

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 23
5320497

BETWEEN JOHN DAVIES, ROBERT
REECE and JAMES VEVERS
Applicants

A N D TIMARU BUS SERVICES
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Lindsay Chappell, Advocate for Applicant
No appearance for Respondent

Investigation Meeting: 28 January 2011

Date of Determination: 3 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John Davies, Robert Reece and James Vevers were all employed as urban bus drivers with Timaru Bus Services Limited (Timaru Bus).

[2] At the time of their employment they were members of the Amalgamated Workers Union of New Zealand Southern Incorporated (the Union) and their work was covered by the collective employment agreement 1 July 2008 to 30 June 2010 between Timaru Bus and the Union.

[3] Timaru Bus had a contract with Environment Canterbury for operating the bus routes. Events lead to Environment Canterbury seeking tenders for the contract in or about May 2010 and Timaru Bus was not successful in its subsequent tender for the urban bus routes.

[4] A meeting was held with the Union and employees of Timaru Bus and chaired by Clive Peter, Managing Director of Timaru Bus on 12 May 2010. Mr Peter advised Union officials and the employees present, including Mr Davies, Mr Reece and Mr Vevers that as a consequence of the end of the contract and the cessation of operations in Timaru the employees positions would become surplus upon the conclusion of the bus service. There was discussion during the meeting about Timaru Bus assisting to facilitate employment with the new operator of the bus routes. Employees were asked to indicate their willingness to be considered for employment by the new operator and whether they consented to providing their relevant employment details that may assist in the recruitment process.

[5] Mr Davies, Mr Reece and Mr Vevers received a letter from Timaru Bus dated 12 May 2010 confirming the position as stated in the meeting that their employment would be terminated for redundancy effective from midnight 26 June 2010 and that the letter should be treated as notice of termination of employment.

[6] The new operator who successfully tendered for the Timaru urban bus routes was Ritchies Transport. Ritchies Transport advertised in the Timaru Herald on Saturday 15 and 22 May 2010 for bus drivers for the Timaru urban bus runs on a full and part-time basis.

[7] All three applicants filled out application forms for positions with Ritchies Transport and were duly interviewed. They were successful in obtaining work with Ritchies Transport after their employment terminated with Timaru Bus at midnight 26 July 2010. Their terms and conditions of employment with Ritchies Transport are not the same as with Timaru Bus.

[8] Under clause 16 of the collective employment agreement there was provision for redundancy compensation as follows:

16.3 Compensation for redundancy is conditional upon the employee continuing to attend work and working in the normal manner until the termination date as formally advised by the employer. Failure to comply may result in no compensation being payable, at the employers discretion.

16.4 The employer shall pay compensation additional to notice of termination for redundancy in accordance with the following schedule:

- (i) *Up to twelve months current continuation service:
NIL*
- (ii) *On one years current continuous service or more and
up to two years service: one weeks pay*
- (iii) *For each subsequent twelve months of current
continuous service or part thereof to a maximum of
19 years: one weeks additional pay.*

[9] All three applicants received pay advice slips on or about 8 July 2010 that provided for wages, holiday pay and redundancy payments for each of the three applicants.

[10] On or about 13 July 2010 a letter was then sent to each of the applicants by the Officer Manager, Sue Jennings, who advised that there was an error in the calculation. Ms Jennings enclosed an amended corrected payslip which corresponded with the earlier payslip except that the redundancy compensation amount was omitted for all three applicants.

[11] Mr Chappell wrote to Mr Peter on 9 July and 20 July 2010 querying the omission of redundancy compensation from the final pay of Mr Davies, Mr Reece and Mr Vevers.

[12] On 29 July 2010 a solicitor, Tim McGinn, responded to Mr Chappell and advised that no redundancy was payable because the three applicants were transferred in accordance with the employment protection provisions in the employment agreement to the new employer on terms comparable to those with Timaru Bus. Mr McGinn described Ritchies Transport being successful in its tender as creating a subsequent contractor situation under Part 6A of the Employment Relations Act 2000.

[13] Mr Chappell responded to Mr McGinn by letter dated 5 August 2010 and advised that it was not accepted that the three applicants had transferred to Ritchies Transport but rather had applied for positions with that company. He explained that they had not had any of their entitlements such as holiday, redundancy or sick leave transferred to their new employment. Further, Mr Chappell advised in his letter that there had been no discussions with the Union for transfer of employees and that he had inquired with Ritchies Transport and they had confirmed there was no negotiation or transfer of employees agreed between it and Timaru Bus. Further Mr Chappell confirmed that the applicants were not vulnerable workers under Part 6A of the Employment Relations Act 2000.

[14] Mr Chappell requested in his letter and this remains the claim that the applicants be paid the following amounts by way of redundancy:

Robert John Davies	\$1,373.60 gross
Robert Reece	\$685.51 gross
James Vevers	\$703.42 gross

The investigation process

[15] I am satisfied that the statement of problem was served on Timaru Bus and as a result Mr McGinn initially responded on its behalf to queries from the Authority Support Officer on 5 November 2010 whether a statement in reply would be filed by Mr McGinn or directly by the company.

[16] Mr McGinn was unsure whether he still had instructions. The Support Officer then wrote to Mr Chappell and Mr McGinn asking whether they would be available for a telephone conference with the Authority on 11 November 2010 at 11.00am to progress the matter. Eventually a date for a teleconference was agreed taking into account Mr McGinn's availability for 19 November 2010.

[17] There was no appearance on behalf of Timaru Bus at the telephone conference call held on 19 November 2010. I am satisfied that Timaru Bus was advised of the time of the conference call.

[18] The Authority set the matter down for an investigation meeting on 28 January 2011. The Support Officer advised Mr McGinn following the telephone conference that the notice of direction and investigation meeting notice would be served at the registered office and address for service of Timaru Bus. That service is confirmed by Courier Post track and trace held on the Authority's file.

[19] There was no appearance at the investigation meeting on 28 January 2011 on behalf of the respondent and no reason was advanced as to why that was the case. A statement in reply was never lodged with the Authority. In the circumstances the Authority proceeded to hear evidence from the three applicants.

The issue

[20] The issue for the Authority to determine is whether redundancy compensation is payable under clause 16.4 of the collective employment agreement.

Is redundancy compensation payable under the collective employment agreement to Mr Davies, Mr Reece and Mr Vevers?

[21] Mr Davies, Mr Reece and Mr Vevers applied for positions as bus drivers with Ritchies Transport after having been advised their positions with Timaru Bus would be terminated for reason of redundancy.

[22] All three confirmed when they gave their evidence that they had heard nothing further from Mr Peter after 12 May 2010 in relation to any discussions that he may have had about facilitating new employment for them with Ritchies Transport.

[23] Subpart 1 of Part 6A of the Employment Relations Act 2000 does not apply to the applicants' and the focus in terms of any obligations and requirements for transfer of employees falls squarely on the employee protection provision negotiated and agreed to in clause 16.5 of the collective agreement.

[24] Clause 16.5 required the employer to consult with the Union on the implications of any sale or transfer of the employer's business. This includes providing to the Union relevant information regarding the general nature of a sale or transfer including how that would impact on employees covered by the agreement and timing of negotiations and implementation of transactions with any proposed new employer. There is nothing to support that clause 16.5 was complied with in those respects by Timaru Bus.

[25] I am further not satisfied that there was a sale or a transfer of all or part of Timaru Bus' business to Ritchies Transport. Ritchies Transport simply tendered for the contract with Environment Canterbury.

[26] Ritchies Transport confirmed in writing to Mr Chappell on 2 August 2010 that when it knew that it had the contract it had advertised for drivers and there was no negotiation about transfer of employees with Timaru Bus.

[27] Mr Davies, Mr Reece and Mr Vevers obtained their positions with Ritchies Transport by applying in the usual way. They were treated as new employees with no

entitlements transferred from Timaru Bus such as holidays, sick leave, redundancy or service.

[28] Mr Davies, Mr Reece and Mr Vevers are entitled to redundancy compensation in accordance with clause 16.4 of the collective employment agreement.

[29] Mr Davies, Mr Reece and Mr Vevers gave evidence that the redundancy compensation shown by Timaru Bus in the first payslip as owing to them is correct. They confirmed that there had been no payment received from Timaru Bus and that they are still owed redundancy compensation in the amounts claimed.

Determination

[30] John Davies is owed redundancy compensation by Timaru Bus under clause 16.4 of the collective employment agreement in the sum of \$1,373.60 gross.

[31] Mr Davies should have been paid this compensation on or before his employment was terminated at midnight on 26 July 2010. It is appropriate that I order the payment of interest on that money from 27 July 2010 until the date of payment at the rate of 5% which rate does not exceed the 90 day Bill rate at the date of this determination plus 2%.

[32] I order Timaru Bus Services Limited to pay to John Davies redundancy compensation in the sum of \$1373.60 gross together with interest on that amount at the rate of 5% from 27 July 2010 until the date of payment.

[33] Robert Reece is owed redundancy compensation under clause 16.4 of the collective employment agreement in the sum of \$685.51 gross.

[34] Mr Reece should have been paid this compensation on or before his employment was terminated at midnight on 26 July 2010. It is appropriate that I order the payment of interest on that money from 27 July 2010 until the date of payment at the rate of 5% which rate does not exceed the 90 day Bill rate at the date of this determination plus 2%.

[35] I order Timaru Bus Services Limited to pay to Robert Reece redundancy compensation in the sum of \$685.51 gross together with interest on that amount at the rate of 5% from 27 July 2010 until the date of payment.

[36] James Vevers is owed redundancy compensation under clause 16.4 of the collective employment agreement in the sum of \$703.42 gross.

[37] Mr Vevers should have been paid this compensation on or before his employment was terminated at midnight on 26 July 2010. It is appropriate that I order the payment of interest on that money from 27 July 2010 until the date of payment at the rate of 5% which rate does not exceed the 90 day Bill rate at the date of this determination plus 2%.

[38] I order Timaru Bus Services Limited to pay to James Vevers redundancy compensation in the sum of \$703.42 gross together with interest on that amount at the rate of 5% from 27 July 2010 until the date of payment.

Costs

[39] The Union seeks disbursements for travel, accommodation and the filing fee in the sum of \$420.

[40] The claim for disbursements is reasonable, Mr Chappell having to travel from Christchurch. I order Timaru Bus Services Limited to pay to the applicants the sum of \$420 for the disbursements incurred for representation at the investigation meeting in Timaru.

[41] I order Timaru Bus Services Limited to pay to Mr Davies, Mr Reece and Mr Vevers the sum of \$420 being reimbursement of disbursements.

Helen Doyle
Member of the Employment Relations Authority