
STATES OF JERSEY



STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE MINISTER FOR INFRASTRUCTURE REGARDING THE MINISTER’S ACTIONS UNDER CLAUSE 18.3 OF THE CONNEX BUS CONTRACT

**Presented to the States on 1st April 2016
by the Privileges and Procedures Committee**

STATES GREFFE

REPORT**Foreword**

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint against the Minister for Infrastructure regarding the Minister's actions under clause 18.3 of the Connex bus contract.

Connétable L. Norman of St. Clement
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD**24th February 2016**

**Findings of the Complaints Board constituted under
the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint
by the Transport and General Workers' Union (now Unite the Union)
against the Minister for Transport and Technical Services
(now the Minister for Infrastructure) regarding the Minister's actions under
clause 18.3 of the Connex bus contract**

1. Present**Board members –**

C. Beirne (Chairman)
G. Marett
J. Eden

Complainant

Advocate C. Hall, Viberts (representing Unite the Union)
N. Corbel, Regional Officer, Unite the Union
G. de Heaume, Staff representative, CT Plus
J. McCartan, Unite the Union

Minister for Infrastructure

Advocate V. Milner, Callington Chambers (representing the Minister for
Infrastructure)
T. Dodd, Director of Transport, Department for Infrastructure (DfI) (formerly
Transport and Technical Services (TTS))
J. Winter, Deputy Chief Executive Officer, HCT Group (Parent company of
CT Plus)
K. Hart, General Manager, CT Plus
A. Miziolek, Project Manager, DfI
J. Rogers, Chief Executive Officer, DfI

States Greffe

L.-M. Hart, Deputy Greffier of the States
K.L. Slack, Clerk.

The Hearing was held in public at 9.30 a.m. on 24th February 2016, in the Blampied Room, States Building.

At the time that this complaint was initially brought, the Department for Infrastructure was known as the Transport and Technical Services Department (TTS) and the Department is, therefore, referenced throughout as TTS.

2. Summary of the dispute

- 2.1 The Board was convened to hear a complaint by Unite the Union (formerly the Transport and General Workers' Union, ('Unite')) against the Minister for Transport and Technical Services (now the Minister for Infrastructure, ('the Minister')) relating to the Minister's actions under clause 18.3 of the Connex bus contract ('clause 18.3'), which read:

“On expiry of the Contract or early termination for whatever reason, the [Minister] shall or shall procure that any other body issuing tender documentation shall:

Require in any tender documentation that the incoming service provider submit proposals that ensure that all of the Contractor's staff, with the exception of the general manager and any director of the Contractor, as at the date of the issue of any tender documentation are taken on by the incoming service provider on the same terms and conditions as apply at the date of the issue of any tender documentation and use its reasonable endeavours to facilitate the transfer of the staff from the Contractor to the incoming service provider provided always that the Contractor shall fully co-operate with both the [Minister] and the incoming service provider by providing them both with such employee information as is reasonably necessary for the [Minister] to compile any tender documentation and for bidders properly to price their bids and for the incoming service provider to take on the Contractor's staff.”

- 2.2 The Chairman formally welcomed both parties to the meeting and outlined the terms of Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982, against which the complaint would be considered. He reminded both parties that the Board was an independent body and not a court of law, and that those giving evidence should feel that they could express their concerns openly and genuinely. He advised that the members of the Board had read the written submissions, which recognised the history of the concern that had originated when the transfer of the bus contract from Connex to CT Plus had taken place. However, the Board's role was not to fall back into historical reflection on the background to the complaint, but specifically to examine the Minister's actions in respect of clause 18.3 and, in so doing, to discern and decide whether the Minister had fulfilled his obligations thereunder as reasonably as he possibly could. The Chairman reminded both parties of the importance of presenting to the Board the information on which they would rely to argue their cases in respect of clause 18.3.

3. Summary of the Complainant's case

- 3.1 Advocate Hall, on behalf of Unite, argued that when CT Plus had taken over the bus contract from Connex in 2013, those staff (notably the bus drivers) who had previously been employed by Connex had become employees of CT Plus on less favourable terms and conditions than they had previously enjoyed when working for Connex. The material changes centred on the reduction in salary and changes to shift pay, 'spread-over pay' and sickness allowances.
- 3.2 Advocate Hall opined that the complaint was straightforward. It was not disputed that the Minister had a duty to the then employees of Connex when the

bus contract was transferred to CT Plus. The key issue centred on whether the Minister had ‘performed’ in relation to that obligation. It was for the Board to decide whether the employees had been transferred from Connex to CT Plus on largely the same terms and conditions as they had previously enjoyed, and Advocate Hall acknowledged that it was for Unite to demonstrate that there had been a substantial change to the same. If the Board members were satisfied that there had been a material change to the terms and conditions, it was for them to determine whether the actions of the Minister, in effecting those changes, were reasonable.

- 3.3 In the view of Advocate Hall, the loss in salary was a key change, which had resulted in a serious detrimental impact upon the drivers’ lives, as they had become accustomed to receiving a certain level of remuneration and had budgeted accordingly. The Board was reminded that the bundle contained statements provided by several of the drivers, in which they indicated how their quality of life had been adversely affected by the change. Unite’s complaint also focused on changes that had been made to the sick pay provision which, they argued, were significant. It was acknowledged that there were allegations that, under Connex, sickness benefit had been misused by some drivers, who would use their sick pay entitlement to bolster their holiday allowance. However, it was argued that if CT Plus believed that the system was being abused, it should have put management procedures in place to prevent this, rather than making a substantial change thereto, which had affected those employees who had significant health issues and who really needed it.
- 3.4 Advocate Hall urged the Board to consider why clause 18.3 had been included in the Connex contract. She suggested that it was indicative that the States of Jersey felt that the drivers should benefit from something akin to the UK Transfer of Undertakings (Protection of Employment) Regulations (TUPE), which afforded certain protections to employees when they transferred from one employer to another. It was accepted that, under TUPE, changes could be made to terms and conditions on various grounds, including operational efficiency, profitability or health and safety, and it was noted that in its contract with TTS, CT Plus had been required to reduce the maximum time that drivers could work each week to 54 hours (or 60 in urgent cases) for health and safety reasons. However, Advocate Hall advised that this was not a source of complaint, as it was only a small minority of the drivers who had worked such long shifts and the majority welcomed the cap on hours.
- 3.5 The drivers took issue with the reduction in the overtime rate and the removal of the standby, shift and ‘spread-over’ pay and the performance allowance, which, CT Plus would argue, was counter-balanced by an increase in the basic hourly rate. This was contested by Unite, as it did not compensate for the monies that the drivers had ‘lost’, and Unite felt that the Minister would have been aware of this, had he done the necessary calculations. It was alleged that the drivers’ working day had, effectively, changed very little, but they were being paid less. It was stated that they were still working overtime and, whereas under Connex they had been paid for the downtime between shifts, this was no longer the case, although they still worked split shifts. The Board’s attention was drawn to a document, entitled ‘Wage comparison of Connex to CT Plus’ and its appendices, which, it was argued, demonstrated that the drivers earned significantly less under the current employer than they had under Connex.

- 3.6 Advocate Hall expressed the view that the figures for standard hours and overtime that had been included in paragraph 9 of the Minister's final report were incorrect and also did not include the shift and performance allowances. Therefore, this gave a distorted view of the hours worked by a particular driver, who was, in her opinion, one of the most extreme examples that the Minister could have chosen to demonstrate a driver earning an inflated salary through overtime. Whilst the Minister's calculations indicated that this particular individual had worked 70 hours per week, the use of the figures provided by Advocate Hall showed him to have in fact worked for 62.9 hours. A review of this particular driver's hours showed that he had worked an average of 58 hours per week under Connex and 42 under CT Plus. It was suggested that the incorrect calculations were, perhaps, indicative that the Minister did not understand how the drivers were paid, and that he had listened to rumour and gossip, such as the JEP headline alleging that drivers earned £70,000 per year, rather than grasping the facts. None of the drivers had earned that amount, she explained, and the few that earned more than £60,000 had worked excessive hours in order to do so. She acknowledged that there were claims that some of the drivers had complained about the amount of overtime they were working, but stated that these claims were unsubstantiated and that the majority of the drivers had been adversely affected by the change in terms and conditions.
- 3.7 The Board heard from Mr. N. Corbel and Mr. J. McCartan from Unite the Union in respect of meetings that had been held between Unite, TTS, Connex, CT Plus and the Jersey Advisory and Conciliation Service (JACS) on 10th October 2012, 25th October 2012 and 18th December 2012. They stated that there had been no opportunity for them to negotiate at those meetings, and that when they had made enquiries about the CT Plus terms and conditions, they had been told that they would be placed on the company's website and published. In their view, they were faced with the choice of either accepting the terms and conditions or walking away. They accepted that the meetings were open and amiable, but had expected to receive from CT Plus the same terms and conditions that they had enjoyed under Connex. They disputed claims of bullying, and allegations that only an elite group of drivers had benefitted from working excessive overtime. They informed the Board that they had been turned away by CT Plus from one meeting and had been disappointed by the Company's response in turning its back on Unite. They accepted that the Union was now recognised by CT Plus and had negotiating rights, but denied that the lack of industrial action by drivers since CT Plus had taken on the contract meant that they were happy with the terms and conditions.
- 3.8 In respect of the letter, dated 28th September 2012, from the Chief Officer of TTS to Mr. Corbel, in which the former set out the terms and conditions that were to be provided by CT Plus and asked for Unite's views, Advocate Hall conceded that no written response had been provided, but indicated that Unite representatives had verbally expressed their views at the meetings held with JACS.
- 3.9 The Board queried why Unite had not brought an application for judicial review if it felt so strongly that, having engaged with JACS, it had only accepted the new terms and conditions under protest. Advocate Hall advised that the Union had wanted to bring such an application but had, unfortunately, missed the deadline for doing so.

- 3.10 Advocate Hall argued that the Minister had not gone far enough under clause 18.3. She emphasized that Unite had provided the employment contracts and the hourly rates to TTS, so the Minister should have understood the detrimental impact that the removal of shift, performance and spread-over pay would have had on the drivers and he should have undertaken thorough calculations. It was strongly denied that Unite had hindered the process: they did not have an issue with CT Plus taking over the contract, but had sought to obtain substantially the same terms and conditions for the staff, of whom the drivers were the most adversely affected. She emphasized that the drivers had thought they would be protected and that none of their requests were unreasonable, and that they felt badly treated as a result of the transfer.

4. Summary of the Minister's case

- 4.1 Advocate Milner, on behalf of the Minister, indicated that it was important to consider the reason for the hearing, and emphasized the importance of the word 'reasonable' within Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982, and the higher threshold that had to be met. Simply to disagree with a decision was not to say that it was not reasonable. She argued that a reasonable person, after proper consideration of all the facts, could have acted in the same way as the Minister in this case, and opined that he had met his obligations under clause 18.3 and that, therefore, the complaint should be dismissed.
- 4.2 The original complaint of Unite, dated 21st January 2013, alleged a breach of undertaking, and stated: "Clause 18.3 did not require every tenderer to agree to accept transferring staff on the same terms and conditions as they had previously enjoyed." There was no suggestion that the tender document did not meet the requirements of clause 18.3, as it indicated at paragraph 5.9 that the tenderer was required to provide a proposal for the transfer of all the existing operator's staff based on the terms and conditions at the time of the tender. Further, there was no indication that the Minister did not facilitate the transfer of staff. Indeed, she stated that he had facilitated the transfer of all eligible staff and had gone further than required by also facilitating the transfer of some staff who did not meet the criteria. Therefore, she argued that both requirements of clause 18.3 had been met by the Minister.
- 4.3 Advocate Milner referred the Board to the Minister's résumé of the case, which had been prepared in February 2013, and included the letter, dated 28th September 2012, from the Chief Officer, TTS to Mr. Corbel. The letter set out the terms and conditions that were to be provided by CT Plus, which the Chief Officer felt were the same or better, and expressed disappointment that Unite had not identified specific areas of concern for its members in respect of the transfer. Advocate Milner emphasized that there had been no formal response from Unite to this letter, nor to an earlier letter from 2011 along similar lines.
- 4.4 She explained that from the time that the tender document had been issued in 2010, through to 2012, the Minister had endeavoured to work with Unite to understand the primary concerns of its members. However, a December 2012 press release, issued by Unite, indicated that the staff wished to remain in the employ of Connex under their current terms and conditions, and that they were going to ballot in this respect. The Board was informed that although Connex

had tendered for the bus contract, their bid had not been successful. It was emphasized that CT Plus was a social enterprise which was not profit-driven, and wanted to work for the benefit of the Island, so had no intention or reason to exploit the workforce.

- 4.5 Advocate Milner advised that all of the drivers who had provided witness statements had transferred from Connex to CT Plus. They had been given the option to take voluntary redundancy, but had not availed themselves of that opportunity and were aware of the CT Plus terms and conditions at the time of transfer. There had been 53 drivers working for Connex, of which 18 had provided statements, but CT Plus now employed 89 full-time drivers. The overall staffing levels had also increased from 123 under Connex to 175.
- 4.6 In relation to salary and sickness, Advocate Milner suggested that the report by Unite was misleading, as it made various references to drivers suffering a drop in annual income, a decrease in wages and a reduction in salary. However, she made the point that gross annual income, which included additional earnings such as overtime and other allowances, was very different from a person's contractual pay entitlement. Whilst it was accepted that the gross annual income of some of the drivers had decreased under CT Plus, the rate of basic pay (salary), which was contractual, had increased. Also, drivers were contracted to work the same number of basic hours as they had under Connex, namely 39 hours per week, but they would work a 5-day week, rather than the 6-day week they had worked under Connex. It was accepted that the overtime rate had changed, but it was argued that there was no contractual entitlement to overtime, and those drivers who wished to work overtime, up to a maximum of 54 hours per week, could earn approximately £40,500.
- 4.7 The Board's attention was drawn to the statement of Ms. J. Winter, the Deputy Chief Executive Officer of HCT Group (the parent group of CT Plus), in which she explained that the intention of CT Plus had been to make bus driver earnings more transparent and fair. By consolidating certain rates and allowances that had been paid by Connex, they had been able to provide a higher basic rate of pay and introduce a more efficient system that was fairer for the drivers and safer for those who used the buses, by reducing the maximum number of hours worked.
- 4.8 Advocate Milner informed the Board that the particular driver, to whom Unite had referred at paragraph 3.6, had not been chosen as an extreme example, but because his statement had been the first one in the bundle. Even accepting the error in calculation of his hours, he had still worked over 63 hours per week, which was above the level that the Health and Safety Inspectorate deemed to be safe. It was noted that in the UK, Unite the Union had run a campaign to cap the maximum working hours of their members at 54 per week, but the local Union had refused to promote that campaign. Advocate Milner provided other examples of drivers who had worked well in excess of 60 hours (87 hours and 68 hours respectively) as evidenced by the payslips that had been provided, and it was suggested that there was a significant overtime culture under Connex. It was accepted that some drivers' gross annual earnings had decreased, but this was due to the reduction in overtime rates and the cap on the maximum hours that they could work for health and safety reasons. It was emphasized that it would have been difficult for the Minister to carry out an accurate analysis of

the likely changes to gross annual income for the drivers, because the information to make the comparison was not forthcoming.

- 4.9 Unite had suggested that the Minister had ‘let sleeping dogs lie’ in respect of his obligations under clause 18.3 to obtain the necessary information. This was strongly contested, and Advocate Milner advised the Board that the Minister and TTS had worked throughout to ensure that Unite was engaged and had sent them information, seeking clarification as to whether it was accurate. It was emphasized that TTS was not the employer of the bus drivers, so did not hold the information in relation to individual overtime or earnings, which would have assisted CT Plus. Unite could have indicated that the drivers would lose money as a result of the change, but failed to do so; did not respond to correspondence, and did not indicate what their concerns were. It was mooted that the reason for this could be that the information would have demonstrated that some of the drivers were earning huge amounts by exploiting an unsafe and unprincipled system.
- 4.10 In relation to the changes to sick pay entitlement, Advocate Milner informed the Board that the information on sickness levels, requested by the Minister, had not been provided by Connex because Unite, who had a data protection agreement with Connex, refused to allow disciplinary or sickness information to be provided to CT Plus without members’ permission. Consequently, staff who were transferred from Connex to CT Plus did so on a ‘clean sheet’ basis on CT Plus’ terms and conditions in relation to sickness. The maximum amount of sick leave payable under Connex was 20 weeks for staff with over 7 years’ service which, Advocate Milner explained, was not normal in the bus industry, whereas under CT Plus, new employees were entitled to paid sick leave, but this was capped at a maximum of 8 weeks’ full pay and 6 weeks’ half pay for all employees of more than 4 years’ service. Whilst 36 employees had been entitled to benefit from sickness pay under Connex, CT Plus had extended the entitlement to include part-time drivers and the school bus drivers, so that 96 employees were eligible.
- 4.11 Whilst Advocate Milner accepted that genuine sickness occurred, she suggested that sickness levels under Connex had been abnormal and were historically of the order of approximately 20%, whereas the rate under CT Plus was now 3%. She referenced the allegation that there was a sick rota under Connex, and that some drivers had taken all the paid sick leave to which they were entitled in order to bolster their holiday entitlement.
- 4.12 The Board heard from Mr. T. Dodd, the Director of Transport, TTS, who had been involved in work on the tender leading to the 2013 contract. He expressed the view that the Minister did meet his obligations under clause 18.3, but he considered that he had been thwarted in his attempts to obtain data from Connex to inform the tender process, as Unite had controlled the flow of information in order to protect the interests of a small, select group of its members. Consequently, despite best efforts by TTS and the Minister, Connex did not ultimately furnish a definitive, complete single package of employee information, but did provide enough to enable CT Plus to allow the staff’s basic terms and conditions to be priced within the tender. CT Plus had endeavoured to speak directly to staff in order to obtain specific information about them, and to explain about their company, but had been opposed in their efforts by Unite, so had resorted to meeting employees away from the workplace because of

allegations of intimidation and bullying. He informed the Board that these allegations, combined with what CT Plus had learned of the alleged systematic abuse of overtime, sickness and standby, had led the company to decide to take on the staff on a 'clean break' basis. This had been strongly resisted by TTS, as it was keen to ensure the best possible arrangements for the employees, whilst acknowledging the difficulties that CT Plus had faced in obtaining background information. Ultimately, CT Plus agreed to accept the staff with transferred continuity of employment, but with CT Plus terms and conditions.

- 4.13 The Board heard from Ms. J. Winter, Deputy Chief Executive Officer of HCT Group, the Parent company of CT Plus, who explained the frustration that had been experienced when endeavouring to obtain specific information from Connex on each individual employee who was eligible to transfer. In her view, the lack of clear data had given rise to rumours and anxiety, and it was unfortunate that it was still being discussed 3 years on, at a time when the working relationship with Unite was much improved. Ms. Winter accepted that CT Plus had been furnished with generic job descriptions, but stated that these didn't contain clear information on which driver was entitled to which terms and conditions, nor did they indicate how long each individual had been employed. Ms. Winter advised the Board that in 20 years working for HCT Group, she had never experienced such resistance when attempting to obtain information. She indicated that staff from TTS had been tireless in working through the information that had been provided to CT Plus, and in trying to get the details that they needed from Connex.
- 4.14 Mr. Dodd advised the Board that on 8th October 2012, an illegal 'wild cat' strike had taken place. TTS representatives met on 10th October 2012 with Unite, Connex, CT Plus and the Jersey Advisory and Conciliation Service (JACS) in order to seek to avoid further industrial action and to allay the fears of staff. A further meeting with JACS took place on 25th October 2012 and a third on 18th December 2012. Mr. Dodd provided the Board with e-mail correspondence, dated 20th November 2012, from the former Director of JACS to Mr. Corbel, in which he indicated that he believed TTS to have met its commitments in respect of using its best endeavours to facilitate the transfer of staff and demonstrating how drivers would earn their basic salaries for working 39 hours in a 5-day week, rather than in a 6-day week under Connex.
- 4.15 Mr. Dodd informed the Board that TTS had continued to broker negotiations with Unite, and JACS and felt that this was a clear indication of the Minister using all endeavours to facilitate the transfer of staff in compliance with clause 18.3. He praised the service provided by CT Plus who, he indicated, had brought new vehicles to the Island, introduced timetables to meet users' needs, and increased bus use by 22%.

5. Closing remarks by the Chairman

The Chairman thanked both parties for the time, dedication and care that they had taken in presenting their case in a reasonable and balanced manner. He was hopeful that this hearing would bring to a close a long chapter, in which many people had been involved. He thanked the bus drivers for their vocational commitment, and emphasized that there was a duty of care to ensure that they were appropriately remunerated and looked after. The Chairman explained that

it would be a challenging task for the Panel to reach a decision, and that they would take that responsibility seriously.

6. The Board’s findings

6.1 The Board considered whether the complaint could be upheld on any of the grounds outlined in Article 9 of the Administrative Decisions (Review) (Jersey) Law 1982, as having been –

- (a) contrary to law;
- (b) unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;
- (c) based wholly or partly on a mistake of law or fact;
- (d) could not have been made by a reasonable body of persons after proper consideration or all the facts; or
- (e) contrary to the generally accepted principles of natural justice.

6.2 The Board expressed the wish that every care should be taken to ensure that this situation should not arise again. It felt that when the bus contract next went out to tender, the equivalent of clause 18.3 should be amended to ensure that the Minister’s ability to obtain information could not be hampered in the way that it had been in 2012 by Unite and the outgoing contractor.

6.3 In the view of the Board, the role of Unite should have been to liaise with the Minister on behalf of its members. However, there had been a paucity of communication from Unite, which had been evidenced by the lack of response from them to letters from TTS, in which they had been specifically asked to identify the particular changes to the terms and conditions with which they took issue.

6.4 The Board concluded that the Minister had correctly interpreted his duties under clause 18.3 to ensure equivalency and supported the drivers to the limit of his ability to do so, and the Board, therefore, did not uphold the complaint.

Signed and dated by:

C. Beirne, Chairman

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G. Marett

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J. Eden