

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 107
3117372

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

Member of Authority: Geoff O'Sullivan

Representatives: Tanya Kennedy, counsel for the Applicant
Andrew Caisley, counsel for the Respondent

Investigation Meeting: 28 October 2020

Submissions [and further
Information] Received: 30 October from the Applicant
5 November from the Respondent

Date of Determination: 16 March 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In an amended statement of problem filed on 16 October 2020, New Zealand Tramways and Public Passenger Transport Employees Union Wellington Branch Inc (the Union') claimed the respondents Wellington City Transport Limited and Cityline (NZ) Limited (the Respondents) had breached their respective collective employment agreements with the Union by:

- (a) Failing to adequately consult over changes to workplace practices;
- (b) Breaching the respective employment agreements between the parties by failing to comply with the contractual obligation to consult where there is a proposal for the “introduction of new technology” or “major changes to the workplace practices”.
- (c) Breaching good faith in failing to be active and constructive and establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative in relation to changes to workplace practices.

The Union seeks a determination in its favour from the Authority in respect of the above breaches together with an injunction restraining the respondents from implementing the change requiring members of the Union to use the new systems.

[2] The respondents deny the claims, saying they have not undertaken any action which triggers an obligation to consult, either under the Employment Relations Act 2000 or the applicable collective agreements. Further, despite having no obligation to consult, the respondents have written to the Union inviting it to attend meetings to discuss matters. However, the Union failed to respond to meeting requests.

The Authority’s Investigation

[3] The Authority heard from two witnesses, namely, Kevin O’Sullivan on behalf of the Union and Jay Zmijewski on behalf of the respondents. The proceedings arose out of:

- (a) NZ Buses decision to replace its current suite of management software programmes with a different suite of management software programmes known as TIMS.
- (b) The use of fleet management software known as Telematics.
- (c) The introduction of a driver identification key.

[4] At the commencement of the investigation meeting the following issues were identified. The respective employment agreements contained an identical provision, clause 71 in the agreement between the First Respondent and the Union and clause 49 in the agreement between the Second Respondent and the Union. The respective provisions provide:

The parties to this Agreement recognise that the introduction of new technology or major changes to the workplace practices have the potential to alter conditions of work. It is therefore acknowledged that prior consultation should take place regarding such changes. To this end the employer agrees:

- (a) At the earliest opportunity, the employer will prepare and present to employees and their unions a preliminary plan for introducing such changes. This plan will address:
 - (i) An overview of the reasons or factors for the proposed changes;
 - (ii) The aims and scope of such changes;
 - (iii) The timetable proposed for such changes;
 - (iv) The communication process that will be followed;
 - (v) Training needs for staff during the changes;
 - (vi) Programme for the discussion and consultation with employees and affected unions.
- (b) A review will then be conducted and will include a process of consultation as provided for under subclause (a) (vi) of this clause. When a final decision on the implementation of the plan is made by the employer, it will be presented to employees and their unions.
- (c) Nothing in this agreement shall be used to frustrate the rights of the employer to carry out reviews of its operations and to implement change.

[5] The issue therefore is has the consultation period in each of the agreements been triggered? In other words, are the changes wanted by the respondents:

New technology or major changes and if so, did this new technology or major change have the potential to alter conditions of work.

[6] The parties agreed that the changes which needed to be discussed comprised:

- (a) Telematics;
- (b) The unique driver key;
- (c) The driver touch screens and the fact that no more paper copies were needed;
- (d) The use of driver's licences to scan in;
- (e) The new defect logging system;
- (f) An issue regarding information being visible;
- (g) Sign off;
- (h) Streamax; and
- (i) The effect on drivers' pay.

[7] In order for the consultation provision in each of the applicable collectives to be triggered, there needed to be either the introduction of a new technology, or major changes to workplace practices. In both cases, the new technology or major changes would need to have the potential to alter conditions of work. Accordingly, in order to deal with the claims, the Authority needs to determine whether or not there has been the introduction of new technology, whether or not there have been major changes to workplace practices, and whether or not either of these have the potential to alter conditions of work. If the answer is in the affirmative, then the next step of the investigation is to whether or not there had been a sufficient degree of consultation between the parties.

The Evidence

Kevin O'Sullivan

[8] Mr O'Sullivan is the Union Secretary of New Zealand Tramways and Public Passenger Transport Employees Union Wellington Branch Inc. His evidence was clear, Mr O'Sullivan believed that the respective consultation provisions contained in the applicable collective employment agreements had been triggered. He accepted that this required a three-step analysis, namely i.e., had new technology been introduced, and/or was there a major change to workplace practices and did either of these matters have the potential to alter conditions of work.

Telematics

[9] Mr O'Sullivan confirmed that Telematics, had it been introduced many years ago, following an acceptable process. It gave drivers feedback on their driving. However, he said that for whatever reason this fell into disuse but was now being reintroduced. He also took issue with the introduction of a unique driver ID key, saying that Telematics had never been used before in conjunction with such a key. He seemed to accept, however, that in essence what the respondents were doing, was not a major change in technology or work practice. He was upset that his Union had simply received an email stating that Telematics were back and that the unique driver ID keys were to be rolled out. He didn't know what information was contained in the key and what responsibilities members of the Union might face in respect of losing the keys or damaging them. He was also concerned that he faced queries from members of the Union which he could not answer because he had not been provided with information by the respondents.

[10] Mr O’Sullivan was also concerned regarding the introduction of touch screens. These were introduced at depots and required the use of a driver’s license to log into the kiosk. Mr O’Sullivan was concerned that the screens had been put in with no communication, along with departure board screens. Mr O’Sullivan’s concerns regarding the touch screens, other than a lack of consultation, also centred around privacy issues. He was concerned that information could be displayed on those screens which could be seen by others, although it appeared unlikely that members of the public would be able to see these touch screens. He was also concerned that a driver needed to scan the barcode of their license, in order to log in and questions the legality of that, saying only New Zealand Police were entitled to demand a person produce their license for identification. He felt that as the touch screens were doing away with paper copies, this too was a change in workplace practices.

[11] Mr O’Sullivan also had issues how defects would be logged and the possibility that a new method of signing off could affect driver’s pay. He noted that the current practice was that there was no signing off or timekeeping processes at the end of a person’s shift and that in circumstances when there was no one available at the depot counter, a driver would either ring Auckland directly or approach the service delivery supervisor to advise of their arrival, discuss any issues that may be relevant to their duty such as roadworks or special events in the city and proceed to obtain a bus and depart the depot.

[12] Mr O’Sullivan also had a concern regarding Streamax. He says this arrived unannounced on about 8 September 2020 when it first appeared on a driver dashboard. He accepted he had since become aware that Streamax was simply a backup device which already existed in a bus but when the systems were changed, it was moved.

Jay Zmijewski

[13] Mr Zmijewski is the Chief Operating Officer for the NZ Bus group of companies which include both respondents. He gave evidence regarding the respondent’s decision to replace its current suite of management software with a different suite of software programs known as TIMS. From his perspective he felt that none of the proposed changes would have any significant impact on operators. In other words, the changes were simply about efficiency.

[14] Although Mr Zmijewski was of the view that the consultation provisions contained in the applicable collective agreements had not been triggered, nonetheless there had been discussions between the parties with the respondents amenable to fixing any problems as they

arose. He confirmed that Telematics had first been introduced in about 2013 and noted that the ID key was a Wellington only issue which the company had introduced with effect from 28 August 2020.

[15] Mr Zmijewski's evidence was that the respondents simply were changing a range of software tools, products, and information systems it used to operate its business. There were enterprise resource planning systems (ERP) tailor made for the bus industry and the respondents wished to take advantage of these. His evidence was that ERP solutions were simply a way of integrating all different software systems that a modern commercial business needed, making sure that the systems in his words, "*play nicely together*". They had turned to the Trapeze Group, a global software company, for support. The system it had developed was known as TIMS or Transport Integrated Management System.

[16] Mr Zmijewski was of the view that although there was no consultation about the decision to purchase TIMS back in late 2019, there had been consultation about aspects of the implementation of TIMS. He felt there was no need for consultation as the introduction of TIMS would have no impact whatsoever on operators. The fact that the company was transitioning from old systems to new systems he felt would be invisible to operators.

[17] He felt that the only new aspects for operators were:

- (a) The sign on/sign off procedure; and
- (b) The defect reporting procedure.

[18] His evidence was that in the prior circumstance, an operator gave their operator number to the person behind the counter or a person at the end of the phone. They were then allocated a bus to drive for their shift. That process would take 60 – 90 seconds. However, under the TIMS process, the sign on/sign off was automated. Instead of talking to a person, the operator scanned the barcode on their driver's licence into the kiosk at the depot. The system then recognises the driver and advises the operator of the bus that has been allocated to them for that shift. The automated process takes less than 30 – 60 seconds. In his view, the change was inconsequential.

[19] His evidence was that the system didn't download or store any of the driver's licence data. The system simply read the barcode and created a link to the driver's profile which the respondents already held. They also held already, a copy of each driver's licence.

[20] Mr Zmijewski also noted that some operators had been using the system since 2 October 2020 and had not reported any issues, or problems or concerns. He acknowledged that others had been instructed or advised by the Union not to use the system. He advised that there had been no penalty for these drivers as the company was keen to work with the Union to resolve any outstanding concerns.

[21] Mr Zmijewski was adamant that the respondents had been consulting with unions about the implementation of TIMS, i.e. the sign on/sign off process and the defect process. In that regard he noted that the parties had met on 9 July 2020 when a brief overview was given. He felt that the proceedings filed by the Union were premature and that the parties were talking regarding the proposed changes.

[22] Mr Zmijewski felt that the new driver ID key didn't involve new technology but was merely an easier way of joining up other data already in the system. For those reasons, he did not consider there was an obligation to consult in respect of the employment agreement or indeed in terms of the Employment Relations Act 2000. But in any event, consultation had occurred through explanation that the change was just a minor one giving operators (drivers) the ability to see information about their driving that they previously had direct access to but then lost. Indeed, he pointed out that he had written to the Union on 16 September 2020 confirming no personal information was stored on the key and it was not used for any sign on/sign off purpose or payroll purpose.

[23] In respect of Streamax, Mr Zmijewski also gave evidence that the respondent's engineers had moved and replaced a device that was already in each bus and placed it on the dashboard. After hearing concerns about this, the device was moved to be less obtrusive. Nonetheless, Mr Zmijewski's evidence was essentially there had been no new technology being introduced, rather there were technology upgrades. There were no major changes to workplace practices let alone changes which would have the potential to alter conditions of work.

Analysis

[24] This determination has been issued outside the timeframe set out at s 174C(3) of the Act. In circumstances the Chief has decided as he is permitted by s 174C(4) to do, that exceptional circumstances exist.

[25] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions but I do not record all evidence and submissions received. The discussion below and attributing recollections and assertions made by witnesses draws from their written statements, appearance at the investigation meeting and documentation provided.

[26] During the course of the investigation meeting, it became apparent that the changes promulgated by the respondents were not major changes. Neither were the respondents introducing new technology with the potential to alter conditions of work. It seemed most of the complaints from the Union centred around communication. An example of this, for instance, was the Streamax device. As noted earlier, this was simply a backup device which existed in a bus, albeit in a different form and location. The Union had not been informed this update was to occur and accordingly this placed the Union in a difficult position, when it was queried by members and it could not explain the device and/or its purpose. This could have been avoided if there had been proper communication with the Union. In the respondent's defence, it seems Mr Zmijewski was also unaware of the upgrade, as the respondent's engineers were doing this essentially as part of an upgrade without involving Mr Zmijewski.

[27] The same can be said for each of the other matters listed in paragraph 6 above. On an objective basis, none of the changes trigger the consultation provision contained in the agreements. Nonetheless it was unfortunate that the Union was placed in a position, at least initially, where it could not explain to its members what the changes were and what they were designed to do. It seems likely if there had been better communication between the parties, this matter would not have proceeded to an investigation meeting.

[28] Although the Union relies very much on what it sees as a specific breach of the respective employment agreements (clause 71 and clause 49), the Employment Relations Act 2000 also requires parties to be active and constructive in establishing and maintaining a productive employment relationship. This means that the parties are also required to be responsive and communicative. Whilst I have determined from the evidence that consultation in terms of the specific clauses of the agreements referred to by the Union, was not required, consultation did occur albeit after issues had been raised by the Union. The issues, especially in relation to Telematics, the unique driver key, the use of driver's licences to scan in and the effect on driver's pay were resolved. Because there was no introduction of new technology or major changes to the workplace practices which had the potential to alter conditions of work,

there could be no breach of clause 49 of the Cityline Collective Agreement or clause 71 of the Wellington City Transport Collective Agreement.

Conclusion

[29] I have concluded that the respondents have not breached the applicable collective employment agreements. There are accordingly no grounds to consider an injunction restraining them from implementing the changes referred to above. There are no grounds justifying the imposition of a penalty.

Costs

[30] Costs normally follow the event. However this seems to be a circumstance where perhaps costs should lie where they fall. This is because although I have found the consultation provisions contained in the respective collective agreements were not triggered because there was no introduction of new technology or major changes to the workplace practice with the potential to alter conditions of work, that is not to say that matters could not have been handled better by the respondents. Better communication would have perhaps meant that the Union's application did not need to proceed. However, if the issue of costs cannot be resolved then the respondents have 14 days within which to file a memorandum as to costs with the Union having a further 14 days within which to respond.

Geoff O'Sullivan
Member of the Employment Relations Authority