

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 75  
3034336

BETWEEN            WARREN DERBIE  
Applicant

AND                    TRANZURBAN HUTT VALLEY  
LIMITED  
Respondent

Member of Authority:    M B Loftus

Representatives:        Simon Meikle, Counsel for Applicant  
Daniel Vincent, Counsel for Respondent

Investigation Meeting:    29 August 2018 at Wellington

Submissions Received:    At the investigation meeting

Determination:            30 August 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Notwithstanding the fact this application has been lodged under the name of a single applicant, Warren Derby, the issue is really a dispute with an outcome that, at the time of lodgement, had potential to affect a number of members of the NZ Tramways & Public Passenger Transport Employees Union Wellington Branch which is supporting the claim.

[2] The application put two questions to the Authority. They are:

- a. Has the respondent, Tranzurban Hutt Valley Limited (Tranzurban) breached a contractual term by requiring the applicant exceed 13 hours of work time in any cumulative 24 period contrary to the limitations of s 30ZC of the Land Transport Act 1998; and

b. Has Tranzurban breached s 69ZD of the Employment Relations Act 2000 by failing to provide paid rest breaks?

[3] If the question concerning s 69ZD is answered in the affirmative a penalty is sought and while not expressly put in the form of a question there are issues as to whether or not Tranzurban is ensuring the safety of its employees by providing adequate rest breaks.

[4] Tranzurban denies it is operating in breach of applicable transport regulations and asserts the claim misinterprets the regulations and their effect. Tranzurban denies s 69ZD requires the provision of paid meal breaks.

### **Background**

[5] Tranzurban is a transport service operator which recently saw a significant change to its operations as a result of the re-tendering of bus services in the greater Wellington region. One such change was the acquisition of responsibility for a number of services in the Hutt Valley which resulted in the engagement of a number of new employees.

[6] Mr Derby is one such employee and works as a bus driver. He commenced with Tranzurban on 20 June 2018 having earlier signed an individual employment agreement which specified his terms and conditions.

[7] One of those conditions requires Mr Derby work rosters set by Tranzurban. Another requires he comply with relevant legislation and regulations.

[8] Some of the rosters Mr Derby has worked had a span of hours greater than 13 from first commencement to final sign off. All, however, have breaks of some form whether they are unpaid meal breaks or shorter comfort stops. Some also include split shifts which give breaks of a longer duration.

[9] Mr Derby contends these longer shifts breach statutory requirements and he asks the Authority determine whether or not that is so.

[10] Finally it should be noted there have been subsequent changes to the rosters. The evidence strongly suggests that since changes implemented with effect 5 August there are no rosters which exceed a total of 13 hours between a days' initial commencement and the final sign off; no meal break is now less than 40 minutes and

some rosters contain additional and/or extended short breaks. This means that while the matter was originally lodged as urgent the outcome will now have little more than historic interest and possibly provide an avenue for financial recompense for those who worked what the Union claims were unlawful rosters.

[11] Referred to by both parties, and relevant to the dispute, are the following statutory provisions.

[12] Section 30ZC of the Land Transport Act specifies limits on work time. It reads:

- (1) A driver subject to this subpart—
  - (a) may not exceed the work time restrictions specified in this section, the rules, or any variation granted undersection 30ZA; and
  - (b) must comply with the rest time requirements specified in this section, the rules, or any variation granted undersection 30ZA.
- (2) in any cumulative work day, a driver—
  - (a) may not exceed 13 hours of work time; and
  - (b) must have at least 10 hours of continuous rest time.
- (3) In any cumulative work period, a driver may not exceed 70 hours of work time.
- (4) To avoid doubt, the rules may extend the limits for a cumulative work day or period for a specified activity or service.
- (5) This section does not apply to a driver of an ambulance service or a fire brigade who is proceeding to or returning from an incident attended in response to a priority call specified in the rules.

[13] Section 2 of the Land Transport Act defines some of the phrases used above and in particular:

- cumulative work day** means a period—
- (a) during which work occurs; and
  - (b) that—
    - (i) does not exceed 24 hours; and
    - (ii) begins after a continuous period of rest time of at least 10 hours

**cumulative work period** means a set of cumulative work days between continuous periods of rest time of at least 24 hours

- rest time** means all time that—
- (a) is not work time; and
  - (b) is at least 30 minutes in duration; and
  - (c) is not spent in a moving vehicle associated with work

- work time** includes (but is not limited to) all the time spent—
- (a) driving a vehicle to which section 30ZB(1) applies;
  - (b) performing work-related duties, including (but not limited to)-
    - (i) loading and unloading;

- (ii) maintenance and cleaning of vehicles (other than unpaid cleaning outside working hours):
- (iii) administration or recording:
- (c) in any paid employment (other than paid leave or paid breaks of at least 30 minutes' duration), whether or not related to transport activities

[14] Reference is also made to the following in the Employment Relations Act:

69ZD Employee's entitlement to rest breaks and meal breaks

(1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that—

(a) provide the employee with a reasonable opportunity, during the employee's work period, for rest, refreshment, and attention to personal matters; and

(b) are appropriate for the duration of the employee's work period.

(2) The employee's entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions—

(a) are—

(i) reasonable and necessary, having regard to the nature of the employee's work; or

(ii) if subparagraph (i) does not apply, reasonable and agreed to by the employer and employee (whether in an employment agreement or otherwise); and

(b) relate to 1 or more of the following:

(i) the employee continuing to be aware of his or her work duties or, if required, continuing to perform some of his or her work duties, during the break:

(ii) the circumstances when an employee's break may be interrupted:

(iii) the employee taking his or her break in the workplace or at a specified place within the workplace.

(3) An employee's entitlement to rest breaks under this section is to paid rest breaks.

69ZH Relationship between Part and other enactments

Where an employee is a person who is required to take rest breaks or meal breaks by, or under, an enactment other than this Part, the requirement for rest breaks or meal breaks defined by, or under, the other enactment applies instead of this Part.

[15] Part 11 of the Land Transport Act also allows the promulgation of rules. Relevant to this dispute is section 2 of that pertaining to work time and log books. It contains the following:<sup>1</sup>

Section 2 Work time and rest time [Note: Refer to section 30ZC of the Act for limits to work time hours.]...

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<sup>1</sup> Part 1 (Rule Requirements), Section 2 of the Land Transport Rule: Work Time and Log Books 2007

2.1(1) A driver, other than a driver specified elsewhere in this section, must take a rest break after 5½ hours of continuous work time. [Note: 'Rest break' and 'Rest time' are defined terms.]

[16] Finally there is the definition section of Land Transport Rule: Work Time and Log Books which provides *Rest Break means a period of rest time taken within a cumulative work day.*<sup>2</sup>

### **Determination**

[17] For the applicant it is argued, in respect to the first question, that:

Section 30ZC of the Land Transport Act 1998 prohibits the applicant from exceeding 13 hours of work time within a consecutive 24-hour period when such 24-hour period starts after a rest time of at least 10 hours.

Section 2(c) of the Land Transport Act 1998 defines work time as driving a vehicle, along with work related duties, in any paid employment (such paid employment excluding paid leave or paid breaks of at least 30minutes duration).

The rosters contain unpaid 'meal breaks' which constitute part of the paid employment of the applicant.

The unpaid 'meal breaks' constitute work related duties as they are required to be taken pursuant to clause 2.1(1) of section 2 of the Land Transport Rule: Work Time and Log Books 2007.<sup>3</sup>

[18] It is then alleged that by virtue of requiring Mr Derby breach land transport requirements Tranzurban has also breached his employment agreement in that it has:

- a) failed to ensure he is capable of complying with a duty to ... *ensure that all driving duties are completed within New Zealand's legal driving regulations;*<sup>4</sup>  
and
- b) Failed to ensure Mr Derby can ... *comply at all times with any legal requirements with regard to health and safety ...*<sup>5</sup> by requiring he work hours the land transport regime deems unsafe.

[19] Finally it is said Tranzurban has breached its duty to provide a safe environment by not providing reasonable short rest breaks as required by s

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<sup>2</sup> Part 2 (Definitions) of the Land Transport Rule: Work Time and Log Books 2007

<sup>3</sup> Paragraphs [14] to [17] of the Statement of Problem

<sup>4</sup> Clause 6 of Schedule 1 of Mr Derby's individual employment agreement

<sup>5</sup> Clause 9.3 of Mr Derby's individual employment agreement

69ZD(1)(a) of the Employment Relations Act though no specific question was posed in respect to this allegation.

[20] With respect to the claim meal breaks should have been paid it is said s 69ZH of the Employment Relations Act means it is the applicable land transport rule that specifies when and how breaks should be taken. That must, in turn, define what must be considered reasonable and appropriate under s 69ZD(1).

[21] Under s 69ZD(3) it is a rest break which must be paid. It follows this does not extend to meal breaks as s 69ZD(2) separates the two by referring to each separately.

[22] The argument is that is not so in this instance. The applicable land transport rule requires a driver stop for what it labels a *Rest break* after 5 and a half hours. It then specifies *Rest break* is a defined term. The definition in question says *Rest Break means a period of rest time taken within a cumulative work day.*<sup>6</sup>

[23] Rest time is then defined by the Land Transport Act as time of at least 30 minutes duration which is not work time and spent in a moving vehicle. It is what in normal parlance would be considered a meal break and was so defined prior to the 2015 changes to the Employment Relations Act when s 69ZD, as originally enacted, defined 30 minute breaks as meal breaks and shorter 10 minute breaks as rest.<sup>7</sup>

[24] The fundamental problem with this word play is it neglects to recognise the fact s 69ZH of the Employment Relations Act stipulates the alternate provisions, when applicable, apply ...*instead of this Part*.

[25] That phrasing can only be read to say the provision applies to the part in which it is placed, Part 6D (Rest breaks and meal breaks) of the Employment Relations Act, as a totality. The part includes s 69ZD, The fact none of the part remains means there is no longer a requirement meal breaks be paid in accordance with s 69ZD(3).

[26] In the absence of a requirement to pay in either the Land Transport Act and its attendant rules or the applicable employment agreement the employees can have no right to paid meal breaks.

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<sup>6</sup> Above n 2

<sup>7</sup> Sections 69ZD(3) and (4) as enacted by the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008

[27] When this problem was put to Mr Meikle it was suggested that was not so given the Court of Appeals decision in *Jetstar Airways Ltd v Greenslade*.<sup>8</sup> *Greenslade* is similar in that it examined an apparent conflict between the requirements of s 69ZD and another instrument which arguably detailed rest and meal breaks for the employees concerned but the submission appears to face a significant impediment. Mr Greenslade's case involved an earlier version of s 69ZH which required there be a comparison between the provisions of the Employment Relations Act and the other potentially applicable instrument with the others provisions applying where they were they provided additional or enhanced breaks.<sup>9</sup> That is no longer the case with the Part being replaced and it must be assumed the statutory change was deliberate and intended to implement an altered regime.

[28] The second question is therefore answered in the negative and it follows the question of penalties need not be considered.

[29] Turning to the first question Mr Derby raises. As already said the evidence is exclusive of the breaks none of the runs exceed 13 hours. The key submission is that by virtue of the fact the breaks were unpaid their tenure should be added to the runs time. Indeed it was said that had they been paid this would not be necessary given the definition of work time expressly excludes paid leave or paid breaks of at least 30 minutes' duration as constituting work time. The argument is that as the breaks were unpaid they were not excluded and must be added to the hours worked.

[30] This approach fails to convince. I find it inconceivable that a situation previously deemed improper as it prevented an employee from attaining the rest and sustenance required to work safely can suddenly become safe by virtue of a payment when the times involved and the ability to access sustenance have not changed. It makes much more sense to construe the provision as meaning just because it is a paid break does not mean it is work as is clearly the case with the other exception mentioned in the same sentence – paid leave. Such an interpretation appears to be confirmed by the fact Section 2 of the Land Transport Act expressly states rest time, which these breaks are defined to be, is not work time.

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<sup>8</sup> [2015] ERNZ 71

<sup>9</sup> Section 69ZH of the Employment Relations Act as repealed by s 52 of the Employment Relations Amendment Act 2014

[31] I conclude the rosters before me do not require a driver complete more than 13 hours work time in any cumulative work day. The provisions of s 30ZC(2) have not been breached and it follows that while many would consider these shifts onerous they do not breach the terms of Mr Derby's employment agreement whether express or implied.

[32] Turning to the issue of short breaks within the five and a half hour work period. While discussed this will be taken no further for three reasons. The first is no specific question was put in this regard. The second is such breaks are not required by the Land Transport Act and its rules and there is no set criteria against which the claim can be measured other, perhaps, than what is reasonable.<sup>10</sup> The third is the evidence suggests such breaks are scheduled though there may be issues over the practicality there-of given factors beyond the control of the parties such as traffic congestion etc. Given the lack of specific legislative criteria against which such issues can be measured I reiterate a comment I made at the end of the investigation. These are issues that can, and perhaps most appropriately should, be addressed through discussion and bargaining. I would encourage the parties to advance those discussions rather than squander resources on adversarial litigation the outcome of which is now of little more than historic interest.

### **Conclusion and costs**

[33] For the above reasons I conclude:

- a. Tranzurban has not breached a contractual term by requiring Mr Derby exceed 13 hours of work time in any cumulative 24 period contrary to the limitations of s 30ZC of the Land Transport Act 1998;
- b. Tranzurban has not breached s 69ZD of the Employment Relations Act 2000 by failing to provide paid rest breaks.

[34] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority

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<sup>10</sup> Section 69ZD(1)(a) of the Employment Relations Act