**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

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

[2022] NZERA 605
3077656

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| | BETWEEN | THE MANUFACTURING AND CONSTRUCTION WORKERS UNION INC.<br>Applicant |
| | AND | WELLINGTON CITY TRANSPORT LIMITED<br>Respondent |

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| Member of Authority: | Geoff O'Sullivan |
| Representatives: | Andrew Hamilton, representative for the Applicant<br>Andrew Caisley, counsel for the Respondent |
| Investigation Meeting: | 20 April 2021 |
| Submissions Received: | Up to and including 21 May 2021 |
| Date of Determination: | 17 November 2022 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Manufacturing and Construction Workers Union Inc. (the Union) claims that the respondent, Wellington City Transport Limited (WCTL) has breached the 2017 collective employment agreement (the CEA) between the parties. The Union says the breaches are that WCTL employed three new employees, Mr Taukamo, Mr Haenga, and Mr Ivor, on individual employment agreements (IEAs) when the CEA requires them to be provided with and engaged on the terms and conditions of the CEA for the first 30 days of their employment.

[2] The Union further says one employee Jason Taukamo was engaged on terms less favourable than the payment rates set out in the CEA. The Union claims the three employees

were not given a copy of the applicable CEA and were not introduced to the Union organiser. It seeks a declaration that there has been breaches of the CEA and asks the Authority to impose a penalty of $20,000, the total of which should be paid to the Union.

[3] WCTL denies the claims. It says that as a consequence of changes required by the Public Transport Operating Model (PTOM), Cityline (NZ) Limited (Cityline), another company within the NZ Bus group of companies closed all its depots including its Upper Hutt depot. This meant that three workshop employees employed by Cityline at that depot were faced with a redundancy situation. At the same time WCTL had three vacancies for workshop employees in its Kaiwharawhara depot.

[4] It offered employment to the three Cityline employees and although they were a different employer, employed them on their then current terms and conditions of employment. It says at the crucial time, the three employees concerned were not members of the Union. In any event, WCTL says all three of the employees were provided with a copy of the collective agreement and met with the Union organiser.

[5] The parties accepted that as the three employees were employed after 6 March 2015, but prior to 5 May 2019, it was the provisions of s 62 of the Employment Relations Act 2000 which was in effect during that period, that applied.

[6] Evidence on behalf of the Union was given by David Thomson, a Union organiser, and Graeme Clarke, a previous General Secretary of the Union who retired in 2015. Evidence on behalf of WCTL was given by Ian Gordon who was employed as Chief Engineer – Fleet and Infrastructure of NZ Bus Group. All witnesses gave evidence on oath.

**The Authority's investigation**

[7] The following issues were identified:

(a) Did WCTL have to offer the three non-Union employees the terms and conditions contained in the CEA for the first 30 days?

(b) Did WCTL inform the employees of the matters it was required to do so under clause 4 of the CEA and/or the then s 62 of the Employment Relations Act 2000 (the Act)?

(c) Was WCTL required to give a copy of the CEA to each of the three employees?

[8] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has however been considered.

[9] The determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

**The evidence**

[10] Mr Thomson gave evidence that he was the Union's organiser responsible for its members employed by WCTL. He said he attended meetings involving the Southern Region Realignment presentation which came about as a response to the changes associated with the PTOM. He said he was aware of the possibility that new charge hand and mechanic positions were being created at Kaiwharawhara and that Cityline employees could apply for those positions. He said that he had been advised there were three new employees at the Kaiwharawhara depot. He met Mr Taukamo but did not meet with Mr Haenga. He says he introduced himself to Mr Taukamo as the Union organiser, stating that there was a collective agreement that covered their work and asked him whether he wished to sign up. Mr Taukamo took a membership form but ultimately would not sign it.

[11] Mr Thomson noted that Mr Gordon's evidence stated that the parties reached agreement that Mr Taukamo would begin at 5.30 am but states no agreement was reached with the Union. He says this would have been necessary because it would have constituted a variation of the CEA. However, Mr Gordon's evidence did not quite go that far with Mr Gordon stating that the Kaiwharawhara depot did subsequently pick up some responsibility for services out of the Karori depot. This meant that one of the fleet staff had to begin at 5.30 am rather than 6 am.

[12] He said that agreement was subsequently reached that this would be done by one of the Kaiwharawhara staff starting at 5.30 am. He was not certain that it was Mr Taukamo who was the one that started at 5.30 but said that if that were the case, he may have changed his shift start time to 5.30 am and then finish half an hour earlier. He also noted that if that was the case, it would have been done by agreement with Mr Taukamo.

[13] Mr Clarke was the Union's General Secretary until he retired in 2015. He gave evidence that if WCTL chose to alter a start time to 5.30 am for one employee, such

authorisation would require a variation to the CEA. He said to change the start time of Mr Taukamo, who was not covered by the CEA to a time inconsistent with the shift hours of the work clause in the CEA, was a breach of the provision in the agreement that prohibited non-Union employees having different hours of work in their IEAs. He said that as far as he was aware, the Union had not been asked to agree to such a variation.

[14] Mr Clarke also noted that Mr Taukamo's terms and conditions were different. He started work on $31.01 per hour flat rate. This meant for a 40 hour week he received $1,240.40. He said that the IEA contained two weeks less annual leave, less sick leave and no redundancy compensation. He said that Mr Gordon expected the Union to believe that Mr Taukamo exercised a free choice to work for less than what the collective agreement provided. It was his view, that it was illogical for Mr Taukamo to make such a choice and accordingly his choice not to be covered by the CEA was occasioned by a misrepresentation of its terms.

[15] Mr Gordon gave evidence on behalf of WCTL. He said that he had developed a career in transport engineering over the last 35 years. He explained that WCTL is a wholly owned subsidiary of NZ Bus Limited. He said the Union's claim arose out of a transfer of three workshop employees from the Upper Hutt depot to the Kaiwharawhara depot. He said this occurred with effect June 2018 and was part of a southern realignment plan at NZ Bus that was brought about in response to the changes associated with the new public transport operating model (PTOM).

[16] He explained that the changes associated with PTOM basically halved the size of the NZ Bus business in the Wellington region. He said ironically, although NZ Bus Group had to shed almost 700 staff as a consequence of PTOM, the three workshop staff mentioned in this dispute were not made redundant. Instead they were offered and accepted ongoing employment on the same terms and conditions as they had before. They simply shifted from one depot (Upper Hutt) to another (Kaiwharawhara). Their employment also transferred from one subsidiary of NZ Bus to another.

[17] Mr Gordon said that to the best of his knowledge the three employees were very happy with the transfer. He said he had spoken to the three employees from time to time and they had never expressed concerns about the transfer, nor had they raised any personal grievance claims or any other disputes about the process. He took issue with the fact that the Union had instigated proceedings in respect of the three when none of them were Union members at the

time of the transfer or indeed in the months that followed. Instead, they accepted offers of employment at WCTL immediately following the PTOM changes. He said in discussions they had had, Mr Haenga had told him that he had been approached to join the Union almost as soon as he had arrived at the Kaiwharawhara depot. He explained that he was not interested in joining but was approached several times after that and each time gave the same answer.

[18] He said he believed that WCTL had carried out their obligations in respect of the Union. The three employees had been spoken to and asked for permission to hand over their personal information to the Union. Each declined permission. He also pointed to an email dated 23 July 2018 (Document 8) which was evidence of the Union being advised that the employees had declined permission to share their information.

[19] He stated he did not accept the Union position that WCTL was obliged to offer the three employees employment only on the terms and conditions of the CEA between WCTL and the Union. He referred to the CEA, specifically clause 4, paragraph 2, pointing out it only applied to those employees who joined the Manufacturing and Construction Workers Union. As the three workshop employees were not members of the Union, he considered there had been no breach of the collective agreement. He further pointed out, that at the time the Employment Relations Act 2000 did not require the three employees to be on the CEA for the first 30 days of their employment.

[20] In respect of any failure to provide a copy of the collective agreement to the three employees, Mr Gordon denied the allegation. It said that WCTL prints off literally hundreds of copies of the CEA, making them widely available to all employees and at all depots. He also said to the extent it was relevant at the investigation meeting, nothing turned on whether or not the three new employees were introduced to the Union delegate. This was because the Union's own evidence showed that the employees were approached by the Union. Mr Gordon also said that at the material time, the Union did not have a designated delegate at the Kaiwharawhara depot which was a small workshop.

[21] He also noted that Mr Thomson at the very least acted as a de facto organiser at Kaiwharawhara from Kilbirnie. He made regular visits to the workshop and had never been denied access to or prevented from talking to workshop employees. Mr Gordon was certain that Mr Thomson had visited Kaiwharawhara and spoken to at least two of the three employees.

[22] Mr Gordon was adamant that no action of WCTL could be considered to be "undermining". There certainly was no intention to undermine the Union and the three employees transferred purely as a result of the situation created by PTOM and a loss of about half of NZ Bus Group's business. He said the company was simply trying to do the right thing and he believes it achieved this.

**Discussion and analysis**

*Did WCTL have to offer the three non-Union employees the terms and conditions contained in the CEA for the first 30 days?*

[23] WCTL did not have to offer the three non-Union employees the terms and conditions contained in the CEA agreement with the Union. The Union relied on clause 4 of the agreement, however that clause in paragraph 2 made it clear that the terms and conditions of that agreement only applied to new employees who had joined the Wellington Tramways Union or the Manufacturing and Construction Workers Union. The three employees had not joined the union. Further, they had made it clear they did not wish to be members of the union and entered into new individual employment agreements.

***The applicable provision of the Act***

[24] Section 62 of the Act, however also applied to the three employees. The version of s 62 that existed between 6 March 2015 and until 5 May 2019, differs from the current s 62. The obligation on WCTL meant:

> Section 62(2) at the time when the employee enters into the individual employment agreement with an employer, the employer must –
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> (a) inform the employee –
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> (i) that the collective agreement exists and covers work to be done by the employee;
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> (ii) that the employee may join the Union that is a party to the collective agreement; and
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> (iii) about how to contact the Union;
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> (iv) that, if the employee joins the Union, the employee will be bound by the collective agreement;
>
> (v) repealed.
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> (b) give the employee a copy of the collective agreement;
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> (c) if the employee agrees, inform the Union as soon as practicable that the employee has entered into the individual employment agreement.

[25] Amongst other things, the Act also provided that any employer who failed to comply with the section, was liable to a penalty imposed by the Authority.

*Did WCTL inform the three employees of the matters it was required to do so in terms of clause 4 of the CEA?*

[26] WCTL's evidence was that the employees were informed regarding the existence of the collective employment agreement and had copies. The employees had made it clear they did not wish to join the Union, and this information was passed on to the Union. Its evidence was also that the three new employees had the opportunity to speak to the Union organiser and reaffirmed with him, the intention not to join the Union. The Union cannot contradict this evidence and it is accepted.

*Was a copy of the CEA required to be given to the three employees?*

[27] There was an obligation on WCTL to give each of the employees a copy of the collective agreement although it could easily be inferred from the evidence, that each of the employees had access to a copy of the CEA it was not clear whether or not a copy had been physically given to each of them. However, I feel unable to reach any strong conclusion because none of the three employees effected have given evidence.

[28] Secondly, it was clear from the evidence that it was more likely than not each of the three employees had access to the CEA and could have taken advice from the Union or from elsewhere if they had so wished, in comparing terms and conditions. They had, as proved by the email trails, advised WCTL that they did not wish to be part of the Union and they did not want their information being sent to the Union. Further, Mr Thomson's evidence was that on the Kaiwharawhara site he met Mr Taukamo, although he implies Mr Taukamo resisted joining the Union because of pressure from at least one of the other of the new employees.

[29] I accept WCTL's point that the three new employees had been employed by Cityline (NZ) Limited and after the introduction of PTOM, the comprehensive consultation and restructure process was undertaken. Ultimately three vacancies were identified and Mr Taukamo, Mr Haenga and Mr Ivor, previously employed on IEAs at the Upper Hutt depot, transferred to WCTL at the Kaiwharawhara depot. It seems to me this was a positive outcome as otherwise the three would have lost their jobs through redundancy. None of the three employees gave evidence but the evidence that exists indicates they were happy with their new arrangement.

**Conclusion**

[30] It follows therefore that the remedy sought by the Union, namely that a declaration be made that WCTL breached the 2017 collective, is denied. The applicant also sought a penalty for breaches of the agreement. Even if I had found there had been a breach of the 2017 agreement, I would not have thought this was an appropriate case for a penalty to be imposed, bearing in mind at the heart of the alleged breach was the transfer of three employees under circumstances where it was entirely possible, they would have lost their jobs.

**Costs**

[31] As this matter appears to be about the interpretation and application of the collective agreement between the parties, it would normally be expected that costs would lie where they fall. However, if Wellington City Transport Limited disagrees with the above classification, then they should lodge and serve a memorandum of costs within 14 days of the date of the issue of this determination. From the date of service of that memorandum, the Manufacturing and Construction Workers Union Inc would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timeframe unless prior leave to do so is sought and granted.

**Geoff O'Sullivan**
**Member of the Employment Relations Authority**