IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 12
WRC 27/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGERS TRANSPORT EMPLOYEES' UNION INC Plaintiff
AND	WELLINGTON CITY TRANSPORT LIMITED Defendant

Hearing: 2 December 2009
(Heard at Wellington)

Appearances: Paul McBride, Counsel for Plaintiff
P A Caisley, Counsel for Defendant

Judgment: 2 March 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This challenge by hearing de novo to a determination (WA 106/09) of the Employment Relations Authority turns first on the interpretation and application of a collective agreement. The issue is whether the defendant as employer is required by contract to reimburse the legal costs of an employee who successfully defended a criminal prosecution for events that occurred at work. The Authority concluded at para [10] that the collective agreement requiring reimbursement of such costs applied only to prosecutions for driving offences and dismissed the claim for reimbursement.

[2] There is a second associated and no less important issue. That is whether at common law, and irrespective of the contract, the employer is obliged to indemnify the employee's costs of defending successfully the prosecution. The issues are regarded as important ones of principle by both the plaintiff union and the defendant employer and they seek clarification of their rights and obligations at law. On the common law indemnity question, at least, the case has wider importance for others in employment relationships.

[3] The parties have helpfully provided an agreed statement of relevant facts which obviated the need to call evidence and has allowed the Court to focus, first, on the interpretation of the collective agreement and its application to those agreed facts and, second, on the implied obligations of employers at common law.

[4] In summary the facts are as follows. Danny Xie was an operator (driver) of Wellington City buses operated under the trading names "Stagecoach Wellington" and, more latterly, "Go Wellington". Mr Xie was a member of the Tramways Union at all relevant times and his terms and conditions of employment were set in part by two successive collective agreements, the Stagecoach Wellington Collective Employment Agreement 2005-2008 and the Go Wellington Collective Employment Agreement 2008-2010.

[5] In August 2007 Mr Xie was rostered to operate and was driving a late night bus service. At the end of a run he discovered an intoxicated female passenger still on the bus and required her to leave the vehicle. Later that month, and following a complaint from the passenger, police charged Mr Xie with the offence of indecent assault[1] on the passenger. Mr Xie appeared in court, pleaded not guilty and, as a result of representations made to police by his counsel and reconsideration of the prosecution's case, police withdraw the indecent assault prosecution in about May 2008. Mr Xie's legal costs in connection with the criminal charge and up to the date of its withdrawal were $2,776.25. Mr Xie, through his union, claimed reimbursement from the defendant but this was declined. Counsel for the defendant sought to describe to me the details of the complaint to the police. There is,

[1] Section 135 of the Crimes Act 1961 provides: *"Every one is liable to imprisonment for a term not exceeding 7 years who indecently assaults another person"*.

however, no evidence of this denied allegation and the issue for decision in the case does not turn on what Mr Xie may or may not have done. He is entitled in law to the presumption of innocence in the absence of a conviction for a serious offence.

[6] The Employment Relations Authority's determination was issued on 11 August 2009. The Authority concluded that the reimbursement provision had to relate to "a prosecution for a driving-related offence. Indecent assault is not a driving offence." The Authority dismissed the union's case based on the collective agreement. Turning to an alternative submission that, at common law, the employer as principal was bound to indemnify its employees as agents, the Authority concluded that the relevant clause in the collective agreement modified and thereby extinguished the common law of indemnity of employees in this case.

[7] The relevant provisions of both collective agreements are identical. Because these events occurred during the currency of the earlier (Stagecoach) collective agreement, I will refer to its provisions.

[8] At the heart of the case is cl 25 ("Legal fees"). It is the last clause in a part of the agreement headed "Operations section" and (with my emphasis by underlining) reads:

> When operators are <u>on duty and driving a company vehicle</u>, the company, when it is <u>a driving related prosecution</u>, will pay legal fees of operators who successfully defends [sic] <u>any charges</u> brought against them.
>
> If the company believes legal fees are getting out of hand, in consultation with the Union, alternative practices will be asked to quote for the work.

[9] Although expressed inelegantly, the intent of the clause, other than its controversial phrase "a driving related prosecution", is tolerably clear. The company will pay the legal fees of operators who defend successfully prosecutions in court arising out of events when they are on duty and driving the company's vehicles. In dispute is the nature of the charge or charges referred to.

[10] It is a fundamental rule of employment agreement interpretation that particular clauses must be read in the light of the whole agreement including by

having regard to its intent and purposes. Other relevant provisions of the collective agreement include the following.

[11] Clause 9 ("**DEFINITIONS**") defines an "Operator" such as Mr Xie as:

> … an employee employed to drive a bus and to collect fares. The duties of an operator can include any work to be performed other than driving duties as part of their normal rostered shift, but shall be limited to sweeping out, refuelling, washing, associated clerical duties and earth-testing trolley buses. Operators required to undertake refuelling, washing or earth-testing duties will be provided with appropriate protective clothing.

[12] The operations section of the collective agreement that was applicable to Mr Xie's work is a compilation of duties and entitlements incumbent on and for the benefit of the employer and the employees. Among these provisions it contains clauses for the protection or other benefit of employees in unusual circumstances. These provisions include additional paid time for employees to complete responses to reports, complaints or enquiries where these cannot be completed during rostered duties (cl 10.1(e)); Paid travelling time where employees may be required to begin or finish work at depots other than their home depot (cl 12(a)). Clause 19 dealing with "**ACCIDENTS**" is instructive as to the philosophy of the collective agreement when dealing with unusual events in the course of employees' work. It provides:

> (a) Any employee having to be relieved owing to an accident shall receive a full day's pay for the day on which the accident occurs. The employer may demand a medical certificate.
>
> (b) Twenty minutes shall be allowed for making out accident reports, provided the report is written in the employee's own time. Payment for the writing of such reports shall be for 20 minutes at ordinary time.
>
> (c) Where an employee is assaulted while on duty or is involved in a non-blameworthy vehicle collision accident and as a result is in receipt of ACC payment, then his/her wages shall be made up to 100% of his or her ordinary pay. Provided that prior approval has been given the employer shall also reimburse the employee standard medical expenses incurred as a result of the injury that are not fully covered by ACC or other provider. Payments will be made up for three months following the date of injury. All payments are subject to the employee participating in a rehabilitation programme as determined in consultation with the Company and the employee's medical practitioner.

[13] Inspection of buses by operators is recognised by the collective agreement. Clause 10 ("**HOURS OF WORK**") provides at 10.1(d):

> Signing On and Off – Operators shall be allowed 10 minutes for signing on and 5 minutes for the inspection of their vehicles and 10 minutes for signing off and paying in.

[14] The reference in cl 19(c) to a "non-blameworthy vehicle collision accident" is significant to the interpretation of cl 25.

[15] Clauses 66 and following under the heading "General conditions applicable to all workers" includes cl 73 ("**COURT ATTENDANCE**") as follows:

> The employer shall grant time off on ordinary pay for the period of absence of any employee required to be on jury service, a subpoenaed witness, or to attend at court on matters connected with their employment, provided that any fees (excluding reimbursement payments) paid to the employee shall be handed to the employer.

[16] The phrase "to attend at court on matters connected with their employment" is significant in assessing the general tenor of the agreement and therefore for the interpretation of cl 25.

[17] Clause 81 of the collective agreement ("**REPORTS, COMPLAINTS AND ENQUIRIES**") generally provides a level of protection to employees subject to adverse complaint or report. This clause contains comprehensive protections for employees where adverse complaints or adverse reports may disadvantage employees in their employment including, but not limited to, ultimate dismissal.

[18] Taking account of the collective agreement holistically, I conclude that cl 25 is to be interpreted in a manner that is protective of employee interests if these are affected adversely in the course of employment. It is a facilitative provision for the benefit of employees, not a restrictive one to limit the employer's liability, although it is not unlimited in its application. More particularly, the clause was intended to indemnify employees for the costs of defending themselves (successfully) against criminal prosecutions arising out of the performance by them of their duties.

[19] The phrase "on duty and driving a company vehicle" means in the course of that element of their employment involving driving. The words are intended to and do exclude such situations, for example, as being at a depot on standby, waiting without a vehicle at a pre-arranged point to take over a bus from another operator, cashing up takings at the depot, and other elements of the work apart from operating a vehicle. But the clause is not restricted to events occurring when sitting in the driving seat of a vehicle, whether the bus is in motion or stationary. Other elements of driving a bus or other vehicle that are not restricted to controlling its motion are covered by cl 25. Activities might include alighting to affix or remove school bus sign boards, reconnecting disconnected trolley bus poles, helping passengers with perambulators, and a myriad of other activities associated with the operation of a bus as the employer would expect its drivers to do. This includes, for the purposes of this case, checking on passengers on the vehicle and, in particular, that all passengers have left the vehicle at the end of a service or run.

[20] Nor is the notion of "driving" to be narrowly confined to the operation in motion of a vehicle or even to activities conducted by a bus driver in the driver's seat. Rather, driving when on duty includes activities necessarily attendant upon the operation of the vehicle and the collection of fares. Such duties may require the operator to be inside or outside the vehicle. There must be an association with the operation of the vehicle as part of a duty. So in the sense of being a driving-related duty, Mr Xie was on duty and driving a company vehicle when he inspected the interior of the bus at the end of a scheduled run and dealt with the issue of a passenger who remained on board.

[21] If an operator in charge of a vehicle checks on passengers in the vehicle (and this may necessitate stopping the bus and alighting from the driving seat although remaining within the vehicle) then this is related to the driving of it. A driver in the circumstances of Mr Xie may need to determine, in connection with driving the bus, whether to drive on or to require the passenger to alight.

[22] As to the phrases "successfully defends" "any charges brought against them", I find there must be a charge, that is a prosecution brought by police or other competent prosecutorial authority by information in the District Court. I conclude,

also, that successful defence of any such charge is not limited to a 'not guilty' finding by a court. Withdrawal of a charge after it has been laid is a successful outcome to that charge from a defendant's point of view. Defending a charge, particularly with the assistance of a lawyer, includes as a matter of course, if not inevitably, discussions and negotiations with the prosecutor and advocating for its abandonment by the prosecution. To defend is to protect one's own position, to resist or oppose so that a successful defence of a charge is not necessarily only by acquittal after trial.

[23] I do not agree with the Authority's narrow interpretation of the phrase "a driving related prosecution" as being confined to what the Authority described as a "driving offence". The phrases are different and mean different things. Rather, I conclude that a "driving related prosecution" is a prosecution for an offence the factual substance of which is related to bus driving as broadly related above. That is reinforced by the reference in the second sentence of cl 25 to "any charges". That tends to indicate a broader as opposed to a narrower definition of the phrase "a driving related prosecution".

[24] There are difficulties with the Authority's interpretation of the phrase "a driving related prosecution" which Mr Caisley understandably sought to support in argument for the defendant. The defendant's case is that the phrase means, in effect, a prosecution for a traffic offence or a driving offence such as careless use of a motor vehicle in which driving or being in charge of a motor vehicle is an essential element of any prosecution for that offence. So, the defendant's argument goes, because driving is not an essential element of a prosecution for indecent assault, that is not a driving-related offence.

[25] The problems with such an interpretation emerge when different fact situations are teased out. What of the bus driver who kills a pedestrian in the course of such allegedly reckless driving that he or she is charged with the offence of manslaughter? Driving is not a necessary ingredient of a charge of manslaughter. Yet the offence alleged clearly occurred in the course of being on duty and driving a company vehicle. Qualities such as recklessness or other distinctions between blameworthiness and accident are not relevant to the interpretation of the clause. So

it cannot follow, as the Authority found, that the clause only applies to driving or traffic offences (arising predominantly, but not exclusively, under the Land Transport Act 1998), essential elements of which involve the operation of a motor vehicle.

[26] Rather, the phrase "driving-related prosecution" means prosecution for an offence allegedly committed while on duty and operating (in the broad sense defined above) a company vehicle. It follows that the charge of indecent assault of a passenger on the bus, in the course of performing work duties, is covered by cl 25. It is, in this sense, "a driving related prosecution".

[27] Although not strictly relevant in this case, the second sentence may affect the interpretation of the first in cl 25. This second sentence may be interpreted in at least two ways. It may relate to the employer's belief that legal fees in any particular case of indemnity are becoming excessive and, being met by the company, the employer may be entitled to see whether more modest legal fees can be incurred by paying for alternative legal representation. The second meaning may relate to a situation in which a particular firm of solicitors represents bus operators covered by the indemnity through a union or employer retainer arrangement and whose fees generally are considered by the employer to be excessive, so enabling the company to shop around for another firm of solicitors to undertake the work paid for by the company under the indemnity in the future. Mr Caisley for the defendant supported the first interpretation which might, in turn, favour the plaintiff's interpretation of the first sentence of cl 25. It is, however, unnecessary to determine the meaning of this clause in this case. It is, of course, open to the parties to eliminate confusion when they renegotiate the collective agreement.

[28] For these reasons I conclude that the Authority's determination that cl 25 did not apply to the circumstances of Mr Xie, was wrong. Under s 183(2) the determination of the Authority is set aside and this judgment stands in its place. I find that the defendant is liable to reimburse Mr Xie for his full legal fees incurred in defending successfully the prosecution against him.

[29] I turn now to the more general question of whether there was an obligation at common law for the defendant to indemnify and, if so, whether that was modified or extinguished by cl 25. The following part of the judgment is observation not essential to its determination. I am aware of another case in which this issue will come into sharper and determinative focus and I do not wish to pre-empt the decision of that case by making statements of law in an unsettled area that are broader than necessary to determine this.

[30] Insofar as others outside the employment relationship are dealt with by the parties to it, that relationship of employer/employee is one of principal and agent: *The Laws of New Zealand*: [2]

> The relation of principal and agent by implication raises a contract on the part of the principal to reimburse the agent for all expenses and to indemnify the agent against all liabilities included in the reasonable performance of the agency … This applies as long as the implication is not excluded by the express terms of the contract between the principal and the agent and provided that the expenses and liabilities are in fact occasioned by the agent in his or her employment.[3]

And from *Bowstead and Reynolds on Agency*: [4]

> Where the agency agreement is contractual, the agreement to reimburse and indemnify, if not express, can be regarded as an implied term of the contract that operates unless clearly excluded.

[31] Turning to employment relationships in particular, *Halsbury's Laws of England* states: [5]

> An employer is under an implied duty to indemnify or to reimburse the employee … in respect of all expenses incurred by the employee either in consequence of obedience to his orders, or incurred by him in the execution of his authority, or in the reasonable performance of the duties of his employment.[6]
> Notwithstanding the fact that an employee was acting in the course of his employment, he may lose his right of indemnity or reimbursement where the liabilities or expenses did not arise out of the nature of the

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[2] *Laws of New Zealand* Agency: Rights of Agent against Principal at [99].
[3] *New Zealand Farmers' Co-operative Distributing Co. Ltd v National Mortgage and Agency Co of New Zealand Ltd* [1961] NZLR 969.
[4] 18th ed, 2006 – Rights of Agents against their Principals at [7-058].
[5] (4th ed, reissue, 2005) vol 16(1A) Employment at [39].
[6] *Adamson v Jarvis* (1827) 4 Bing 66.

> transaction which he was employed to carry out, but was solely attributable to his own default or breach of duty.[7]

[32] There are two New Zealand cases on the existence of an implied duty by an employer to indemnify an employee in respect of actions carried out in the course of employment. In *Attorney-General v Jones*[8] the Master of a vessel was found guilty of operating it in an unseaworthy condition but discharged without conviction under s42 of the Criminal Justice Act 1954 and required to pay court costs. He sought to be indemnified for those costs by his employer. The High Court adopted the statement on indemnity set out above from *Halsbury* and Quilliam J concluded:

> The general rule is that an employee is to have indemnity where he acted in obedience to his orders or in the execution of his authority or in the reasonable performance of the duties of his employment.

[33] The second and more recent case is a judgment of this Court in *F v Attorney-General*.[9] Deciding whether there should be indemnity of an employee by an employer for expenses incurred in an action for libel, the Employment Court accepted that it is "an elementary, fundamental and axiomatic proposition of the law of agency" that:[10]

> The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency.

[34] *F*'s case related to the costs of defending an action in tort. There may, however, be debate as to whether this extends to the costs of defending a criminal action. In *Davidson v Christchurch City Council*[11] (a case involving the unsuccessful prosecution of employees on criminal charges) the Employment Court held:[12]

> The indemnity … does not extend to cases in which criminal conduct is established.
> …

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[7] *Lewis v Samuel* (1846) 8 QB 685.
[8] HC Wellington M73/79, 16 June 1981.
[9] [1994] 2 ERNZ 62, 68
[10] Ibid, at 68.
[11] [1995] 1 ERNZ 172
[12] Ibid, at 206.

> It is self-evident that no one may be indemnified for knowingly committing a criminal act, …

The Court noted however:

> … there is no reason why an employee or other agent should not be indemnified for the cost of defending herself or himself against an allegation which in the event is never established that he or she committed a crime in the course of the agency or employment. That is not indemnifying for criminal conduct, but indemnifying for the consequences of working in the employer's or principal's interests.

On appeal, although on other points, the Court of Appeal opined in *Davidson*: [13]

> … the indemnification of agents at common law does not extend to expenses incurred in defending an allegation that the person charged did something which he or she did not in fact do and in which it was not his or her duty to do. The reason is that which expenses were not incurred by the worker as an agent of the employer in the reasonable performance of the worker's duties.

[35] The position at common law alone with regard to criminal prosecutions is therefore not settled. To the extent necessary for determining this case, I would be inclined to find that, but for cl 25 of the collective agreement, the common law of employment would have included an indemnity of the employee's costs in successfully defending the prosecution that arose from the performance by him of his employment duties.

[36] I turn now to the relevant question of exclusion or modification of the implied position at common law. The Employment Court in *F* accepted that an employee's implied rights of indemnification can be excluded or modified by express terms of the employment agreement. That is confirmed by the texts including *Bowstead and Reynolds*, *Chitty* ("Unless otherwise agreed"[14]) and *Halsbury's Laws of England*.

[37] I would hold that the implied obligation of indemnification has, in this case, been modified expressly by the relevant provisions of the collective agreement to the extent that the latter addresses the former. This would not, however, extinguish or

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[13] *Christchurch City Council v Davidson* [1996] 2 ERNZ 1, 24.
[14] *Chitty on Contracts* (26th ed, 1999) vol 11 at [2624]

exclude or otherwise read down the application of the implied term in relation to other circumstances to which no relevant express clause exists.

[38] For the reasons set out in [28] and the preceding paragraphs leading to it, I allow the plaintiff's challenge and set aside the Authority's determination.

[39] Costs are reserved and, if unresolved but sought, may be claimed by memorandum filed and served within 60 days of this judgment with the respondent to any application having a further 30 days in which to reply.

GL Colgan
Chief Judge

Judgment signed at 9 am on Tuesday 2 March 2010