

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 77  
5534739

BETWEEN      MANUFACTURING AND  
                    CONSTRUCTION WORKERS  
                    UNION INCORPORATED  
                    Applicant

AND              WELLINGTON CITY TRANSPORT  
                    LIMITED  
                    Respondent

Member of Authority:      M B Loftus

Representatives:          Peter Cranney, Counsel for Applicant  
                                    Kylie Dunn, Counsel for Respondent

Investigation Meeting:      20 November 2015 at Wellington

Submissions Received:      Various correspondence up to and including 5 May 2016

Determination:              17 August 2017

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] The applicant, the Manufacturing and Construction Workers Union Incorporated (MCWU or the Union), contends the respondent, Wellington City Transport Limited (Go Wellington) has breached three clauses contained within a collective agreement to which the two are a party. They are clauses 5, 7 and 67.

[2] MCWU also claims Go Wellington is in breach of the duty to act in good faith (s.4(1) of the Employment Relations Act 2000 (the Act)) and s.9 of the Act which prevents the conferring of a preference in relation to terms or conditions of employment on the grounds of Union membership.

[3] Go Wellington denies the claims have validity.

## **Background**

[4] MCWU and Go Wellington are parties to the Go Wellington collective employment agreement 2013 to 2016. Contained therein are the following provisions relevant to this dispute:

*5.(b) The terms and conditions of employment within the Workshop section of this agreement shall apply to those Employees appointed by Wellington City Transport Limited to any positions as Engineers, Fitters, Fitter Welder, Turners, Mechanics, Oxyacetylene and Electric Welders, Automotive and Trolley Bus Electricians, Trolley Bus Section Electronics Technician – Service Person, Armature Winders, Automotive (Heavy) Mechanics, Trolley and Diesel Omnibus Mechanics, Metalworkers, and to Garage Service Employees, Garage Assistants, Fitters Assistants, Coach Builders, Trimmers, Spray Painters and Panel Beaters and Day Cleaners.*

*7. Bargaining agency. Employees who are not members of the Union's party to this agreement and who accept the terms and conditions of this agreement as an individual employment agreement will pay a bargaining agents fee to the Tramways Union ...*

*26. Hours of work. The ordinary hours of work shall be 8 hours per day, 40 hours per week, work Monday to Friday, both days inclusive between the hours of 7.30am and 5.30pm with not less than 30 minutes allowed for lunch. The above hours may be varied by agreement with the Employee, such agreement not to be unreasonably withheld. Work performed outside these hours shall be classed as overtime.*

*28. Shift Operations. The Employer may operate shifts in addition to the normal day work provisions contained in this section of this agreement in accordance with the following provisions:*

*(a) The hours of shift work shall be 0600 hours to 1400 hours and 1400 hours to 2200 hours on Monday to Friday inclusive for Workshop staff excluding Garage Service Employees. ...*

*(b) A shift shall be inclusive of one half hour paid crib time for the purposes of taking a meal on the Employer's premises. The meal shall be taken as near to the middle of the shift as practicable.*

*(c) A shift Employee shall, while so employed, be paid an allowance as per below Table per shift ...*

*(d) A shift Employee excluding Garage Service Employees shall, while so employed, receive a 5.33% loading on their printed base rate as set out in clause 33(a).*

...

(g) *The shift for each Employee will be fixed unless there is a mutual arrangement otherwise between the Employees concerned and as agreed by the Employer.*

67. *Deduction of Union Fees. Subject to the provisions of the Wages Protection Act 1983 and where authorised by the Employee, the Company shall, by arrangement with the Union concerned, deduct Union fees weekly from the wages of Union members covered by this agreement and such deduction shall be paid to the respective Union Officers at fortnightly intervals. ...*

[5] On 8 December 2014 John Nielsen, a MCWU member, sent the Union a letter of resignation. Perhaps already aware of this, Go Wellington did not make a union fee deduction from Mr Nielsen's wages for the pay week ended 6 December 2014. This was subsequently rectified.

[6] Upon receiving the resignation MCWU contacted Go Wellington and was advised the company intended a positive response to Mr Nielsen's request he be given an individual employment agreement (IEA) but was yet to offer it.

[7] The call followed earlier discussions that had been prompted by the Union hearing reports Go Wellington intended paying workshop employees who were not its members at a rate greater than that paid to members.

[8] Perhaps that was not surprising as Mr Neilson was not the first employee to seek an IEA. Upon his commencement a new manager, Perry Hunt, had been approached by a mechanic, Craig Goodwin, who sought an individual employment agreement (IEA).<sup>1</sup> Mr Hunt says he told Mr Goodwin he could not discuss the issue as Mr Goodwin was a union member. Mr Goodwin response was to resign from the Union and continue to ask for an IEA. He says he did so as he sought greater flexibility with respect to his hours of work and he felt an IEA would facilitate this. The proposed quid pro was a flat hourly pay rate. He says other employees were aware of this and tried to dissuade him.

[9] With respect to Mr Neilson the Union asked Go Wellington not offer the IEA as to do so would, in its view, undermine working party proposals agreed during negotiation of the current collective agreement.

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<sup>1</sup> Goodwin brief at paragraph [6]

[10] As events transpired, Go Wellington concluded four IEAs for employees performing work covered by the collective agreement. The IEAs provide for normal working hours on any five of the days of the week at any time bus services operate. They shall be notified by roster as determined by Go Wellington and with five days' notice.

[11] The Union contends this contravenes clause 29(g) which provides:

*Overtime, when necessary, shall be rotated in the depot or section in which Employees are employed unless it is to complete a specific job already started by a particular Employee. The rotating list method shall be adhered to and any work declined shall rotate to the next appropriately skilled Employee in the order listed. The list shall be posted in a place accessible and conspicuous to all concerned. Where overtime is obligatory, the principles of strict rotation shall be adhered to.*

[12] The wages being offered to workers on these agreements are, in the Union's view, approximately 15% better than those offered to its members.

[13] MCWU claims that since agreeing the new IEAs Go Wellington has been allocating overtime work to employees on the flat rate IEAs. It says this allocation has been to the detriment of members covered by the collective employment agreement and seeks an order Go Wellington desist and that it be penalised accordingly.

[14] Go Wellington considers neither the collective agreement nor the Act prevents it from providing an IEA on terms different to the collective to employees such as Mr Nielsen who have resigned from the Union. Accordingly, it denies there has been a breach of either the collective employment agreement or the duty of good faith. Similarly, it denies it has breached s.9 of the Act.

### **Determination**

[15] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[16] As already said MCWU's claim, as originally enunciated, is Go Wellington's actions are in breach of clauses 5, 7 and 67 of the applicable collective agreement;

section 4(1) of the Act (the duty to act in good faith) and section 9 of the Act in that it offered a prohibited preference.

[17] In arguing its position MCWU notes what it considers key factual ingredients. It says clause 29(g) provides overtime shall be rotated among all workers in accordance with the process described in the clause. It also notes the collective agreement is a minimum rate document and the parties intend working toward a paid rate document. It says this was to be done by a working party agreed during the last negotiation and while the relevant clause was omitted from the collective there is no disagreement this occurred.

[18] It is MCWU's assertion Mr Hunt behaved incorrectly as he should have told those inquiring about IEA's the issue was being dealt with by the working party but instead told the workers concerned they could have a flat rate but only by resigning from the union.

[19] Reference is also made to clause 70 of the collective. It is entitled Consultation and provides, amidst other things, that major changes to workplace practices require prior consultation. MCWU says the introduction of the IEA's *had a material effect on union members* [by reducing the amount of overtime available to them] *or at least a potential one*<sup>2</sup> and should have been discussed. It is the same failure that leads to an alleged breach of section 4 and confirmation of this comes from the fact the parties had already agreed changes of this type *would* impact on the workers and were to be addressed by the working party.

[20] The Union says it made unsuccessful attempts to establish the working party with the result being Go Wellington failed to be active, constructive, communicative and responsive as required by s 4 of the Act. It says these failures undermined both the collective and the bargaining process.

[21] MCWU concedes, via its submission, the claim regarding the unions fees and a breach of clause 67 has been addressed. It need not be consider further.

[22] For the respondent it is initially noted the claims Go Wellington breached clauses 5 and 7 of the collective agreement were not pursued in submissions and the Union is now focusing on the allegations regarding a breach of the duty of good faith

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<sup>2</sup> Closing submission at paragraph [16]

and the bestowing of a preference. Reference is also made to what Go Wellington say are new claims which were not pleaded in the statement of problem – namely that it breached clause 70 by failing to discuss individual arrangements with MCWU.

[23] That, I conclude, is essentially correct.

[24] Considering the claim Go Wellington has breached clause 70 of the collective agreement by failing to discuss a major change, namely application of the flat rate along with a seven day a week roster as specified in the IEA's. Go Wellington's response is clause 70 does not oblige it to consult with the union about individual arrangements with non-union members.

[25] Clause 70 is entitled consultation. It recognises the introduction of new technology or major changes to workplace practices have the potential to alter conditions of work. As a result it acknowledges prior consultation about such changes should occur.

[26] I agree with Go Wellington's submission that discussing terms with non-union members involves neither technology nor a major change to workplace practices. Here I also note the evidence does not support MCWU's contention these individuals were enticed to abandon the union. The evidence from the employees concerned and the managers with whom they discussed the issue is the impetus for change came from the employees who were motivated by their personal circumstances.

[27] I also note and agree with Go Wellington's submission the idea the union has a role in determining the terms of non-union members was at the heart of the now abandoned claim Go Wellington had breached clause 5. The simple answer is a collective can only apply to those it covers. It does not cover non-union members and the union has no rights of representation in respect to such employees.

[28] Similarly it is difficult to conclude MCWU should be consulted about such terms as to do so and thereby allow a possible influence over the outcome of individual negotiations would appear to breach the Act's freedom of association provisions and in particular s 7(a).

[29] The only arguable change to workplace practice, and one of the two that has essentially led to this application, regards the allocation of overtime. That shall be discussed when considering the effect of clause 29.

[30] In any event I note the evidence shows the concept of a flat rate was discussed with MCWU at various meetings and the fact Go Wellington was willing to offer this to union members was confirmed in writing. The fact the meetings occurred is not nullified by the fact the parties were unable to reach an agreement about the issue and does not constitute a breach of the collective agreement as it was not applicable to those working on the flat rate.

[31] That then raises clause 29 argument. MCWU claims there was a sudden diminution in the amount of overtime being offered to its members and this was due to it being allocated to those on the flat rate. The evidence simply does not support this claim.

[32] The evidence of Mr Gordon, Go Wellington's GM Fleet, is all employees indicate their availability to work overtime and it is then allocated to such individuals on the basis of hours already worked so as to maintain a balance in the total worked by each employee. That complies with the intent of the clause and the way in which it has been previously applied. The only difference was that those on the flat rate were paid accordingly when they worked overtime.

[33] Mr Gordon's evidence went undisturbed by questioning as did his assertion the real issue was that overtime was diminishing across the board. Indeed documents tabled at the investigation show that when viewed over a period of time union members averaged more overtime than non-members and the overtime worked by the non-members had reduced since they left the union. The alleged anomaly relied upon by MCWU is not, for reasons enunciated by Go Wellington in their submissions at paragraphs 3.23 (b) to (d), an accurate reflection of events generally.

[34] Turning now to the claims Go Wellington has breached the duty of good faith in various ways.

[35] It is said Go Wellington breached s 4(1A)(b) and failed to be active, constructive, responsive and communicative. In this regard two issues were canvassed in evidence. The working party regarding changes to hours and the flat rate as well as the failure to discuss the terms Go Wellington was offering to employees on IEA's. As already said the working party did discuss hours and the flat rate but was unable to reach a conclusion and there is no obligation to discuss the terms applicable to non-members with a union which does not represent them.

[36] The second claim is Go Wellington undermined the collective by enticing members from MCWU and offering preferential individual terms. Again, and as already said, the evidence from both the employees and managers concerned is the impetuous for the IEA's came from the employees. Indeed the evidence is Go Wellington refused to deal with Mr Nielson while he remained a union member and there is no evidence it then suggested he resolve the issue by resigning from the union. He did that of his own volition.

[37] There is no evidence Go Wellington did anything designed to encourage other members to resign. Indeed the evidence from those non-members who appeared at the investigation is their departure from the union was a result of dissatisfaction with the union and/or the terms it had negotiated as opposed to any enticement from Go Wellington.

[38] There is then the view Go Wellington offered preferential terms thus undermining the collective and breaching s 9 of the Act. While it is correct non-members got a higher hourly rate they lost both penal and overtime loadings along with various allowances.

[39] While the union is emphasising the increased hourly rate I consider the arrangement needs to be considered as a totality. Here, and while there was a pay increase for non-union members the employees gave a number of concessions which had a monetary value. Indeed and during the period in the early 90's when employers were aiming to implement flat hourly rates and do away with penalty loadings the price, for want of a better word, was often agreed to be 15%. That is analogous with what occurred here. This was a bargain with both give and take and there is no evidence it delivered an advantage when considered as a totality.

[40] Finally I note the issue of the employer's intent. The evidence is this was designed to enhance the Go Wellington's ability to respond to maintenance needs when its buses were running and not undermine MCWU. Indeed the same deal was available to the union and its members if they chose to avail themselves of the offer.

[41] Finally I note a claim Go Wellington's action undermined bargaining. That fails if only because there is no current or ongoing bargaining.

**Conclusion and Costs**

[42] For the above reasons I conclude the union has been unable to establish its claims. They are therefore dismissed.

[43] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority