

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Marcel Aarts (Applicant)
AND Red Bus Limited (Respondent)
REPRESENTATIVES Marcel Aarts In person
Richard Cunliffe, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 25 August 2005
DATE OF DETERMINATION 23 September 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Marcel Aarts is employed by Red Bus Limited as a driver. There are two aspects to this employment relationship problem. Mr Aarts commenced employment in November 2003 as a trainee driver on a probationary period and from 15 December 2003 he worked in accordance with the employers' roster until a new roster was posted to take effect from 8 June 2004. The new roster affected Mr Aarts by significantly increasing the amount of book-off time in his working week. Book-off time is an unpaid break or breaks during the driver's work hours on any one day. Mr Aarts vigorously objected to the new roster but was required to work it until he and Red Bus Limited eventually reached an agreement about alternative hours of work. Mr Aarts says Red Bus breached his employment agreement, at least from 8 June 2004 until the alternative hours were agreed. To resolve the problem, I need to identify and interpret the terms of employment originally agreed between Mr Aarts and Red Bus. It will not be necessary to canvas the exchanges between Mr Aarts and Red Bus that preceded the agreement they reached about alternative hours of work.

[2] The second part of the problem arose later. Mr Aarts says that Red Bus has not complied with the Holiday Act 2003 in respect of several alternative holidays that he requested. To resolve this, I will need to explain the circumstances of the alternative holidays that Mr Aarts sought to take and apply the terms of the Holidays Act 2003.

[3] Despite mediation Mr Aarts and Red Bus were unable to resolve the employment relationship problem.

Terms of Employment

[4] It is helpful to explain the industry context. Red Bus operates passenger transport services. The routes, timetables and service frequency are set by the Regional Authority and Red Bus (and other operators) periodically tender for each route. Currently, Red Bus employs about 360 drivers to cover the routes it has won tenders for. Service frequency and therefore demand for buses and drivers varies significantly during the day. There is a morning peak of about 195 buses which falls

to about 120 buses during the middle part of the day, rises to about 150 buses in the late afternoon, falls to about 50 buses during the evening and then tails off to zero after midnight. Part time employment and book-off times are used to match the availability of drivers with demand for services.

[5] There is not complete agreement between Mr Aarts and the Red Bus witnesses over what was said to him about the nature and terms of the employment. However, there is also some documentary evidence. Mr Aarts was first offered employment as a probationary bus driver. The arrangements are set out in a letter dated 16 October 2003 and a collective employment agreement dated 1 December 2001 – 30 November 2003. The collective agreement provides for each employee to be given written notification of whether their employment is full-time, part-time, relief, temporary or casual. It also provides for a new employee (such as Mr Aarts) to be subject to a two-month trial or probationary period during which the employee is classified as a probationary driver. Mr Aarts completed and signed an application form which included an acknowledgement about unpaid book-off time and variations to the duty schedule being an inherent part of the employment contract.

[6] Mr Aarts' evidence is that he started work on a full-time roster in December 2003 and that he was never told that he was a part-time employee. Against that however, I am told by John Graham (the training officer) that Mr Aarts signed a new employee form which indicates that Mr Aarts was engaged as a part-time employee. Mr Graham believes that he completed the relevant part of the form before it was signed by Mr Aarts on 13 November 2003, that being his usual practice with trainees such as Mr Aarts. I also have evidence from Mr Graham that he typically tells trainees that they are being offered permanent part-time work with twenty (20) hours guaranteed per week but with book-off periods. There is also evidence from a participant in the trainee course with Mr Aarts (Karen Steele) that Mr Graham did say this to them at the beginning of the course. That backs up what is conveyed in the initial information pack given to those such as Mr Aarts who express an interest in driving positions.

[7] At the investigation meeting, Mr Aarts told me that he did not recall the form mentioned by Mr Graham nor did he recall being told that he was being appointed to a part-time position. I am satisfied from that evidence, the form, Mr Graham's evidence and Ms Steele's evidence that it was conveyed in writing and verbally to Mr Aarts that his employment was part-time but he simply does not now recall those communications.

[8] A new collective agreement was negotiated and applies from 1 December 2003 to 30 November 2006. Mr Aarts did not join the union until February 2005 but both he and Red Bus operated on the basis that the terms of the new collective agreement applied to him. The agreement stipulates that *the minimum hours of work for a part-time employee shall be not less than 20 hours per week, to be worked on no more than 5 days in each week....* It defines a roster as *... a table of work hours for an individual employee as set by the employer and so varied by the employer from time to time defining the hours of work, sign-on and sign-off times, meal breaks and book-off periods.* There is a further definition of *part-time roster* which is where the hours of work do not meet those specified for a full-time employee. *Book-off* is defined as *... an unpaid period, other than a meal break, where no work is performed and is rostered by the employer to be taken during a driver's duty schedule.*

[9] Clause 4.9 of the agreement is at the heart of this problem. It reads

No full-time driver shall be booked off duty for any lesser period than one-half-hour, or for a longer period than two-hours, or more than once during any one day....

[10] The roster worked by Mr Aarts prior to 8 June 2004 complied with clause 4.9 while his roster after 8 June 2004 breached clause 4.9. This part of the problem is resolved by answering the

question: Do the restrictions on the number and lengths of book-offs apply to Mr Aarts? The restrictions clearly apply only to full-time drivers. Mr Aarts was not employed as a full-time driver but was expressly employed as a part-time driver. Red Bus did not breach clause 4.9 or Mr Aarts' terms of employment requiring him to work in accordance with the new roster.

[11] Mr Aarts raises an associated point. He questions whether Red Bus is permitted to employ someone such as himself for more than forty (40) hours per week regularly and still classify them as a part-time employee. The answer lies in the terms of the employment agreement. Under the collective agreement, a part-time employee is someone employed as such for a minimum twenty (20) hours per week while a full-time employee is someone employed as such for a minimum of forty (40) hours on five (5) days in any week who is not a casual or part-time employee. There is no maximum number of hours in either case. The parties to an employment agreement are entitled to adopt such classifications and define them in ways that are different from other industry or employment situations or even from common usage. Mr Aarts' hours of work were consistent with the definition of part-time employee in the collective agreement.

Alternative Holidays

[12] This issue arises because there were two occasions late last year and earlier this year where Mr Aarts sought to take alternative holidays but his requests were declined. One request was made about six-weeks in advance while the second request was made two-weeks in advance. On both occasions, Red Bus refused to approve the requested leave. On one of the requested days, Mr Aarts simply failed to report for work. Mr Aarts says that *...management simply decline applications for alternative days without consultation and without informing employees of entitlements and denying that they are aware of entitlements.*

[13] The relevant section of the Holidays Act 2003 is clear. Section 57 (1) states that an alternative holiday must be taken on a day that is agreed between the employer and the employee. That requires some communication between both in an effort to reach an agreement. Section 57 (2) deals with the situation where agreement has not been reached. The alternative holiday may be taken on a date determined by the employee after taking into account the employer's view as to when it is convenient to take the day. It is difficult to see how an employee could properly take into account the employer's view unless there is some communication about that point. Under section 57 (3), the employee must give at least fourteen (14) days notice of his or her intention to take the alternative holiday. The employer and the employee must deal with one another in good faith when discussing these matters: see section 73 (1).

[14] Applying the law to the present matter, Mr Aarts was entitled to take an alternative holiday on at least fourteen (14) days notice but only after taking into account his employer's views. Absent here was any real communication between Mr Aarts and Red Bus about those views. It was incumbent on both Mr Aarts and Red Bus to ensure adequate communication.

Summary

[15] Mr Aarts was employed as a part time driver and the restrictions on book-off periods in clause 4.9 of the collective agreement did not apply to him during the disputed period.

[16] Both Mr Aarts and Red Bus should have regard to the comments above when dealing with one another in the future about alternative holidays.

[17] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority