

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 342
3073273

BETWEEN NEW ZEALAND TRAMWAYS
 AND PUBLIC PASSENGER
 TRANSPORT EMPLOYEES
 UNION
 Applicant

AND TRANZURBAN HUTT VALLEY
 LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Simon Meikle, counsel for Applicant
 Daniel Vincent, counsel for Respondent

Investigation Meeting On the papers

Submissions Received: 8 May and 20 May 2020 from Applicant
 15 May 2020 from Respondent

Determination: 3 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a dispute over the interpretation of wording in the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 (the rule) and its application to members of the New Zealand Tramways and Public Passenger Transport Employees Union (the union) employed by Tranzurban Hutt Valley Limited (Tranzurban).

Background

[2] Tranzurban operates buses used for the provision of public transport services. The union represents members employed by Tranzurban. The union also has members with other employers with whom similar claims have been lodged.

[3] This claim is pleaded as follows:

[3] On 6th May 2019 new legislation came into force governing rest breaks and meal breaks. The legislation applies to scheduled passenger services performed in a large passenger service vehicle and applies in addition to the Land Transport Work Time & Log Book Rule 2007.

...

[5] The Rule requires 10 minute rest breaks to be taken that are not in a moving vehicle and at intervals throughout the work period. For the purpose of the Rule, work period means the period beginning with the time at which, in accordance with the driver's terms and conditions, the driver starts work and ending at the time at which, in accordance with the driver's terms and conditions the driver finishes work and includes all authorised breaks whether paid or unpaid to which the driver is entitled.

[6] This means that in addition to rest breaks provided in accordance with the Work Time & Log Book Rule 2007 the respondent must provide additional 10 minute rest breaks as follows:

- a. if the work break is more than 2 hours but not more than 6 hours, one 10 minute break;
- b. if the work period is more than 6 hours but not more than 10 hours, two 10 minutes breaks;
- c. if the work period is 10 hours or more, but not more than 13 hours, three 10 minute breaks.

[7] As per 6(2) of the Rule agreement has been reached with the respondent on the times the 10 minute breaks are to be taken after 2 hours and after 6 hours. However, the respondent has declined to provide a third 10 minute rest break in work periods that include unpaid breaks

despite the Rule clearly defining a work period as beginning at the time the driver starts work and ending at the time the driver finishes work including all authorised breaks whether paid or not.

[4] Tranzurban says it is complying with all relevant obligations.

[5] As already said the rules changed with effect 6 May 2019 when changes were made to the rest and meal break provisions in Employment Relations Act 2000. There were also related changes to Land Transport Rules promulgated under the Transport Act 1998.

[6] Prior to the changes being applied, various interested groups met to discuss the implications. This resulted in a memorandum of understanding (MoU) between the Minister of Transport (for the Government), the Minister of Workplace Relations and Safety and representatives of the Wellington Regional Council, listed operators (including Tranzurban) and various unions including the applicant.

[7] The MoU's purpose was *to achieve the smoothest possible transition to the implementation of amended rest and meal breaks so as to ensure bus drivers receive the rest and meal breaks they are entitled to while minimising service disruption and safety risks, and cost to councils, bus operators and the Government.*

[8] Importantly for the purposes of this discussion, the parties agreed there would be a 12 month transition period commencing 6 May 2019 during which the parties would monitor the effect of the changes and *where required work collaboratively to examine adjustments to scheduling, rostering and timetables.*

[9] This process led to the parties agreeing a series of principles which, for buses being operated in the greater Wellington area, provide:

Breaks will be scheduled according to the following principles:

- a. Wherever possible not in the first or last hour of a work period.
- b. During peak travelling times within 90 minutes of the prescribed times in the ERA and outside of peak times within 60 minutes of the prescribed times in the ERA, as far as is reasonable and practical.
- c. At the end of a trip or prior to a trip starting, with a full ten minutes allocated, in addition to any repositioning or recovery time already scheduled.

[10] That said the agreed principles also recognise the parties are in dispute about work periods and do not prejudice the parties position in respect thereto.

[11] The reference to the dispute recognises the parties retain differing views about the correct interpretation of the new rules. After some discussion following the lodging of that dispute with the Authority it was agreed those disagreements have, at their centre, one generic question and it is that this determination addresses.

[12] That questions is what is the meaning of *work period* in s69ZC of the Employment Relations Act and what is the meaning of the same phrase in the Land Transport Rule: Work Time in large Passenger Service Vehicles 2019 (the rule).

[13] Section 69ZC of the Employment Relations Act reads:

Interpretation

In this Part, unless the context otherwise requires, **work period**—

(a) means the period—

(i) beginning with the time at which, in accordance with an employee's terms and conditions of employment, an employee starts work; and

(ii) ending with the time at which, in accordance with an employee's terms and conditions of employment, an employee finishes work; and

(b) includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

[14] The entitlements provided under this provision are:

- a. For a work period of 2 to 4 hours – one 10 minute paid rest break;
- b. For a work period of 4 to 6 hours – one 10 minute paid rest break and one 30 minute meal break;
- c. For a work period of 6 to 8 hours – two 10 minute paid rest breaks and one 30 minute meal break; and
- d. The above is repeated for any subsequent period of work. For example, and if the employee works a further 2 to 4 hours there is a third rest break while working another 4 to 6 hours will attract a second meal break.

[15] The rule, which was to apply for the 12 month transitional period (or a lesser period if revoked earlier) has an definition, which both parties accept is for all material purposes, identical to that contained in the Employment Relations Act.¹ That said, it also provides further clarification and requirements as follows:

In addition to rest breaks provided in accordance with the Land Transport Rule: Work Time and Logbooks 2007, the operator must ensure that the driver of a large passenger service vehicle operated as part of a scheduled passenger service is provided with 10-minute rest breaks as follows:

- a. if the work break is more than 2 hours but not more than 6 hours, one 10 minute break;
- b. if the work period is more than 6 hours but not more than 10 hours, two 10 minutes breaks;
- c. if the work period is 10 hours or more, but not more than 13 hours, three 10 minute breaks.²

[16] The Land Transport Rule: Work Time and Logbooks 2007 provides a driver must take a rest break after 5 and a half hours of continuous work. The break is required to be of at least 30 minutes duration.³

[17] Finally it should be noted there was, under the Land Transport Rule, a desire the parties agree when breaks are taken but failing that the operator (Tranzurban) may schedule the breaks in accordance with some quite specific criteria.⁴ That said the operator is granted some flexibility with respect to the ten minute breaks if application of the specific criteria would have a disruptive impact.⁵

Discussion

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

¹ Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 at [5]; Union submission at [14] and Tranzurban submission at [6]

² Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 at [6(1)]

³ Section 2 of the Land Transport Act 1998

⁴ Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 at [6(2)] and [6(3)]

⁵ Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 at [6(4)]

[19] As already said the union is firmly of the view Tranzurban and others are failing to properly apply the new requirements. In particular it says Tranzurban has failed to agree how the 10 minute breaks are to be taken after 2 and 6 hours and declined to consider providing a third 10 minute rest break in work periods that include unpaid breaks occasioned by the use of a split shift.

[20] To illustrate its claim the union refers to two specific shifts, 2502 and 2469. Shift 2502 requires the driver be on duty between 0538 and 1041 hrs. The driver then has a break before returning to work between 1451 and 1643hrs. Shift 2469 requires the driver work 0710 to 0846hrs and then 1142 to 1941hrs.

[21] Here it should be noted Tranzurban originally raised various technical defences including a claim the Authority lacked jurisdiction to interpret rules made under the Land Transport Act and that the union failed to address this claim via the process outlined in the MoU. Those have been set aside and, as already said, the parties agree the issue can be determined by answering one question – what is the meaning of the phrase *work period* in s69ZC of the Employment Relations Act and in the Land Transport Rule: Work Time in large Passenger Service Vehicles 2019.

[22] The union's position is as follows. Each driver's duty is prescribed by a roster that specifies a shift with there being one per driver per 24 hour period. It therefore follows that each work period can only have one start and one finish time. In other words, and notwithstanding the split shift, the work period starts when the driver first reports for work and ends when s/he finally departs. The intervening period includes all authorised breaks whether paid or not and this is confirmed by the express wording of the definition in both the Act and the Rule. The period between the two portions of the shift is therefore a long authorised but unpaid break.

[23] The union also notes Tranzurban might argue its position unworkable and inflexible. To this it says the Employment Relations Act has various provisions through which such issues might be addressed but more importantly points out that should it be possible to have more than one start and finish time it would also be possible to artificially structure the work day into many work periods and thereby deprive staff of any breaks. This, it is pointed out, would totally undermine the Employment Relations Act, its express provisions and intent. An example of this is shift 2502 where the second duty would attract no break.

[24] For Tranzurban it is noted split shifts have always been a part of the provision of bus services and while work period is not defined in the principles the issues of whether or not a split shift comprises one work period given both portions are worked on a single day, or whether there are two distinct period of work has been addressed in New Zealand Transport Agency guidelines.

[25] It is Tranzurban's position that:

...defining a work period as including the entire period within one day that a person is working would be artificial. If there is a significant period of time between the ending of the first shift and the commencing of the second, then the work period would be artificially inflated and their entitlements to meal and rest breaks artificially inflated as well.⁶

[26] For Tranzurban it is submitted a *work period* is the time an employee is actually performing work duties or is on an authorised break with that being either a rest or meal break. It cannot include time between shifts and common sense and pragmatism ought to lead to that being confirmed with a pointer it was intended being *the industry's own agreed principles*.

[27] With respect to work it is argued this must initially be concerned with the actual performance of work and that submission is supported with reference to both dictionary definitions and the Land Transport Act itself. With respect to this later point it is noted that Employment Relations Act's definition of work time refers only to duties that clearly constitute the actual performance of work.

[28] To that can then be added rest and meal breaks if only because they too are expressly provided for by statute and it is therefore they to which the term authorised breaks applies. This it is submitted is because *the term "authorised" implies that the break is during time that the employee is performing work duties because he or she remains under the "authority" of the employer at that time and is being allowed to take a break.*

Conclusion and Orders

[29] Having considered the factual scenario, the principles of statutory interpretation and the submissions I conclude the unions argument are far more persuasive. Tranzurban's argument relies heavily on implication (as seen in the quote in [28] above)

⁶ Brief of evidence of Ms Snelgrove at [29]

and a suggestion the legislation would be distorted should it be interpreted the way the union seeks.

[30] On the other hand the unions' argument is simple – read the various provisions. They expressly state there is only one start and finish time for each period of work and that period of work may be interrupted by breaks be they paid or unpaid.

[31] That concept fits well with Tranzurban's practices. Tranzurban specifies when, over a complete period of a shift, work shall be performed. Included in the way in which it specifies this it not only authorises but requires extended unpaid breaks.

[32] For the above reasons I conclude the Union is correct and the term *work period* covers all time between an employees' initial commencement and final cessation on any given day.

[33] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority