

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 20/08
5092776

BETWEEN POSTAL WORKERS UNION
 First Applicant

 MARK DALLEY, JOHN
 EVRARD and KIM WILSON

 Second Applicant

AND NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Phil Yarrall, Advocate for Applicants
 Naomi Jones, Advocate for Respondent

Investigation Meeting: 7 November 2007 at Christchurch

Determination: 29 February 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The first applicant, Postal Workers Union (PWU), is a registered union representing postal workers.

[2] The second applicants, Mark Dalley, John Evrard and Kim Wilson, are members of the first applicant, and employees of the respondent New Zealand Post Limited. Mr Dalley and Mr Evrard are based at the Ferrymead delivery branch of New Zealand Post Limited and are employed as postal delivery officers. Ms Wilson was, until recently, employed as a full time permanent postal delivery officer at Ferrymead but is now an on-call postal delivery officer at Rangiora.

[3] PWU and the Postal Workers Association are federated and jointly negotiated the collective employment agreement 2006-2008 between Postal Workers Federation and New Zealand Post Limited (the collective employment agreement). The collective employment agreement covers the second applicants' work.

[4] The respondent New Zealand Post Limited (NZ Post) operates a postal service delivery throughout New Zealand.

[5] The problem that the first and second applicants want the Authority to determine is the release of, and payment for, the second applicants to attend mediation.

[6] The employment relationship problem came about when PWU wrote to NZ Post on 9 October 2006 and advised that the second applicants wished to proceed to mediation to discuss alleged personal grievances of unjustified action causing disadvantage.

[7] PWU was advised by NZ Post that the second applicants would have to apply for leave to attend mediation. Leave could be on the basis of special leave without pay, lieu days or on annual leave.

[8] Some correspondence took place between PWU and NZ Post before the statement of problem was lodged with the Authority. It appears that the original matter that was to have been the subject of mediation is not as pressing for reasons that I need not go into in this determination.

[9] The second applicants say that they have no ability to obtain lieu days. They say requiring their attendance at mediation either on leave without pay or on annual leave, is a breach of the express and implied terms of the collective employment agreement, a breach of certain provisions in the Employment Relations Act 2000 and the Holidays Act 2003.

[10] Mr Yarrall referred to the good employer obligations of NZ Post under the State Sector Act 1988 but probably intended to refer to the good employer obligations under the State-Owned Enterprises Act 1986.

[11] The first and second applicants seek a compliance order under s.137 of the Employment Relations Act 2000 that NZ Post comply with the good faith and fair treatment requirements and allow the second applicants to attend mediation on pay.

[12] NZ Post says in its statement of reply that it requires all its employees to apply for leave for all time away from work, including for mediation, and take either annual leave, special leave without pay or use lieu days owing.

[13] NZ Post says that its practice of offering employees the option of either annual leave, lieu days or special leave without pay to attend mediation, is lawful and meets its obligations under the collective employment agreement, Employment Relations Act 2000 and Holidays Act 2003. Further, it says there is no requirement at law for it to pay employees to attend mediation.

[14] I am satisfied that all parties to the collective employment agreement have had notification about this application.

The issues

[15] I discussed the employment relationship problem with the representatives at the commencement of the Authority's investigation meeting. There was agreement that the main issue for determination is whether NZ Post is in breach of express or implied provisions in the collective employment agreement and/or in breach of statutory obligations by not agreeing to pay the second applicants when they attend mediation to resolve an employment agreement problem. As part of determining that main issue, I will need to make findings about the release of employees of NZ Post for mediation and whether there is a breach in respect of that matter.

The evidence

[16] The second applicants gave evidence about the physical nature of their roles as postal delivery employees. They said they needed to have time to rest after working six days a week to recover from the physical exertion of delivering mail. The three applicants viewed their annual leave entitlements as precious and did not want to use them up for participation in mediation.

[17] The second applicants did not want to lose pay through unpaid leave to attend mediation and said in their evidence that they viewed themselves as being low wage earners.

[18] I accept the second applicants do not have the opportunity to obtain time in lieu to use for the purpose of attending mediation although there may be some other employees in NZ Post who have this opportunity.

[19] The second applicants thought it was unfair that management of NZ Post attended mediation and were paid for doing so and they were not. They gave evidence about the inconsistency in terms of whether or not an employee is paid to attend mediation. Mr Dalley said that he attended mediation about using a particular type of mail bag. Mr Dalley was paid for doing so on that occasion because he said that was a matter which NZ Post wanted to go to mediation about.

[20] The second applicants generally finished their work between 1pm–2pm but on occasions they could be required to work until 4pm. Mr Dalley explained that the physical nature of the job meant that they needed to go home and have a meal after work. He said that this was because there was no opportunity to eat on the round. The second applicants were not happy about attending mediation in their own time after they had completed their work.

[21] The Authority was provided with a sworn affidavit from Graeme Clark dated 10 October 2007. Mr Clark is the General Secretary of the Manufacturing and Construction Workers Union and the advocate for the Postal Workers Federation. Mr Clark confirmed in his affidavit that there was no agreement by him to any policy that members and delegates not be paid for attending mediation.

[22] For NZ Post, I heard from Duncan Burman who is the delivery business leader, Canterbury/West Coast, and Naomi Jones who is employed by NZ Post as an employment relations adviser (National Postal Services Group) in Auckland. Mr Burman said that NZ Post would not refuse leave for mediation except in the unlikely situation that there was a particularly short staffed day. Mr Burman gave evidence about the additional leave for an employee of NZ Post who had worked for longer than five years that is provided for in the collective employment agreement. Mr Burman said that he had tried to work around some of the second applicants'

concerns with the Mediation Service but it was not able to be managed on this occasion.

[23] Ms Jones says that she was unaware of any policy that NZ Post would pay for mediation and said there was no written policy at all with respect to mediation. Ms Jones said she was unaware of any situation where NZ Post had declined leave for an employee to attend mediation.

[24] Ms Jones said that NZ Post managers may approve payment to employees to attend mediation as part of the mediated settlement and there had been some approvals in the discretion of the manager for employees to attend mediation on pay prior to mediation taking place. Ms Jones said that if employees were dissuaded from attending mediation then it was an unintentional consequence.

Submissions

The applicants

[25] Mr Yarrall submits that there are inconsistencies in terms of how NZ Post dealt with employees attending mediation. He refers to alleged breaches of several clauses in the collective agreement in Part A, Part B and Part J, breaches of s.3 of the Holidays Act 2003 breaches of s.3(a), (i), (ii) and (v) and (vi) and (4) of the Employment Relations Act 2000 and breaches of good employer obligations NZ Post has to treat its employees fairly.

[26] Mr Yarrall submits that the Employment Relations Act 2000 was a move towards addressing the balance of power in an employment relationship, yet he submits NZ Post is wielding all the power and control about whether or not they release and pay employees to attend mediation.

The respondent

[27] Ms Jones said in her submissions that NZ Post expects all its employees to apply for leave in the normal way when they attend mediation and that such leave is inevitably granted. She said that NZ Post assists employees to be released for mediation and submits that NZ Post has used its discretion in terms of paying employees to attend mediation fairly and appropriately and had exercised it in good faith.

Determination

[28] The Authority has jurisdiction to make a compliance order under s.137 of the Employment Relations Act 2000. Compliance can be ordered in circumstances where any person has not complied with any provision of any employment agreement. Compliance can be ordered if any person has failed to comply with Part 1, Parts 3-7, or Part 9 of the Employment Relations Act 2000, terms of settlement and a demand notice. There can be an order for compliance under provisions of several statutes listed under s.137 and in terms of an order, determination or requirement given by the Authority under the Employment Relations Act 2000

[29] It is necessary in this case to consider whether there has been a breach of any express provision in the collective employment agreement or breach of the statutory obligations that Mr Yarrall relies on. If there is no express provision in the collective employment agreement or statutory obligation then it is necessary to consider whether a term that employees are paid when they attend mediation with NZ Post can be implied.

[30] Terms can be implied into an employment agreement in addition to those which have been expressly agreed. Terms can be implied by law and in fact.

[31] The difference between the two types of implied terms was described in *Scally v. Southern Health and Social Services Board* [1991] IRLR 522 as:

... between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary ingredient of a definable category of contractual relationship.

[32] The Court of Appeal in *Attorney-General v. NZ Post Primary Teachers Assn* [1992] 1 ERNZ 1163 recognised that the nature of employment agreements will affect the content of the implied terms (implied duties of fairness, confidence, fidelity and trust). The Court of Appeal said that this did not call for a different test for implication in a contract and that there was no established basis for implying terms into employment contracts simply because it would be reasonable to do so.

[33] The Employment Relations Act 2000 provides that parties have obligations and duties of good faith toward each other.

[34] S.161(2) of the Employment Relations Act 2000 provides that, except in certain circumstances, the Authority does not have jurisdiction to make a determination about any matter relating to bargaining or the fixing of new terms and conditions of employment.

Express terms

[35] Mr Yarrall relies on Part A, clause 14 of the collective employment agreement which is concerned with NZ Post's obligations to treat people fairly, including acting with procedural fairness when taking any action that affects a person's employment or role at NZ Post.

[36] Mr Yarrall also relies on Part J of the collective employment agreement which is about resolving employment relationship problems. Clause 8 of Part J is headed mediation services. It states that if an employee is not happy with the way their manager or other company representative has dealt with the problem or if the employee does not wish to discuss it with them, then the employee should contact the union, or the Mediation Services for free assistance. Clause 10 of Part J provides at any stage the employee is entitled to be represented by the union and the company will work with the employee and the union to try and sort out the problem. Part J contains a flow chart of the employment relationship problem resolution which includes mediation as part of the process.

[37] Mr Yarrall submits that requiring employees to take annual leave is a breach of Part B of the collective employment agreement which is concerned with holidays and desirability of time away from work. In his final submission Mr Yarrall put a hypothetical question as to what would happen if leave to attend mediation was refused. I am not satisfied from the evidence that NZ Post has refused leave or is uncooperative in arranging leave for its employees to attend mediation. I do not find in circumstances where it is up to the employee whether or not they take annual leave to attend mediation that there has been a breach of that part of the collective employment agreement.

[38] Although not relevant for the investigation that the Authority carried out in this matter, I note the provisions of Part K of the collective employment agreement

which part concerns union representation and paid leave for delegates. Clause 6 of Part K provides *delegates are entitled to reasonable time off on pay to deal with concerns of employees who are union members.*

[39] Whether or not that provision entitles delegates who attend mediation in their role to deal with employee concerns, was not specifically argued in the context of the matter that I was investigating because it was not about a delegate dealing with the concerns of another employee.

[40] In the absence of a live issue before the Authority about clause 6 of Part K any determination about its interpretation, application or operation will have to wait for another day.

[41] When employees have an employment relationship problem there are a series of steps which are set out in Part J of the collective employment agreement to be followed. Employees in NZ Post are entitled to union representation in that process and in my view entitled to expect NZ Post will be constructive and fair and not inhibit the employment relationship problem resolution process.

[42] Part K, clause 6 aside for the time being, I do not find there is an express term in the collective employment agreement that provides that an employee who attends mediation with NZ Post will be paid.

Statutory requirements or obligations to pay employees to attend mediation

[43] Mr Yarrall submits that Part 1, s.3 of the Employment Relations Act 2000, is breached by NZ Post by their requirement that their employees apply for, and take leave either unpaid or from their annual leave entitlement when they attend mediation to resolve an employment relationship problem.

[44] Specifically in s.3, Mr Yarrall relies on mediation being promoted as the primary problem-solving mechanism and the acknowledgment of, and addressing of the inherent inequality of power as set out in that section. Mr Yarrall also refers to the recognition in s.3 that employment relationships must be built not only on the implied mutual obligation of trust and confidence, but on the legislative requirement for good faith behaviour.

[45] Mr Yarrall submits the requirements of employees of NZ Post to take annual leave or unpaid leave to attend mediation is a breach of the principles of good faith in s.4 of the Employment Relations Act 2000. He submits that by requiring the employee to use annual leave for attendance at mediation there is a breach of s.3 of the Holidays Act 2003 because time spent resolving grievances is neither restful nor recreational.

[46] I accept that under the Employment Relations Act 2000, mediation is promoted as the primary problem-solving mechanism. In the relationship between the first and second applicants and NZ Post, mediation is promoted as an important part of a problem resolution process in the collective employment agreement as previously set out. The evidence supports that mediation is used successfully by the parties as part of that process. I do not find that the promotion of mediation in the Employment Relations Act 2000 can be converted to a specific term that NZ Post must pay employees when they attend mediation.

[47] The implied mutual obligations of trust and confidence in an employment relationship and good employer obligations are very important. I do not find though that the implied obligations of trust and confidence can be extended from being a general obligation of fair treatment in the workplace to a specific and substantive term of the collective employment agreement that employees at NZ Post be paid to attend mediation.

[48] Mr Yarrall is correct that an object of the Employment Relations Act 2000 is to acknowledge and address the inherent inequality of power in employment relationships. It does this amongst other ways in the promotion of collective bargaining and in provisions relating to industrial action.

[49] Mediation requires parties to take time out from their day-to-day work and focus on whether a problem between them can be resolved. The second applicants feel that the playing field in terms of mediation is not level for them because they are not paid to attend mediation and/or payment is left to the discretion of their manager. I accept that is their view but I do not find that an object of the Employment Relations Act 2000 to address the inherent inequality of power in an employment relationship can be extended to impose a term into the collective employment agreement that NZ Post pay its employees to attend mediation.

[50] In terms of good faith, NZ Post and its employees should be active and constructive in establishing and maintaining a productive relationship. They should be responsive and communicative, which should extend to meeting to resolve employment relationship problems and enabling mediation to take place as part of the problem-solving process. NZ Post are aware of the issues the second applicants have about attending at mediation. Mediation plays an important role in resolving problems in the employment relationship. Ms Jones said that she may be agreeable to some guidelines being prepared for employees about attendance at mediation. NZ Post has 17,000 employees. I think that approach would be in line with good faith obligations and it would assist to reduce any inconsistencies between different managers in terms of employees attending mediation. I do not find, though, that the duty of good faith in s.4 extends to imposing a term into the collective employment agreement that NZ Post pay its employees when they attend mediation.

[51] I accept that annual leave is for rest and relaxation. The applicants in this case though are not required by NZ Post to take annual leave to attend mediation but can, as an alternative to unpaid leave, attend in their own time. I do not, in those circumstances, find that there is a breach of the Holidays Act 2003.

[52] In conclusion, in terms of the statutory provisions on which Mr Yarrall relies, I do not find that either confer a statutory right, or enable a term to be implied as a necessary ingredient, into the collective employment agreement that NZ Post pays its employees to attend mediation.

Implied terms

[53] In the absence of an express term or a statutory obligation that NZ Post pay its employees to attend mediation, I have considered whether a term can be implied that employees at NZ Post be paid when they attend mediation with their employer.

[54] The criteria as to whether a term can be implied in fact was set out by the Privy Council in *BP Refinery (Western Port) Pty Ltd v. Shire of Hastings* (1977) 52 ALJR. The criteria is that the term must be reasonable and equitable, be necessary to give business efficacy to the contract, be so obvious that it goes without saying, to be capable of clear expression and not contradict the express terms.

[55] Mr Yarrall relies on the obligations of NZ Post to deal with the second applicants fairly and reasonably and in good faith and the provisions in the collective

employment agreement that have already been referred to in this determination under consideration of express terms.

[56] A term that employees are paid while they attend mediation with their employer is a reasonable and equitable term if they would otherwise have been working at the time the mediation takes place. That a term is reasonable though is not enough.

[57] The difficulty in implying a term that employees are paid to attend mediation is that such a term is not necessary to give business efficacy to the collective employment agreement and although not inconsistent with other express terms it is not so obvious that it goes without saying.

[58] On that basis, such a term does not meet the necessary criteria it must for implying it into the collective employment agreement.

[59] I do not find that a term can be implied in fact into the collective employment agreement that employees of NZ Post are paid to attend mediation with their employer.

[60] In conclusion, I have not found that NZ Post breached express or implied terms or statutory obligations by not agreeing to pay its employees to attend mediation. I cannot therefore make the compliance order the applicants seek.

Costs

[61] I reserve the issue of costs. This may be the sort of dispute between the parties to a collective agreement where it would not be appropriate to award costs.

Helen Doyle
Member of the Employment Relations Authority