

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA274/2022
[2025] NZCA 1**

BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES' UNION WELLINGTON BRANCH INCORPORATED Appellant
AND	TRANZURBAN HUTT VALLEY LIMITED Respondent

Hearing: 22 February 2024

Court: Katz, Mallon and Ellis JJ

Counsel: P Cranney and K N S Gawe for Appellant
D D Vincent and C T C Bell for Respondent

Judgment: 4 February 2025 at 11.00 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B We answer the question of law as follows:**
- Did the Employment Court err in its interpretation of s 69ZC of the
Employment Relations Act 2000?**
- No.**
- C The appellant must pay the respondent costs for a standard appeal on a
band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] Many public bus drivers in the Hutt Valley are rostered to work for a period in the morning and a period in the afternoon, with a time in the middle of the day where they are not rostered to work. This arrangement reflects the periods in the day where there is a high demand for buses and is commonly known as a “split shift”. This appeal concerns whether, under a split shift, there are two discrete work periods or one work period for the purposes of the worker’s entitlements to rest and meal breaks under the Employment Relations Act 2000 (the Act). That Act sets rest and meal break entitlements with reference to an employee’s “work period” as defined in s 69ZC of the Act.

[2] The appellant, the New Zealand Tramways and Public Passenger Transport Employees’ Union Wellington Branch Inc (the Union), represents bus drivers who are employed by the respondent, Tranzurban Hutt Valley Ltd (Tranzurban). Tranzurban operates buses in the Hutt Valley used for public transportation under contract with the Greater Wellington Regional Council (the Regional Council). The Union disputed Tranzurban’s approach to treating a split shift as two separate work periods under s 69ZC when the middle period exceeded two hours.

[3] The Employment Relations Authority (the Authority) determined that a split shift constituted one work period covering all the time between an employee's initial commencement and final cessation of work on any given day.¹ Judge Corkill in the Employment Court subsequently determined the Authority's interpretation was incorrect. The Judge considered that the Act did not preclude parties agreeing to there being more than one work period in a given work day.² Whether a split shift constituted separate work periods was a question of fact to be determined with reference to the hours an employee was required to work including their authorised breaks (those breaks being contiguous with work responsibilities) and in light of the terms agreed between the parties.³

[4] The question on appeal is whether the Employment Court erred in its interpretation of s 69ZC of the Act.⁴

Legislation

Background

[5] The precursor to the rest and meal breaks provided for in the Act was the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008. The objective of the 2008 provisions was explained in the Bill which introduced them as follows:⁵

The objective of the proposed Bill is to create minimum standards for a modern workforce in respect of the promotion and protection of infant feeding through breastfeeding and provision of rest and meal breaks. It also supports government policy concerning the choices of employees, particularly regarding their work-life balance and caring responsibilities.

¹ *New Zealand Tramways and Public Passenger Transport Employees Union v Tranzurban Hutt Valley Ltd* [2021] NZERA 342 [Authority determination] at [32].

² *Tranzurban Hutt Valley Ltd v New Zealand Tramways & Public Passenger Transport Employees Union Wellington Inc* [2022] NZEmpC 75 [Employment Court judgment] at [63].

³ At [64].

⁴ *New Zealand Tramways & Public Passenger Transport Employees Union Wellington Inc v Tranzurban Hutt Valley Ltd* [2022] NZCA 429 [Court of Appeal leave judgment] at [4].

⁵ Employment Relations (Breaks and Infant Feeding) Amendment Bill 2008 (205–1) (explanatory note) at 9. In *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432, [2015] ERNZ 71 at [35] and *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 495, [2016] ERNZ 381 at [16] this Court described the purpose as being to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during work periods.

[6] In introducing the Bill, the Minister of Labour said:⁶

I think it would surprise many people that no statutory requirement for meal and rest breaks exists, but minimum entitlements to rest breaks and meal breaks during a working day are already in the vast majority of collective agreements. However, anecdotal evidence has suggested that some sectors—service and manufacturing sectors, in particular, and sectors where there are vulnerable workers—may be providing less than the breaks specified in this bill. Most New Zealanders would have thought, like me, that these sorts of minimum entitlements are already part of the law, and although many workers do enjoy these protections, the Government is making sure that there is absolutely no doubt that these basic entitlements must be provided for.

[7] The Bill (a government Bill) had its origins in a member's Bill drafted by Sue Moroney MP. In speaking to the government Bill Ms Moroney identified health and safety benefits of the proposals. Ms Moroney referred to research that had indicated work-related fatalities were more likely to occur in the late morning and mid-afternoon which was roughly when people ought to be taking breaks.⁷

[8] The rest and meal break provisions were amended in 2015 to make the regime less prescriptive.⁸ However in 2018 the 2008 amendments were broadly reintroduced by the Employment Relations Amendment Act 2018 (the 2018 Amendment Act). The 2018 Amendment Act introduced the new pt 6D and made other changes to the Act, including to the rules governing collective bargaining. The explanatory note explained the purpose of the Bill as follows:⁹

The purpose of this Bill is to implement the Government's post-election commitments to restore key minimum standards and protections for employees, and a suite of changes to promote and strengthen collective bargaining and union rights in the workplace. The changes are intended to introduce greater fairness in the workplace between employees and employers, in order to promote productive employment relationships.

[9] In introducing the Bill, the Minister for Workplace Relations and Safety described the purpose of the rest and meal breaks provisions as follows:¹⁰

Elsewhere, to enhance minimum standards, the bill restores an employee's right to a minimum number and duration of set rest and meal breaks. The previous Government took away this right, nickel-and-diming Kiwi workers.

⁶ (9 April 2008) 646 NZPD 15512.

⁷ (9 April 2008) 646 NZPD 15524.

⁸ See Employment Relations Amendment Act 2014, ss 49–52.

⁹ Employment Relations Amendment Bill 2018 (13–1) (explanatory note) at 1.

¹⁰ (1 February 2018) 727 NZPD 1648.

We are restoring it. This will give employees enough time to rest, refresh, and eat during working hours and be able to continue to work safely. ...

The Act

[10] The new pt 6D of the Act came into force on 6 May 2019 following the commencement of the 2018 Amendment Act.¹¹

[11] Before setting out the pt 6D provisions, we note the object of the Act is as follows:

3 Object of this Act

The object of this Act is—

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
 - (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
 - (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
 - (iii) by promoting collective bargaining; and
 - (iv) by protecting the integrity of individual choice; and
 - (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
 - (vi) by reducing the need for judicial intervention; and
- (ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court; and
- (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[12] The scheme of pt 6D is to provide rest and meal break entitlements based on the length of the employee’s “work period”. Breaks are to occur during the

¹¹ Employment Relations Amendment Act 2018, s 2(a)(vii).

“work period” and the time within which they are to be taken is as agreed between an employer and employee or in accordance with the times set out in the provisions of the Act if there is no agreement.

[13] Section 69ZC defines the “work period” as follows:

69ZC Interpretation

In this Part, unless the context otherwise requires, **work period**—

- (a) means the period—
 - (i) beginning with the time at which, in accordance with an employee’s terms and conditions of employment, an employee starts work; and
 - (ii) ending with the time at which, in accordance with an employee’s terms and conditions of employment, an employee finishes work; and
- (b) includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

[14] Section 69ZD provides the entitlements as follows:

69ZD Employee’s entitlement to, and employer’s duty to provide, rest breaks and meal breaks

Entitlement and duty

- (1) An employee is entitled to, and the employee’s employer must provide the employee with, rest breaks and meal breaks in accordance with this Part.

Work period between 2 hours and 4 hours

- (2) If an employee’s work period is 2 hours or more but not more than 4 hours, the employee is entitled to one 10-minute paid rest break.

Work period between 4 hours and 6 hours

- (3) If an employee’s work period is more than 4 hours but not more than 6 hours, the employee is entitled to—
 - (a) one 10-minute paid rest break; and
 - (b) one 30-minute meal break.

Work period between 6 hours and 8 hours

- (4) If an employee's work period is more than 6 hours but not more than 8 hours, the employee is entitled to—
 - (a) two 10-minute paid rest breaks; and
 - (b) one 30-minute meal break.

Work period over 8 hours

- (5) If an employee's work period is more than 8 hours, the employee is entitled to the rest breaks and meal breaks in accordance with subsections (6) and (7).
- (6) During the work period of 8 hours, the employee is entitled to—
 - (a) two 10-minute paid rest breaks; and
 - (b) one 30-minute meal break.
- (7) During the work period beyond 8 hours (the **subsequent period**), the employee is entitled to the following:
 - (a) if the subsequent period is 2 hours or more but not more than 4 hours, to one 10-minute paid rest break:
 - (b) if the subsequent period is more than 4 hours but not more than 6 hours, to—
 - (i) one 10-minute paid rest break; and
 - (ii) one 30-minute meal break:
 - (c) if the subsequent period is more than 6 hours but not more than 8 hours, to—
 - (i) two 10-minute paid rest breaks; and
 - (ii) one 30-minute meal break.

[15] Section 69ZE provides for the timing of these entitlements as follows:

69ZE Timing of rest breaks and meal breaks

Timing of breaks as agreed

- (1) If an employee and employer have agreed on the times at which the employee is to take rest breaks and meal breaks during the employee's work period, the rest breaks and meal breaks are to be taken at those times.

Timing of breaks in absence of agreement

- (2) In the absence of an agreement, the rest breaks and meal breaks are to be taken in accordance with the applicable provision in subsections (3) to (7).

Work period between 2 hours and 4 hours

- (3) If section 69ZD(2) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest break in the middle of the work period.

Work period between 4 hours and 6 hours

- (4) If section 69ZD(3) applies, an employer must, so far as is reasonable and practicable, provide the employee with—
- (a) the rest break one-third of the way through the work period; and
 - (b) the meal break two-thirds of the way through the work period.

Work period between 6 hours and 8 hours

- (5) If section 69ZD(4) applies, an employer must, so far as is reasonable and practicable, provide the employee with—
- (a) a rest break halfway between the start of work and the meal break; and
 - (b) the meal break in the middle of the work period; and
 - (c) a rest break halfway between the meal break and the finish of the work period.

Work period over 8 hours

- (6) If section 69ZD(5) and (6) apply, an employer must, so far as is reasonable and practicable, provide the employee with—
- (a) a rest break halfway between the start of work and the meal break; and
 - (b) the meal break in the middle of the work period; and
 - (c) a rest break halfway between the meal break and the finish of the work period.
- (7) If section 69ZD(5) and (7) apply, an employer must, so far as is reasonable and practicable, provide the employee with the breaks as follows:
- (a) if the subsequent period is 2 hours or more but not more than 4 hours, the rest break in the middle of the subsequent period:

- (b) if the subsequent period is more than 4 hours but not more than 6 hours,—
 - (i) the rest break one-third of the way through the subsequent period; and
 - (ii) the meal break two-thirds of the way through the subsequent period;
- (c) if the subsequent period is more than 6 hours but not more than 8 hours,—
 - (i) a rest break halfway between the start of the subsequent period and the meal break; and
 - (ii) the meal break in the middle of the subsequent period; and
 - (iii) a rest break halfway between the meal break and the finish of the subsequent period.

[16] Section 69ZEA provides exemptions from these requirements in relation to services critical to national security and essential services where continuity of service or production in the essential service is critical to the public interest and unreasonable costs would be imposed on the employer in replacing the employee during the rest breaks and meal breaks. By agreement, breaks for these employees may be taken in a different manner or compensation must be paid.¹²

[17] Section 69ZF provides that an employer is liable to a penalty for non-compliance with these requirements.

[18] Section 69ZG provides that an employer may provide an employee with enhanced or additional entitlements. It also provides that an employment agreement that provides less than the required breaks has no effect to the extent that it does so.

[19] Lastly, s 69ZH provides the relationship between breaks required under this Act and other enactments that provide for breaks. In essence, the employee must have at least the same number of breaks and of at least the same the duration.

¹² Employment Relations Act 2000, s 69ZEB.

Transitional arrangements

[20] Renee Snelgrove, an employee of Tranzurban's parent company, Tranzit Group Ltd, gave evidence in the Employment Court. Ms Snelgrove was responsible for incorporating the required meal and rest breaks into the bus driving shifts for Tranzurban and other companies in the group. Ms Snelgrove said that it was apparent to the Government and industry participants that the new scheme would create some challenges for bus operators with scheduling breaks and potential service disruption.

[21] As a result, on 29 April 2019 a memorandum of understanding was signed between the New Zealand Council of Trade Unions (on behalf of the Union and other unions), the Regional Council, the Bus and Coach Association of New Zealand and the Ministers of Transport and for Workplace Relations and Safety. Its stated aim was:

... to achieve the smoothest possible transition to the implementation of the amended rest and meal break provisions ... [to] ensure bus drivers receive the rest and meal breaks they are entitled to while minimising service disruption and safety risks, and costs to councils, bus operators and the Government.

[22] The memorandum covered a transition period of up to 12 months commencing on 6 May 2019. Amongst other things, it set out principles for cooperation and provided for the New Zealand Transport Agency | Waka Kotahi to monitor the scheduling of rest and meal breaks. It also recorded that the Government would make a new Land Transport Rule to come into effect before 6 May 2019 that would set out clear parameters for the rest and meal breaks for bus services.

[23] In accordance with the memorandum, the Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019 (the Rule) was introduced by Order in Council with effect from 6 May 2019 and to expire on 6 May 2020. Its purpose was to provide short term measures to enable the transition. It provided that where there was agreement between the operator and the driver as to the times at which the driver would take the 10-minute breaks, then the breaks were to be taken at those agreed times. Otherwise the 10-minute breaks were to be taken as set out in the Rule, unless that would have a disruptive impact in which case the operator could adjust the scheduling of the 10-minute breaks to minimise the disruptive impact.

Tranzurban arrangements

Collective Agreement

[24] The Union and Tranzurban signed a Collective Agreement covering the period 1 April 2020 to 30 June 2021.¹³ Kevin O’Sullivan, the secretary of the Union gave evidence at the Employment Court hearing in March 2022 that a further collective agreement had been negotiated and was ready for signing. This made no substantive changes to the one covering the 1 April 2020 to 30 June 2021 period.

[25] Clause 8 of the Collective Agreement provides:

8. DAYS AND HOURS OF WORK

Roster

A plan outlining the employee’s shifts to be worked, including days and hours of work and rostered days off.

Shift

A workplan for the day detailing duties to be completed. An employee may be allocated multiple shifts during a workday. A shift may include multiple work periods.

...

[26] Clause 11 provides:

11. MEAL BREAKS AND REST PERIOD

11.1 Rest and meal breaks will be scheduled in accordance with the employee’s entitlement within relevant legislation. The employee agrees to take their rest and meal breaks at the times scheduled within their work period as set out in the shifts provided to the employee by the Company. In providing agreement the employee recognises that:

11.1.1 Break times will change from shift to shift. The Company will endeavour to schedule breaks at regular portions throughout each shift or work period; however, the timing of breaks will be subject to any industry principles that the company has accepted, following facilitated meetings commissioned by NZTA. Where this is not possible, breaks may be scheduled at the outset or at the end of a work period

¹³ The Collective Agreement was entered into while the Authority’s determination was reserved. It was therefore not considered by the Authority but it was considered by the Employment Court.

as the operational requirements of a scheduled and semi-scheduled bus driving operations allows.

- 11.2 The Company will provide tea, coffee, milk and sugar at all Tranzurban depots. Where the employee is required to have a break away from the depot, provisions will be supplied.
- 11.3 If an unpaid meal break is required to be taken away from the employee's home depot, the employee will be paid a meal allowance in accordance with Schedule 2.

Tranzurban shifts

[27] In her evidence in the Employment Court, Ms Snelgrove said that, as at July 2021, Tranzurban operated 197 shifts in the Hutt Valley, of which 33 per cent were split shifts and the remaining 67 per cent were "straight shifts". She anticipated that the number of split shifts would decrease to 17 or 18 per cent in 2022. She explained that the reason split shifts were used was because public transport demand has two peaks, one in the morning and one in the afternoon. This required Tranzurban to provide more vehicles and drivers during the morning and in the afternoon to transport the public.

[28] The evidence before the Employment Court included examples of Tranzurban split shifts. These examples were as follows:

- (a) Shift 2107 was a Rongotai depot split shift applying from 5 September 2021.¹⁴ It was for eight hours and 20 minutes of work (inclusive of rest breaks and exclusive of meal breaks). The middle period between the split shifts was just under four hours. The sign-on at the depot for the first part of the shift was at 5.58 am, with a driving route commencing at 6.08 am and arriving at Churton Park at 7.28 am, a paid rest break at Churton Park from 7.28 am to 7.38 am, a further driving route returning to the Rongotai depot at 9.28 am and a sign-off at 9.31 am. The sign-on for the second part of the shift was at 1.17 pm, with a driving route that returned to the Rongotai depot via a staff car at 3.30 pm, with a paid rest break from 3.30 pm to 3.40 pm, a further driving route with a return

¹⁴ This shift was replaced in February 2022. The evidence does not cover the details of the replacement shift.

to the Rongotai depot at 5.54 pm, an unpaid meal break from 6.04 pm to 6.34 pm, and a sign-off at 6.34 pm.

- (b) Shift 2112 was a broadly similar Rongotai depot split shift applying from 25 July 2021 but covering different routes and eight hours and four minutes of work (inclusive of rest breaks and exclusive of meal breaks) with a middle period between the split shifts of just under four hours. In summary it had a sign-on at the Rongotai depot at 6.18 am, a rest break at 7.22 am to 7.32 am at the Wellington depot and sign-off at 9.03 am. It then had a sign-on at 12.48 pm, a rest break at 3.41 pm to 3.51 pm at the Island Bay depot, a meal break from 6.07 pm to 6.37 pm at the Rongotai depot and sign off at 6.37 pm.
- (c) Shift 2417 was a Lower Hutt depot split shift applying from 18 October 2021. It was for eight hours and 21 minutes of work (inclusive of rest breaks and exclusive of meal breaks). The middle period between the split shifts was just over three hours. The sign-on for the first part of the shift was at 6.39 am, with a driving route that returned to the Lower Hutt depot at 8.53 am, a paid rest break at the Lower Hutt depot by staff car from 9.30 am to 9.40 am, a further driving route with a return to the Lower Hutt depot by staff car at 11.21 am with a meal break from 11.26 am to 11.56 am and a sign-off at 11.56 am. The sign-on for the second part of the shift was at 3.01 pm, with a driving route that returned to the Lower Hutt depot at 4.05 pm, a paid rest break from 4.10 pm to 4.20 pm, a further driving route with a return to the Lower Hutt depot by staff car at 6.25 pm and a sign-off at 6.35 pm.
- (d) Shift 2507 was an Upper Hutt depot split shift applying from 18 October 2021. It was for eight hours of work (inclusive of rest breaks and exclusive of meal breaks). The middle period between the split shifts was three hours and 45 minutes. The sign-on for the first part of the shift was at 6.07 am, with a driving route arriving at Te Marua at 7.58 am, a paid rest break at Te Marua from 7.59 am to 8.09 am, a further driving route with a return to the Upper Hutt depot

at 9.55 am and a sign-off at 10.00 am. The sign-on for the second part of the shift was at 1.45 pm, with a driving route that returned to the Upper Hutt depot at 4.27 pm, a paid rest break from 4.32 pm to 4.42 pm, a further driving route with a return to the Upper Hutt depot at 5.42 pm, and then an unpaid meal break from 5.52 pm to 6.22 pm and a sign-off at 6.22 pm.

[29] An example of a shift that was not split was Shift 2469. It was a Wainuiomata depot shift applying from 18 October 2021. It was for 10 hours and 24 minutes of work (inclusive of rest breaks and exclusive of meal breaks). The sign-on was at 7.03 am. There was then a route that returned to the Wainuiomata depot at 9.24 am with a paid rest break from 9.29 am to 9.39 am. There was then a further driving route with a return to the Lower Hutt depot by staff car at 12.18 pm with an unpaid meal break from 12.18 pm to 1.38 pm. There was then a route that arrived at the Courthouse at 2.58 pm with a paid rest break there from 3.00 pm to 3.10 pm. The next route returned to the Courthouse at 4.17 pm with a paid rest break from 4.20 pm to 4.30 pm. Lastly there was a route that returned to the Wainuiomata depot at 6.17 pm with a sign-off at 6.47 pm.

[30] Ms Snelgrove's evidence was that generally the Tranzurban rest breaks would allow enough time after driving a scheduled route for the driver to be running late and still have enough time for their 10-minute break. She also said that wherever possible they did not schedule breaks in the first or last hour of a work period. Shifts 2107, 2112 and 2507 were provided as examples for the Employment Court of where meal breaks were scheduled at the end of a shift but this was not the case for the majority of shifts.

[31] In the above examples of split shifts the middle period was between three and four hours. As at July 2021, 56 per cent of split shifts had a non-rostered time of between two to three hours and 44 per cent had a period of three to four hours.¹⁵

¹⁵ We understand this is based on 63 split shifts. Elsewhere Ms Snelgrove said there were 65 split shifts. We understand the difference is because two of the 65 shifts would not require an additional rest break on the Union's approach to the definition of a work period. They were therefore excluded from her calculation of the cost estimate at [38] below.

[32] Ms Snelgrove explained that Tranzurban had no middle periods of longer than four hours because long middle periods was a contentious issue when Tranzurban took over the Regional Council contracts. Tranzurban took that on board and put in place a maximum of four hours. Ms Snelgrove also explained that over time Tranzurban put in place a policy that a middle period of less than two hours was treated as a single work period (that is, a straight shift). Having a minimum of two hours between split shifts reflected that all Tranzurban scheduled meal breaks were between 30 minutes and one hour. A middle period of two hours or more for a split shift reflected that this was more than double the length of meal break.

[33] During the middle period, Ms Snelgrove said that the driver signed off from work and was entitled not to be at work. She said that Tranzurban had a policy of only giving “local drivers” split shifts so they could go home in their down time. She said that during the period between shifts, only a few drivers normally stayed around. The majority left the depot. Many played golf or went swimming, often together in groups, or had a shared meal.

[34] Ms Snelgrove also said that Tranzurban had been working with the Regional Council to reduce the impact on drivers of split shifts (which she referred to as “ugly shifts”). This involved trying to schedule more services between peak hours in order to provide more paid time for drivers during off-peak hours rather than having their day split. Some improvements in Wellington City were already in place and, at the time of the hearing, work on improvements in the Hutt Valley was to start soon.

Other evidence

[35] Benjamin McFadgen, the chief executive of the Bus and Coach Association, gave evidence in the Employment Court. He carried out a survey of the eight significant bus operators in the Wellington and Auckland public sectors. Of the eight, only one indicated they were not using split shifts at all. Of those using split shifts, one treated the split shifts as a singular work period for rest and meal break purposes. The average period of time between the split shifts was three to four hours.

[36] Mr O’Sullivan gave evidence to the effect that split shifts could be written for long hours from signing on at the start of the day to signing off at the end but with

insufficient paid rest breaks. He gave evidence of shift 2469 operated out of Wainuiomata effective from 6 May 2019, that is before the 2018 Amendment Act came into force.¹⁶ This shift was:

7.10 am to 8.46 am	working
8.46 am to 11.42 am	no work
11.42 am to 2.38 pm	work
2.38 pm to 3.08 pm	no work
3.09 pm to 7.41 pm	work

[37] In this shift the total period between signing on at the start of the day and signing off at the end of the day was 12 hours and 31 minutes. On the Union's approach to the meaning of s 69ZC of the Act, the employee would be entitled to three paid rest breaks and two (unpaid) meal breaks. On Tranzurban's approach, there would be two paid rest breaks and one (unpaid) meal break. The difference arises because the break between 8.46 am and 11.42 am is more than two hours so would be treated as the end of a work period under Tranzurban's policy.

[38] Ms Snelgrove's evidence was that the Union's approach would add a cost of approximately \$57,000 for the additional paid rest breaks.

Employment Court

[39] The Employment Court noted that under s 69ZC(a) of the Act the meaning of "work period" was to be in accordance with an employee's terms and conditions of employment.¹⁷ The Judge therefore accepted that recourse to the terms and conditions of employment would normally establish the factual question of when work duties start and finish.¹⁸ The Judge also accepted that the terms and conditions were not

¹⁶ See [29] above for the later version of shift 2469.

¹⁷ Employment Court judgment, above n 2, at [31].

¹⁸ At [32] and [47].

necessarily determinative because an employer was required to provide the minimum statutory requirements.¹⁹

[40] The Judge considered the clear implication of the statutory entitlements was that each of the periods in s 69ZD(2)–(7) were contiguous and that work breaks would be contiguous with work duties.²⁰ It followed that the proper interpretation of the statutory words was that rest and meal breaks were calculated by reference to hours when an employee had work responsibilities or was on a contiguous authorised break.²¹ This was consistent with the purpose of the minimum standards which was to enable workers time to rest, refresh and eat during working hours and for workers' wellbeing.²²

Assessment

[41] The starting point is the definition of “work period” in s 69ZC as the minimum entitlements in s 69ZD are determined with reference to an employee's work period. Work period is defined under s 69ZC(a) with reference to when an employee starts work in accordance with their terms and conditions of employment and when they end work in accordance with those terms and conditions. Under s 69ZC(b) it includes all authorised breaks whether paid or not during this period.

[42] Authorised breaks are those provided to an employee (that is, in addition to the statutory entitlements as contemplated by s 69ZG) or to which they are entitled during the work period (that is, the statutory entitlements under s 69ZB). The statutory rest and meal breaks entitlements are to be taken at a time agreed between the employer and the employee or, in the absence of an agreement, at the times set out under s 69ZE(3)–(7).

¹⁹ At [34].

²⁰ At [39] and [43]. At [42], the Judge referred to *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 5, at [12] where this Court said in respect of a previous iteration of the rest and meal break provisions: “Given that the required ‘break’ is from the employee's ‘work’ and it is to be ‘paid’, a natural inference is that what is to be paid for the break is that which is being paid for the work at the time”.

²¹ At [45].

²² At [57].

[43] The issue is whether a driver has ended work when the driver signs off for the first part of a split shift and begins again when the driver signs on again for the second part of the split shift or whether they are on an authorised break during a work period.

[44] The Union submits this mid-shift break is a break provided to the driver and is therefore an authorised break under the “work period” definition. The Union submits the purpose of s 69ZC(b) in the “work period” definition is to prevent an employer from excluding authorised breaks it provides to the employee or to which they are entitled when calculating work period length. It submits that Tranzurban’s approach enables an employer to establish work practices that circumvent the employee’s rest and meal break entitlements.

[45] Tranzurban submits the Union’s position is inconsistent with the plain meaning of s 69ZC and the purpose of the Act and is contrary to the Collective Agreement which expressly recognises that a shift can contain multiple work periods. It says it would result in the absurd outcome of having paid and unpaid breaks scheduled during periods that an employee is not actually working. We agree with Tranzurban for the following reasons.

[46] There is nothing in the words of s 69ZC that suggest that the start and end of work cannot happen more than once in any particular period. The start and end of the work period are determined with reference to the employee’s terms and conditions of employment. Those terms and conditions for the Union’s members who drive for Tranzurban under the Collective Agreement provide for shifts that will detail the duties to be completed in a work day and contemplate more than one work period for a shift and the potential for more than one shift to be worked in a work day.

[47] Further, s 69ZD contemplates a single work period, with paid rest breaks and unpaid meal breaks determined in increments of two hours of work up to eight hours, and more if the period of work is more than eight hours. It is implicit in s 69ZD, and consistent with s 69ZC, that the calculation is based on the period of time during which the employee is working or is on a paid rest break or unpaid meal break or other authorised break. This is the approach that Tranzurban takes to the paid rest breaks and unpaid meal breaks set out in the example shifts above.

[48] Under the Act, when an employee's employment agreement does not include rest or meal breaks additional to the statutory entitlements (and does not authorise any other break from a continuous work period), the continuous work period for the purposes of calculating the statutory entitlements to rest and meal breaks will include those entitlements. When an employee's employment agreement includes rest and meal breaks in excess of the statutory entitlements, then the agreement will govern the rest and meal breaks to which the employee is entitled rather than s 69ZD. Whether the agreement provides for breaks that exceed the statutory entitlements will, as in the case of a contract under which only the statutory entitlements apply, be determined by calculating the work period in increments of two hours inclusive of the authorised breaks (those agreed under the contract as against those under s 69ZD).

[49] We agree with Tranzurban that this approach is consistent with the purpose of the statutory entitlements to rest and meal breaks. As set out earlier, in introducing the Bill that reinstated these entitlements, the explanatory note said the changes were intended to introduce greater fairness (by ensuring that all workers have the minimum entitlements) and to promote productive employment relationships.²³ The Minister for Workplace Relations and Safety described the purpose as being to "give employees enough time to rest, refresh, and eat during working hours and be able to continue to work safely".²⁴ We note that a rested, refreshed and nourished driver is consistent with promoting a productive employment relationship.

[50] When a bus driver is on a split shift, they are free to do whatever they wish during the middle period because they have signed off from work during this period. The evidence was that many go home, play golf or swim, but they can do what they wish to refresh for the second part of their split shift because they are not under the control of their employer during this period. They do not need to be provided with a further opportunity to rest, refresh and eat because of this middle period when that middle period is already their own. Tranzurban's approach is therefore not inconsistent with a productive employment relationship nor with ensuring its drivers have enough time to rest, refresh and eat during working hours so as to continue to work safely.

²³ Above at [8].

²⁴ Above at [9].

[51] Nor is this approach inconsistent with the broader object of the Act which amongst other things is to build productive employment relationships through promoting good faith including by promoting collective bargaining and protecting the integrity of individual choice. The Union raises the concern that employers could cynically employ staff for two hour periods with a gap between each two hour period to avoid providing any rest or meal breaks. However, such an approach would need to be considered on the facts and may well be ineffective on that factual assessment in meeting any such objective. That is because a small gap between the two hours period would likely be treated as a continuous period of work.

[52] In the present case, such an approach is not evident. Tranzurban's shifts are designed around bus routes and demands and it has worked with the Regional Council to reduce adverse impacts on its drivers from its shifts. Further, Tranzurban treats breaks of less than two hours as part of the work period and breaks of at least two hours as breaks that are not part of a continuous work period. That approach is not consistent with a cynical approach to scheduling work periods. Rather it is consistent with a genuine approach to ensuring that its drivers receive at least their statutory entitlements. It is only when the break is more than twice a one hour meal break, that the shift is treated as two work periods rather than a continuous work period.

[53] It follows that we conclude that the Employment Court did not err in its interpretation of s 69ZC. Tranzurban's approach to split shifts is consistent with the Collective Agreement and it does not deprive their drivers of their minimum rest and meal break entitlements.

Result

[54] The appeal is dismissed.

[55] We answer the question of law as follows:

Did the Employment Court err in its interpretation of s 69ZC of the Employment Relations Act 2000?

No.

[56] The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

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