

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 629  
3163421

BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION Applicant
AND	WELLINGTON CITY TRANSPORT LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Kevin O’Sullivan, advocate for the Applicant Peter Caisley, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	23 September 2022 from Applicant 13 and 27 October 2022 from Respondent
Determination:	29 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The New Zealand Tramways & Public Passenger Transport Employee Union Wellington Inc (the Union) asks the Authority to resolve a dispute between the parties over the interpretation of a provision in the current collective agreement between the Union and the employer, Wellington City Transport Limited (WCTL).

[2] The clause in dispute provides a partial indemnification to employees for costs incurred if they are charged with offences resulting from what they did on duty and at

work. The clause says the employer will pay the legal fees of any driver who “successfully defends” any charges brought against them.<sup>1</sup>

[3] The dispute arose after WCTL refused to pay the legal fees incurred by an employee. A bus driver was charged with operating a vehicle carelessly causing injury but later discharged without conviction under s 106 of the Sentencing Act 2002 (the discharge).

[4] A discharge without conviction is a sentencing outcome available to the court if a person who is charged with an offence is found guilty or pleads guilty. The court has a discretion to grant a discharge without conviction if the court is satisfied, that the direct and indirect consequences of a conviction would be all out of proportion to the gravity of the offence.<sup>2</sup> A discharge without conviction is deemed to be an acquittal in the Sentencing Act 2002.<sup>3</sup>

[5] The issue for me to determine is whether the phrase “successfully defends” in the collective agreement can include when a bus driver receives a discharge without conviction after charges are brought against them.

### **The Authority’s investigation**

[6] The parties agreed this matter could be heard on the papers. For the Authority’s investigation legal submissions were lodged on behalf of the Union and WCTL. Jay Zmijewski, Chief Operating Officer, NZ Bus Group, provided an affidavit and Alisdair Ross, Barrister provided written legal submissions for the Union on discharge without conviction.

### **Interpretation of collective agreements**

[7] The case law sets out the principles used to interpret collective agreements and the approach to interpreting contracts generally also applies to employment agreements.<sup>4</sup> The focus is on the objective meaning of the words the parties have used to ascertain the meaning that a reasonable person having all the background knowledge

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<sup>1</sup> Collective Agreement, cl 24.

<sup>2</sup> Sentencing Act 2002, s 107.

<sup>3</sup> Sentencing Act 2002, s 106 (2).

<sup>4</sup> *New Zealand Air Line Pilots’ Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 48 at [74]–[78].

that was available to the parties at the time they agreed to the contract.<sup>5</sup> Background material can be helpful if a reasonable person would regard it as relevant and any context provided by the contract as a whole and any relevant background can inform the meaning.<sup>6</sup>

[8] Clause 24 of the collective agreement between the parties provides:

#### LEGAL FEES

When operators are on duty and at work, the Company, when it is a work related prosecution, will pay legal fees of operators who successfully defend any charges brought against them. If the Company believes legal fees are getting out of hand, in consultation with the Union, alternative practices will be asked to quote for the work.

#### *Plain and ordinary meaning of the phrase “successfully defend”*

[9] The Union’s legal submission traversed a number of issues focussing on the fact that a discharge without conviction is deemed to be an acquittal. The submission was there is no difference between a discharge without conviction (and various other alternative resolutions) and a finding of not guilty because the practical effect and the outcome for a defendant is the same.

[10] The conclusion drawn by the Union is that the focus is on the outcome for the defendant and not having a conviction entered equates to a charge that was successfully defended.

[11] WCTL instead relies on whether the conduct forming the basis for the charge was blameworthy to support its view that to successfully defend a criminal charge does not automatically include a discharge without conviction. In this case, WCTL says the bus driver accepted he was at fault, went through a red light and hit a pedestrian who had right of way on a pedestrian crossing causing her significant injuries.<sup>7</sup> In these circumstances WCTL say the charge could not have been defended. The conduct was

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<sup>5</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912. See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14].

<sup>6</sup> *Arohanui Hospice Service Trust v New Zealand Nurse Organisation* [2022] NZEmpC 207.

<sup>7</sup> *New Zealand Police v Iosia Jerome* [2021] NZDC 20310.

plainly careless. In addition, it says the bus driver accepted he was at fault because he entered a guilty plea to the charge.

[12] The Union also submitted that entering a guilty plea is not an indication of culpability or guilt and nor is a guilty plea an admission of negligence or breach of a duty. To consider a guilty plea to be an indication of wrongdoing was “wrong and contrary to law.”

[13] I accept there are often many issues for defendants to consider when they are faced with criminal charges, including practical and pragmatic matters that they may seek advice on and give instructions to their counsel about. However, I do not accept that the entry of a guilty plea can be anything other than an indication of culpability. To support this conclusion, I look no further than the policies underpinning the alternative resolutions referred to in the Union’s submissions, which all operate based on acceptance of wrongdoing as a starting point.

[14] More specifically to be eligible for a discharge without conviction, a defendant must have been found guilty or entered a guilty plea. In an employment context, in the absence of any other information, an employer can have some confidence that there has been fault on the part of the employee, despite the sentencing outcome.

[15] At this point I find that the plain reading of the words “successfully defends” could include a discharge without conviction but not if the consideration includes whether the conduct itself that resulted in the charges was blameworthy or if the intention of the parties at the time was to provide reimbursement of an employee’s costs only when the employee is not at fault.

*What was the intention of the parties?*

[16] Neither party provided direct information about their intention when entering into the collective agreement. This means I need further information to be able to ascertain the meaning of the clause and it is accepted that relevant background can inform meaning when considering the objective meaning of a contractual term.

[17] WCTL submitted with reference to case law that business common sense was a way of establishing the parties intentions. WCTL says it would make business sense to incorporate such a clause into a collective to ensure employees who were wrongly

charged with work related offending could be reimbursed, but not the other way round. Mr Zmijewski, Chief Operating Officer, confirmed WCTL accepts it has agreed under cl 24 of the collective to reimburse drivers who are wrongly charged, but not drivers who were at fault and were properly charged.

[18] The legal submissions from the Union did not extend to the background to the clause or the intentions of the parties. At first blush an employer paying the expenses incurred by an employee who is at fault seems ill-logical. That would also be inconsistent with the common law indemnification rule which is an implied term in employment agreements when collective agreements are silent on that point.

[19] The common law indemnification rule does not apply in its totality in this case. With respect to legal costs incurred by employees when charged in relation to conduct at work, the rule is replaced by cl 24 of the collective agreement. However, in effect the clause operates as a partial indemnification because it provides that legal expenses will be paid when criminal charges are successfully defended. The question is what does to successfully defend mean.

[20] In a case involving the same parties, *New Zealand Tramways & Public Passenger Transport Employee's Union Inc v Wellington City Transport Limited*,<sup>8</sup> the Court set out the parameters of the common law indemnification rule and discussed cases where employees were not indemnified because the rule did not extend to all circumstances. When an employee knowingly committed a criminal act, or they were charged in relation to something they did that was not their duty at work to do, their employer was not required to reimburse them for the cost of defending the charge.<sup>9</sup>

[21] The facts in *New Zealand Tramways* involved a clause that provided WCTL would indemnify a driver who “successfully defends” any charges brought against them, when it is a “driving related prosecution”. The bus driver had been charged with indecently assaulting a passenger on the bus, however, the charges were later withdrawn by the prosecution.<sup>10</sup> The issue for the Employment Court was whether a charge of indecent assault was a “driving related prosecution”. Judge Colgan found it was

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<sup>8</sup> *New Zealand Tramways & Public Passenger Transport Employee's Union Inc v Wellington City Transport Limited* [2010] NZEMPC 12

<sup>9</sup> *Christchurch City Council v Davidson* [1996] 2 ERNZ 1

<sup>10</sup> *New Zealand Tramways and Public Passengers Transport Employee's Union Inc v Wellington City Transport Limited I* [2010] NZEMPC 12.

because it related to a passenger on the bus, in the course of performing work duties and so was covered by the clause and in that sense it was a driving related prosecution.

[22] Judge Colgan also recorded his view that withdrawal of a criminal charge could be considered to be a successful defence to a criminal charge if the matter was to be considered under the common law indemnification rule rather than under a collective agreement.

[23] Then in *Katz v Mana Coach Service Limited*<sup>11</sup> Judge Ford considered whether the common law indemnification rule meant Mana Coach Services had to pay the legal fees incurred by the driver who ultimately received a discharge without conviction for a charge of careless driving. The bus driver was involved in an accident at work when she turned across an intersection and the bus collided and scraped along the front of a vehicle which was stationary waiting to cross over the intersection.

[24] The Employment Relations Authority had dismissed the claim by the employee that her legal fees be reimbursed by her employer on the basis she was the driver and at the time she was at fault.<sup>12</sup> The Employment Court agreed and held that under the common law indemnification rule employees are not reimbursed when charges against them are a consequence of the drivers breach of duty, negligence or other fault. Judge Ford was satisfied despite the discharge without conviction, the accident had been caused solely by the bus driver's negligence and that was a breach of her obligation to take all reasonable skill and care in the course of her employment.

[25] Both of these cases consider the term "successfully defends". The *New Zealand Tramways* case provides background that assists me to understand what the parties intended at the time because it considered what appears to be a clause that was a precursor to the current cl 24. And then under the indemnification rule, the fact of the discharge was not as important as the facts themselves. Whether the driver was at fault determined whether or not the charge was successfully defended, not the sentencing outcome of a discharge without conviction.

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<sup>11</sup> In *Katz v Mana Coach Service Limited* [2011] NZEmpC 49

<sup>12</sup> *Katz v Mana Coach Services Limited* WA 102/10, 30 November 2010.

## **Objective assessment of the ordinary meaning and the parties' intentions**

[26] The Union refers solely to the fact that a discharge is a deemed acquittal. It argues that the guilty plea necessary for a discharge cannot be an indication of fault by the driver. In making no comment about fault or blameworthiness in this case, the Union is relying solely on the discharge itself. I take that to mean that the outcome for the defendant is the key indicator of whether the charge was successfully defended rather than an analysis of the conduct itself.

[27] In this case the parties have agreed that cl 24 is a mechanism to ensure that employees are not out of pocket for expenses incurred in successfully defending criminal charges. The term successfully defends is problematic when the outcome is a discharge without conviction. WCTL says the intentions of the parties can only have been an intent that makes business sense and to require an employer to reimburse a employee for criminal conduct for which the employee was at fault does not make business sense. The Union says there are fairness and justice reasons why what is tantamount to an acquittal should be considered to be a successful defence.

[28] There is a key distinction in this matter and that is the line between a finding of guilt or fault in relation to the charge and a sentencing outcome. The sentencing outcome comes after it has been established that the charge has been made out which requires an indication of fault on the part of a defendant. I consider there is a clear difference between these two stages in the process.

[29] If, in the course of receiving a discharge without conviction, it is accepted or found an offence occurred, then it follows the charges cannot have been successfully defended, regardless of the sentencing outcome.

[30] I prefer WCTL's interpretation of clause 24, that for the purposes of an employer reimbursing legal costs incurred by an employee in relation to criminal charges connected with that employee's work, that the meaning of to "successfully defend" does not include a discharge without conviction.

## **Costs**

[31] The Authority's practice note on costs indicates certain matters will generally not be subject to the daily tariff, including for example, disputes about the application,

interpretation or operation of a collective agreement. In cases of this type, the presumption is that parties bear their own costs.

[32] Accordingly, this is a matter where costs should lie where they fall.

Sarah Kennedy  
Member of the Employment Relations Authority