

application was received. However there was no disagreement with the idea that EPMU should have an opportunity to be heard.

[3] At about the same time as this problem was lodged with the Authority in Christchurch a similar application was lodged with the Authority in Auckland by the Postal Workers Union Of Aotearoa. At one point there was encouragement by me for this matter to be investigated at the same time as the Auckland matter but all the parties eventually did not agree with that course of action. I deferred any further investigation into the Christchurch matter pending the outcome of the Auckland matter. The Auckland determination was released in April 2009: see *Postal Workers' Union Of Aotearoa v New Zealand Post Limited*, 3 April 2009, AA105/09. It counts against the position advanced by and on behalf of Ms Street. I understand that the applicant in that case has challenged the determination. Nonetheless, the present applicants seek to have this matter investigated and determined in the usual manner on the basis that Ms Street's position is materially different. NZ Post considers that the Authority should simply dismiss the application. I required the applicants to provide a statement of evidence for Ms Street and any submissions, EPMU to provide any submissions and the same for NZ Post on the basis that I either apply the Auckland determination if not satisfied there are any material differences or arrange an investigation meeting if it appeared there are material differences.

[4] Ms Street usually works overtime. She says that for 56 weeks between June 2007 and June 2008 she worked overtime during 51 of those weeks. The amount of overtime worked each week varied between .08 hours and 8.33 hours per week. During the four weeks prior to Queen's Birthday 2008 Ms Street worked between 25 minutes and 1 hour 40 minutes overtime. The overtime is worked pursuant to a clause in the collective agreement that reads *Posties may be required to work reasonable overtime in excess of their standard hours, provided that overtime is voluntary on the days which are otherwise non-rostered days for an individual employee*. The proviso is not relevant here. Despite Ms Street usually being required to work overtime, overtime earnings were not included in the calculation of her relevant daily pay for the purposes of statutory holiday payments.

[5] I take from Ms Street's statement that she usually works overtime because the rounds at her branch are too large to be completed otherwise. However it is also clear from Ms Street's statement that she sometimes does not work any overtime and that

the amount of overtime when worked on any particular day does vary. The overtime is not rostered or pre-planned; it is done to complete Ms Street's work if required on the particular day.

[6] When Ms Street does not work on a public holiday and the day is otherwise a working day for her she must be paid not less than her relevant daily pay: see s.49 Holidays Act 2003. *Relevant daily pay* is defined in s.9(1) as *the amount of pay that the employee would have received had the employee worked on the day concerned*. That includes *payments for overtime if those payments would have otherwise been received on the day concerned*.

[7] In the Auckland determination, the Authority found that these words did not mean that posties' unrostered overtime was part of their *relevant daily pay* because the overtime payments on any particular day were not sufficiently certain to be included. The Authority also found that it was possible to determine a postie's *relevant daily pay* by reference to the wages and allowances payable on a daily basis so the averaging formula expressed in s.9(3) of the Act could not be used. There is nothing about the facts of Ms Street's case to result in a different outcome.

[8] Mr Wilton for EPMU urged me to find that the Auckland case was wrongly decided. On his submission the words *would have* mean more probable than not rather than connoting a high degree of certainty or probability. He also argues that if the employee probably would have worked overtime, and if it is not possible to determine the quantum of overtime that would have been worked on the particular day, then the formula provided in s.9(3) must be used.

[9] The difficulty with Mr Wilton's approach and the reconsideration urged by the applicants is that there is already a determination by the Authority resolving these issues in respect of a materially identical situation involving at least the employer party to the same collective agreement. The proper course for the Authority is to follow the earlier determination. That will give the applicants the right if they wish to have this matter dealt with by the Employment Court so that consistent Authority decisions can either be set aside or confirmed.

Summary

[10] For these reasons, the applicants do not succeed.

[11] Costs are reserved. It may be thought that there is an element of test case about this matter but if there is to be an application for costs that should be done within 28 days and the other party may have a further 14 days to reply.

Philip Cheyne
Member of the Employment Relations Authority