

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 470
3166241

BETWEEN RAIL AND MARITIME
TRANSPORT UNION
INCORPORATED
Applicant

AND KIWIRAIL LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Ben Thomson, counsel for the Applicant
Tim Oldfield, counsel for the Respondent

Investigation Meeting: 16 June 2022 at Dunedin

Submissions Received: 2 June and 13 June 2022 from the Applicant
10 June 2022 from the Respondent

Date of Determination: 16 September 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kiwirail Limited (Kiwirail) employs some staff based in Dunedin as remote control operators (RCOs). The RCOs based in Dunedin belong to the Rail and Maritime Transport

Union Incorporated (RMTU). There is a collective agreement (MECA) between KiwiRail and RMTU. Its terms are binding on and enforceable by KiwiRail, RMTU and the RCOs.

[2] Together with rail operators (ROs), RCOs in Dunedin and other locations are responsible for rail shunting yard operations.

[3] For many years, the rail yard in Balclutha was crewed by two yard-operations employees who lived locally. One of these employees transferred to Picton in September 2021. KiwiRail decided to fill the vacancy in Balclutha by rostering its Dunedin based RCOs regularly to travel to and work in Balclutha, as part of ordinary duties. An additional RCO position would be established based in Dunedin. RMTU says that the proposed roster giving effect to that decision is in breach of the MECA and would be a unilateral variation of the Dunedin RCO's established and agreed terms and conditions of employment.

[4] RMTU initially sought both an interim injunction and a final determination to support its contention about the MECA and the existence of a term implied by custom and practice about the location of the Dunedin based RCOs' work. RMTU and KiwiRail reached agreement that resolved the claim for an interim injunction. This determination resolves RMTU's claims that the proposed roster breaches the MECA and a term implied by custom and practice.

[5] The differing views have been well canvassed in the correspondence between the parties, in the submissions lodged in advance of the investigation meeting and in evidence and further submissions during the meeting. There is limited dispute about the facts, but a difference about what comes from that in light of the MECA and other provisions. In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders. I mean no disrespect to the thorough work and submissions of those involved, if I do not directly set out all the evidence and submissions.

[6] It is useful to mention relevant employment provisions at the start.

Terms and conditions of employment

[7] Individually agreed terms and conditions of employment for Dunedin based RCOs are binding only if they are not inconsistent with the MECA.¹

[8] At present, Dunedin based RCOs work in shunting yards in Dunedin and Port Chalmers, but generally not elsewhere. This work is set by roster. The RCOs' work in the Port Chalmers and Dunedin yards includes driving a locomotive on the mainline between these two stations. The qualification for Grade 3 RCOs includes certification to operate on the mainline. Previously, Locomotive Engineers had to drive the locomotive between Port Chalmers and Dunedin, as RCOs were not permitted to operate on the mainline. The change by which Grade 3 RCOs operated on the mainline was brought about by agreement between KiwiRail and RMTU (and its members). The foregoing arrangement has been in place since about 2001. I return later to whether the present arrangement about work in the Port Chalmers and Dunedin yards can be subject to change without agreement.

[9] Shunting work is done in teams of two, comprised of an RCO and an RO. The RCO operates the locomotive, generally by a remote controller rather than from in the cab itself. The RO works under the direction of the RCO. It is not necessary to describe the work for present purposes.

[10] Only four original letters of appointment for the Dunedin based RCOs currently employed by KiwiRail were located and are in evidence.

[11] The only one in evidence for appointment to an RCO position referred to work in the "Dunedin Operations Terminal". Two of the others in evidence, for RO positions, expressed appointment "based at" a street address in Dunedin. One of these two is for a person still employed as an RO but who relieves as an RCO. The second of these two included a line about being required to work in other locations from time to time. That person was later appointed permanently as an RCO, but there is no letter in evidence for his RCO appointment.

¹ Employment Relations Act s 61(1).

The letter in evidence for the fourth person was for an appointment as an RO as part of the “Terminal Operations team: located at the “Dunedin Depot”. It also stated that the position “is such that you may be required to work in other locations from time to time”. This person is still an RO, but relieves as an RCO.

[12] There is a current KiwiRail “Position Description” for “Remote Control Operator Operations”. The “primary task” is to shunt trains and move wagons to and from customer sidings. The “Dimensions:” include “Reports to: Terminal Operations Manager” and “Location: Local Depot”. The “Position Description” does not include a requirement to work in other locations from time to time. The same “Position Description” applies to RCOs employed elsewhere in New Zealand by KiwiRail, so the specific “Location” is not included in the “Position Description”. I am also told and accept that the “Position Description” for ROs does not state that the “Location” is the “Local Depot”.

The collective agreement

[13] Various provisions in the MECA might have some bearing. Clause 4 “Working Together” at 4.1 describes the basis for the cooperative relationship between KiwiRail and RMTU, which includes reaching decisions on projects by consensus, where possible, respecting each other’s right to disagree.

[14] At clause 11, under “Employment Philosophy” an objective is increasing the competitiveness of business through customer focus, efficiency and flexibility. Another objective is recognising employees’ contributions and family responsibilities. Customers’ changing needs are met more effectively by staff learning new skills, taking on new roles and working flexibly. Employees will have a chance to learn new skills.

[15] By clause 13, ongoing consultation is essential, with KiwiRail agreeing to consult with RMTU on proposed changes that may affect conditions of employment. Clause 13.8 states that many current work procedures and related administrative instructions were developed in co-operation with employees or RMTU and parties intend to continue the

consultative approach in the development of work procedures in the future. Parties will cooperate in the introduction of new and improved work methods and arrangements.

[16] Under clause 21, the parties commit to achieving excellence in health and safety management. Health and safety management processes and commitments in the HSAT Terms of Reference can only be varied by agreement.

[17] Clause 23 deals with hours of work. The mutual objective in setting hours and days that are worked is to provide as much stability as practicable yet to be adaptable to customers' changing needs. Those needs must be balanced with respect for an individual's personal and family commitments.

[18] There are comprehensive redundancy provisions, including about alternative employment. Job offers of alternative employment should include information on "the location". The offer may be "suitable" if it meets specified terms. It is not suggested that the present situation engages the redundancy provisions.

[19] There is a vehicle allowance payable "Where KiwiRail requires an employee" to use their own vehicle for KiwiRail's business. However, KiwiRail does not accept liability for damage to the vehicle when it is used on KiwiRail business. Under the proposal, a fleet vehicle would be provided for any travel between Dunedin and Balclutha, so the provision is not relevant.

[20] There is a transport allowance in limited circumstances for those who live more than 2km "from work". A relocation allowance is paid if work is "relocated" so the employee needs to travel additional distance "to work". Accepting an offer of redeployment "to another location" gives rise to certain entitlements. There is a grant if accepting relocation means the employee needs to sell and buy a house.

[21] Clause 37 sets out the "KiwiRail Pay Schedule". It opens with recognition of flexibility, new skills and new tasks to meet "customer changing needs". Employees will be

provided with a generic job description covering the “work undertaken in your position”. Duties may be changed “adding or deleting tasks”, subject to consultation. Pay Scale 7 “KiwiRail Terminal Operations” applies to RCOs and to ROs.

Would it be a variation of terms and conditions to include Balclutha?

[22] It is sufficient just to give an outline of the proposal by which the Dunedin based RCOs would work in Balclutha. The roster for the Dunedin based RCOs would include a shift that required the person to sign on in Dunedin, travel by train (cab passenger) to Balclutha, perform shunting duties there, travel by train (cab passenger) back to Dunedin, perform necessary shunting duties there and then sign off. Leave for the Balclutha based employee would be covered by two Dunedin based RCOs who would travel between Dunedin and Balclutha by KiwiRail fleet car, not by train.

[23] RMTU says that requiring Dunedin based RCOs to travel to and to work in Balclutha would be a variation of their terms and conditions which would be unjustified. I am referred to *NZ University Technicians IUOW v Canterbury University*.² KiwiRail says that the case did not deal with the implication of contractual terms by custom, so has no present application. I agree that those circumstances differ from the current matter. In that case, there was a University Council resolution that set a retiring allowance. It was discretionary, but was granted almost without exception. A later industrial award provided an absolute entitlement to retirement leave. The employee was paid the award retiring leave, but claimed the resolution payment which was a greater sum. The Court found that the resolution was an implied term in the claimant’s employment contract. The award’s enabling statute did not exclude the application of more favourable contracts of service. The Court specifically noted that counsel did not rely on an argument based on custom. The present case directly concerns a term said to be implied by custom and practice, so is different.

² *NZ University Technicians IUOW v Canterbury University* [1988] NZILR 1682

[24] KiwiRail says that the legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome. I am referred to *Bathurst Resources Limited v L&M Holdings Ltd*.³ However, I agree with counsel for RMTU. That case dealt with terms implied to give business efficacy to a contract. It involves interpreting the contract. If there is a gap, the Court must consider whether the implication of a term is justified.⁴ The case did not consider terms implied by custom.⁵ See for example *Four Winds Foundation Limited v New Zealand Community Trust*,⁶ as a civil law case discussing the different tests applicable to the two different types of implied terms. The tests for different types of implied terms also are relevant in employment law.

[25] The Employment Court summarised the principles for deciding the implication of terms by custom and practice.⁷ The custom must have acquired such notoriety that the parties must be taken as knowing of it and intended it should form part of the contract. The custom must be certain. It must be reasonable. It must be proved by clear and convincing evidence. It must not be inconsistent with the express contract.

[26] The implied term relied on by RMTU is that the Dunedin based RCOs perform their work at Port Chalmers and at Dunedin, which includes the mainline between those yards. Setting such geographical boundaries to the work of the Dunedin based RCOs is certain.

[27] I find it is reasonable. The arrangement is the result of agreed work procedures that meet KiwiRail's reasonable business needs and employees' preferences for balance between work and non-work commitments.

[28] The evidence is clear and convincing that these are the locations for the work of the Dunedin based RCOs.

³ *Bathurst Resources Limited v L&M Holdings Ltd* [2021] NZSC 85.

⁴ *Vulcan Steel Limited v Manufacturing & Construction Workers Union* [2022] NZEmpC 78 at [11].

⁵ *Bathurst Resources Limited* at footnote 98.

⁶ *Four Winds Foundation Limited v New Zealand Community Trust* [2022] NZHC 767 at [28] and [29].

⁷ *Ovation New Zealand v NZ Meat Workers & Related Trades Union* [2018] ERNZ 455 at [73].

[29] I find that the arrangement acquired such notoriety that the parties must be taken to have known of it and intended that it form part of the contract. Mr Rex Buckley-Beham is one of the RCOs. He has relieved in Balclutha whenever one of the two workers based there was not available. The evidence is that his work in Balclutha was always the result of a specific agreement with him at the time. KiwiRail did not purport to exercise a contractual right to assign him to perform the work in Balclutha on any occasion. This demonstrates that the parties must be taken as having known that the work of the Dunedin based RCOs was in Port Chalmers and Dunedin, not Balclutha and that they intended that as part of the contract.

[30] Notoriety, knowledge and intention are also apparent from the raft of changes required to implement the proposal.

[31] More needs to be said about whether the term relied on by RMTU is “not inconsistent” with the express contract.

[32] KiwiRail refers to various provisions in the MECA.

[33] Grade 3 RCOs can operate remote outside station limits, whereas lower graded RCOs are restricted to within terminal or within station limits. KiwiRail says that it can direct the RCOs to run on the mainline south from Dunedin to Henley or Taieri. However, operations to Henley or Taieri by the Dunedin based RCOs is not part of their rostered work. I accept that this was part of a different shunting arrangement, prior to the establishment of the RCO roles. Grade 3 RCOs being able to operate remote outside station limits does not mean that the implied term argued for is inconsistent with the MECA.

[34] I am referred to several provisions that apply if an employee is relocated. The submission is that these provisions that apply if an employee’s “ultimate workplace” is relocated, indicate that where an employee works during the work period does not require agreement each time. I do not accept the submission. The provisions apply in the specific circumstances they each deal with. They do not support KiwiRail having a general right to assign RCOs to work anywhere during their working day.

[35] KiwiRail also points to the general provisions about “Employment Philosophy” and “Consultation” in support of its submission that the implied term argued for is inconsistent with the MECA. They are general terms about intent and philosophy. For the most part they can be read as supporting the position of either party. However, I note specifically clause 13.8. It notes that many current work procedures were developed in co-operation with the employees or the Union. Parties’ intend to continue “this” consultative approach to the development of work procedures in the future. This provision points more to the need for agreement to be achieved for changes in “work procedures” to be implemented. It is reinforced by the “Working Together” provisions at clause 4. The point for present purposes is that the general terms, taken together, do not lead to the conclusion that the implied term would be inconsistent with the MECA.

[36] Counsel refers me to *Auckland Harbour Board v NZ Harbours IUOW*.⁸ The Court there said, in rejecting what it characterised as the Union’s strongest argument based on six years practice, that past practice can never reach a point where it becomes regarded as a term in an award or industrial agreement. The Court went on to say that with adequate and reasonable notice, established past practice could be set aside as the exigencies of the case require. I need only observe that the Court there was exercising the powers of the then defunct Waterfront Industry Tribunal, required under statute to have regard to the necessity to promote efficiency in the waterfront industry and the desirability of ensuring proper utilisation of labour and facilities for the rapid and economical turn around of ships and transit of goods through ports. The present statutory context is substantially different, as are the circumstances of the custom.

[37] I was also referred to *NZ Railways Corporation v NZ Locomotive Engineers Assn & Ors*.⁹ I agree with counsel for KiwiRail that the case involved a different industrial relations regime. I also note that the Court at 755 commented about the “right to manage”:

⁸ *Auckland Harbour Board v NZ Harbours IUOW* [1988] NZILR 702.

⁹ *NZ Railways Corporation v NZ Locomotive Engineers Assn & Ors* [1989] 3 NZILR 733.

... although it is a label that has been put upon an important question to be determined in this case, the following should not be seen as any sort of general statement of the extent of such a right, even if that it be.

[38] The Court then referred to a passage from an earlier interim judgment that noted the existence but often indistinct boundaries of the prerogative of management, expressed its agreement with the earlier judgment, but then turned to the specific factual and legal issues in the case before it. The case expressly did not set down a general statement of principle to be followed more widely. That, together with the different statutory and industrial context, means it provides little assistance in the present case.

[39] I conclude that the implied term relied on is not inconsistent with the provisions of the MECA.

[40] I return to the appointment letters.

[41] The RCO appointment letter “for work in the Dunedin Operations Terminal” is not inconsistent with work in Port Chalmers and Dunedin.

[42] There is one of the ROs, who relieves as an RCO, with an appointment letter to their RO position with the role located at the Dunedin Depot. The letter goes on to say “The nature of the position is such that you may be required to work in other locations from time to time and your reporting lines may change”. I agree with counsel for RMTU that the “time to time” sentence would not grant KiwiRail a right to roster that person regularly to work in Balclutha, even assuming that the “time to time” sentence also applied to their relieving RCO work.

[43] The other employee who had the same provision in his letter when appointed as an RO, is now an RCO. No letter of appointment to the RCO position is in evidence. It would not be appropriate to assume that the “time to time” sentence still had any force.

[44] The appointment letters also need to be read alongside the “Position Description”. Stating “Dimensions” of the position that include “Location: Local Depot” indicates a geographical boundary to the position’s “Purpose” to “shunt trains and move wagons to and

from customer sidings”. The Dunedin “Local Depot” is understood to include shunting work at Port Chalmers and on the mainline between those stations.

[45] I conclude that the implied term relied on is not inconsistent with express terms in any letters of appointment, in the “Position Description” and in the MECA.

[46] I find that there is an implied term that the Dunedin based RCOs are employed to work at Dunedin as their Local Depot, at Port Chalmers yard and the mainline between those yards.

[47] The implied term is capable of variation by agreement. However, the Dunedin based RCOs have not agreed to include Balclutha as a location they can be rostered to work at in accordance with their ordinary roster. KiwiRail cannot require the Dunedin based RCOs to work in Balclutha without their agreement.

Health and Safety issues

[48] RMTU seeks a determination that KiwiRail would breach clauses 21.1 and 21.4 of the MECA if it proceeds with the proposal for Dunedin based RCOs to travel to and work in Balclutha as part of their ordinary roster. RMTU’s submissions also refer to clause 21.3.

[49] Clause 21.1 expresses the parties’ commitment to achieving excellence in health and safety management in the workplace. Clause 21.1.3 states that as a minimum, the parties will comply with statutory and regulatory provisions, codes and guidelines of the Health and Safety at Work Act 2015. Clause 21.1.4 states that processes and commitments laid out in HSAT Terms of Reference can be varied only by the parties’ agreement.

[50] Some risks are identified and RMTU says that KiwiRail has given insufficient consideration to those risks.

[51] KiwiRail refers to the process by which risks were assessed, together with its responses to specific risks raised by RMTU. It also expresses the view that the parties’

consultation about the health and safety issues around the proposed roster has been “clouded” by RMTU’s view about the effect of the implied term. I am asked to allow further time for consultation, if KiwiRail prevails on that issue.

[52] Given the determination that the Dunedin based RCOs cannot be required to work in Balclutha without their specific agreement, it is not necessary to make any determination about whether the proposed roster would be in breach of clause 21. Changes to the status quo can only be achieved by agreement and that no doubt would include renewed focus on the application of clause 21 and health and safety obligations.

Summary

[53] There is a term implied by custom that Dunedin based RCOs work at their local depot (Dunedin), at Port Chalmers yard and the mainline between those yards.

[54] Given that finding, it is not necessary to determine whether KiwiRail would breach the MECA provisions regarding health and safety if it went ahead with the introduction of the proposed roster.

[55] Costs are reserved. If there is an application, it must be made by submissions lodged and served within 14 days. The other party may lodge and serve a reply within a further 14 days. I would then determine the claim for costs with regard to those submissions, together with the Authority’s approach to costs. However, the parties should consider whether the present matter is the type of case where costs should be left to lie where they fall.

Philip Cheyne
Member of the Employment Relations Authority