-compliance with the collective agreement.

[64] Transportation Auckland Corporation Limited and Cityline (NZ) Limited together trading as NZ Bus is ordered to comply with its consultation obligations under the collective agreement by ensuring it provides adequate and sufficient time for consultation to ensure the first and second applicants and its members are able to participate fully in the consultation process.

Penalties

[65] The applicants seek the imposition of penalties against NZ Bus for the breach of the collective agreement and for those penalties to be paid to the third and fourth applicants.

[66] The Authority's jurisdiction to recover penalties is contained in sections 133 and 135 of the Act which allow for the recovery of penalties for any breach of an employment agreement or where a party breaches the Act and the provision which has been breached provides for a penalty. In the case of a company, the maximum penalty is \$20,000.00 per breach.

[67] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*⁹ the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

[68] The breaches by NZ Bus of the consultation requirements of the employment agreement have led to a number of employees being negatively impacted by the new rosters. I acknowledge that NZ Bus provided an opportunity for employees to have their personal circumstances taken into account prior to confirming the new rosters and that a small number of employees took up that opportunity.

[69] There was nothing before the Authority that indicates the breaches identified in this determination have been a regular ongoing concern between the parties and the steps taken to assist individuals are mitigating circumstances which I have taken into account.

[70] The impact of the breaches has rendered the consultation process nugatory and failed to provide the parties an opportunity to discuss and address the health and safety concerns raised and the life/work balance issues which are a feature of the collective agreement.

⁹ [2014] NZEmpC 65.

[71] I have concluded that there is a need for deterrence to ensure that in the future adequate and sufficient time is provided to enable the applicants to fully participate in the consultation process.

[72] The breaches of the consultation requirements of the collective agreement have affected a multitude of employees. Rather than look at the breaches as they pertain to each individual employee I have adopted the totality principle to the imposition of a penalty and have formed the view that an appropriate penalty is \$10,000.

[73] The third and fourth applicants seek to have the whole or part of the penalty paid to them under section 136(2) of the Act. Not all employees covered by the collective agreement were negatively impacted by the change to fully rotary rosters. It is difficult to assess the extent to which some or all of the applicants were negatively impacted by the changes. For that reason the application under section 163(2) is declined.

[74] Transportation Auckland Corporation Limited and Cityline (NZ) Limited together trading as New Zealand Bus is ordered to pay a penalty of \$10,000 into the Authority within 28 days of the date of this determination which will then be paid to the Crown.

Costs

[75] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the applicants shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. NZ Bus shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[76] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell
Member of the Employment Relations Authority