

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 189

3004134

BETWEEN            MARITIME UNION OF NEW  
                             ZEALAND INC  
                             Applicant

A N D                PORTS OF AUCKLAND  
                             LIMITED  
                             Respondent

3023015

BETWEEN            PORTS OF AUCKLAND  
                             LIMITED  
                             Applicant

AND                  MARITIME UNION OF NEW  
                             ZEALAND INC  
                             Respondent

Member of Authority:    Nicola Craig

Representatives:        Simon Mitchell and Jeremy Lynch, Counsel for  
   Applicant  
   Jennifer Mills and Jess Greenheld, Counsel for  
   Respondent

Investigation Meeting:    16 March 2018 at Auckland

Submissions Received:    Prior to and at the investigation meeting

Date of Determination:    15 June 2018

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**DETERMINATION OF THE AUTHORITY**

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**A. The proceedings, including costs issues, under Authority file number 3004134 are stayed.**

**The Authority's earlier determination**

[1] The Authority previously issued a determination regarding the interpretation of the collective agreement between the Maritime Union of New Zealand Inc (MUNZ or the union) and Ports of Auckland Ltd (POAL or the company).<sup>1</sup>

[2] In that determination the Authority concluded that clause 5.1 of the collective agreement<sup>2</sup> requires stevedores to be tentatively assigned to an actual roster with confirmation of the actual roster being confirmed the Friday preceding the week of work. Further, at the time of confirmation stevedores will be notified of the days they will work and their start and finish times on those days.<sup>3</sup>

[3] The Authority determined that the current practice of providing what POAL refers to as its "Actual Roster" does not comply with the requirement of clause 5.1 as it does not enable stevedores to know when they are working on a particular day.<sup>4</sup>

[4] Between the investigation meeting dates leading up to the previous determination, MUNZ initiated bargaining for a new collective agreement and thus under s 53 of the Employment Relations Act 2000 (the Act) the collective agreement continued in force. The Authority concluded in the previous determination that the parties should have further discussions on the issues and did not issue the compliance order sought by MUNZ. Leave was granted for the parties to return to the Authority regarding the compliance order issue in the event that they were unable to come to an understanding.

**Challenge to the Court**

[5] POAL elected to have the whole of the matter heard in the Employment Court by way of a hearing de novo. This occurred in May 2018 although no decision has been issued yet.

**Stay and compliance order applications**

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<sup>1</sup> *Maritime Union of New Zealand Inc v Ports of Auckland Limited* [2017] NZERA Auckland 350, concerning 3004134

<sup>2</sup> 18 February 2015 to 17 August 2017

<sup>3</sup> Above n 1 at [115]

<sup>4</sup> Above n 1 at [116]

[6] In December 2017 POAL filed in the Authority an application for stay of proceedings.<sup>5</sup> The application was made on the basis of POAL having elected to have the matter heard by the Court. The grounds on which the stay application was made are:

- (a) POAL would have to make significant changes to its allocation and rostering practices in order to implement the Authority's interpretation. POAL has challenged that interpretation;
- (b) The parties are currently in bargaining for a new collective agreement and any issues regarding the proper interpretation would be appropriately dealt with in that forum; and
- (c) When meeting with the union POAL inquired as to whether it would be required to seek a stay whilst discussions were taking place, and MUNZ indicated that a stay would be necessary.

[7] MUNZ filed a notice of opposition to the stay application on the basis that:

- (a) No stay was required as the compliance order application had not yet been determined by the Authority; and
- (b) Even if a compliance order were to issue (which is now sought by MUNZ) this is not an appropriate matter for a stay on the following grounds:
  - (i) The challenge would not be rendered nugatory by the lack of a stay;
  - (ii) Substantial disadvantage will arise to MUNZ and its members if a stay is granted;
  - (iii) No issues of public interest arise;
  - (iv) MUNZ has a strong case in relation to the challenge; and
  - (v) The balance of convenience favours MUNZ.

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<sup>5</sup> 3023015

## **The Authority's procedure**

[8] The parties agreed that the issues of the stay and compliance order were closely related and should be dealt with together and the Authority has proceeded on that basis.

[9] An issue arose early on about the nature and extent of the discussions which had occurred between the parties and whether the discussions were completed. Submissions were sought and received.

[10] A timetable was then set for the receipt of evidence by way of affidavit. Affidavits were received from Russell Mayne (Secretary, Auckland Branch) and Craig Harrison (Assistant Secretary, Auckland Branch) for MUNZ and Jonathan Hulme (Senior Manager, Terminal Operations and Employment Relations) for POAL. An investigation meeting was held on 16 March 2018 where evidence was heard by telephone from Dale Harnett (POAL Programme Planner – Business Transformation). Counsel also spoke to their submissions.

[11] As permitted by s 174E of the Act this determination does not record all the evidence and submissions received from the parties 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. I was assisted by detailed submissions provided by counsel for both parties.

## **Compliance and stay issues**

[12] Although there are some similarities between the considerations for whether to grant a compliance order and whether to stay the Authority's proceedings, I will consider each question separately, starting with the compliance order issue.

### **Compliance order criteria**

[13] Under s 137 of the Act the Authority is able to issue a compliance order where a person has not complied with any provision of an employment agreement.

[14] Proof of previous non-compliance is required. The previous determination included a finding that POAL had not been complying with clause 5.1 of the collective agreement.

[15] Under the Act there is no requirement on applicants to show that they were prejudicially affected by the non-compliance, as was the case under the Employment Contracts Act 1991.

[16] The Authority has a discretion as to whether to grant a compliance order. The discretion is conditioned by the requirement to do justice.<sup>6</sup>

### **Compliance order considerations in this case**

[17] This is not a situation where the respondent (POAL) has indicated a willingness to comply. It has had an opportunity to comply and has made it clear that it will not do so voluntarily.

[18] The parties have met on more than one occasion, as well as exchanging correspondence, regarding the possibility of reaching some sort of agreed resolution. There was dispute about whether suggestions of resolution were reasonable or were properly explored. What is clear is that there is no indication that resolution is likely at this point.

[19] In the previous determination, I accepted that on occasions members of MUNZ have suffered detriment as a result of POAL's actions, as they were not able to plan activities or events due to uncertainty about whether they were going to have to work.<sup>7</sup>

[20] POAL strongly opposes the Authority issuing a compliance order. It considers that a compliance order would amount to a draconian step.<sup>8</sup> This was partially based on the company's position regarding MUNZ's approach to resolution discussions.

[21] On the other hand MUNZ objected strongly to POAL's suggestion that its business could be on its knees if the compliance order was issued.

[22] POAL's position is that it would have to make substantial changes to its allocation and rostering practices, if a compliance order was issued. I do accept that some changes would be necessary. However, I note the reference in the previous

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<sup>6</sup> *United Food & Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756 (LC)

<sup>7</sup> Above n 1 at [120]

determination to contrasting strands of POAL's evidence. On the one hand POAL stressed the need for flexibility, and on the other, the fact that stevedores in practice under the current system have a high degree of certainty as to when they would be working.<sup>9</sup>

### **Conclusion on compliance order**

[23] Employment agreements create binding obligations on the parties. MUNZ relied on *Northern Local Government Officers Union Inc v Auckland City*<sup>10</sup>, where the Full Court held that employers could not be permitted to breach an employment contract on the grounds of commercial necessity. The Court further stated that once the meaning of a provision has been established, the Employment Tribunal, as it then was, should not shrink from enforcing the obligation by way of compliance order.<sup>11</sup>

[24] POAL did not accept that the Court's comments were applicable in situations where there was more than one interpretation available which was awaiting appellate clarification. It described that case as concerning a provision the interpretation of which was clear but which the employer did not wish to be bound to comply with.

[25] It is important that employment obligations are enforceable. Had it not been for the stay application I would have issued a compliance order, albeit allowing some time for POAL to implement the change. However, rather than issue a compliance order and then stay it if I grant the stay application, I consider it more sensible to go on now to consider the question of the stay.

### **Stay criteria**

[26] The filing of a challenge in the Court does not operate as a stay of the Authority's proceedings.<sup>12</sup> The Authority has a discretion as to whether to grant a stay. There must be evidence justifying the exercise of the discretion, and the overriding consideration is the interests of justice.<sup>13</sup>

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<sup>8</sup> Referring to *Auto Movements (NZ) Ltd v Read* ERA, Wellington, WA7/10, 15 January 2010

<sup>9</sup> Above n 1 at [97]

<sup>10</sup> *Northern Local Government Officers Union Inc v Auckland City* [1992] ERNZ 1109

<sup>11</sup> At 1127

<sup>12</sup> S 180 of the Act

<sup>13</sup> *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 118 at [7]

[27] The Court of Appeal in *NZ Cards Ltd v Ramsay* described the criteria to be considered in stay applications as follows:

In determining whether or not to grant a stay, the Court must weigh the factors in the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position in case the appeal is successful. Relevant factors include whether the appeal would be nugatory, if the stay were not granted, the bona fides of the applicant as to prosecution of the appeal, the effect on any third parties, injury or detriment to the respondent if the stay is granted, the novelty and importance of the question involved, the public interest in the proceedings, the strength of the case on appeal and the overall balance of convenience.<sup>14</sup>

[28] These factors were also outlined by Chief Judge Colgan in *Assured Financial Peace Limited and Prosper With Us v Pais*.<sup>15</sup>

[29] I now look at these factors in the present case.

### **Rendered nugatory**

[30] If no stay is granted, would POAL's right of appeal be rendered nugatory or ineffectual? I do not accept that it would be. What is likely to happen is that, assuming a stay was not successfully sought from the Court, POAL would start work towards a notification system which complied with the Authority's previous determination. Even if it had to implement the change before the Court's decision was available, I cannot see why that could not be undone if the Court accepts POAL's proposed interpretation of the collective agreement.

### **Bona fides**

[31] POAL does not agree with the Authority's interpretation of the collective agreement. I accept that POAL is pursuing the challenge on a bona fide basis.

### **Effect on any third parties**

[32] There was a little evidence about the possible effects on others, although this was not a main feature of the evidence or submissions received. There is a prospect

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<sup>14</sup> *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582 at [7], footnotes omitted.

<sup>15</sup> *Assured Financial Peace Limited and Prosper With Us v Pais* [2010] NZEmpC 50 at [5]

of the stevedores who are not MUNZ members being affected if a stay is not granted, assuming a compliance order is issued.

[33] The stevedores covered by the Port Pro collective agreement were covered by the same relevant wording as the MUNZ agreement<sup>16</sup>, although it is not clear whether that is still the current provision.. However, Port Pro has not sought to have any involvement in this proceeding and any effect of a stay on its members is somewhat unclear.

#### **Detriment to MUNZ and its members**

[34] MUNZ says that the effect on its members of a stay, namely inability to plan their non-work lives, cannot be remedied. As outlined above I accept that there is some detriment suffered by MUNZ members. However, I also take into account that the current system has been in operation since around mid-2015 and that MUNZ chose to withdraw its earlier proceedings.<sup>17</sup>

#### **Novelty, importance of the question and public interest**

[35] Although the issues are no doubt very important for POAL and MUNZ, the interpretation issue is focused on the wording of clauses in this particular agreement. I have already referred to the Port Pro situation.

[36] Broadly there is a public interest in the operation of the port. I do not accept that the operation of the port would be jeopardised if a stay is not granted.

#### **Strength of the case on challenge**

[37] POAL maintains that it has a strong likelihood of success in the Court. I cannot make any observations about the merits of the case on challenge, not having had any involvement or seen any of the pleadings or evidence, other than the statement of claim. As it is a de novo challenge, new evidence may well have been given which was not available to the Authority.

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<sup>16</sup> Above n 1 at [85] – [87]

<sup>17</sup> Above n 1 at [12] – [13]

## **Detriment to POAL**

[38] POAL placed considerable emphasis on the difficulties which having to comply with the Authority's interpretation would place on it. These were outlined as:

- (a) Significant changes to its rostering system in order to comply with the Authority's determination;
- (b) POAL having to operate a different system for non-MUNZ stevedores, placing significant pressure on the allocations team;
- (c) The current bargaining for a replacement collective agreement being the proper setting for coming to an agreement about the interpretation of the clauses in question; and
- (d) The conduct of the parties following the earlier determination.

[39] In response MUNZ emphasised the ability of POAL under the collective agreement to change or cancel shifts at 24 hours' notice and thus having more flexibility than was suggested for POAL. MUNZ also noted that POAL does not mention other ways, such as the use of casuals, to manage any issues arising from its need for flexibility.

## **Conclusion on stay**

[40] The considerations are finely balanced in this case. I do not consider that a compliance order would create a situation as dire as that described by POAL. However, I conclude that the overall balance of convenience, particularly in light of the state of the challenge proceedings, favours POAL. I therefore grant a stay of the Authority's proceedings, including costs issues.

Nicola Craig  
**Member of the Employment Relations Authority**