

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 17
3155581

BETWEEN RAIL AND MARITIME
TRANSPORT UNION
INCORPORATED
Applicant

AND KIWIRAIL LIMITED
Respondent

Member of Authority: Claire English

Representatives: Geoff Davenport, counsel for the Applicant
Tim Oldfield, counsel for the Respondent

Investigation Meeting: 1 November 2022 at Wellington

Submissions received: 18 November and 16 December 2022 from Applicant
14 December 2022 from Respondent

Determination: 17 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Rail and Maritime Transport Union Incorporated (the union) says that when its members take paid sick leave, the payment for sick leave should be calculated so as to include the payment of a daily transport allowance, as, if the employee had worked on that day, this allowance would have been paid to them. The union says that the failure to include the transport allowance in the calculation of paid sick leave is in breach of the collective agreement and of the Holidays Act 2003 (Holidays Act).

[2] KiwiRail Limited (KiwiRail) says that the transport allowance is not included when calculating paid sick leave. It gives various reasons as to why this is so, and takes

the position that the exclusion of the transport allowance from the calculation of paid sick leave is compliant with both the collective agreement and the Holidays Act.

[3] The parties have been unable to reach agreement on this matter, and have asked the Authority to determine their dispute.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged on behalf of the union from Wayne Buston, Graham Beazley, and Jed O'Donoghue, and on behalf of KiwiRail by Raweyn Hills-Davey, Maryan Street, and Hannah Weeks. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) When calculating the payment of sick leave, should KiwiRail include the transport allowance?
- (b) Should either party contribute to the costs of representation of the other party.

Facts

[7] The relevant collective agreement between the parties in this matter is the Multi Employer Collective Agreement 1 July 2021 – 30 June 2023 (the collective agreement). The collective agreement provides for several different allowances, to be paid in accordance with their terms.

[8] The allowance in question in this matter is a transport allowance, referred to as the GTRP allowance, which is provided for at clause 33.5 of the collective agreement. This clause is headed "Transport" and states:

33.5.1 If you work between 2000 and 0600 hours and live more than 2km away from work \$6.38 effective 14/11/21 and \$6.64 effective 13/11/22 is paid for the work period (code GTRP).

33.5.2 If you are called back to work between work periods you are paid \$6.38 effective 14/11/21 and \$6.64 effective 13/11/22 (code GTRP) or the KiwiRail rate for the use of your vehicle, at your option.

33.5.3 These payments do not apply if you have a KiwiRail vehicle provided by your employer to travel to/from work.

[9] The GTRP allowance has been provided as part of the collective agreement for many years. Mr Buston explained that the code stands for “General Transport Reimbursing Payment”, and Ms Street advised that the word “General” is a reference to KiwiRail’s “General” payroll.

[10] The GTRP is a set amount payable for each eligible work period (eg, each rostered shift where some or all of the hours of work are between 2000 hours and 0600 hours). The amount that is payable is set out at clause 33.5.1, and is routinely negotiated between the parties, with adjustments to the rate made from year to year.

[11] As is apparent from clause 33.5, the GTRP is a conditional allowance. It is only payable where:

- a. The worker is working between 2000 hours and 0600 hours (that is, between 8.00 pm to 6.00 am); and
- b. The worker lives more than 2 kilometres from the place of work; and
- c. The worker does not have a vehicle provided by KiwiRail (in which case different rules apply).

[12] The union witnesses explained that this allowance was more permissive than the previous allowance, known as the VTA or Vehicle Transport Allowance. That allowance was calculated on the basis of distance actually travelled and a milage rate. The GTRP in contrast is available for all staff working during the defined hours, who live more than 2 kilometres from the place of work (and who do not have a KiwiRail vehicle, although I was advised this was relatively rare, and no dispute arises from this particular condition). As KiwiRail operates rosters on a 24-hour basis, many workers will be eligible for the GTRP allowance from time to time.

[13] In order to be paid the GTRP, workers have to indicate on their timesheet the relevant code, eg the letters “GTRP”, and the relevant work period they are claiming the GTRP for¹. The timesheets are then processed by payroll. Payroll (or for that matter, a worker or a worker’s manager) can check that the worker has worked during the period of 2000 hours to 0600 hours by reference to the relevant roster, and if so, the GTRP will be paid accordingly.

[14] This is not an automated system. If a worker forgets to claim for the GTRP in relation to a work period when that worker would have been eligible to be paid the GTRP, no payment will be made.

[15] When a worker takes paid sick leave, GTRP is not paid. There was evidence that workers were told on an informal verbal basis by other workers, not to claim for GTRP on a day they took sick leave, because it would not be paid. Mr O’Donaghue gave evidence that he had claimed the GTPR when he took paid sick leave earlier in 2022, and despite claiming it in relation to a work period between 2000 hours and 0600 hours when he would otherwise be eligible for it, he was not paid the GTRP for that sick day.

[16] KiwiRail’s witnesses gave evidence that, to the best of their knowledge, payment for the GTRP has never been included when calculating paid sick leave. There were various reasons given for this, namely:

- a. That the GTRP was a “reimbursing allowance”, by which KiwiRail witnesses meant that it was a non-taxable allowance, and no PAYE tax would be deducted from it;
- b. That the GTRP was an allowance for travel, and so was not payable when a worker was sick, because the worker would therefore not be traveling;
- c. The exclusion of the GTPR from sick pay was provided for in the collective;
- d. The exclusion of the GTRP from sick pay was provided for in the Holidays Act.

¹ Some workers use a hard-copy time sheet, and some workers use an app-based system, but both provide for the addition of allowances using the same code.

[17] Neither KiwiRail nor the union was aware of any written policy or guidelines around this. Knowledge of how the GTRP was to be treated was conveyed verbally. This means that, although it seems likely from the evidence given that many workers knew that GTRP was not paid when they took paid sick leave, they did not know why, or how their paid sick leave was calculated. The workers who gave evidence explained to me that, as far as they could tell from their pay slips, their sick pay was calculated on the basis of their appropriate hourly rate, multiplied by the number of hours they were rostered to work on the date that they took sick leave. They provided past pay slips that supported this assumption.

[18] In addition, some allowances are paid when a worker is on sick leave, namely the Tea and Coffee allowance, provided for at clause 33.3 of the collective agreement, and the Laundry allowance, provided for at clause 33.6 of the collective agreement. Both of these allowances are also for an agreed rate which changes from year to year, which is set out in the relevant clause of the collective, and are non-taxable meaning that no PAYE is deducted from them.

[19] KiwiRail witnesses explained that, until recently, sick pay was calculated on the basis of Relevant Daily Pay as defined in section 9 of the Holidays Act (RDP). To calculate RDP, all allowances were disregarded. Any allowances that KiwiRail considered applicable were then paid separately, on top of the RDP payment for sick leave. Average Daily Pay as defined in section 9A of the Holidays Act (ADP) was never used, as the payroll system was not capable of performing the requisite calculations.

[20] In regards to the Tea and Coffee and Laundry allowances, KiwiRail witnesses accepted that these two allowances were very similar to the GTRP, in that they were reimbursable or non-taxable allowances, where the rate of pay was set by agreement and recorded in the collective.

[21] KiwiRail witnesses candidly explained that the Tea and Coffee allowance and the Laundry allowance were paid on a fortnightly basis. So, in order to reduce transactional costs, and to ensure that workers always received at least what the collective provided for, a decision had been made to always pay the Tea and Coffee allowance and the Laundry allowance in full every fortnight to those who qualified, rather than trying to make an assessment of an appropriate daily rate. In contrast, the

GTRP was payable on a daily rate, so it could be accurately deducted (or simply not paid) for any given day taken as sick leave.

[22] KiwiRail witnesses also explained that as of late June 2022, an upgrade to the payroll system occurred, which allowed the payroll system to calculate ADP as well as RDP. As a result, as of the end of June 2022, any BAPS² leave is now paid at the higher of RDP or ADP. The payroll system now automatically calculates both RDP and ADP, and pays the higher rate.

[23] It was explained that KiwiRail had decided to always pay the higher of either RDP or ADP now that the payroll system had the ability to perform the comparative calculation, as it was considered fairer given the potential impact of both penal rates, and overtime payments, and to better ensure compliance with the collective agreement and the Holidays Act.

[24] This change in the way BAPS leave is calculated has not changed the way that KiwiRail deals with the payment of allowances. I was advised that allowances are still excluded from the calculation of both RDP and ADP, and then those allowances that KiwiRail considers applicable for the relevant day (or time period) are added back in. The fortnightly Tea and Coffee and Laundry allowances continue to be paid in full regardless of sick leave taken, and the GTRP continues to be excluded or not paid, for days taken as sick leave even when it would otherwise be payable had the worker worked instead of taking sick leave.

[25] This raises the following questions:

- a. Does the collective agreement require the inclusion of the GTRP in the calculation of RDP? Or, to ask the question from KiwiRail's perspective, does the collective agreement require the GTRP be excluded from the calculation of RDP?
- b. Does section 9 of the Holidays Act require that the GTRP be included in the calculation of RDP?
- c. Does section 9A of the Holidays Act require that the GTRP be included in the calculation of ADP?

² Sometimes referred to as "special leave" or "other leave", being Bereavement leave, Alternative days in lieu where a public holiday is worked, Public holidays not worked, and Sick and family violence leave.

The Collective Agreement

[26] I have already set out above clause 33.5 of the collective agreement which defines the amount of the GTRP, and sets the conditions under which it becomes payable.

[27] 23.2.10 defines “Relevant Daily Pay” as:

Has the meaning given to it by the Holidays Act 2003. In this Act, unless the context otherwise requires, “relevant daily pay”, for the purposes of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave, means the amount of pay that the employee would have received had the employee worked on the day concerned and includes:

- Productivity or incentive-based payments (including commission) if those payments would have otherwise been received on the day concerned;
- Payments for overtime if those payments would have otherwise been received on the day concerned;
- The cash value of any board or lodgings provided by the employer to the employee;
- Allowances paid in accordance with the provisions of this collective agreement with the exception of strict reimbursing allowances.

[28] The wording of clause 23.2.10 of the collective agreement anticipates that there will be allowances set out in the collective agreement which are properly included in the calculation of RDP, and there will be other allowances which are not properly included in that calculation, e.g., those allowances which are “strict reimbursing allowances”.

[29] The dispute between the parties can be summarised as being a dispute as to whether or not the GTRP is a “strict reimbursing allowance”. If so, then it is not required to be included when calculating RDP. On the other hand, if it is not a “strict reimbursing allowance”, but is merely an allowance (that is, a conditional payment), it falls to be included when calculating RDP.

What is a “strict reimbursing allowance”?

[30] The collective agreement does not define “strict reimbursing allowance”, and the experienced witnesses for both the union and KiwiRail were unaware of any formal definition of this phrase in policy or otherwise.

[31] The union takes the position that the GTRP is not as a matter of fact a “strict reimbursing allowance”, because it is not a reimbursement of actual costs incurred, but

is an agreed payment made once certain conditions are met. This agreed conditional payment does not rely on the worker having incurred any costs at all.

[32] KiwiRail takes the position that the GTRP is a “strict reimbursing allowance”, The primary reason advanced for this was because it is a non-taxable allowance, and also because KiwiRail witnesses said they understood the GTRP was intended to compensate workers for the increased cost of getting to work when public transport was not available. As already mentioned, this understanding is not formally recorded, and does not appear to have been shared with workers generally.

[33] Clause 33 of the collective agreement which defines the GTRP is headed “Allowances”, making it clear that the GTRP is an allowance. The words “reimbursing” and “strict reimbursing allowance” do not appear in clause 33 of the collective agreement. This suggests that the GTRP is not viewed as a “reimbursing allowance” or a “strict reimbursing allowance”.

[34] Under questioning, the KiwiRail witnesses all explained that when they referred to a “reimbursing” allowance, they meant an allowance from which PAYE was not deducted. The phrase “non-taxable” was used as an alternative to, and interchangeably with, the word “reimbursing”.

[35] On the facts of the matter, the GTRP is not a “strict reimbursing allowance”. The Oxford English Dictionary defines the word “reimburse” as:

To repay (a sum of money which has been spent or lost).

[36] The GTRP does not repay a worker for any sum of money spent, because the terms and conditions upon which the GTRP is payable do not require the worker to spend or lose any money at all. The conditions are: that the worker works between 2000 hours and 0600 hours; that the worker lives 2 kilometres or more from the place of work; and that the worker not have a KiwiRail vehicle provided to allow the worker to get to and from work. The worker may incur an expense, or they may not depending on the particular work period and the worker’s individual circumstance, but this is not material to whether or not a worker is entitled to the GTRP under the terms of the collective agreement. A worker may spend nothing at all and still be entitled to the GTRP allowance. Uncontested evidence was given by workers that they may walk to work (presuming they are willing and able to do so despite the distance) or may be

dropped off by a friend or family member at no cost to themselves at all, and still receive the GTRP. This would not be in breach of the collective agreement, as all witnesses agreed that the only requirements for receiving the GTRP were those expressly set out in the collective agreement.

[37] In relation to the argument advanced by KiwiRail, that the GTRP is a “strict reimbursing allowance” because its intended purpose is to provide some compensation for the cost of getting to work when public transport is not available, I note there is no record of such a rationale in the collective agreement. In response to questioning from me, witnesses from both the union and from KiwiRail advised they were not aware of any written record of such a rationale. Rather, this was an understanding held by certain members of the payroll team which had been conveyed verbally over time. The difficulty with this evidence is that there is no indication that this was a shared understanding. KiwiRail witnesses also referred to the idea that there was an element of compensation in the GTRP for working at “antisocial” times of day.

[38] During the course of the investigation meeting, KiwiRail witnesses began to develop the idea that the GTRP was a “reasonable assessment” of what it might cost on average, for a worker to get to work. In other words, that there was still an element of reimbursement in the GTRP, even though this was not calculated accurately (or strictly). However, they conceded that no process had ever been undertaken (as far as they were aware) to accurately scope what it might cost a worker to get to work at certain times of day. Rather, the rate of the GTRP was a lump sum payment that had been agreed between the parties over many years, and was regularly adjusted for inflation.

[39] What is clear is that as a matter of fact, the GTRP is not a “strict reimbursing allowance”. It is not a reimbursing payment, as it does not repay a sum of money which a worker has spent or lost. It is a conditional payment made to a worker who is required to work at certain inconvenient or anti-social times of day.

[40] In addition, the amount of the GTRP is not set with reference to a “strict” or accurate cost, or even implemented or enforced strictly. This may be contrasted with the previous VAT allowance, which I was told was implemented strictly on the basis of mileage rates for actual distance travelled.

[41] As the GTRP is not a strict reimbursing allowance, the exception for “strict reimbursing allowances” in clause 23.2.10 of the collective does not apply to it. The GTRP needs to be included in the calculation of RPD as an allowance which is paid in accordance with the provisions of the collective agreement.

Does the Holidays Act require the GTRP to be included in the calculation of RDP?

[42] KiwiRail witnesses placed great importance on the tax treatment of the GTRP when explaining why it was not included in RDP.

[43] When asked why the GTRP was not included in the calculation of RDP, which “means the amount of pay that the employee would have received had the employee worked on the day concerned”, all KiwiRail witnesses explained that if the worker had gone to work, they would have been paid the GTRP, but the worker was not paid the GTRP when they did not go to work because they did not incur the cost of travel.

[44] They then referred to the idea that the GTRP was a “reimbursable allowance” because it was not taxed.

[45] The explanation by the KiwiRail witnesses in this respect is circular – when calculating RPD, this payment must include “the amount of pay that the employee would have received had the employee worked on the day concerned.” KiwiRail witnesses agreed that if a worker came to work, and met the relevant conditions, they would receive the GTRP. However, when taking sick leave, they would not be paid the GTRP, because they did not qualify for it because they did not come to work. This argument is not only circular, it is in fact an admission that the GTRP “would have been earned” if the employee worked on a hypothetical sick day.

[46] Section 9 of the Holidays Act requires KiwiRail to perform a notional assessment, focusing not on what actually happened (eg the worker didn’t attend work because they were sick) but to assess what would have happened had the worker attended work on that day. The Court of Appeal has held:

The calculation of relevant daily pay is necessarily a notional exercise. It is to be undertaken retrospectively on the basis of what would have been earned if the employee had worked on the relevant holiday or leave day³.

³ *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited*, [2012] ERNZ 358, at [29].

[47] Unlike the facts considered by the Court of Appeal in the matter quoted above, where there was inherent uncertainty as to the amount of unrostered overtime that might have been worked on any given day, there is no such uncertainty here, as the payment in question is for a conditional allowance. It can be said with certainty that had a worker attended work on a given shift, then that worker would have been eligible to receive the GTRP. KiwiRail's own witnesses confirm this.

[48] However, the allowance is deducted when the worker does not attend work, in circumstances where it is otherwise payable. That is not an outcome that is permitted by section 9 of the Holidays Act, as confirmed by the Court in a variety of different examples:

The employee who regularly (but not invariably) worked unrostered overtime or exceeded productivity targets would be entitled to higher relevant daily pay than those who did so less often or only occasionally. That outcome reflects the legislature's evident intention to ensure that the minimum entitlements of employees under the Act include not only their basic or ordinary time pay but also other items of remuneration they would ordinarily receive....⁴

[49] The GTRP is an item of remuneration that the worker would ordinarily receive. When calculating RDP under section 9 of the Holidays Act, the GTRP must be included in that calculation where the worker would otherwise be eligible for it (eg the relevant work period involved work between 2000 hours and 0600 hours, the worker lives more than 2km away from work, and the worker does not have a KiwiRail vehicle provided for travel to/from work).

[50] To the extent that this argument refers to the idea that the worker should not be paid the GTRP because the worker has not incurred the cost of travel to work, I note that this condition (incurring cost of travel to work) is not what is required by clause 33.5 of the collective agreement or by section 9 of the Holidays Act. Rather the focus of section 9 of the Holidays Act is on the "amount of pay that the employee would have received". As I have found as a matter of fact that the GTRP is a conditional payment, it must therefore be included in the calculation of RDP.

⁴ *Ibid*, at paragraph [32].

Does the Holidays Act require the GTRP to be included in the calculation of ADP?

[51] Up until late June 2022, KiwiRail paid sick leave on the basis of RDP excluding allowances, as discussed above. However, KiwiRail witnesses gave evidence that it now has a practice of paying sick leave at the higher rate of either RDP or ADP. When paying ADP, the GTRP is also excluded from the calculation, on the basis that the GTRP is a non-taxable reimbursing allowance, and therefore does not form part of gross earnings, as these are defined by section 14 of the Holidays Act.

[52] The relevant definition at section 14 of the Holidays Act excludes:

- a. non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment (at section 14(a)(ii));
- b. any payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment (at section 14(c)(i));
- c. any payment of a reasonably assessed amount to reimburse the employee for any costs incurred by the employee related to his or her employment (at section 14(c)(ii).

[53] KiwiRail witnesses pointed to the wording of section 14 of the Holidays Act to explain why the GTRP was excluded from the calculation of ADP.

[54] I do not perceive there to be any difference between the parties that, as a matter of general principle, true reimbursing payments to repay an employee for out of pocket costs incurred, may be properly excluded from both RDP and ADP on the basis that such payments are not wages.

[55] The evidence established that the GTRP is not a payment to reimburse workers for any actual costs. The evidence also established that it is a lump sum with the amount negotiated between the parties from time to time, with no indication of any assessment being made of what a “reasonably assessed amount” for a defined amount of travel might be. As I have found that the GTRP is not such a payment, it follows that the exceptions in section 14 of the Holidays Act do not apply.

[56] The consistent evidence from the KiwiRail witnesses suggests that KiwiRail's longstanding practice of excluding the GTRP from the calculation of sick pay is driven by its classification of the GTRP as "non-taxable", rather than by a direct consideration of the true status of the GTRP as described in the collective agreement, or by any direct consideration of whether or not there are any statutory differences in how RDP and ADP are calculated. And that this in turn has been historically obscured, for both KiwiRail and for workers, by the limitations of the previous payroll system.

[57] It has been suggested for KiwiRail that the union is estopped from raising any claim over the GTRP because it is an allowance of long standing, and no issues have been raised prior. I do not think that this is an entirely fair characterisation, as it appears to me on the basis of evidence from both KiwiRail and the union that neither party has had proper visibility of this issue up until now. I do not accept that the union is estopped from bringing this present claim.

Costs

[58] I have been asked to determine the issue of costs as part of this determination.

[59] The union submits that this matter comprises a failure of KiwiRail to pay in accordance with the Holidays Act and with the collective agreement, and that the matter needed to be brought to enforce minimum entitlements. Therefore, the union seeks costs on the daily tariff basis of \$4,500 for a one-day investigation meeting.

[60] KiwiRail says that his matter is a dispute about the interpretation of a collective agreement, and that therefore costs should lie where they fall in accordance with the Authority's current practice note.⁵

[61] This matter is properly characterised as a dispute about the interpretation of a term of a collective agreement. Despite communication between the parties in good faith, it has been necessary for the Authority to resolve what was a fundamental disagreement about the meaning of certain provisions in the collective agreement.

[62] There was no conduct by either party that might result in an adjustment of any costs award.

⁵ the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>

[63] Accordingly, costs are to lie where they fall.

Claire English
Member of the Employment Relations Authority