

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 30
3027935

BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION Applicant
AND	CITYLINE (NZ) LIMITED First Respondent
AND	WELLINGTON CITY TRANSPORT LIMITED Second respondent

Member of Authority: M B Loftus

Representatives: Tanya Kennedy, Counsel for Applicant
Andrew Caisley, Counsel for Respondent

Investigation Meeting: 27 April 2018 at Wellington

Submissions Received: At the investigation meeting

Written record of
determination: 30 April 2018

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, the New Zealand Tramways and Public Passenger Transport Union (the Union) has lodged a number of claims concerning issues emanating from recent alterations to the contracts the Greater Wellington Regional Council has for the delivery of public passenger transport in its region.

[2] The issues are in the nature of a dispute¹ and involve differing views about how the respondents should address redundancies which will inevitably flow from

¹ Section 129 of the Employment Relations Act 2000

implementation of new Regional Council contracts. The parties also agree, quite correctly, there is a short time frame in which their differences must be resolved.

Background

[3] The first respondent, Cityline, operates various public passenger transport schedules from five depots in the Hutt Valley – Eastbourne, Upper Hutt, Stokes Valley, Waterloo and Wainuiomata. Cityline currently employs 188 staff of whom 166 are operators (ie: bus drivers). The bulk of the operators are members of the Union and their terms of employment are specified in a collective employment agreement (CEA) expiring on 14 October 2018.

[4] The second respondent, Wellington City Transport (WCTL) conducts a similar operation from three depots in Wellington city – Kilbirnie, Kaiwharawhara and Karori. It employs approximately 316 operators. Again the bulk are members of the Union and their terms of employment are also contained in a CEA which expires on 14 October 2018.

[5] With the exception of a Cityline operation known as the ‘Airport Flyer’ and which is not affected by issues canvassed in this determination, the business of both respondent’s is dependent on contracts let by the Regional Council. Those contracts have recently been reviewed and as a result the breadth of both respondents operations will be severely curtailed.

[6] Cityline calculates that once the new contracts are implemented it will, in addition to Airport Flyer drivers, only require 28 operators all of whom will work from the Eastbourne depot. That is an increase on the 20 currently employed at Eastbourne but the other four depots will close and redundancies must ensue.

[7] Similarly WCTL also faces a significant reduction to its workforce along with a repositioning of some employees. It envisages it will require 38 operators at Kaiwharawhara (an increase of 17) and 28 at Karori (an increase of 5). Unfortunately, however, it will only require 146 operators at Kilbirnie which is a reduction of approximately 126.

[8] Neither collective is specific on how these reductions should be achieved with neither addressing issues such as selection criteria. That said 28 of WCTL’s operators

remain covered by a more detailed document that was agreed in 1990. It is this lack of specificity that is at the heart of this dispute.

[9] Essentially the Union asks each respondent address its surplus by first seeking volunteers for redundancy on a company wide basis and then assigning the remainder to available jobs on seniority. It now argues this must be done due to the content of various rostering provisions contained in the respective CEA's and which it says require the allocation of altered rosters operable under the new Regional Council contracts prior to the making of decisions about who is to be redundant.

[10] The respondents have a differing view. Underpinning their approach is a belief each operator's job is depot, as opposed to company, based. This means they must reconfirm those currently employed at Eastbourne (Cityline) and Kaiwharawhara/Karori (WCTL) before filling remaining positions at those depots by relocating affected staff from the other depot(s). There are additional issues in Wellington given the 1990 agreement and the number of jobs remaining at Kilbirnie.

[11] This fundamental difference has created a barrier to agreeing how best to proceed in what all three parties see as an unpalatable, but unavoidable, situation. It is this impasse that has led them to the Authority.

Determination

[12] During a telephone conference to discuss the application and given the parties recognition their differences are ones best settled by negotiation if possible, it was decided that rather than address the application as filed I would answer three questions in order to assist the parties advance their discussions.

[13] Those questions are:

- a. Whether an operators job is depot based or not;
- b. Whether the new rosters need be allocated from a pool comprising all current staff as opposed to those who will be retained to operate the new Regional Council contracts; and
- c. An ancillary issue over whether or not Cityline operators can perform what had previously been WCTL schedules.

[14] In reaching the following conclusions I am cognisant of both the evidence and the rules of interpretation to which both Counsel referred.

[15] The first and most pertinent issue, at least in respect to the party's ability to advance their discussions, is whether or not operator positions are depot or company based.

[16] There are a number of indicators that point toward the answer being depot for both respondents. An operators' position is synonymous with the shift he or she is currently operating and the shift rosters, or at least the ones produced in evidence, all expressly identify a 'home' depot to which that shift applies. This is the same for both Cityline and WCTL rosters.

[17] It is also common ground that once an operator has been allocated a specific roster actual practice is his or her home depot will only change at the operator's behest and by virtue of the operator requesting a different roster. As Mr O'Sullivan, the Union's Secretary, conceded, it may be contractually possible for the employer to permanently reassign an operator to another roster and depot but this does not occur in practice.

[18] There is then the fact that when either respondent requires an operator whose normal weekday shift is assigned to a specific depot to commence at another on a temporary basis for, say, absence cover or a weekend shift, various costs are incurred primarily through travel time and/or allowance clauses. Again this indicates an employee's position is domiciled at a specific depot and working from another is an abnormal situation requiring recognition.

[19] Putting aside these strong indications which apply to both respondents there is, at least in the case of WCTL an express contractual provision. Clause 11(a) of the CEA reads:

Operators covered by this agreement shall within 14 days of their being employed be allocated to a particular depot at which they will commence and finish work. This will then become their home depot.

[20] That, I conclude, means a shift (read position) carries with it assignment to a specific depot and until the employee exercises his or right to apply for another shift (assignment to which is dependent upon seniority) that is where they stay. The position is depot based.

[21] Whilst not as express there is a similar reference to home depots in the travel allowance provisions of the Cityline collective.² I conclude, given the provision of the collectives, along with the other indicators, an operators position is depot based.

[22] The argument the rosters should be reallocated prior to a decision on who is to be made redundant fails to convince. It would, if correct, effectively deliver a redundancy selection process based solely on company-wide seniority.

[23] There is no evidence in either CEA the rostering process purports to be, or is intended to be used as, a redundancy selection process. Furthermore to use it as one would, given the conclusion positions are depot based, lead to an untenable outcome contrary to the respective CEA's in that it would allow someone to be displaced from a position that is *theirs* by a person who is effectively an outsider occupying another position. That could leave the employers in a fraught position if called upon to defend future personal grievances.

[24] There is then evidence the parties have, in recognition of the fact the respective redundancy clauses do not (with the exception of the 1990 document) deal with how the redundancy selection shall be addressed, already entered into discussion about the issue at least to the extent they have agreed selection shall not be merit based. There is also the fact the 1990 agreement has been expressly incorporated into the present WCTL CEA for what is now a select few. It specifies various redundancy selection rules and its express retention for a limited section of the workforce would indicate similar rules do not, at least contractually, apply to the rest.

[25] Finally there are Court decisions such as *Toll NZ Consolidated Limited (formally Tranz Rail Limited) v NZ Seafarers Union Inc and Maritime Union of NZ Inc.*³ There the Court concluded where there were potential conflicts between two doctrines of employment law such as a curb on the employer's ability to alter the terms of an employment agreement and its right to run its business as it sees fit it may continue with alterations in the way it manages its business provided there is no express fetter contained elsewhere in the CEA. There is no such express fetter, especially within the roster allocation clause as the Union is now trying to argue.

² Clause 15.2(a)(i)

³ [2004] 1 ERNZ 392

[26] The third issue is whether or not Cityline employees can drive what were historically schedules performed by WCTL employees though that is not the way it is being expressed. It is being expressed as a geographical prohibition on Cityline drivers working in Wellington City. That would be a historic nonsense given a large number of Cityline drivers do, and always have, worked in Wellington. A number of their schedules either end or commence in central Wellington and the airport buses transit the city.

[27] Furthermore there appears to be no contractual prohibition on the practice. The coverage clauses refer to a home depot which is geographically positioned but has no limitation on where the operator may go to from there. Indeed there are provisions in the Cityline CEA which specifically provide for work being performed beyond the Hutt Valley.⁴ Finally I note there are already a couple of examples of what might be considered domestic WCTL schedules being performed by Cityline drivers albeit with the agreement of the Union.

[28] Having effectively answered all three questions in the way promoted by the respondents I now choose to put on a facilitators hat and make some ancillary comments. I do so in the spirit of the approach taken by the parties and in the hope I can assist them resolve the issues by discussion and agreement.

[29] I am a little bemused neither respondent is currently of a view to seek expressions of interest in voluntary redundancy on a company wide basis. I say this for a couple of reasons. First it may go a long way to addressing the impasse and here I note the Union's comment that had this been conceded we may not have been here today. Second the respondent's evidence is there is no fiscal impediment in adopting this approach and it may well be beneficial in that it removes those who no longer wish to remain. It is more likely to see the retention of employees who truly want to stay and provide the service the respondents wish to provide their customers. Furthermore I note it is the very approach WCTL intends adopting for those covered by the 1990 agreement. Surely there cannot be too much administrative effort involved in applying it on a wider basis.

[30] I am not going to offer a view as to what may happen if there are either too many or too few volunteers and suggest that is an area which can be resolved by

⁴ For example clause 15.1

further discussion given my guidance regarding positions being depot based though I do note the Union's insistence on seniority is, potentially, fiscally beneficial to the respondents.

[31] Finally I am also a trifle puzzled by the Union's position regarding Cityline operators performing some Wellington work. For reasons we discussed at the investigation it is almost inevitable that if there were such a prohibition there would be more operator positions at Eastbourne but a greater percentage of the jobs would be either part-time or require split shifts and neither would be considered particularly desirable by the majority of those who remained.

Conclusion and costs

[32] The answer to the three questions I was asked to address are as follows:

- a. Positions are specific to an allocated depot;
- b. The roster allocation is not a precursor to redundancy selection;
- c. There is no contractual prohibition on Cityline employees working within the boundaries of Wellington city.

[33] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority