

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 13
3061280

BETWEEN NEW ZEALAND TRAMWAYS
 AND PUBLIC PASSENGER
 TRANSPORT EMPLOYEES
 UNION INCORPORATED
 Applicant

AND WELLINGTON CITY
 TRANSPORT LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Kevin O’Sullivan, advocate for the Applicant
 Andrew Caisley, counsel for the Respondent

Investigation Meeting: 2 September 2019

Submissions Received: Prior to the investigation meeting

Date of Determination: 14 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Wellington City Transport Limited (WCTL) operates bus services in Wellington.

[2] Prior to mid-2018, an informal practice existed where WCTL would call for bus drivers (known as “operators”) to volunteer to work on a public holiday. A roster of available operators would then be constructed.

[3] In mid-2018 WCTL lost a significant portion of its work and staffing levels were correspondingly reduced. Some operators have since been rostered to work on public holiday without volunteering.

[4] The employment relationship problem concerns whether operators who are rostered to work a public holiday without volunteering to do so are entitled to payment for work on a public holiday at the rate of quadruple time (“T4”).

The material provisions

[5] Bullet-point 7 of cl 10 (“point 7”) and cl 47(g)(ii) of the parties’ collective agreement are both material to the parties dispute, and are set out below.¹ Portions of the remainder of cl 47 have been summarized to provide context.

[6] Clause 10 is headed “**WAGES / ALLOWANCES**”. The first portion of cl. 10 contains two tables. The tables respectively record pay for operators depending on the nature of the position, years of service, and the applicable shift allowance. Underneath these is the following:

OVERTIME/PENAL RATES

- After 8 hours – Monday to Friday, time and a half
- After midnight – double time
- Broken Shifts – Time and a half after the 11th hour is exceeded
- Saturday – Time and a half for 8 hours, double time thereafter
- Sunday – double time
- Day Off – time and a half for the first 4 hours, double time thereafter
- **Statutory holidays – double time***

...

*Emphasis added

[7] Clause 47, headed “**PUBLIC HOLIDAY**”, sets out, amongst other things, a comprehensive range of entitlements associated with a public holiday, including how pay is calculated for operators:

- who are not rostered to work on the day in which the public holiday occurred;
- whose annual holiday leave coincides with a public holiday; and
- who are rostered to work on a public holiday but have been granted the day off;

[8] Clause 47(g)(ii) is the only provision within cl 47 that sets out payment entitlements for employees who work a public holiday. It states:

¹ Collective Employment Agreement between Wellington City Transport Ltd and The New Zealand Tramways and Public Passenger Transport Employees Union (Wellington Branch), and another: 15 October 2018-17 October 2020

The company may require employees to work on a public holiday. If an employee is required to work on a public holiday the following shall apply:

...

- (ii) An employee shall be paid their relevant daily pay that relates to the time actually worked on the day, plus that amount again.
- (iii) An employee shall receive an alternative holiday.

[9] The term “relevant daily pay” and its application is defined in section 9 of the Holidays Act 2003 (the HA).

9. Meaning of relevant daily pay

- (1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave, -
 - (a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and
 - (b) includes-...
- (2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, ... if the rate is equal to, or greater than, the rate that would otherwise be calculated under subsection (1).
- (3) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section (1)(a) which relates to the requirement to pay time and a half).

The parties' positions

[10] The applicant union (the Union) submits the rate at which WCTL must pay operators for work on a public holiday depends on whether the operator volunteered to work or whether s/he was required to work the day in question.

[11] The Union says if work on public holidays is not covered by volunteers and operators are required to work, then payment (for this group) must be at their relevant daily pay plus that rate again, in accordance with cl 47(g)(ii). It says this rate amounts to T4 where relevant daily pay (on a public holiday) is the rate described in the collective agreement at point 7: “*Statutory Holidays – double time*”. It further says point 7 sets the rate for operators who volunteer to work on a public holiday.

[12] WCTL denies the collective agreement differentiates between operators who volunteer and those otherwise assigned to work the holiday. It says cl 47(g)(ii) provides all

employees (covered by the relevant collective agreement) who work a public holiday, with payment of double time (“T2”) plus an paid alternative holiday.

The Authority’s investigation

[13] As permitted by s 174E of the Employment Relations Act 2000, I have not recorded all evidence and submissions received, but have expressed findings on matters that require determination to resolve the employment relationship problem. These are as follows.

- (a) whether the collective agreement provides separate rates for work performed on a public holiday depending on whether (or not) an operator volunteered to work on the day concerned; and
- (b) whether the collective agreement provides for payment of T4 to operators who work a weekday public holiday and in particular, whether (or not) point 7 at cl 10 specifies a relevant daily pay rate for the purpose of calculating payment for a public holiday.

[14] This determination has been issued outside the timeframe set out at s 174C(3). However the Chief of the Authority has decided exceptional circumstances exist.²

Contractual interpretation

[15] Resolution of the dispute between the parties requires the Authority to apply principles of law appropriate to the interpretation, application or operation of the contractual provisions contained in the collective agreement. The key principles are summarised as follows:³

- (a) The aim in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. The courts (and the Authority) do so by assessing objectively what a reasonable person, having all the necessary background information and knowledge, would understand the parties have intended to mean at the time the agreement was made.
- (b) The ordinary and natural meaning of the language provides a powerful but not always conclusive indicator of what the parties meant.

² Pursuant to s 174C(4)

³ Derived from the following judgements: *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC; *Vector Gas Limited v Bay of Plenty Energy Ltd* [2010] NZSC 5, *Air New Zealand v New Zealand Airline Pilots Association Incorporated* [2016] NZCA 131.

- (c) It is necessary to cross-check the words used against the context of the collective agreement as a whole, and any other extrinsic material relevant to the parties at the time of their agreement if it establishes a fact or circumstance capable of demonstrating what meaning the parties intended the words to bear. However, extrinsic material will not be relevant if it does no more than establish what an individual party intended or understood the words to mean.

Does the collective agreement provide separate rates for operators who work on a public holiday?

[16] By the use of the words: ‘*If the employee is required to work on a public holiday then the following will apply*’, the Union views the entitlements at cl 47(g)(ii) to apply exclusively to operators who have not volunteered to work on a public holiday.

[17] I am not persuaded by the Union’s interpretation that the “require[ment]” to work is generated by the absence of an offer by an operator to work on a public holiday. WCTL says whether or not an operator volunteers or is otherwise rostered to work is immaterial. It submits the requirement to work crystallizes when an operator is placed on the roster.

[18] On balance, I find the submission advanced by WCTL more accurately describes when an operator becomes obliged to work a particular shift. I accept that once an operator is placed on the roster s/he is “required” to work. Clause 47(g)(ii) therefore applies to all staff who work a public holiday irrespective of whether they volunteered to work the day or not.

[19] It is also notable that there is no mention within the ‘PUBLIC HOLIDAY’ provisions (cl 47) regarding public holiday entitlements for operators who volunteer at all. The omission is significant particularly where it is said the practice of operators offering to work is the primary means by which staffing of services on public holidays is managed. No explanation was given by the Union to the Authority as to why public holiday entitlements for volunteers would be excluded from cl 47 other than it relies on point 7 as setting out the entitlement.

[20] The difficulty with point 7 is there is nothing in the wording used to indicate the provision governs, exclusively, the entitlement to payment for operators who volunteer to work on a public holiday.

[21] I am not satisfied point 7 and cl 47(g)(ii) would convey to a reasonable person having all the necessary background knowledge, that these provisions provide two separate payments

regimes depending on whether an operator volunteered or was otherwise rostered to work on a public holiday.

Does clause 10 specify a relevant daily pay rate for the purpose of calculating payment for a public holiday?

[22] The crux of the dispute centres on point 7. The Union says point 7 sets a special relevant daily pay rate of T2 on a public holiday (and cl 47(g)(ii) is required to double that which results in a payment of T4). WCTL says point 7 merely confirms the payment expressed at cl 47(g)(ii) as T2.

[23] The plain words recorded at point 7 do not advance either parties' interpretation.

[24] Pointing away from the Union's interpretation is the heading "OVERTIME/PENAL RATES" under which point 7 sits. The title suggests the recorded points beneath are directed at events in which penal rates apply. The provision appears to set out whatever penal rate may apply to a particular situation. To say the payment expressed at point 7 does not include the penal aspect of the entitlement, is at odds with the overall thrust of cl.10. As with my previous appraisal regarding point 7, there is nothing in the language used to indicate it should be treated as the relevant daily pay rate, or that it should be further read alongside cl 47(g)(ii) to determine payment for a worked public holiday.

[25] The parties each provided extrinsic material to support their respective positions, although no evidence was furnished as to when point 7 was introduced as a collective term between them.

[26] The Union points to payments made for work on Waitangi Day in 2011. It says T4 was paid in circumstances where volunteers were not called to work. The issue between the parties concerned payment where the public holiday occurred on a Sunday.⁴ Under the collective agreement relevant daily pay for Sunday work attracts a payment of T2 in any event. Applying relevant daily pay in that situation plus that amount again (pursuant to cl 47(g)(ii)) resulted in an entitlement of T4. The dispute did not involve the application of point 7 and the example provided by the Union does not establish post-contractual conduct that supports its position.

⁴ Letter from the Union to WCTL dated 14 March 2011

[27] WCTL provided copies of the “STATUTORY/PUBLIC HOLIDAY” provisions extracted from each collective agreement between the parties (7 in total) beginning in 2000 including the current collective agreement.⁵

[28] The language contained in the 2005 collective agreement, and going forward, alters slightly from that used previously. But the entitlements attached to a worked public holiday have, in essence, remained unchanged since 2000: i.e. the rate of pay for an operator working a public holiday is twice that s/he would usually receive, and an alternative paid day off.

[29] Prior to 2005 the relevant provision stated: “*All statutory holidays will be paid at double time with a further paid day in lieu...*” The current provision is “*An employee shall be paid their relevant daily pay that relates to the time actually worked on the day, plus that amount again*”. The change to wording likely reflects the terminology that appeared following the commencement of Holiday Act 2003 on 1 April 2004.

[30] Separate to the parties’ agreement that payment would be doubled on a public holiday, there are no provisions in the collective agreement, nor anything contained in extrinsic evidence, to demonstrate the parties intended to enhance an operator’s rate of relevant daily pay per se for a worked public holiday. In answer to questions from the Authority, the Union accepted that the parties had never, during bargaining, agreed operators would be paid T4 for work on a public holiday as a matter of course.⁶ I am unwilling to conclude that point 7 of cl 10 of the collective agreement would convey to a reasonable person that the provision provides a special relevant daily pay rate for the purposes of cl 47(g)(ii). I find point 7 does no more than confirm the payment expressed at cl 47.

[31] The Union’s application for a finding under the parties’ collective agreement that Wellington City Transport Limited must pay operators for work performed on a public holiday at the rate of T4 is dismissed.

[32] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

⁵ It also provided a copy of the 1990 Tramways Award as it concerned payment for Statutory Holidays.

⁶ Testimony given by Mr O’Sullivan at the Authority’s investigation.