

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 45  
5347183

BETWEEN                      NUKU CHESLEY  
   Applicant  
  
AND                                CITYLINE (NZ) LIMITED  
   Respondent

Member of Authority:      Trish MacKinnon  
  
Representatives:            Kevin O’Sullivan, for the Applicant  
   Susan-Jane Davies, for the Respondent  
  
Investigation Meeting:     19 December 2012  
  
Submissions Received:     Oral 19 December 2012, and written 11 January 2013  
   from the Applicant  
   Oral and written 19 December 2012 from the  
   Respondent  
  
Determination:              15 April 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Chesley has a dispute with his employer over the payment of wages. He says his employer declined to pay wages in accordance with what he believes to be his entitlement for a period extending from the end of August 2007 to early March 2011. He seeks resolution of his dispute and the payment of wage arrears. Mr Chesley estimates the amount owing to him is \$12,194.

[2] Mr Chesley is a member of the Tramways Union (the union) which is a party to the Valley Flyer Tramways Collective Agreement 6 December 2009 to 5 December 2012. His employer, Cityline (NZ) Limited, is the other party to the collective agreement. The Tramways Union supports Mr Chesley in pursuing the dispute and

says Cityline applied the provisions of the collective agreement in a way that disadvantaged him and was not in accordance with the spirit of the agreement.

[3] Cityline NZ Limited (Cityline) is a public bus company providing bus services in the Hutt Valley and Wellington areas. It acknowledges Mr Chesley had a valid claim for wage arrears which it says it resolved by the payment of \$965.46 into his bank account on 12 October 2012. Cityline says this payment remedied an admitted underpayment of wages to him.

[4] The payment Cityline made, which it called a *catch up* payment, related to *top-up* hours. These are provided for in the collective agreement and are made by Cityline to take an employee's ordinary hours of work to 40 in weeks where they fall short because the employer requires them to work less.

[5] Mr Chesley says the payment of \$965.46 by Cityline may partially resolve his claim and, if so, could be deducted from the wage arrears he estimates he is owed. During the investigation meeting he agreed to delete an additional claim for payment of wages for 4.47 hours worked in the week ending 12 March 2011. Mr Chesley was provided with information by his employer that satisfied him those wages formed part of the \$965.46 payment he had acknowledged receiving.

### **Background to the Dispute**

[6] Mr Chesley's dispute arises from his work on the L8 Nite services provided by Cityline. L8 Nite services (L8) provide public transport after midnight on Friday and Saturday nights. Cityline uses volunteer bus drivers for the provision of L8 duties wherever possible. Under the terms of the collective agreement, hours worked on L8 are paid at double time.

[7] Mr Chesley has volunteered for L8 on a regular basis for several years as well as working his regular weekly roster. In order to accommodate these duties and remain compliant with Land Transport regulations regarding driver hours, Mr Chesley has frequently been unable to work one of his regular shifts, usually on a Friday or a Saturday. This would bring his weekly hours under the 40 for which he is entitled, as a full time employee, to be paid under the terms of the collective agreement. He says until late August 2007, his employer would *top up* his ordinary hours to 40 to enable him to undertake L8 work without losing a day's pay.

[8] He says that stopped when a new roster supervisor was appointed in August 2007 and began treating Mr Chesley's ordinary hours of work differently. Mr Chesley would be rostered for 40 hours of work but told to take a day off so he had the 9 hour break required by law before starting work on the L8 service. This would result in a shortfall in pay of up to 8 hours for that week. The problem is now an historical one as a change to the roster in 2011 overcame the problem for him.

[9] During the period for which Mr Chesley claims wage arrears, he says he consistently worked on his rostered day off (RDO), and those hours were included by his employer in the 40 hours of work per week he was entitled to be paid. He says that was wrong and he should have received a *top up* payment for all hours less than 40, but excluding any hours he worked on his RDO and on L8 duties.

[10] The calculation of Mr Chesley's wage arrears was undertaken by one of his colleagues, William Geddes. Mr Geddes arrived at the wage arrears amount of \$12,194 by examining Mr Chesley's rosters and payslips over one 6 week roster cycle. From those documents he calculated the *top up* hours required to meet 40 per week, not taking hours worked on RDOs or L8s into account. He then extrapolated from that 6 week period to the full period of Mr Chesley's claim. Mr Geddes used Mr Chesley's current pay rate to reach the claimed arrears, rather than the pay rate applicable at the time. Mr Chesley acknowledged the figure reached was an estimate rather than a precise calculation of arrears and, accordingly, may not be entirely accurate.

[11] Cityline says it was right to count hours Mr Chesley worked on his RDOs as part of his 40 hours of work in weeks during which he worked on L8 duties. This is because his roster had to be changed in those weeks because he volunteered to work L8 duty, not because his employer required him to change his roster.

[12] It also says the methodology used in the calculation of Mr Chesley's wage arrears, which it denies he is owed, is inaccurate. It says rosters, which are prepared 6 weeks in advance, are subject to change when circumstances change, for example because of volunteering for L8 duties, and therefore cannot be taken to be determinative of the hours Mr Chesley actually worked in any roster cycle. While it provides an indication of what hours he might have worked, it does not provide a guarantee of hours he actually did work, because of the variable factors that could have applied.

[13] Mr Chesley says he was treated differently from 2 other Cityline bus drivers who were doing the same work patterns and whose rostered days off were not being treated as part of their 40 ordinary hours of work. Those drivers did not give evidence, and I do not accord any weight to that part of Mr Chesley's evidence.

### **The collective agreement**

[14] The Valley Flyer Tramways Union Collective Agreement includes the following clauses relevant to this matter:

#### **3. DEFINITIONS**

##### ***Daily Hours:***

*Hours of work which are paid at ordinary rates and are counted as part of the total of 40 ordinary hours per week*

##### ***Full Time Employee:***

*An employee who is normally paid on the basis of a 40 hour week.*

#### **8 HOURS OF WORK**

##### **8.1 All Employees:**

a) *The daily hours for employees shall not exceed 11 hours, to be worked in a maximum of 14 hours including meal breaks. The hours worked will be in accordance with the Transport Act 1962 and amendments.*

....

##### **8.2 Full Time Drivers:**

a) *The ordinary hours for employees shall be 40 per week, to be worked on any of five days in each week, Sunday to Saturday, both days inclusive.*

....

#### **10 MINIMUM PAYMENT PER WEEK**

10.1 *Where a full time employee is required to work less than a total of 40 hours in a week and does work all hours required, the employee shall receive an additional payment at the hourly rate for the difference between the total hours work and 40 hours. Except where a full-time employee voluntarily swaps their shift for a part-time duty they shall be paid for time worked only.*

#### **12 OVERTIME/PENAL RATES**

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### 12.3 *Weekend work*

- a) *All weekend work on a Saturday or Sunday inclusive will be paid at time and half rates either as overtime for work over 40 hours or as penal rates within the 40 hour week.*

### 12.4 *“L8 Nite” Services*

- a) *The parties recognise the community benefits of services that provide public transport after mid-night. Where possible the employer shall attempt to use volunteers for the provision of “L8Nite” duties that commence near mid-night and before 0400. Where there are sufficient volunteers to complete “L8Nite” duties that commence near mid-night and before 0400 hours then the employer will not roster employees for those duties.....*

- b) *Any shift that contains trips designated under the Regional Council Contract as being a “L8Nite” service shall be paid at double ordinary time rates for all “L8Nite” duties. No other overtime rates shall apply to this work ....*

## **The Dispute**

[15] Initially the union, on behalf of Mr Chesley, set out the dispute as being about the treatment of hours voluntarily worked and paid at double time as part of the employer’s L8 services. It sought a determination that Cityline must recognise those hours as being over and above the 40 ordinary hours that make up a full-time employee’s roster.

[16] Cityline responded that the 40 hours for which Mr Chesley is entitled to be paid weekly under the terms of the collective agreement include all hours he actually works in any 5 days out of 7, regardless of whether those hours attract penal rates or not. This includes hours voluntarily worked as part of the L8 services.

[17] It became clear during the course of the Authority’s investigation meeting that a major issue of contention between the parties was how Cityline treated hours Mr Chesley worked on his rostered days off during weeks in which he volunteered for L8 duties.

## Issues

[18] The issues I have to determine are:

- (a) The correct application of the *top-up* provisions of clause 10 of the collective agreement with respect to:
  - (i) hours worked on L8 Nightrider duties; and
  - (ii) hours worked on an employee's rostered day off;
- (b) Whether Cityline has paid Mr Chesley correctly in accordance with the provisions of the collective agreement;
- (c) If Cityline has not paid Mr Chesley correctly, the amount of the underpayment; and
- (d) Whether remedies are appropriate.

### **Should hours worked on L8 Nightrider duties be counted as part of an employee's 40 hours a week for *top-up* purposes?**

[19] Cityline's actions belie its stated position that all hours worked, whether paid at ordinary or penal rates should be counted towards Mr Chesley's 40 hours per week. In its formal response to notification of the dispute Cityline referred to clause 12.3 (a) of the collective agreement as support for this proposition and denied that "*there is or has ever been an implied term and condition of employment that hours worked by an employee in accordance with clause 12.4 do not count towards the 40 hours in clause 10*".

[20] However, Cityline also acknowledged wage arrears were owing to Mr Chesley, and made a payment to him of \$965.46 on 12 October 2012 in satisfaction of those arrears. In making that acknowledgement and payment Cityline implicitly agreed L8 hours should not form part of the 40 hours. To calculate the arrears Cityline identified every pay period from June 2007 in which Mr Chesley's ordinary hours were fewer than 40, and made a *top up* payment for the deficit. It excluded L8 hours from its consideration of the hours he worked.

[21] Cityline's witness in the investigation meeting, Hana Zawodny, stated in evidence that "*Working a Night Rider shift is voluntary therefore these hours are over and above the ordinary 40 hours per week.*" Ms Zawodny is the Human Resources Consultant who analysed Mr Chesley's payslips, rosters and Cityline's payroll reports to calculate the arrears owing to him.

[22] I agree with Ms Zawodny's statement of the position regarding L8 hours. I find it to be in accordance with the collective agreement that L8 duties be omitted from the 40 hours per week that are taken into account in determining whether a *top up* payment is required under clause 10. Cityline treated Mr Chesley's L8 hours differently in practice and I find that to be appropriate, given the voluntary nature of the work. The L8 hours are not hours Cityline required Mr Chesley to perform and they should not be included in his 40 hours a week for *top up* purposes.

**Should hours worked on an employee's rostered day off be counted as part of the employee's 40 hours per week for *top up* purposes?**

[23] Mr O'Sullivan submitted on behalf of Mr Chesley that hours worked on RDOs were not part of a full-time employee's 40 hours and should not be taken into account in determining whether a top up payment is required under clause 10 of the collective agreement. He submitted that to include hours worked on RDOs would not be in accordance with "*the spirit of the collective agreement*". He said this was not a matter of interpretation, but rather of the application of the collective agreement provisions.

[24] Cityline says that, on weeks when Mr Chesley volunteered for L8 duties, the roster had to be changed to accommodate the Land Transport Act requirements. If the Friday or Saturday he was unable to work because of L8 duty was not a normal RDO for Mr Chesley he would fall short of his 40 hours per week. Therefore the roster would be changed for that week and he would be asked to work on what would otherwise have been his RDO. Ms Davies submitted Cityline was correct to count those hours towards the 40 hours per week it was obliged to pay him under the collective agreement.

[25] I agree with Cityline's reasoning. In the weeks Mr Chesley volunteered for L8s he could not always work all days for which he was rostered while still complying with the statutory requirement to have a 9 hour break between driving

spells. His employer did not require him to work L8s, therefore the roster change was to accommodate Mr Chesley rather than his employer. He worked on days that would otherwise be his RDOs to maintain his hours for the week in addition to undertaking L8 duties.

[26] If Cityline had not counted those days he worked on RDOs, or days that would have been RDOs if it were not for Mr Chesley's volunteering for L8 duty, he could effectively be paid twice for the same period. He would receive payment for working the day, and could also receive a *top up* payment for those hours if the hours he worked that week, after disregarding the RDO worked, were fewer than 40.

[27] I find this is neither explicitly provided for in the collective agreement's hours of work or minimum payment provisions, nor is it a term that can reasonably be implied into them.

### **Has Cityline paid Mr Chesley correctly?**

[28] Ms Zawodny undertook the calculation of wage arrears by obtaining a report from Cityline's Payroll for the period between 23 September 2006 and 2 June 2012 and checking each of Mr Chesley's payslips for that period against the report. She also cross referenced payslips with rosters and had a Human Resources colleague review her work to ensure accuracy. Ms Zawodny's method of analysis seems robust and I am satisfied with the accuracy of the result she reached.

[29] I find Cityline initially underpaid Mr Chesley in the period for which he is claiming, but it corrected the underpayment by making the payment of \$965.46 to him on 12 October 2012.

[30] It follows that the remaining issues are no longer live, and do not require determination.

### **Summary of Findings**

[31] (i) The hours Mr Chesley worked on L8 Nite services do not form part of the minimum 40 hours per week he was entitled to be paid as a full time employee under the Valley Flyer Tramways Collective Agreement 6 December 2009 – 5 December 2012.

(ii) The hours Mr Chesley worked on his rostered day off in weeks when he volunteered for L8 Nite services do form part of his 40 hours a week.

(iii) Cityline initially underpaid Mr Chesley for the period for which he is claiming, but rectified the underpayment by the payment to him of \$965.46 on 12 October 2012.

**Costs**

[32] Costs are reserved.

**Trish MacKinnon**

Member of the Employment Relations Authority