# New Zealand Employment Relations Authority Decisions



## Farah v Wellington City Transport Limited (Wellington) [2018] NZERA 2020; [2018] NZERA Wellington 20 (28 February 2018)

# New Zealand Employment Relations Authority



## Farah v Wellington City Transport Limited (Wellington) [2018] NZERA 2020 (28 February 2018); [2018] NZERA Wellington 20

Last Updated: 18 March 2018

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| **IN THE EMPLOYMENT RELATIONS AUTHORITY<br>WELLINGTON** | | |
| | | [2018] NZERA Wellington 20<br>3001352 |
| | BETWEEN AND | ABDUL AZIZ FARAH<br>First Applicant<br><br>THE MANUFACTURING AND CONSTRUCTION WORKERS UNION INCORPORATED<br>Second Applicant |
| | AND | WELLINGTON CITY TRANSPORT LIMITED<br>Respondent |
| Member of Authority: | Michele Ryan | |
| Representatives: | Andrew Hamilton, Advocate for the Applicants | |
| Emma Peterson, Counsel for Respondent | | |
| Investigation Meeting: | 7 June 2017 at Wellington | |
| Submissions Received: | 15 and 29 June 2017 for the applicant<br>22 June 2017 for the respondent | |
| Determination: | 28 February 2018 | |
| **DETERMINATION OF THE AUTHORITY** | | |

**Employment Relationship Problem**

[1] Mr Aziz Farah is employed by Wellington City Transport Limited (Go Wellington, or the company) and is a member of the second applicant, the Manufacturing and Construction Workers Union, (MCWU, or the Union).

[2] The Union seeks a declaration that Go Wellington breached cl. 6 (a variation clause) and cl. 70 (a consultation provision) of the 2013-2016 collective agreement

when it failed to advise it [the Union] of changes to Mr Farah's terms and conditions.

The Union requests corresponding compliance orders.1

[3] The Union further alleges that Go Wellington has altered Mr Farah's positon, his hours of work, and deprived him of corresponding shift allowances and benefits. Arrears of wages and an additional compliance order is sought on these matters. The Union also claims Go Wellington has created and paid an allowance to Mr Farah in breach of the collective agreement.

[4] Go Wellington denies it has breached obligations towards the Union or Mr Farah.

**Background**

[5] Mr Farah began his employment with the company in September 2013. He initially worked as a 'Garage Service Employee' (a 'shiftman') but quickly moved to a Garage Assistant positon. Both positions receive the same hourly base rate of pay but hours of work and corresponding allowances differ.

[6] Clause 26 the collective agreement encompasses the possibility that Garage Assistants may work ordinary hours between the hours of 7.30am and 5.30pm (although these may be varied by agreement – a matter I shall return to) or shift work according to the provisions at cl 28(a), which state:

28 **SHIFT OPERATIONS**

...

1. The hours of shift work shall be 0600 hours to 1400 hours and 1400 hours to 2200 hours on Monday to Friday inclusive for Workshop staff excluding Garage Service Employees. ...

[7] Hours of work for shiftmen are recorded at cl 28(a)(i):

For Garage Service employees only – the ordinary hours of work of shift work shall be 40 hours per week and shall not be less than 8 hours per shift to be worked on 5 days of the week from 0530 to 0100 hours Sunday to Saturday inclusive.

[8] Mr Farah worked A.M. shifts until some point in 2014 when he took up an option to work P.M. shifts. Shift entitlements under cl 28 are as follows:

1 The statement of problem also sought a penalty for alleged breaches of the collective agreement but the request was withdrawn during the Authority's investigation.

1. A shift shall be inclusive of one half hour paid crib time for the purposes of taking a meal on the Employer's premises. The meal shall be taken as near to the middle of the shift as practicable.
2. A shift employee shall, while so employed, be paid an allowance as per below Table per shift ...
3. A shift employee excluding Garage Service employees shall, while so employed, receive a 5.33% loading on their printed base rate as set out in clause 33(a).

[9] Clause 30(c) provides...

..shift employees who are regularly employed on shifts shall be allowed an extra week's annual leave upon completion of a years' service as a shift worker.

[10] The P.M. shift attracts a double shift allowance (although that matter is not recorded in the collective agreement) and this was one reason why Mr Farah moved to the afternoon shift.

[11] At the beginning of 2015 Go Wellington made plans to operate a small depot in Kaiwharawhara. Evidence produced by the Union was aimed to demonstrate that Go Wellington did not properly consult with it about the proposal. That matter was not pleaded in the statement of problem nor was leave sought to amend the claim, and I have not determined the issue.

[12] In early April 2015 the company notified staff of the positons available at the Kaiwharawhara depot. An online application for a Tradesperson Assistant positon sent to Go Wellington on 5 May 2015 in Mr Farah's name persuades me it is more likely that he applied for the positon rather than being shoulder tapped for it.

[13] On or about 29 May 2015 Mr Farah was given a letter of transfer. The letter advised his application to Kaiwharawhara has been accepted. The material information in that letter is as follows:

The anticipated hours of work are between 6 a.m. and 5 p.m.

Your terms and conditions will continue to be those set out in your Collective Employment Agreement, except those outlined at the bottom of the letter.

...

Before signing you may wish to seek legal advice from your union representative or an independent source.

[14] The following statement was set out next to the signatory area at the bottom of the letter.

I agree to the changes being made to my regular hours of work. The normal hours of work are now between 6.a.m and 5.pm, which differ from those set out in my Collective Agreement. I understand that the hours I will work may differ from those which I work currently...

[15] Mr Farah signed the transfer letter on 2 June 2015. The time delay between when Mr Farah and the then Fleet Manager Mr Weeks each signed the letter leads me to conclude that the offer was not conveyed and accepted over the course of a single meeting. I consider it more likely that Mr Farah was given an opportunity to seek advice on the contents of the letter.

[16] Mr Farah says on his first day at the Kaiwharawhara depot (6 July 2015) he started work at 6am but was told to come in at 9am from then on. I have not accepted his evidence entirely on this point. A log-sheet filled out by Mr Farah records he started work at 7.45am that day. Payroll records establish that for the first 2-3 weeks Mr Farah generally worked between 7.30-8am and 4.30-5.30pm. In the third week he took on additional overtime hours.

[17] From the fourth week onwards his hours of work have been from 9am until 5.30pm. Mr Farah accepts he agreed to this work pattern but says he did what his supervisor told him to do. Those changes are said to be based on operational needs where buses do not reach the depot until 9am. Mr Farah also worked overtime hours, usually from 5.50pm until 8pm.

[18] In August 2015 Mr Farah noticed he was no longer receiving any allowances. He notified his supervisor. It is unclear whether Mr Farah and Mr Weeks spoke directly. On 11 August 2015, Mr Weeks wrote to Mr Farah advising he would receive

$9.14 as a daily allowance (the sum equal to a shift allowance) "*to compensate for the loss of the shift allowance previously received*". The payment was back-dated to Mr Farah's start date at the new depot. Mr Farah continues to receive the allowance.

[19] In December 2015 the Union raised concerns with Go Wellington about the omission to pay shift allowances to Mr Farah. It also noted there had been no discussion with it regarding the allowance paid to Mr Farah. Those concerns were not accepted by the company but to resolve the matter it suggested (on two occasions)

Mr Farah return to the Kilbirnie depot and work shift hours. The Union accepts it did not respond to the offers.2

[20] The witnesses for Go Wellington report Mr Farah is good at his job and there are no issues with his performance. Mr Farah says he enjoys his work and wants to stay at the Kaiwharawhara depot.

The parties' positions

[21] The Union's positon concerning the alterations to Mr Farah's hours of work is somewhat convoluted. At its essence the Union says Mr Farah remains a shift worker but has been wrongly categorised as an 'ordinary hours' worker. It has not alleged the agreed hours of work are a breach of the collective agreement per se, rather it says Go Wellington's proposal to make those changes breached contractual obligations to notify it of those changes.

[22] Go Wellington says Mr Farah agreed to become an ordinary hours worker under the collective agreement and he does not work shift work hours. It says there was no obligation to notify the Union of Mr Farah's work arrangements because those changes did not vary the terms of the collective agreement.

**The issues**

[23] The follow matters require determination:

1. Whether Mr Farah is entitled to be paid shift work benefits set out in the collective agreement. To resolve this matter I need to examine:
   (a) Whether Mr Farah is employed as a shiftman or a Garage Assistant. If Mr Farah is a shiftman he is entitled to shift benefits and the dispute is resolved;
   (b) If Mr Farah is a Garage Assistant, whether the hours of work set out in the transfer letter are permissible under the ordinary hours provisions at cl 26, or whether they
2. It became apparent during testimony that the parties had further discussed the offer in a mediation setting. Matters discussed in mediation are confidential and I was unwilling to obtain further evidence on the matter.

constitute a variation to the collective agreement that requires the Union to be notified;

(c) Whether Mr Farah's shift related allowances were guaranteed under the transfer letter in any event.

2. Whether the daily allowance paid to Mr Farah is a breach of the collective agreement.
3. Whether the arrangement agreed between Mr Farah and the company breached Go Wellington's obligations to the Union at cl. 6 and/or cl 70.

[24] A determination as to each of these matters requires an assessment of what was agreed by the parties against the relevant content of the collective agreement.

**Is Mr Farah entitled to shift work benefits under the collective agreement that corresponding to a shift worker**

Is Mr Farah employed as a Garage Assistant or as a shiftman?

[25] In its statement of problem the Union alleged Go Wellington created a new job by giving Mr Farah duties that combine the role of a shiftman and a Garage Assistant.

[26] The claim altered in evidence and submissions. The Union now says Mr Farah is effectively employed as a shiftman on his own shift hours. This claim has been advanced on the basis that if Mr Farah is found to work as a shiftman he will be entitled to payment of shift allowances under the collective agreement.

[27] Firstly, the Union submits that the role Mr Farah applied for at Kaiwharawhara can only have been that of a shiftman. It says when Go Wellington was recruiting for staff at Kaiwharawhara it wanted shiftmen to transfer to the depot, not Garage Assistants. I have found that Mr Farah applied for the positon at Kaiwharawhara via WCTL's on-line system. That application specifically records the role being applied for was a Tradesperson Assistant – an alternative title of the Garage Assistant positon. I note also that there is nothing in the transfer letter to indicate the parties agreed that Mr Farah would take up a shiftman positon when he moved to Kaiwharawhara depot.

[28] I am not persuaded the parties intended, at the time Mr Farah transferred to the new depot, that he would work as a shiftman.

[29] Next, the Union alleges Mr Farah's duties are substantially those of a shiftman. A review of the corresponding job descriptions indicates Mr Farah does perform some tasks assigned to shiftmen. However many of these duties

are also listed in the Garage Assistant job description. No evidence was produced to demonstrate how those activities are distinguished between the two roles and this evidence did not advance the claim one way or the other.

[30] The Union focussed on assistance with vehicle recovery, bus refuelling, and depot lockup activities as duties which are undertaken solely by shiftmen, but which Mr Farah is required to do. Mr Farah accepts he refuels only when undertaking voluntary overtime work. It is clear that Mr Farah does transport technicians to vehicle breakdowns, but the extent of his involvement in that task appears to fall within the job description of a Garage Assistant. A more persuasive factor is that Mr Farah appears to shut the doors to the workshop when he finishes work, however there is competing evidence that 'Comms' personnel remain on-site at the depot and are responsible for depot security.

[31] There is no dispute that a fundamental difference between the two positions is that the shiftmen are required to be licenced to drive and tow buses on public roads. Mr Farah accepts he does not perform these functions and it is not an activity Garage Assistants are required to do. The Union advised that historically WCTL had employed shiftmen without relevant licences and provided training to that end. Mr Farah has passed the written requirements for the relevant licence but has not pursued the matter further and is not in training.

[32] While there is evidence that Mr Farah undertakes some shiftman tasks I am not persuaded he performs, or is able to perform, the critical and defining aspects of a shiftman role such that it could be objectively regarded as his employment positon. Mr Farah is employed as a Garage Assistant.

Are the hours of work set out in the transfer letter permissible under the 'ordinary hours' provisions at cl 26 of the collective agreement, or do they constitute a variation to the collective agreement?

[33] Clause 6 of the collective agreement allows the collective agreement to be varied by written agreement between the company and the employees the variation applies to. The Union is to be advised of any proposal to vary the collective for the purpose of negotiation.

[34] The parties dispute whether the hours of work agreed in the letter of transfer fall within the ordinary hours provisions at cl. 26.

**HOURS OF WORK**

The ordinary hours of work shall be eight 8 hours per day, 40 hours per week, worked Monday to Friday, both days inclusive between the hours of 7.30am and 5.30pm with not less than 30 minutes allowed for lunch. The above hours may be varied by agreement with the Employee, such agreement not to be unreasonably withheld. Work performed outside these hours shall be classed as overtime.

[35] The variation provision included in cl. 26 is worded very broadly. It permits the company and an employee to vary ordinary hours of work. The provision makes no distinction between the parties' ability to vary the length of hours worked over a day or a week, and a variation as to when the hours of work occur. The only constraints are that the work must be undertaken between Monday and Friday inclusive, and where the hours of work performed are outside 7.30am -5.30pm these will be classed as overtime.

[36] While the surrounding provisions, both at cl 26 itself and within the shift work clauses, each record that a work-day or shift is 8 hours in length, they provide no contextual assistance where cl 26 provides an express mechanism for the employer and an employee to vary ordinary hours of work and agree to alternative arrangements.

[37] Having assessed the contents of cl 26 I am satisfied the hours of work offered in the transfer letter are permitted under the variation exception contained in the second portion of cl 26. It follows that collective agreement itself has not been varied and there was no contractual obligation to initiate the procedural requirements at cl. 6 to notify the Union of the proposal.

[38] The Union also took issue with the alteration of Mr Farah's hours of work from those recorded in the transfer letter (6am-5pm) to the additional hours subsequently agreed; 5pm to 8pm. These too fall under cl. 26 noting that any work undertaken after 5.30pm is categorised as overtime and must be paid accordingly. The new arrangement does not appear to be in writing but cl 26 does not demand that it must. Mr Farah accepted in evidence that he is not obliged to work the overtime hours offered and is able to refuse the work if he does not wish to perform it.

Were Mr Farah's shift related allowances guaranteed under the transfer letter in any event?

[39] The Union's positon is that the letter of transfer advised that the only changes to Mr Farah's terms and conditions were the changes to his hours of work.

[40] The Union's submissions 'in reply' state the transfer letter breached obligations of good faith by its failure to clearly state the impact of the arrangement on Mr Farah's then current entitlements. It suggests Mr Farah was disadvantaged by the action.

[41] There is no evidence of an unjustified disadvantage claim having been made. Neither that matter nor the claim of a breach of good faith was raised in the statement of problem. It would be unfair at this juncture to determine these matters where Go Wellington has had no opportunity to respond to them. I do agree however that effects of the transfer could have been better explained, particularly where English is not Mr Farah's first language.

[42] Nevertheless, I do not accept the proposition that the letter precluded changes to Mr Farah's entitlements. The statement "*your terms and conditions will continue to be those set out in your Collective Employment Agreement...*" affirmed the provisions of the collective agreement would remain going forward. The statement cannot be fairly construed as meaning Mr Farah's *shift entitlements* would be carried over without any changes. That is not what the letter says.

[43] Mr Farah's own evidence on this point does not support the Union's contention. He conceded Mr Weeks had told him he would not receive the afternoon additional shift allowance. His concession leads me to conclude that he was aware his entitlement to allowances would be affected. The transfer letter did not preserve Mr Farah's shift allowances as is claimed.

[44] The claim for payment of shift allowances could not succeed under the collective agreement in any event. With the exception of shiftmen, cl 28(1) states *"The hours of shift work shall be 0600 hours to 1400 hours and 1400 hours to 2200 hours..."*.

[45] Further, the provisions regarding payment of "shift" and "loading" allowances both state the allowance will be paid to, or received by, "*a shift employee ... while so employed*". The use of the phrase in the context of each clause leads me to conclude

that payment of either allowance is conditional on working a shift pursuant to cl 28. Although worded differently, the contractual entitlements to 'crib time' and additional annual leave have the same corresponding requirement. Mr Farah did not and has not worked the shifts set out at cl 28 since his transfer. It follows he is not entitled to payment of shift allowances.

**Is the allowance paid to Mr Farah a breach of the collective agreement?**

[46] The daily allowance is a payment that does not exist within the terms of the collective. It is accepted Mr Weeks did not obtain Mr Farah's written agreement on the matter nor advise the Union of the proposal. In the absence of those conditions being met I find the collective agreement has been varied in breach of cl 6.

[47] I pause to note that s 61 of the Act recognises that an employee who is bound by an applicable collective agreement may agree additional terms and conditions with the employer provided they are not inconsistent with the terms and conditions of the collective agreement. Additional terms which are more favourable to the employee will not be inconsistent.3

[48] No harm resulting from the breach has been asserted or identified. No have remedies been claimed. There is no dispute that the allowance is more favourable to Mr Farah than he would otherwise receive under the terms of the collective agreement. There is no evidence that Mr Farah has attempted to return the allowance monies or wants it ceased.

[49] I find the breach to the collective agreement to be technical one at best and I take the claim no further.

**Has cl 6 or cl 70 been breached?**

[50] I have already found that the changes to Mr Farah's hours of work did not vary the terms of the collective agreement. Clause 6 was not triggered. This claim is dismissed.

[51] Clause 70 sets out a prescriptive process that requires WCTL to consult with the Union where the "*introduction of new technology or major changes to workplace practices have the potential to alter conditions of work*". The clause requires WCTL to

3. *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Energex Limited* [2006] ERNZ 749

present a comprehensive plan to the union which addresses the reasons, aims, scope, and timetable for such changes as well as a communication process and a programme for affected employees.

[52] The action which is alleged to have breached this provision is not the introduction of a further depot but rather the change to Mr Farah's terms and conditions. I am not at all persuaded Go Wellington and the Union envisaged cl 70 to be applied when changes to an employee's individual terms and conditions are proposed. Nor can Mr Farah's individual work arrangements be objectively characterised as "major changes to workplace practices". The Union has not established a breach of cl 70 and this claim is also dismissed.

**Conclusion**

[53] The claims against Go Wellington are dismissed.

[54] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

**Costs**

[55] The issue as to Costs are reserved.

Michele Ryan

Member of the Employment Relations Authority

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