

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 105/09
5098534

BETWEEN POSTAL WORKERS' UNION
 OF AOTEAROA
 Applicant

AND NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Simon Mitchell, counsel for Applicant
 Richard McIlwraith and Gillian Service, counsel for
 Respondent

Investigation Meeting: 31 March 2009

Determination: 3 April 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Postal Workers' Union of Aotearoa (formerly the Postal Workers Federation) is a union that represents Posties employed by the respondent New Zealand Post Limited. Between those parties an employment relationship problem has arisen as to the way certain provisions of the Holidays Act 2003 are to be applied and also, for this reason, the employment agreement Posties have with New Zealand Post.

[2] The resolution of the problem depends upon whether in the circumstances the employer is bound to say for the purposes of the Holidays Act, "*it is not possible to determine an employee's relevant daily pay*" as that pay is defined in s 9(1) of the Act.

[3] Under the Act “*relevant daily pay*” is the basis of payment required to be made to an employee for a public holiday which would otherwise be a working day for the employee. For such a day s 49 of the Act requires the employer to pay the employee not less than the employee’s relevant daily pay as determined.

[4] The union contends that for the particular employees concerned the determination of relevant daily pay as defined is not possible, whereas New Zealand Post puts forward the contrary view.

[5] Where it is not possible for an employer to determine an employee’s relevant daily as defined by s 9(1), a formula under s 9(3) must be used. It gives the employee’s average daily earnings calculated over a four week period immediately prior to any public holiday being taken by the employee.

[6] The parties have attempted to resolve the problem through mediation.

[7] The material facts around which it has arisen are agreed between the parties and are as follows.

[8] New Zealand Post employs several thousand Posties to deliver mail. Their standard hours of work each day are 37 hours and 40 minutes. Even if they are able to finish their delivery rounds in less time, Posties are still paid for at least those standard hours, on a ‘job and finish’ basis.

[9] Posties are not rostered to work any overtime, but if for any reason they must work longer than the standard hours to complete their rounds on any given day they are paid overtime. The need to work overtime may or may not arise from matters within the control of the Postie.

[10] Usually it is difficult if not impossible on any given day to predict whether a Postie will need to work overtime. This does not become apparent on the day until near the end of the standard hours of work.

[11] Statistically only 2.4% of the total hours worked by all Posties are overtime. Averaged out across all Posties employed, seven minutes of overtime is being worked per day by each.

[12] The profiles of individual Posties show that some are more prone than others to work overtime. There are Posties who have never been in that situation while

others are in it regularly; 80% of the total unrostered overtime worked is being worked by only 20% of Posties. There are therefore considerable elements of randomness and uncertainty about the occurrence of overtime across Posties as a group of New Zealand Post employees.

[13] Although overtime is classified in the employment as “*non-rostered*,” this labelling has no bearing on the application of the Holidays Act with regard to the determination of relevant daily pay. Neither do the reasons why non-rostered overtime may be worked by Posties. The absence of rostering though does indicate the unplanned nature of the overtime and contributes to the uncertainty surrounding its occurrence.

[14] This dispute has arisen in particular through the claim made by the union that because the working of overtime by Posties cannot be foretold or anticipated, it becomes a matter of impossibility to determine their relevant daily pay as defined by s 9(1) of the Holidays Act.

[15] If that is correct then s 9(3) of the Act may be resorted to. It requires the calculation of relevant daily pay to be made under the formula provided, which averages earnings over a four week period falling immediately before the calculation is made. That averaging exercise takes account of any overtime paid in the four week period leading up to the public holiday and reflects it in the relevant daily pay.

[16] The union submits that as employees are paid overtime they are entitled to be paid for it in the relevant daily pay calculated for public holidays that are not worked.

[17] New Zealand Post contends that it is possible to calculate relevant daily pay and that therefore the s 9(3) formula has no application. The employer argues that where overtime is paid on occasions to Posties it cannot be regarded as a component of their relevant daily pay. This is because, with reference to s 9(1) of the Act, it cannot be said that such overtime is included in “*the amount of pay that the employee would have received had the employee worked*” on the day of the public holiday concerned.

[18] The Act simply requires overtime to be included in the calculation of relevant daily pay under s 9(1)(b)(ii) if overtime payments “*would have otherwise been received on the day concerned.*”

[19] Counsel have been unable to find any decided cases from the Employment Court on the issue now before the Authority.

[20] Generally the expression “*would have*” which appears in s 9(1)(a) and in s 9(1)(b)(ii) signifies a high degree of certainty or probability in relation to an occurrence or the happening of an event. That is its natural meaning.

[21] I agree with the submissions made by Mr McIlwraith for the employer that when applying the plain and ordinary meaning of s 9(1) it cannot properly be said that there is no possibility of New Zealand Post being able to determine what employees would have received had they worked on the day concerned. There are clearly identifiable payments of wages and allowances that Posties receive on a daily basis. Those are the payments that the employee would receive for sure but for the public holiday.

[22] It is, I find, those payments that employees are therefore entitled to receive when they are paid relevant daily pay.

[23] Overtime payments are not certain or sufficiently predictable and therefore are not appropriately to be included in the calculation of relevant daily pay.

[24] In my view it is a misapplication of s 9(3), and therefore wrong, to use uncertainty as a trigger for the application of the formula given by that sub-section. It is clear from the express language of s 9(3) that the trigger is the existence of a state of impossibility with regard to determining an employee’s relevant daily pay under s 9(1).

[25] That state does not exist here, as I find that it is possible to say what Posties would have earned had they worked on the day in question.

[26] I accept the submission that the employer’s approach to s 9 is in accordance with a correct application of the principles of statutory interpretation. The plain meaning of an enactment must be used, read in the light of the Act’s purpose. The purpose of the Holidays Act in this context is to avoid employees from being disadvantaged when observing public holidays or taking sick or bereavement leave or an alternative holiday. This purpose is being met by the employer as New Zealand Post does pay its Posties what they “*would have*” received had they worked on the day concerned.

[27] I accept the submission that there is no requirement for the employer to include payments that could or might have been received on the day concerned, if it had been worked.

Determination

[28] For the above reasons, I find that there has been no breach of the Holidays Act or the employment agreement by New Zealand Post in relation to the employment of Posties as alleged. There is therefore no basis for considering the imposition of any penalty as claimed against the employer.

Costs

[29] Costs are reserved. If the parties, through counsel, are unable to resolve the question, it can be referred to the Authority by written memoranda in the usual way.

A Dumbleton
Member of the Employment Relations Authority