

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 307
5576231

BETWEEN POSTAL WORKERS UNION
 OF AOTEAROA
 Applicant

AND NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Andrew Dallas

Representatives: Simon Mitchell, Counsel for the Applicant
 Gillian Service and Ashleigh Cropp, Counsel for the
 Respondent

Investigation Meeting: 17 May and 9 June 2016 at Auckland

Submissions During the investigation meeting on 9 June 2016

Determination: 9 September 2016

DETERMINATION OF THE AUTHORITY

- A. The “lost time” for delays occasioned by hazards sought by the Postal Workers Union of Aotearoa is accounted for by New Zealand Post Limited’s Delivery Work Measurement System.**
- B. Costs are reserved.**

Employment relationship problem

[1] The Postal Workers Union of Aotearoa (PWU) and New Zealand Post Limited (Post) were bound by and to the New Zealand Post and PWUA Collective Agreement, 1 July 2013 – 31 March 2016 (collective agreement).

[2] Michael Hunter is the Northern Secretary of the PWU. He is also a postal delivery worker (Postie) based at the Maungawhau Delivery Branch in Auckland. The branch delivers mail to several surrounding suburbs including Epsom.

[3] Mr Hunter often undertook the postal round known as “MAG404”. Mr Hunter said the round was, in effect, beset by what he characterised as “pause points” or “delays”. Mr Hunter claimed such “delays” - which he said was the process of pausing to slow down between mailboxes - were caused by road hazards such as large walls, hedges or fences, hidden driveway and uncontrolled intersections on the round. These were the hazards considered by this determination. In turn, such delays meant he could not ride a bicycle at the speed of travel calculated by Post’s Delivery Work Measurement System (DWMS). Mr Hunter claimed he had also experienced similar delays on other rounds in the Maungawhau Delivery Branch catchment.

[4] The DWMS, which is incorporated by reference into the collective agreement, was extensively detailed in the Delivery Work Measurement Manual. The DWMS provided, in summary, the basis for measuring the work rate and time standard for delivering mail by bicycle.

[5] The PWU contended that Mr Hunter’s evidence was representative of the circumstances confronting Posties on other rounds, particularly in the affluent suburbs of the major metropolitan cities. Post contended Mr Hunter’s evidence was that of his own experience as a Postie.

[6] Various attempts were made by Mr Hunter and PWU to resolve the issue before it came to the Authority. Mr Hunter initially took his concerns to the Post/postal unions National Work Measurement Forum (NWMF). However, the view of Post at that forum was that Mr Hunter’s concerns needed to be investigated at a local level as a “local exception”. Local exceptions are based on unique factors affecting Posties with sufficient impact that the DWMS is unable to calculate their workload within tolerance levels.

[7] The granting of a local exception to MAG404 was subsequently declined by Post at a local level and the matter appears to have been referred back to the NWMF.

[8] Eventually Mr Hunter raised a personal grievance on 9 October 2014. From 20 July 2015 onwards, the PWU progressed the matter as a dispute under s 129 of the Employment Relations Act 2000 (the Act) over the correct interpretation of cl N47 of the collective agreement.

The Authority's Investigation

[9] As Post had a materially similar collective agreement with E tū, the other union with members employed as Posties, Counsel for the PWU was asked to ascertain their position about the Authority's investigation. Counsel subsequently advised that E tū did not wish to participate.

[10] During the investigation meeting, I heard evidence from Mr Hunter and Post managers: Matthew Riordan, Suzanne Cameron and Gwion Thornley. The parties provided a common bundle of documents.

[11] As permitted by s 174E of the Act this determination has not recorded all the evidence received from the PWU and Post but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[12] While I have not explicitly referred to all the submissions advanced by counsel in this determination, I have fully considered them.

Issues

[13] The issue for investigation and determination were:

- (i) Is "lost time" for the time delays identified in the PWU's evidence already accounted for in the DWMS?
- (ii) If not, does this form of lost time fall within the ambit of "other forms of lost time" set out in cl N47 of the collective agreement?

- (iii) If so, what is the correct approach to the exercise of the Team Leader's discretion in cl N47 in respect of a claim for such lost time?
- (iv) Should either party contribute to the costs of representation of the other party?

[14] The parties accepted at the investigation meeting that if it is found that the lost time claimed by the PWU was captured by the DWMS, then that, subject to the issue of costs, would dispose of the matter in its entirety before the Authority.

The Collective Agreement

[15] The collective agreement relevantly provided:

N. Specific Conditions

...

DELIVERY – POSTIE PAY MODEL (PPM)

...

Definitions

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Calculated Workload: the standard time assessed for the activities carried out by an employee. The calculated workload is determined by way of the Delivery Work Measurement System.

Delivery Work Measurement System (DWMS): the system used to convert activity into statements times, which is called "calculated workload".

The Delivery Work Measurement System Operating: the "Operating Manual" contains all DWMS operating procedures, national time standards and measurement process guide.

...

Work Measurement

1. The Delivery Work Measurement System Operating Manual sets out the structures, processes and methodologies which the parties have agreed will be applied to work measurement and also contains the National Time Standards set for the standard operating procedures.
2. The rate to be applied to work measurement is BS[British Standard]75. Rounds and workload will be sized based on BS82 using 100% of volumes.

[16] The parties agreed that the DWMS operates on a “job and finish” (sometimes referred to as “job and knock”) basis. That means Posties are expected to perform their work and at the conclusion of that work are entitled to finish. Under the “Postie Pay Model” (PPM), Posties are not paid on an hourly basis, rather, they are paid, in the ordinary course, a fixed amount for a defined parcel of work, usually in the form of a postal round.

[17] The exception to this payment for a defined parcel of work is lost time not accounted for by the DWMS.

[18] The collective agreement contains the following lost time provision:

47. The time included by an employee in one of the following circumstances will be recognised as Lost Time in the daily workload calculations
 - Late arrival of mail from the Mail Centre over 5 minutes after the roster start time
 - Bike breakdowns
 - Team Briefs by the team leader exceeding 5 minutes
 - Union service
 - Other forms of lost time and/or work approved at the Team Leader’s discretion
48. ...
49. Any claim for Lost Time must be noted on the time docket and approved by a Team Leader

[19] Lost time was introduced as part of the PPM in 2011. The categories of lost time set out in cl N47 were agreed to by the parties. It was also agreed that rather than drafting an exhaustive list, a discretionary lost time provision would be incorporated into the clause to allow Team Leaders to consider other forms of lost time affecting Posties’ work. Post provided examples of “other lost time” as waiting for overflow bags and roadworks. Mr Hunter provided two further examples: rubbish collection days when streets were lined with wheelie bins and incidences of high winds in Wellington slowing down the speed of travel.

The parties' respective cases

PWU

[20] In general terms, the PWU contended there were some rounds in the Post network where it was either not possible to meet the time standard for bicycle delivery or greater effort, relative to other rounds, was required to achieve it. The PWU contended that while tolerance time was built into the standard, this did not provide a Postie with sufficient time to address certain types of hazards. The PWU said in such circumstances lost time was claimable under cl 47 of the collective agreement.

[21] The PWU claimed delays caused by the need to, for example, “pause” to scan for hazards meant a Postie could not ride a bicycle at the speed of travel calculated by the DWMS. Indeed, the PWU claimed the DWMS made no reference to “delays” only “hazards”.

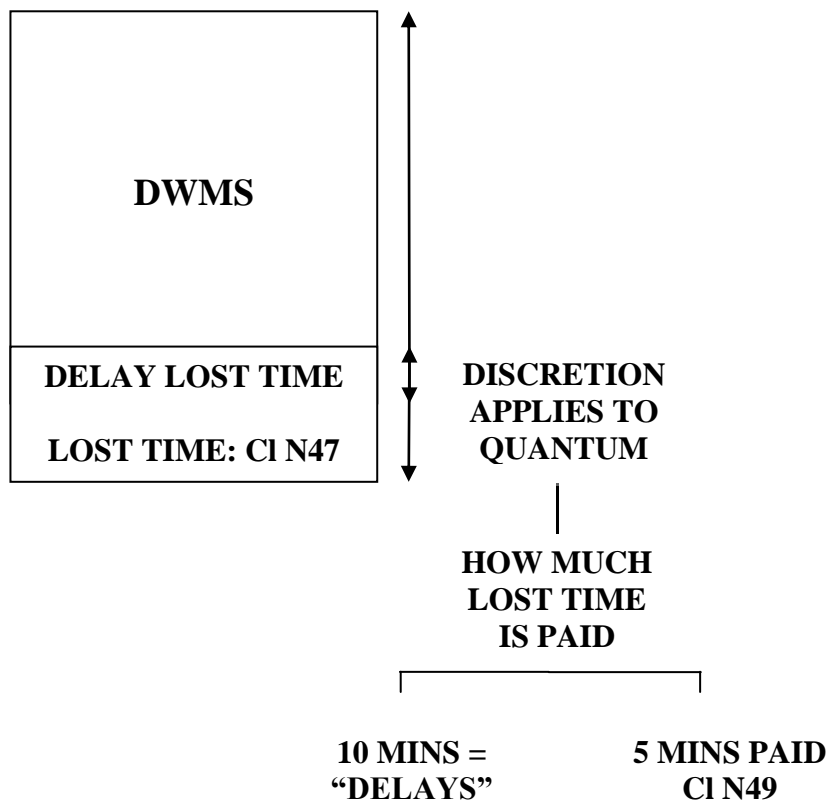
[22] In essence, the PWU's contentions was that the DWMS did not cover the field in terms of delays caused by the need to address such hazards. The delays were, in that sense, separate from other forms of delay captured by the DWMS.

[23] Mr Hunter claimed that MAG404 contained 216 hazards that contributed to delays in completing the round. He said these added approximately 10.8 minutes to MAG404. The PWU contended the delays constituted “other forms of lost time” under cl N47 of the collective agreement and were, therefore, compensable under that agreement.

[24] The PWU further contended that Post had not properly exercised its discretion to compensate Mr Hunter for these 10.8 minutes based on the time dockets he had submitted to his team leader in accordance with cl N49. The PWU submitted the reference to “other forms of lost time” contained in cl N47 was, in effect, a “catch-all” for lost time which fell outside the DWMS and the other four bullet points of the clause.

[25] The parties agreed the discretion contained in cl N49 applied to the length of the lost time claimed. For example, the claim for 10.8 minutes could, by exercise of the discretion, result in payment for only 5 minutes or, indeed, no payment at all. The PWU also agreed with Post that sometimes a round will take longer on some days than others. However, the PWU said it could not accept a position where the concept of averages applied to all rounds as some Posties would receive the same pay for longer work.

[26] Diagrammatically the PWU argument was as follows:



Post

[27] Post claimed, through the evidence of Matthew Riordan, the lost time sought by the PWU was already accounted for in the DWMS. Post said the DWMS was not based on Posties riding “freely and briskly”.

[28] Post claimed the time calculated for Posties to complete a round, including hazard identification, was determined by the methods set out in the DMWS, as ratified by the parties. It said these methods were simulated studies involving skilled, trained Posties and on-the-round-measurement of Posties, including the use of a “cyclometer” which measures the actual distance travelled by the Postie. Post said as part of the pre-measurement process, the measurer and the Postie undertaking the round are required by the DWMS to “go over the hazards on [the] round”.¹

[29] Post contended that this form of round measure took into account hazard or safety issues.² Logically, Post said this also included scanning for hazards. During the investigation meeting this scanning process was described by Mr Riordan as positioning the bicycle in such a way as to get a better view of the hazard or potential hazard - for example, a car emerging from a hidden driveway. Post said the data derived from the cyclometer resulted in a “terrain profile” for each round. The purpose of the profile is to reflect, as accurately as possible, the distance, terrain and delivery points of a round as encountered by the Postie.

[30] Post said round measurement formed the basis of a national average as determined by a statistician. However as the national average was just that, *an average* some Posties, including Mr Hunter, may have to stop more, and some presumably less, than the average. Post said because the DWMS did not capture every variation on every round, tolerances were built into the calculation and these acted as “trigger points” in determining where and when the workload of a Postie could not be performed within the calculated time.

[31] Post said MAG404 had been afforded an extra one hour and 28 minutes per week following a review in 2013. As a result Post contended Mr Hunter should have been more likely to finish his round in the calculated time (or earlier) but he continued to claim an extra 10 minutes lost time.

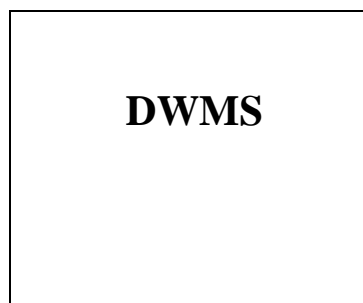
¹Delivery Work Management System Manual at 129.

²Ibid at 130.

[32] A further review conducted in 2014 by Post in response to Mr Hunter’s claim for lost time found that MAG404 was completed within the time calculated by the DWMS on 83% of occasions (which it said was higher than the national average of 75%). Mr Riordan’s evidence was that Mr Hunter had completed the round within the calculated time 67% of the time (based on 72 rounds). He further said other Posties who undertook MAG404 completed the round within the calculated time 86% (based on 140 rounds), 100% (based on 32 rounds) and 91% (based on 34 rounds) of the time.

[33] Post disputed the PWU’s characterisation of the fifth bullet point in cl N47 as a “catch-all” provision for lost time and submitted it was limited by the proper exercise of a Team Leader’s discretion. Post contended that at all times, Mr Hunter’s team leader had properly exercised a discretion not to pay him under cl N47 as he was not entitled to claim for it.

[34] Diagrammatically Post’s argument was as follows:



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LOST TIME AGREED: CI N47

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DISCRETIONARY LOST TIME PAID: CI N49

[35] Post said that it properly investigated Mr Hunter’s claims about the number of hazards associated with MAG404 and did not accept they constituted a local exception. Post said a local exception was reserved for “outlier” rounds of which MAG404 was not one.

Is “lost time” claimed by the PWU already accounted for in the DWMS?

[36] At a threshold level, the dispute between the parties is very narrow. Either the DWMS accounts for the hazards said to exist on round MAG404 (and other rounds said to be affected by such hazards) or it does not. If it does, then that is the end of the matter. If it does not, then consideration must turn to cl N47 and the appropriate exercise of team leader discretion.

[37] I find that the methodology for the DWMS measurement process for bicycle delivery required consideration of hazard and safety issues. It was clear on the face of the DWMS Manual and relevant parts identified above. The manual did not identify threshold limits for the number or type of hazards existing on a round. However, particularly problematic rounds may fall into what Post described as “outliers” giving rise to a local exception to the DWMS. Further, the manual did not refer specifically to hazard identification nor the time that such a process might take per hazard, per round.

[38] The heart of the dispute is actually an argument between the parties about appropriate forms of hazard identification. Mr Hunter argued, in effect, the delay (or pausing) required for hazard identification was not covered by the DWMS because it was not specifically mentioned. If that proposition is accepted, the argument logically goes: as these delays were not mentioned in the DWMS, they were not measured and, therefore, time was not apportioned to them (even within tolerances). Consequently, the time taken for delay (or pausing) was unaccounted for and, therefore, compensable as lost time under N47 of the collective agreement.

[39] Mr Hunter’s argument was, on one level, entirely understandable in that the proper identification of hazards and their attendant risks in any workplace reduces the likelihood of harm including serious harm. Mr Hunter’s workplace was not a controlled or sterile environment and he was correct to place particular emphasis on performing his work safely.

[40] However, there were six significant problems with the PWU's argument.

[41] First, Mr Hunter was, and quite clearly so, a competent, trained and highly experienced Postie working within a time standard determined by the DWMS, which the PWU was involved in developing and which was incorporated into a collective agreement to which the PWU was a party.

[42] Second, Mr Riordan's evidence was that the DWMS was not predicated on a Postie riding their bicycle "freely and briskly". I accept this evidence. This is the only logical way of understanding the tolerances built into the system to account for variations between rounds across Post's network and the 2013 review which added one hour and 28 minutes per week to the delivery time for MAG404.

[43] Third, as a result of the additional one hour and 28 minutes per week added to MAG404, Mr Hunter should have been more likely to finish his round in the calculated time or even earlier, but he continued to claim lost time under cl N47 of the collective agreement.

[44] Four, Post's 2014 investigation showed that MAG404 was being completed within the time calculated by the DWMS on 83% of occasions, which was higher than the national average of 75% for bicycle postal delivery.

[45] Five, Mr Riordan's evidence, which I also accept, was that Mr Hunter had completed the round within the calculated time 67% of the time and other Posties had completed the round within the calculated time 86%, 100% (based on 32 rounds) and 91% of the time respectively.

[46] The ultimate conclusion that I come to is that the lost time claimed by the PWU for delays occasioned by hazard identification is already accounted for in the DWMS. Consequently, it was not necessary to consider the other issues identified above except costs.

Costs

[47] Costs are reserved. However, I have formed the preliminary view that each party should bear its own costs. In my view, despite falling at the first hurdle, this was a genuine dispute raised and progressed by the PWU as it is statutorily entitled to do so under s 129 of the Act and arguably required to do. The PWU and Post have both benefited from a determination of the disputed matter between them. This determination brings to finality a longstanding matter of contention which the parties have been unable to resolve themselves.

[48] Further, the evidence clearly demonstrates, through the establishment of various consultative forums and the reasonable regular settlement of the collective agreement, that the PWU and Post are party to an on-going and productive employment relationship.³

[49] If a determination of the Authority on costs is required Post may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum the PWU would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily tariff.⁴

Andrew Dallas
Member of the Employment Relations Authority

³See, *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport (t/a Stagecoach New Zealand)* [2002] 2 ERNZ 435 at [73]-[74].

⁴*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].