

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2019] NZEmpC 37
EMPC 292/2018**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN WARREN DERBIE
 Plaintiff

AND TRANZURBAN HUTT VALLEY
 LIMITED
 Defendant

Hearing: 29 January 2019
 (Heard at Wellington)

Appearances: S Meikle, counsel for plaintiff
 D Vincent, counsel for defendant

Judgment: 3 April 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Warren Derby is an experienced bus driver who is employed by Tranzurban Hutt Valley Ltd (Tranzurban). The company recently commenced operating urban bus routes in the Hutt Valley. Mr Derby is rostered to drive on many of these routes. This case concerns his statutory entitlements for rest breaks when doing so.

[2] Mr Derby became an employee of Tranzurban on 11 June 2018. He says his individual employment agreement (IEA) refers to an entitlement to an unpaid meal break of not less than 30 minutes; and that the document says nothing about paid rest

breaks. However, his employer has in the IEA committed to complying with applicable laws. He contends this has not occurred because s 69ZD of the Employment Relations Act 2000 (the ERA) requires Tranzurban to provide paid rest breaks that are reasonable and appropriate, and this obligation is not being met.

[3] For its part, Tranzurban says that Mr Derby's meal breaks are governed by the provisions of the Land Transport Act 1998 (the LTA) and the Land Transport Rule: Work Time and Logbooks 2007 (the Rule); and that it complies with the mandatory obligations which thereby arise. Relying on s 69ZH of the ERA, it contends the requirements for breaks in the LTA and the Rule have primacy over the provisions of the ERA. Thus, Tranzurban says it has complied at all times with the provisions which apply to it. It also contends that in any event it does provide paid rest breaks as that term is used in the ERA, subject to operational requirements.

[4] The issue which arises is one of two which were considered by the Employment Relations Authority (the Authority).¹ In its determination the Authority concluded that the effect of s 69ZH is that the LTA provisions prevail; and that they define what is reasonable and appropriate for the purposes of s 69ZD(1) of the ERA.² Thus, the question of entitlements for paid rest breaks – and meal breaks because these were at that stage in dispute – fell for resolution under the LTA and the Rule.

[5] The Authority went on to find that paid rest breaks are not required under the land transport provisions. It noted that the evidence suggested such breaks are scheduled, though there might be issues over the practicality of these given factors such as traffic congestion. But issues as to the adequacy of those breaks were most appropriately dealt with through discussion and bargaining.³

[6] In light of these findings, the Authority determined that Tranzurban had not breached s 69ZD of the ERA.⁴

¹ *Derbie v Tranzurban Hutt Valley Ltd* [2018] NZERA Wellington 75.

² At [20].

³ At [32].

⁴ At [33].

The issues

[7] Having regard to the pleadings of the parties, the evidence and submissions given at the substantive hearing, the issues which arise on the challenge are:

- a) With regard to Mr Derby's work arrangements, do the provisions of the LTA and the Rule prevail over the rest breaks provisions of the ERA? This issue requires the Court to consider the correct meaning of s 69ZH of the ERA.
- b) In light of the answer to this legal question, is Mr Derby receiving his statutory entitlements in respect of rest breaks?

The legislative provisions

The LTA and the Rule

[8] It is first necessary to analyse the LTA, and the Rule which was promulgated under that statute.

[9] A key objective of the LTA, as confirmed in the statement of objectives, is to promote safe road user behaviour. In pursuance of that object, there are elaborate provisions for the mitigation of fatigue management.

[10] Part 4B of the LTA contains detailed provisions relating to work time and logbooks. Relevant for present purposes is s 30ZC which contains provisions as to work time limits, and as to minimal rest time requirements. It provides:

30ZC Limits on work time

- (1) A driver subject to this subpart—
 - (a) may not exceed the work time restrictions specified in this section, the rules, or any variation granted under section 30ZA; and
 - (b) must comply with the rest time requirements specified in this section, the rules, or any variation granted under section 30ZA.
- (2) In any cumulative work day, a driver—
 - (a) may not exceed 13 hours of work time; and
 - (b) must have at least 10 hours of continuous rest time.

- (3) In any cumulative work period, a driver may not exceed 70 hours of work time.
- (4) To avoid doubt, the rules may extend the limits for a cumulative work day or period for a specified activity or service.
- (5) This section does not apply to a driver of an ambulance service or a fire brigade who is proceeding to or returning from an incident attended in response to a priority call specified in the rules.

[11] Section 2 of the LTA defines several of the terms referred to in s 30ZC, as follows:

...

cumulative work day means a period—

- (a) during which work occurs; and
- (b) that—
 - (i) does not exceed 24 hours; and
 - (ii) begins after a continuous period of rest time of at least 10 hours

cumulative work period means a set of cumulative work days between continuous periods of rest time of at least 24 hours

...

rest time means all time that—

- (a) is not work time; and
- (b) is at least 30 minutes in duration; and
- (c) is not spent in a moving vehicle associated with work

...

work time includes (but is not limited to) all the time spent—

- (a) driving a vehicle to which section 30ZB(1) applies;
- (b) performing work-related duties, including (but not limited to)—
 - (i) loading and unloading;
 - (ii) maintenance and cleaning of vehicles (other than unpaid cleaning outside working hours);
 - (iii) administration or recording;
- (c) in any paid employment (other than paid leave or paid breaks of at least 30 minutes' duration), whether or not related to transport activities

...

[12] The Rule was promulgated under s 158 of the LTA which includes a power for the making of ordinary rules as to rest time.

[13] The objectives of the Rule include this statement:

The Rule consolidates and clarifies existing legal requirements and includes changes aimed at increasing safety. In giving effect to the [LTA], the Rule also:

- sets out the requirements applying to the design and use of logbooks to record and monitor work time;
- defines which services and vehicles are exempted from logbook use, and how work time variations in logbook exemptions may be applied;
- establishes a framework for managing commercial driver fatigue;
- sets out the proposed entry criteria and legal requirements for drivers covered by alternative fatigue management schemes.

[14] The statement goes on to say that the Rule balances safety issues with the need for transport efficiency, but in developing it, consideration was given to safety requirements in other safety-conscious jurisdictions. Thus, New Zealand road users have the benefit of overseas' research into driver fatigue, including the results of extensive trials of fatigue management schemes elsewhere.

[15] Turning to the text of the Rule itself, key provisions for present purposes are:

1.3(1) This rule applies to all persons subject to the work time requirements in Part 4B of the [LTA].

...

Standard rest break requirement

2.1(1) A driver, other than a driver specified elsewhere in this section, must take a rest break after 5½ hours of continuous work time.

[16] Part 2 of the Rule includes these definitions:

rest break means a period of rest time taken within a cumulative work day.

rest time means all time that:—

- (a) is not work time; and
- (b) is at least 30 minutes in duration; and

(c) is not spent in a moving vehicle associated with work.

...

work time has the same meaning as it has in *section 2(1)* of the [LTA].

[17] Obviously, these provisions were intended to provide for rest breaks that mitigate against the possibility of driver fatigue.

Relevant ERA provisions

[18] Part 6D of the ERA describes rest breaks and meal breaks. These include:

69ZD Employee's entitlement to rest breaks and meal breaks

- (1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that—
 - (a) provide the employee with a reasonable opportunity, during the employee's work period, for rest, refreshment, and attention to personal matters; and
 - (b) are appropriate for the duration of the employee's work period.
- (2) The employee's entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions—
 - (a) are—
 - (i) reasonable and necessary, having regard to the nature of the employee's work; or
 - (ii) if subparagraph (i) does not apply, reasonable and agreed to by the employer and employee (whether in an employment agreement or otherwise); and
 - (b) relate to 1 or more of the following:
 - (i) the employee continuing to be aware of his or her work duties or, if required, continuing to perform some of his or her work duties, during the break;
 - (ii) the circumstances when an employee's break may be interrupted;
 - (iii) the employee taking his or her break in the workplace or at a specified place within the workplace.
- (3) An employee's entitlement to rest breaks under this section is to paid rest breaks.

69ZE Timing and duration of rest breaks and meal breaks

- (1) An employee must take his or her rest breaks and meal breaks—
 - (a) at the times and for the duration agreed between the employee and his or her employer; but

- (b) in the absence of such agreement, at the reasonable times and for the reasonable duration specified by the employer.
- (2) For the purposes of subsection (1)(b), an employer may specify reasonable times and durations that, having regard to the employer's operational environment or resources and the employee's interests, enable the employer to maintain continuity of service or production.
- (3) An employer must provide an employee with a reasonable opportunity to negotiate with the employer and reach agreement under subsection (1)(a) on the times when the employee's rest breaks and meal breaks are to be taken and on the duration of the breaks.
- (4) To avoid doubt, subsection (3) does not limit the requirement of the employer and employee to deal with each other in good faith as set out in section 4.

...

69ZH Relationship between Part and other enactments

Where an employee is a person who is required to take rest breaks or meal breaks by, or under, an enactment other than this Part, the requirement for rest breaks or meal breaks defined by, or under, the other enactment applies instead of this Part.

[19] These particular provisions applied from 6 March 2015, replacing those which were contained in the original Part 6D which took effect in 2009. The Court of Appeal described the 2015 regime as one which created a “a more flexible formula”: *Lean Meats Oamaru v New Zealand Meat Workers and Related Trades Union Inc*.⁵

[20] In an earlier decision, *Jetstar Airways Ltd v Greenslade*, the Court of Appeal considered the purpose of the original provisions.⁶ The Court said the purpose of the statutory obligation to provide for rest and meal breaks was to benefit employees “by providing for a better work life balance”. It also stated that Parliament’s intention “was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during the work period as defined by s 69ZC of the ERA”.⁷

[21] The Court of Appeal in *Lean Meats* returned to this theme when discussing both the original provisions and the current provisions, where it emphasised that a key objective of both was the improvement of work-life balance.⁸

⁵ *Lean Meats Oamaru v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 495, [2017] 2 NZLR 234 at [10].

⁶ *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432, [2015] ERNZ 71 at [28].

⁷ At [35].

⁸ *Lean Meats*, above n 5, at [16].

[22] The provisions which I have just reviewed provide the context for the issues which arise in the present case.

First issue: what is the meaning of s 69ZH?

[23] Mr Vincent, counsel for Tranzurban, submitted that where there are other statutory regimes for rest breaks in specific employment situations, those provisions could not be overridden by the provisions contained in Part 6D of the ERA. He relied on dicta in *Jetstar*, to which I shall refer shortly, and statements made by the Select Committee Report which introduced the current version of s 69ZH in 2013, to support this submission.

[24] Mr Meikle, counsel for Mr Derby, submitted in essence that having regard to the objects of each statutory regime, they should coexist.

The discussion in Jetstar

[25] In *Jetstar*, the Court of Appeal considered not only the original provisions of Part 6D, but also a separate regime for rest breaks as provided for airline pilots by the Australian Civil Aviation Order 48. The question was whether the latter regime applied in place of the rest break obligations of the ERA.

[26] The Court of Appeal considered the original version of s 69ZH that applied until 5 March 2015, which stated:

69ZH Relationship between Part and other enactments

- (1) Where an employee is provided with, or entitled to, rest breaks or meal breaks under another enactment,—
 - (a) this Part prevails if the breaks provided under this Part are additional or enhanced breaks;
 - (b) the other enactment prevails if the breaks provided under the other enactment are additional or enhanced breaks.
- (2) Despite subsection (1), where an employee is a person who is required to take a rest break by, or under, another enactment, the requirement for a rest break defined by, or under, the other enactment applies instead of the provisions or entitlements for rest breaks or meal breaks provided under this Part.

[27] In the course of its analysis, the court considered s 30ZC of the LTA, and the Rule. Counsel for *Jetstar* had submitted that the regime under this legislation did not necessarily require rest breaks or rest time within a work period, in the way described by s 69ZD. Counsel went on to say that the words “rest break” in the section should be construed to allow for exceptions from the requirements of the ERA, where there were other statutory regimes that provided mandatory rest requirements.

[28] In response, counsel for the affected pilot had submitted that it was not necessary to construe “rest break” more broadly. Arguing that the two regimes could exist side-by-side, it was submitted the ERA applied to minimum rest breaks and meal breaks required during a work period; but where other legislation required employees to take rest breaks or meal breaks within a work period which were of the same or similar character to those required under the ERA, then the other enactment was to prevail. Nor was there any reason why the requirements of other enactments which related to breaks outside the work period should not apply in addition to those within work periods. Thus, there was no incompatibility with other legislation which might require “rest breaks” in s 69ZH(2) to be interpreted more broadly.

[29] The court agreed with this submission, expressing its conclusions in this way:⁹

[35] We accept that it may not always be a straightforward exercise to rationalise different statutory regimes addressing the same or similar topics. But we must construe s 69ZH(2) in the form enacted by Parliament and in the light of the statutory purpose as best it can be discerned. Approached on that basis, we are satisfied Parliament’s intention was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during the work period as defined by s 69ZC of the ERA.

[36] To the extent that employees are required by other enactments to take rest and meal breaks of the same or similar character during the work period, the provisions of the other enactments are to apply. We do not view “rest breaks” in the first part of s 69ZH(2) as extending to any regime which makes provision designed to ensure that employees are adequately rested. For example, we do not consider that s 69ZH(2) was intended to apply to regimes providing for the duties of airline pilots to be rostered so there is adequate time off before they are next required for duty.

[37] We also take into account that the purpose of legislation such as the ERA may be contrasted with that of aviation legislation. The former is concerned specifically with the wellbeing of employees while the latter will necessarily be focused on ensuring the safety of the travelling public as a

⁹ *Jetstar Airways Ltd v Greenslade*, above n 6, (footnotes omitted).

paramount consideration. This distinction is of particular significance in the present case where Jetstar Australia is the operator under the AOC but has chosen to employ Mr Greenslade and other flight crew by its subsidiary Jetstar NZ, which is subject to the obligations imposed by the ERA.

[38] Although we consider the ANZA mutual recognition agreements recognised and implemented by the New Zealand CAA are relevant to the second question of law we do not view them as bearing upon or assisting the first question. Their focus is on provisions applicable to the aviation sector and do not have a goal of mutuality in employment matters.

[39] We note for completeness that Part D of the ERA has been amended with effect from 6 March 2015. The amending legislation was introduced by the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill and is designed to address a concern that the provisions of Part 6D were unduly prescriptive. Greater flexibility is introduced including a requirement that employers provide compensatory measures if rest or meal breaks in accordance with s 69ZD are not, or cannot, be provided. Section 69ZH(1) has been deleted but s 69ZH(2) has been substantially re-enacted, although it now refers to both rest breaks and meal breaks.

[40] No reference is made in the explanatory statement nor in any other Parliamentary materials or debates about the changes to s 69ZH. That is so despite, it appears, Members of Parliament being aware of the Jetstar employment case. On one view, the fact that s 69ZH now refers to both rest and meal breaks tends to support the conclusion that the present version of this section is consistent with Parliament's original intention. If there had been an intention to change the meaning of the provision, one would have expected some reference to this in the Parliamentary materials.

[30] Mr Vincent submitted that these conclusions did not apply to the 2015 regime, because the requirement for rest or meal breaks to be "of the same or similar character" had been repealed. He said this meant that the "other enactment" would now prevail when that enactment required the taking of rest or meal breaks, irrespective of whether those breaks were the same or similar to those in the ERA.

[31] He went on to point out that the Transport and Industrial Relations Committee, when reporting back on the Employment Relations Amendment Bill 2013, explained the correlation between the provisions contained in the ERA, and those of any other enactment. The Select Committee had stated:¹⁰

... First, the Bill would not override any requirements under other legislation. For example, specific regulations governing hours of work for drivers of passenger transport services, and – importantly – the general duty imposed on employers under the Health and Safety and Employment Act 1992, would be unaffected by the provisions in question.

¹⁰ Employment Relations Amendment Bill 2013 (105-2) at 10.

...

Providing breaks, or varying the nature or intensity of work, would remain obvious ways for an employer to address ... hazards, regardless of the changes proposed in the Bill.

[32] Mr Vincent said, in summary, that Parliament's intention was to ensure that the LTA regime would not be overridden by the ERA provisions, and would remain unaffected by those provisions.

[33] Mr Meikle submitted in effect that the reasoning in *Jetstar* continues to apply.

Analysis

[34] It is trite that the meaning of an enactment must be ascertained from its text and in light of its purpose.¹¹

[35] I start with a consideration of the plain and ordinary meaning of the words used in s 69ZH. On the face of it, another enactment is to apply where a person is required to take rest breaks or meal breaks under that enactment. The language used is well capable of accommodating the possibility that another enactment will apply to the extent that it requires a rest break or meal break to be taken.

[36] I have already referred to the different objects of the enactments which fall for consideration. The ERA provides for the wellbeing and work-life balance of employees by requiring them to take specified rest and meal breaks. The LTA and the Rule made thereunder have a focus on the safety of the travelling public, and fatigue management. Logically, the two regimes should operate side-by-side so that both objectives can be achieved. An interpretation of s 69ZH which permits both regimes to operate in parallel is, in my view, more likely to have been Parliament's intent. This was the finding in *Jetstar*.¹²

[37] The legislative history does not suggest a contrary conclusion. Whilst it is the case that the current version of s 69ZH does not contain a statement that additional

¹¹ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

¹² *Jetstar Airways Ltd v Greenslade*, above n 6, at [37] and [38].

and enhanced breaks are to apply according to whichever of two enactments may provide them, there is no evidence that this change was intended to fundamentally alter the way in which the section would operate. The previous s 69ZH(2) is in very similar form to the current s 69ZH, suggesting that this particular provision would continue to apply as before.

[38] I do not consider that the statement made by the Select Committee should lead to a different conclusion. There is nothing in the passage cited earlier to suggest that its members had in mind the possibility that either one regime or the other would apply; the possibility of the ERA not overriding the requirements of another enactment can, and in my view should, be understood as meaning that to the extent other regimes require particular rest breaks or meal breaks, then they will prevail.

[39] Had there been an intention to change the meaning of this provision, one would have expected to see a clear discussion of that in the Parliamentary materials; that is not the case here. A similar point was made by the Court in *Jetstar*.¹³

[40] Accordingly, I do not accept Mr Vincent's submission that the removal of the original s 69ZH(1) was deliberate, so that a step of comparison is no longer required. A comparison is inherent in the replaced provision.

[41] Mr Meikle referred to the fact that the current provisions will be replaced on 6 May 2019 by amendments which, to some extent, reinstate the original provisions. He invited the Court to consider those provisions as an aid to interpretation of the current provisions.

[42] Although later legislative provisions can sometimes assist,¹⁴ I am not persuaded that there are clear indicators of original statutory intent either in the extrinsic materials relating to the provisions which are about to take effect, or in the

¹³ At [40].

¹⁴ *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 at [193]-[195].

provisions themselves, which at least in respect of s 69ZH are not identical to the original version.¹⁵

Rest breaks under the LTA and Rule

[43] It will be seen from the provisions set out earlier that the terms “rest break” and “rest time” have a particular meaning. Rest break means a period of rest time taken within a cumulative work day; rest time is all the time that is not work time, must be at least 30 minutes in duration, and may not be spent in a moving vehicle associated with work. Such a rest break must be taken after five and a half hours of continuous work time. Work time is defined under the LTA. There is no provision for rest breaks under the LTA regime.

[44] As already indicated, the LTA regime focuses on fatigue management, as opposed to employee wellbeing and work-life balance under the ERA regime.

[45] In summary, the land transport provisions do not provide for rest breaks of the kind described in the ERA. In light of my analysis of s 69ZH of the ERA, the LTA provisions should coexist with the ERA provisions.

Second issue: has Tranzurban met its obligations under Part 6D?

[46] Evidence for the purpose of considering the question of compliance as to Part 6D of the ERA was given by Mr Derby, and by Ms Renee Snelgrove, Human Resources and Legal Director for the Tranzit Group; that entity has oversight of employment issues as they affect employees of Tranzurban.

[47] Mr Derby also told the Court that his concerns related to shifts that operated between Upper Hutt and Petone. He said there were about 67 shifts out of a total of 84 shifts that operated between these locations.

¹⁵ Employment Relations Amendment Bill 2013 (105-1) (explanatory note); Employment Relations Act 2000, s 69ZH.

[48] As noted earlier, there were issues as to both rest breaks and meal breaks in the Authority, but the challenge focuses on rest breaks. However, for the sake of completeness, I summarise the evidence which the parties gave as to meal breaks.

Meal breaks

[49] There was one provision in Mr Derby's IEA dealing with breaks, which states:

6. MEAL BREAKS AND REST PERIOD

- 6.1 You will be entitled to one unpaid meal break of not less than 30 minutes if working a shift of 5 and a half hours or more. Your meal break length and location will be determined by the roster.
- 6.2 We will provide tea, coffee, milk and sugar at all our depots for your breaks. Where you are required to have a break away from the depot, provisions will be supplied.
- 6.3 If your unpaid meal break is required to be taken away from your depot, you will be paid a meal allowance in accordance with Schedule 2.

[50] The allowance under sch 2 is \$8.00.

[51] Mr Derby said that between June and early September 2018, some of the shifts he worked spanned up to 14 hours. Ms Snelgrove said these were subsequently altered so that the maximum span was 13 hours, thus complying with the LTA.

[52] Tranzurban has made other changes to the shifts, so that meal breaks extend to at least 40 minutes. Ms Snelgrove said that this ensured there was compliance with the requirement under the Rule that a driver must take a rest break of at least 30 minutes duration after five and a half hours of continuous work time.¹⁶ She explained that during these breaks, drivers are not expected to work. She also said that if any driver was concerned about any of the requirements under the LTA or the Rule, they were to communicate with the operations manager.

[53] I find that these particular breaks, described by Tranzurban as meal breaks, arise under the LTA and the Rule.

¹⁶ Above at para [15].

Rest breaks

[54] The position regarding rest breaks is more complex and was the focus of more detailed evidence. Of the multiple shifts that are of concern to Mr Derby, the Court was provided with examples of five. The evidence given has been reduced to the summary which appears at Appendix 1 to this judgment.

[55] In addition to providing for breaks in the rostered arrangements, drivers are provided with a Tranzurban backpack, and a thermal flask to fill with tea or coffee for refreshment during any rest break when a driver is away from the Upper Hutt depot.

[56] Mr Derby has three principal concerns, which he says are illustrated by the examples provided to the Court.

Operational issues

[57] First, he says that there are operational issues which mean that apparent rest breaks are largely “non-existent”. He says that unexpected delays “mostly” prevent them from being taken.

[58] Ms Snelgrove acknowledged that operational requirements do sometimes limit the ability to take rest breaks, but she said the opportunity remains for drivers to take them when they arise.

[59] In his closing submissions, Mr Vincent stated that time greater than seven minutes from arrival at a stopping point until departure, amounted to a potential break. This concession was consistent with the evidence, where the possibility of an adequate rest break occurring in less than seven minutes was accepted as being unrealistic. I proceed accordingly.

[60] Each of shifts 1504, 2501 and 2502 provide for two meal breaks; shift 2506 has a sign off period, and presumably an opportunity for a driver to take a meal in that period; shift 2507 has a meal break, and a sign off period when there is a further opportunity for a meal break.

[61] That leaves, in each instance, further breaks at either the Petone Station or Upper Hutt Station, or at an outlying area such as Plateau Road or Emerald Hill.

[62] I turn now to consider the issue of the prescribed breaks being limited by operational requirements. I do not doubt Mr Derby's evidence that these can occur unexpectedly. I accept his point that delays may be created by traffic, new routes, road works and uncertainties when dealing with the public.

[63] That said, I have some doubt as to whether such unforeseen factors would completely erode all rest breaks, particularly those of a longer duration. However, I evaluate this issue on the basis of Tranzurban's concession that such interruptions can arise.

[64] Section 69ZE relates to the timing and duration of rest and meal breaks. It states that an employee must take those breaks either at the times and for the durations agreed between the parties, or in the absence of such agreement, at reasonable times and for reasonable durations as specified by the employer.

[65] Ms Snelgrove described the process by which shifts were created. A computer programme was used to determine the most operationally efficient shifts. She explained that the system requires certain parameters to be introduced; optimal routes and shifts for vehicles and drivers are then provided.

[66] This evidence does not suggest that times and duration of breaks were agreed between employees such as Mr Derby and Tranzurban. There was some evidence of consultation once the routes were initially established; and in a meeting which involved Mr Derby, no reference was made by him to the particular concerns which are now before the Court. That should not, however, be regarded as amounting to an implied agreement between Tranzurban and Mr Derby as to the times and duration of his breaks, given the manner in which the shifts were developed.

[67] Accordingly, the question is whether ss 69ZE(1) and (2) apply, as suggested by Mr Vincent. Have reasonable times and durations been specified that enable

Tranzurban to maintain continuity of service or production, having regard both to its operational environment or resources and the employee's interests?

[68] Tranzurban has an obligation to ensure drivers such as Mr Derby are provided with a reasonable opportunity to take rest breaks that comply with the objects of Part 6D, but the operational environment can cause unexpected delays; that is to be expected. The employer's obligation is to balance these factors in a reasonable way. Having regard to the range of breaks which are evident in the five routes for which details have been provided, I find that Tranzurban has specified reasonable times and durations for rest breaks, notwithstanding the fact that from time to time unexpected events may impact on their duration.

Issues as to security of bus and cash tins

[69] Mr Derby said that during breaks, it is necessary for a driver to remain in his or her bus to safely guard the cash tin, which is attached to the bus by a wire which would be easy to cut if it was left unattended. The only other choice for a driver is to leave the bus and remove the tin; for his part, Mr Derby was not prepared to do that because he considers that to do so would raise a safety risk.

[70] Ms Snelgrove said that all drivers receive training for cash tin safety-related issues. The Tranzurban Drivers' Manual states that if someone were to attempt to rob a driver, he or she was required to hand over the cash tin, on the basis that the safety of the employee is more important than the contents of the cash tin.

[71] She also said that during training, drivers are told to conceal the cash tin where possible. If they leave the vehicle, they are to use backpacks which are provided, in which the cash tin may be carried.

[72] It is evident from Tranzurban's Induction Training Module that a range of personal safety issues are described, including actions which should be taken in hostile situations. It was confirmed that Mr Derby had undertaken the induction training on 19 June 2018; after a concern was raised that he had not been trained in cash tin safety, he was retrained on this module on 4 September 2018.

[73] Ms Snelgrove stated, in summary, that the driver's responsibility for a cash tin did not make it impracticable for a driver to leave the bus if he or she wished to, and the training made it clear what they would need to do. She said that these issues are simply part of the operational realities of driving buses.

[74] The steps taken by Tranzurban, including its training of drivers, are plainly designed to permit drivers to leave their vehicles during a rest break if they choose to do so. The concerns as to security of the cash tin are not insurmountable, and Tranzurban has adequately balanced driver safety against security. I do not consider that these issues should lead to a conclusion that Tranzurban has not met its obligation to provide rest breaks under the ERA.

Access to toilets

[75] The final concern raised by Mr Derby related to the ability of a driver to attend a toilet.

[76] The evidence is that facilities are available for bus drivers at the Petone Station and Upper Hutt Station, where access is provided to drivers such as Mr Derby with a registered key. Ms Snelgrove told the Court that this had long been the practice for bus operators in the Hutt Valley, including the predecessor operation. Mr Derby worked for that operator for some six years.

[77] Ms Snelgrove said that toilets at the Petone and Upper Hutt Stations were not for public use; and that once a driver entered the facility, the door would be locked behind them. She said that other personnel were employed at each station, who she understood would be close by.

[78] I find that these particular arrangements are reasonable, and that appropriate access to toilets is available for drivers.

[79] Mr Derby's real concern, however, related to the acknowledged absence of toilets at outlying areas such as Plateau Road and Emerald Hill. Whilst the breaks at these locations may be adequate in terms of duration, he said the absence of such facilities means rest breaks as intended under the ERA are not being provided.

[80] The requirement under s 69ZD is that the employee has a “reasonable” opportunity “for rest, refreshment, and attention to personal matters”. Viewed against that yardstick, there are shifts where this issue is likely to be more challenging than others because there are more frequent breaks at outlying areas. Shift 1504 creates the most obvious difficulties, for instance where there are two driving periods of approximately three hours. Some of the other four shifts contain similar problems.

[81] On this topic, Ms Snelgrove said that this was an understood and expected part of the job, particularly where a driver has prior experience such as Mr Derby; such a person could be expected to know about the challenges of intermittent breaks.

[82] No doubt a degree of personal organisation is required. There was no medical or other evidence suggesting Mr Derby has any particular issues in this regard.

[83] There may be instances where inability to attend a toilet facility at a time of need to do so could arise unexpectedly, such as where a driver is pregnant, or is aging. But I consider those issues are capable of discussion so that a driver is not placed in an unrealistic or unfair situation.

[84] The absence of toilets at some locations is, in effect, a restriction which is to be assessed under s 69ZD(2). I find that the restrictions that arise when rest breaks occur at an outlying area are reasonable and necessary having regard to the nature of the driver’s work (s 69ZD(2)(a)(i)) which relates to the employee having to take his or her break at a specified place within the workplace (s 69ZD(2)(b)(iii)). The ERA provides expressly for such restrictions.

[85] Standing back and considering the overall arrangements, I am not persuaded that there is non-compliance with the statutory obligations, such as would warrant the making of a declaration or compliance order.

Conclusion

[86] On the basis of the evidence placed before the Court I find that the rest breaks provided by Tranzurban comply with the provisions of the ERA.

[87] Mr Meikle submitted that there was an issue as to payment for rest breaks. There was no evidence that drivers are not paid during rest breaks. Rather, Mr Meikle's point was that if it was found Tranzurban was not complying with the requirements of Part 6D, an issue as to compensation would arise. Since that is not the finding of the Court, I need not consider this issue further.

Disposition

[88] Mr Derby has succeeded on the first issue, but not the second one. Accordingly, there is no basis for making the declaration or compliance order which he sought. The challenge is dismissed.

[89] I reserve costs. Costs should follow the event. If these cannot be agreed, Tranzurban may apply within 21 days, and Mr Derby may respond within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 3.30 pm on 3 April 2019

Appendix 1

Shift 1504			
Driving times	Period of driving (mins)	Length of break (mins)	Location
8.20 to 9.44	84	20	Petone Station
10.04 to 11.07	63	3	Emerald Hill
11.10 to 11.30	20	52	<i>Upper Hutt Depot – Meal Break</i>
12.22 to 12.32	10	8	Emerald Hill
12.40 to 14.03	83	74	<i>Lower Hutt Depot – Meal Break</i>
15.17 to 15.43	26	20	Petone Station
16.03 to 17.09	66	31	Emerald Hill
17.40 to 18.41	61	23	Petone Station
19.04 to 20.26	82		Sign Off – Upper Hutt Depot

Shift 2501			
Driving times	Period of driving (mins)	Length of break (mins)	Location
5.18 to 6.42	84	8	Petone Station
6.50 to 7.53	63	5	(No location given)
7.58 to 9.10	72	4	(No location given)
9.14 to 10.13	59	124	<i>Upper Hutt Depot - Meal Break</i>
12.17 to 12.58	41	76	<i>Upper Hutt Depot - Meal Break</i>
14.14 to 16.23	129		Sign Off – Upper Hutt Depot

Shift 2502

Driving times	Period of driving (mins)	Length of break (mins)	Location
5.38 to 7.02	84	8	Petone Station
7.10 to 8.13	63	11	Emerald Hill
8.24 to 9.33	69	11	Petone Station
9.44 to 10.38	54	51	<i>Upper Hutt Depot – Meal Break</i>
11.29 to 12.32	63	9	Petone Station
12.41 to 13.37	56	74	<i>Upper Hutt Depot – Meal Break</i>
14.51 to 15.55	64		Sign Off – Upper Hutt Depot

Shift 2506

Driving times	Period of driving (mins)	Length of break (mins)	Location
6.04 to 6.58	54	12	Upper Hutt Station
7.10 to 9.00	110	225	<i>Upper Hutt Depot – (Driver signs off for this period.)</i>
12.45 to 13.46	61	10	Petone Station
13.56 to 15.03	67	7	Emerald Hill
15.10 to 17.49 (Ceases driving at 17.29, then returns to depot.)	159		Sign Off – Upper Hutt Depot

Shift 2507

Driving times	Period of driving (mins)	Length of break (mins)	Location
6.07 to 8.18	136	54	<i>Upper Hutt Depot – Meal Break</i>
9.17 to 9.50	33	10	Upper Hutt Station
10.00 to 10.21	21	9	Plateau Road
10.30 to 11.01	31	141	<i>Upper Hutt Depot – (Driver signs off for this period)</i>
13.22 to 14.31	69	8	Petone Station
14.39 to 15.50	71	10	Emerald Hill
16.00 to 18.33	153		Sign Off – Upper Hutt Depot