

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 62
5453828

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

AND WELLINGTON CITY
 TRANSPORT LIMITED t/a “GO
 WELLINGTON”
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Tanya Kennedy, Counsel for Applicant
 Kylie Dunn, Counsel for Respondent

Investigation Meeting: 23 March 2016 at Wellington

Submissions Received: Oral and written from both parties on 23 March 2016

Determination: 2 June 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Tramways and Public Passenger Transport Employees Union (Inc) Wellington Branch (the Union) has raised a dispute over payment for additional duties it says its members are being required to perform following a change to workplace practice. The Union has asked the Authority to answer a list of questions it has formulated and to make declarations accordingly. Depending on the answers to those questions, the Union will also seek wage arrears which, as yet, have not been specified.

[2] The dispute relates to the inspection bus operators are required to carry out on their vehicles before undertaking a shift. It concerns the time allocated in the collective agreement for undertaking the bus check and the time the Union claims the bus check actually takes to complete. The Union claims bus drivers are being required to undertake ten minute vehicle inspections but are only being paid for five minutes of that time.

[3] This matter has been the subject of two previous Authority decisions, one relating to the jurisdiction of the Authority to award the remedies sought by the Union¹ and the second relating to an application by Wellington City Transport Limited (WCTL) to dismiss the proceedings as frivolous and vexatious².

[4] WCTL rejects the Union's claims and says all its drivers in Wellington and Auckland are required to perform the same standard pre-journey bus check prior to commencing the first trip of each shift. It says a driver can comfortably complete the sign-in process and the pre-journey bus check in 10 minutes total time. The collective agreement allows 15 minutes total time for these activities.

Questions

[5] The questions posed by the Union are:

- (a) Have the employees agreed to undertake a 10 minute vehicle inspection;
- (b) If so, what are the terms of the agreement;
- (c) If so, is the payment of 5 minutes' working time for a 10 minute vehicle inspection inconsistent with the collective agreement and/or Wages Protection Act 1983 and/or Minimum Wage Act 1983;
- (d) Is the respondent required to pay (at the appropriate rate of pay) 10 minutes for each vehicle inspection?

¹ [2014] NZERA Wellington 136, 22 December 2014

² [2015] NZERA Wellington 71, 27 July 2014

The collective agreement

[6] The Union and WCTL are parties to a collective agreement which came into force on 15 January 2013 and expired on 15 January 2016. Clause 9 of the collective agreement concerns hours of work and provides at 9.1(d) as follows:

Signing On and Off – Operators shall be allowed 10 minutes for signing on and five minutes for the inspection of their vehicles and 10 minutes for signing off and paying in.

[7] An operator is defined as an employee employed to drive a bus and to collect fares³.

Evidence of the parties

[8] Evidence for the Union was provided by Kevin O’Sullivan, Secretary of its Wellington Branch; Cathy Howell, who has been a bus driver for approximately five years; and Trish Fenaughty, a bus driver employed by WCTL for approximately 4½ years. Evidence for WCTL was provided by Nasau Fuimaono who is a senior duty supervisor with that company.

[9] It was Mr O'Sullivan's evidence that, at the time the recently expired collective agreement commenced, drivers were required to undertake a limited vehicle check which took five minutes. He said in or around May 2013 WTCL embarked on a driver training programme and introduced a much more comprehensive vehicle check and a *Bus Acceptance and Defect Card*. This card is placed in each bus to facilitate the safety check which comprises:

**Lights working*Air pressure guage*Windscreen wipers*Panel damage & graffiti*Doors open and close*Passenger bell*Radio Telephone*Visual check of tyres*Destination Sign*

[10] The Card includes the following words before the list of items to be checked:

To be done 10 minutes before start of shift.

[11] Mr O'Sullivan confirmed this was the only instruction to bus drivers from WCTL regarding the vehicle inspection or sign on time. When asked what happened if a driver was unable to complete a vehicle check within five minutes, Mr O'Sullivan

³ Clause 8 of the collective agreement

responded that no one stood over bus operators telling them it was time to go and they could complete the check and leave late.

[12] Mr O'Sullivan also said, in answer to a question, the Union had, in recent bargaining for a new collective agreement, initially proposed a change to clause 9.1(d) to increase the time allotted to the inspection of vehicles. However, the Union had subsequently withdrawn that proposal. He confirmed the new collective agreement, which was awaiting ratification at the time of the Authority's investigation, contained an unchanged reference to the allocation of five minutes for the inspection of vehicles.

[13] Ms Howell and Ms Fenaughty gave evidence they were unable to complete the checks they are required to undertake on their vehicles at the commencement of each shift in the five minutes allotted by the collective agreement. Both said they normally arrived at the workplace at least 10 minutes before their sign-on time in order to complete a thorough bus check.

[14] Both acknowledged they were not instructed by WCTL to do so and that it was their own choice. They said they arrived early because they were aware of the importance of completing a thorough vehicle check in accordance with the New Zealand Land Transport Agency guidelines. Ms Fenaughty also said she had a routine of coming into work early and was "*one of those people*" who liked to do that. Neither had been subjected to disciplinary procedures for leaving the depot late due to the length of their vehicle inspections.

[15] Mr Fuimaono emphasised that the vehicle inspection was not a mechanical check: its purpose was to identify any obvious risks or hazards such as a loose seat or broken windscreen wiper. If an issue was identified during the check, the operator would be allocated another bus and the WCTL's maintenance team would address the issue.

[16] He explained that drivers were paid for the fifteen minutes before their buses departed when they completed sign on and vehicle check processes, and no operator was expected to do this work in their own time. They were not asked to start work any earlier before the fifteen minute period. WCTL remained of the view that the vehicle inspection could be carried out in five minutes. Mr Fuimaono said, because drivers were doing the inspection daily, they had got into the routine of it, and were able to do it quickly.

Submissions

[17] Counsel for the Union submitted it was clear that the enhanced requirements for a bus check from May 2013 took significantly more time than the requirements before that date. In Ms Kennedy's submission, it was a nonsense for WCTL to claim that the five minutes it took to do the pre-May2013 vehicle inspection would still be sufficient.

[18] That being the case, Ms Kennedy submitted that drivers should be paid for the additional work they were undertaking. She submitted that a failure to allow for and pay for the time it takes to do the bus check was a breach of the collective agreement and/or various legislative requirements.

[19] She referred to the hours of work clause of the collective agreement which provided at 9.1(c) for the payment of "*all time worked*" by drivers. Ms Kennedy noted there was no dispute that checking vehicles formed part of a driver's role and was work required by the employer of the driver. It was not time for which the operator was signed off duty; it was part of the duty.

[20] Taking into account WCTL's obligations under legislation and the collective agreement Ms Kennedy submitted that the five minutes allocated for bus checks was a minimum amount of time. It did not preclude a longer period being required to conduct the inspection of vehicle. Nor did it preclude the payment for any longer time that is required. In her submission, all of the time worked to carry out the vehicle inspection must be paid for at the appropriate rate of pay.

[21] That could be accommodated under s.61 of the Employment Relations Act 2000 in her submission. That section provides that the terms and conditions of employment of an employee bound by an applicable employment agreement may include any additional terms and conditions mutually agreed by the employee and employer. The proviso is that those additional terms and conditions cannot be inconsistent with the terms and conditions in the collective agreement. Ms Kennedy submitted that agreement for employees to be paid the additional time it takes to carry out the longer bus check is not inconsistent with the collective agreement. However, it would be inconsistent, in her view, to expect the employees to carry out the more detailed bus check in their own time without payment.

[22] Ms Kennedy submitted the employer had no ability to pay the workers less wages than for the time they actually worked because of the provision of s.4 of the Wages Protection Act 1983. That section provides that an employer may not make deductions from an employee's wages except in accordance with other provisions of the Act. In summary, an employer shall, when wages become payable to the employee, pay the entire amount of those wages to the worker without deduction. In Ms Kennedy's submission, by deducting the extra time it takes to carry out the vehicle inspection, WCTL was breaching s.4 of the Wages Protection Act.

[23] She noted that s.6 of the Minimum Wage Act 1983 required the employee to receive payment for his work at not less than the minimum rate. In relation to that she submitted WCTL was breaching the Minimum Wage Act by making no payment for the extra five minutes of time drivers spent on vehicle checks.

[24] In submissions on behalf of WCTL, Ms Dunn submitted that clause 9.1(d) of the collective agreement expressly provided for operators (drivers) to be paid during a shift sign-on process, the bus inspection and a sign-off process. This was provided for by way of an additional 15 minutes at the start of a shift and 10 minutes at the end of a shift.

[25] Ms Dunn denied the Union's claims that WCTL had breached the collective agreement, the Wages Protection Act and the Minimum Wage Act. In her submission, the vehicle check took five minutes to complete. Employees were not working an additional five minutes and, in any event, in her submission the Authority has no jurisdiction to alter the terms of the collective agreement, which clearly and unambiguously provides for a five minute check.

Discussion

[26] I do not accept the Union's submissions that WCTL is breaching the Wages Protection Act or the Minimum Wage Act. The Union presented no evidence during my investigation that bus operators were required to work any time for which they were not being paid. The two drivers who gave evidence confirmed they started work early by their own choice, not because they were instructed by their employer to do so.

[27] While I accept those two drivers are very conscientious regarding the vehicle safety checks they undertake, I am not persuaded that they, or any other WCTL

drivers, are being required to undertake the checks in their own, unpaid, time. By Mr O'Sullivan's evidence, no one stands over drivers to ensure they leave the depot on time after completing their vehicle checks. It was clear also that neither of the two drivers who gave evidence had been subjected to disciplinary procedures for taking more than five minutes to check their vehicles.

[28] I find WCTL does not require its drivers to conduct a ten minute vehicle inspection. The ten minutes originated in the New Zealand Transport Agency's *Roadside Inspection Guidelines for Heavy Vehicles 2013* which include the following sentence:

A 10-minute walk-around now could potentially save you time and money later, and could even save your life.

[29] The only reference in WCTL documentation to this appears to be the sentence I have referred to in paragraph 9 above which is on the *Bus Acceptance and Defect Card*. I do not view the Card as containing an instruction that drivers must complete a ten minute check. However, as the sentence appears to be inconsistent with clause 9 (1)(d) of the collective agreement it might be prudent for WCTL to consider rewording it.

Determination

[30] My findings, and the answers to the questions posed by the Union, are as follows:

- (a) Bus operators are required to undertake a bus inspection. There is no requirement that the inspection take ten minutes. The only time attached to the vehicle inspection is the five minutes allocated in clause 9.1 (d) of the collective agreement.
- (b) Not applicable in light of the answer to (a).
- (c) Not applicable in light of the answer to (a).
- (d) No.

[31] No declarations are required and no question of wage arrears in light of the findings I have made.

Costs

[32] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority