IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 368
3030111

	BETWEEN	MARITIME UNION OF NEW ZEALAND LIMITED First Applicant
		ROBERT BEILBY, SCOTT HEGINBOTHAM, KYLE HUNT, THOMAS LAMONT, GEORGE LYE, EDWARD MAXWELL, ORLANDO MOKA, GERALD SEYMOUR, GORDON WAIKARI, MICHAEL WHAIAPU Second Applicants
	AND	ISO LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Simon Mitchell for First and Second Applicants Kate Ashcroft for Respondent
Investigation Meeting:	15 November 2018
Submissions Received:	15 November 2018
Additional Information Received:	19 November 2018
Determination:	23 November 2018

DETERMINATION OF THE AUTHORITY

A. The application to strike the Maritime Union of New Zealand out as a party to this matter is declined.

B. The employment agreements include an availability provision, the inclusion of which is inconsistent with section 67D of the Employment Relations Act 2000.

C. Section 67G of the Employment Relations Act 2000 does not apply.

D. Costs are reserved.

Employment relationship problem

[1] Each of the second applicants are members of the Maritime Union of New Zealand Limited (MUNZ) and work for ISO Limited as either Stevedores or Forklift Operators at the Port of Tauranga. ISO is a port logistics company providing stevedoring and other services to port industries throughout New Zealand, including at Tauranga.

[2] ISO's labour needs are dictated by the arrival of vessels, the timing of which may vary depending on factors such as weather, berth availability, customer requirements and supply of cargo to be loaded.

[3] ISO operates two shifts. A morning shift which usually starts at 3.15 am and an afternoon shift which usually starts at 3.15 pm. Each of the second applicants work the morning shift.

[4] Each of the second applicants are employed pursuant to individual employment agreements. Those agreements are of similar form. The agreements do not set specific start and finish times and do not stipulate a minimum number of hours to be worked each week.

[5] A dispute has arisen between the second applicants and ISO as to whether the individual agreements comply with the statutory requirements set out in ss 67D and 67G of the Employment Relations Act 2000.

[6] ISO claims MUNZ has no standing as a party to these proceedings because the second applicants who are its members are engaged pursuant to individual employment agreements.

Issues

[7] In order to resolve these employment relationship problems I must determine the following issues:

a) Does MUNZ have the necessary standing to be a party to the application?

b) Are the hours of work provisions in the employment agreements compliant with the requirements of the Act;

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

Standing of the union

[9] ISO says MUNZ is not a party to any collective agreement with it because all MUNZ members are engaged pursuant to individual employment agreements and therefore has no standing to make the application for directions set out in the statement of problem. ISO acknowledges that while ss 18 and 236 of the Act provide for employees to be represented by a union, they do not provide for a union to issue proceedings in its own name in relation to individual terms and conditions of employment.

[10] MUNZ submits that it has standing by virtue of section 18 of the Act which provides a statutory right for MUNZ to represent its members in relation to any matter involving their collective interests.

[11] At the investigation meeting MUNZ withdraw its application for declarations stating that the second applicants all had standing to seek the declarations and this would suffice.

[12] Notwithstanding the concession by MUNZ ISO applied for MUNZ to be struck out as an applicant pursuant to s 221(a) of the Act. In all the circumstances it is just to allow MUNZ to be heard on this matter and the application that it be struck out

is declined.[1] The issues being addressed in this determination may have implications for the union and other workplaces where MUNZ represents the collective interests of its members.

Employment Relations Act

[13] Sections 67D and 67G of the Act were inserted on 1 April 2016 by section 9 of the Employment Relations Amendment Act 2016. The central policy intent underlying the implementation of these provisions was to prohibit the practice of "zero-hour contracts". Zero-hour contracts contain no guaranteed hours of work but require employees to be available should their employer offer them work.[2]

[14] The provisions at ss 67C and 67D sought to rebalance the mutuality of obligations in the employment relationship to avoid situations where employees are required to be available without necessarily being given the opportunity to receive work or payment for that availability.[3]

[15] Section 67G was enacted to address the short cancellation of shifts where employees are told they are no longer required to work a shift, close to the time the shift is to commence, or are sent home midway through a shift without being compensated for this.[4]

[16] The employment agreements for each of the ten second applicants were all entered into between 2006 and August 2015 so were drafted and accepted before the implementation of ss 67D and 67G.

[17] Section 67C(1)(b) of the Act requires individual employment agreements to specify the hours of work agreed by an employer and employee. Subsection 67C(2) of the Act defines hours of work as including any or all of the following:

a) The number of guaranteed hours of work;
b) The days of the week on which work is to be performed;

---

[1] *Bamber v Air New Zealand* CA111/95 13 June 1995.
[2] Employment Standards Legislation Bill (53-1).
[3] Michael Woodhouse "Addressing zero hour contracts and other practices in employment relationships (2015) Ministry of Business, Innovation and Employment at 20 http://www.mbie.govt.nz/publications/employment-and-skills/cabinet-paper-2015--addressing-zero-hours-contracts.pdf.
[4] Ibid at 21.

c) The start and finish times of work;

d) Any flexibility in the matters referred to in paragraph b) or c).

[18] Section 67D of the Act states:

Availability provision

(1) In this section and section 67E, an availability provision means a provision in an employment agreement under which—

(a) the employee's performance of work is conditional on the employer making work available to the employee; and

(b) the employee is required to be available to accept any work that the employer makes available.

(2) An availability provision may only—

(a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and

(b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

(3) An availability provision must not be included in an employment agreement unless—

(a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and

(b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

(4) An availability provision that is not included in an employment agreement in accordance with subsection (3) is not enforceable against the employee.

(5) In considering whether there are genuine reasons based on reasonable grounds for including an availability provision, an employer must have regard to all relevant matters, including the following:

(a) whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision:

(b) the number of hours for which the employee would be required to be available:

(c) the proportion of the hours referred to in paragraph (b) to the agreed hours of work.

(6) Compensation payable under an availability provision must be determined having regard to all relevant matters, including the following:

(a) the number of hours for which the employee is required to be available:

(b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work:

(c) the nature of any restrictions resulting from the availability provision:

(d) the rate of payment under the employment agreement for the work for which the employee is available:

(e) if the employee is remunerated by way of salary, the amount of the salary.

(7) For the purposes of subsection (3)(b), an employer and an employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

[19] Section 67G states:

Cancellation of shifts

(1) This section applies in relation to an employee who is required under the employee's employment agreement to undertake shift work.

(2) The employer must not cancel a shift of the employee unless the employee's employment agreement specifies—

(a) a reasonable period of notice that must be given before the cancellation of a shift; and

(b) reasonable compensation that must be paid to the employee if the employer cancels a shift of the employee without giving the specified notice.

(3) In cancelling a shift of an employee, the employer must—

(a) give the employee the notice specified in the employee's employment agreement under subsection (2)(a); or

(b) if that notice is not given, pay to the employee the compensation specified in the employee's employment agreement under subsection (2)(b).

(4) The period of notice specified under subsection (2)(a) must be determined having regard to all relevant factors, including—

(a) the nature of the employer's business, including the employer's ability to control or foresee the circumstances that have given rise to the proposed cancellation; and

(b) the nature of the employee's work, including the likely effect of the cancellation on the employee; and

(c) the nature of the employee's employment arrangements, including whether there are agreed hours of work in the employee's employment agreement and, if so, the number of guaranteed hours of work (if any) included among those agreed hours.

(5) Compensation specified under subsection (2)(b) must be determined having regard to all relevant matters, including the following:

(a) the period of notice specified in the employee's employment agreement under subsection (2)(a):

(b) the remuneration that the employee would have received for working the shift:

(c) whether the nature of the work requires the employee to incur any costs in preparing for the shift.

(6) Without limiting subsection (5), an employee is entitled to what he or she would have earned for working a shift if—

(a) the shift is cancelled and the employee's employment agreement does not comply with this section; or

(b) the shift is cancelled, but the employee has not been notified of the cancellation until the commencement of the shift; or

(c) the remainder of a shift is cancelled after the shift has begun.

(7) If an employee whose shift is cancelled is entitled, under his or her employment agreement or under subsection (6), to the remuneration that he or she would have earned for working the shift, that remuneration is a part of the employee's ordinary weekly pay and relevant daily pay for the purposes of sections 8 and 9 of the Holidays Act 2003.

(8) To avoid doubt, nothing in this section enables an employer to cancel an employee's shift if that cancellation would breach the employee's employment agreement.

(9) In this section, shift means a period of work performed in a system of work in which periods of work—

(a) are continuous or effectively continuous; and

(b) may occur at different times on different days of the week.

Relevant terms of the Employment Agreements

[20] The employment agreements are all in similar form. Each agreement is to be read in conjunction with the collective agreement between ISO Limited and Amalgamated Stevedores Union Inc. (ASU) dated 9 December 2015 and which expires on 8 December 2018. Although each of the applicants have left the ASU the terms set out in the collective agreement continue to apply as individual terms of employment until such time as ISO and each of the second applicants agree to different terms.

[21] The collective agreement defines the nature of employment for each of the second applicants. Each were engaged as Regular Hourly Associates which is defined as follows:

> An Associate employed on either a rostered or an "as required" basis, but subject to a minimum guarantee or retainer as outlined in the Associate's IEA,

and, except where otherwise agreed with the Union with a preference for on-going work. Preference for on-going work does not mean an exclusive right to all work, only a first call on on-going work subject to some reasonable flexibility to enable the Company to meet safety requirements and/or to maintain service levels, which may necessitate the need to rest or stand down [a regular hourly associate] on rare occasions.

[22] With the exception of Mr Seymour the individual agreements set out the following further relevant provisions:

HOURS OF WORK
The Employer operates a 24 hours a day/7 days a week operation. As such, the Associate will be required to work varying hours and/or day and night shifts as required.

The Associates' actual hours of work will be determined by the Employer's operational requirements, which in turn will be determined by shipping volumes and related factors. The Employer will endeavour to provide as much notice as possible of the actual hours the Associate is required to work, although the hours of work notified to the Associate may be changed at short notice to accommodate the needs of the business. The Associate has no set entitlement to particular days, shifts, or hours of work unless otherwise agreed in writing with the Employer.

To meet the responsibilities of the position the Associate may be required to work or travel during hours additional to those set out in the roster. The Associate will be paid at his/her usual hourly rate for any such additional hours.

The Associate must personally notify their Workforce Coordinator if he/she is unable to work during any scheduled working hours. Failure to report to work for any scheduled working hours without reasonable excuse may result in disciplinary action, including summary dismissal.

This agreement is for permanent employment and any failure on the part of the Associate to accept work offered without justification may result in disciplinary action.

REMUNERATION

The Associate's normal hourly rate for all work is [$....] per hour.

The Associate will receive a guaranteed retainer of [$....] for each four week period during which he/she is available to work. If the Associate's earnings in a four week period, calculated on the basis of the hourly rates set out in clause [X.X], are less than the guaranteed retainer, the balance of the retainer will be paid to the Associate following the conclusion of that four week period, subject to clauses [x.x – x.x].

The amount of the retainer in respect of a four week period may, at the Employer's sole discretion, be reduced to account for any period of time during which the Associate is unavailable to work other than as the result of authorised and paid annual leave, sick leave or bereavement leave.

> Should the Associate be absent during a four week period as a result of authorised and paid annual leave, sick leave or bereavement leave, the amount paid in relation to that leave will be deducted from the retainer in respect of that four week period.
>
> If, following the first two weeks of a four week period, the Associate's earnings are less than 30% of the guaranteed retainer, he/she will receive a progress payment of 30% of the retainer. For the avoidance of doubt, the guaranteed retainer in respect of a four week period includes any amount paid to the Associate as a progress payment pursuant to this clause.

[23] The nominated hourly rate set out in the remuneration clause when compared with the rate struck as the retainer equates to a guaranteed payment for each four-week period equivalent to 120 hours.

[24] In relation to hours of work and the retainer, Mr Seymour's employment agreement states (verbatim):

> **Hours of duty**
> The nature of employment reflects the 24hour / 7 day nature of the operations with varying workloads and patterns. For [regular hourly associate's] it is an agreed condition of your employment that you be available to work varying hours and/or day and night shifts as required. Acknowledgement of the IEA confirms that the employee has understood and accepted this condition.
>
> **Retainer**
> You will be guaranteed a four weekly retainer provided you are available to work when required.
>
> Four weekly retainer amount is: $XXXX
>
> Where less than the retainer is able to be earned in the four week period, the balance of the retainer will be paid out at the end of that fourth week. This will be subject to any deductions which may need to be made.
>
> If an Associate is unavailable to work for any reason then they must notify the labour coordinator or company and get approval to have that time off. The Compnay may make deductions from the retainer for such unavailability on the basis set out in the following clauses (a), (b), (c) and (d). Whereever possible you will be advised of any deduction at the time you advise your availability. A deduction will be made from the retainer for:
>
> (a) Each paid hour of work over the four-week period e.g. Worked hours at the associates "work" rate, but not including cancelled work;
>
> (b) Training and/or travelling time payments (calculated at the specified rates in section 3);
>
> (c) Unavailability due to annual leave and other authorised leave. Where an [regular hourly associate] is unavailable during any portion of the four week period due to annual leave, sick leave and bereavement leave; a deduction will be made from the guarantee for the amount paid to the Associate for that leave.

(d) Cancelled work. Work declined for reasons other than as set out in paragraphs (b) and (c) above will result in the retainer being reduced by the gross amount of equivalent hours of that work declined at the associate's "work" rate.

Note: Given that this agreement is for permanent employment, any failure to accept work offered without good cause may also lead to disciplinary action. Also, should you advise of your availability to work, the Company may plan to use you accordingly and you will be obliged to honor that offer.

[25] I am satisfied the wording used in Mr Seymour's employment agreement is of similar effect to the terms contained in the other nine employment agreements. When I have made conclusions on the issues required to be determined I have not found it necessary to distinguish Mr Seymour's terms and conditions from those of the other second applicants.

Fair and Reasonable Guidelines for Work Allocation

[26] In addition to the terms set out in the collective agreement and the individual agreements ISO and the ASU negotiated and agreed to terms set out in a document entitled Fair and Reasonable Guidelines for Work Allocation. Mr Dean Carter, General Manager HR, told me this document was negotiated in 2015 with the ASU and it formed part of the ratification process of the collective agreement at that time.

[27] While the second applicants could not recall the guidelines being part of the 2015 ratification process I have concluded it is more likely than not, that it did. This is because the document, in the section titled "overview", refers to the 2015 collective agreement and states that the guidelines represent "…the parties' mutual understanding of how the 24/7 availability of staff operates in practice …". This means the terms set out in the 2015 document have been incorporated as individual terms of the employment agreements for each of the Second Applicants.

[28] The 2015 guidelines document was reviewed by the ASU and ISO in 2016 with an amended document produced in 2017. Because the second applicants were no longer members of the ASU when the amended document was introduced I have used the 2015 document which formed part of the collective terms at that time.

[29] 24/7 availability of employees is a cornerstone of the collective agreement and the guidelines have been set out to provide guidance on how to operate the 24/7

availability fairly. The guidelines state that staff cannot make themselves unavailable for any period without ISO's consent.

[30] Through the guidelines ISO undertakes to provide as much notice as possible of the next engagement for each employee and where an employee has not responded to a call 12 hours prior to the start time ISO reserves the right to allocate the work to another employee.

[31] ISO sends text messages to its employees to confirm the start time and berth for each shift. I have viewed examples of the text messages sent to employees all of which had a start time of 3.15 am. The text setting out the shift information was sent during the morning, (usually between 10 and 10.30 am) of the day before the shift with confirmation being required by 1pm that day.

[32] If employees are not available to accept a shift, other than for sick, bereavement or annual leave, they are required to request time off with at least 48 hours' notice. ISO has discretion to consent to the time off but the requirements of customers must take priority.

Compliance with s 67D

[33] Section 67D defines an availability provision as being a provision under which the employee's performance of work is conditional on the employer making work available and requires the employee to be available to accept such work.

[34] I have concluded that the wording in the employment agreements meets the definition of an availability provision under the Act. This is because the terms set out in the employment agreements state that the actual hours to be worked by the employees will be determined by ISO and any failure by the employee to accept work offered without justification may result in disciplinary action.

[35] An availability provision may only be included in an employment agreement if the agreement specifies the agreed hours of work including guaranteed hours of work and relates to a period where an employee is required to be available in addition to those guaranteed hours of work.

[36] Section 67C of the Act defines hours of work as being the number of guaranteed hours, and/or the days of the week on which work is to be performed,

and/or the start and finish times of work, and/or any flexibility in the days or start and finish times of work.

[37] The employment agreements applicable to the second applicants do not specify any guaranteed hours. The closest the employment agreement comes to this is the remuneration clause which specifies an amount to be paid for each four week period. When calculated against the hourly rate the payment equates to 120 hours for the four week period. However, to be guaranteed hours of work, the parties must first agree on what the actual hours of work will be.[5]

[38] The employment agreements do not specify the days of the week, start and finish times, or any flexibility in those arrangements. The employment agreement states that the employee has no set entitlement to particular days, shifts or hours of work unless otherwise agreed.

[39] The inclusion of an availability clause in the absence of agreed hours of work is inconsistent with the requirements of section 67D(2) of the Act.

[40] While each of the employment agreements were in place prior to 1 April 2016 the onus was on ISO to ensure, on that date, that all of its employment agreements met the new requirements of the Act.

Compliance with section 67G

[41] Section 67G applies to employees who are required under their employment agreement to undertake shift work. The Act defines "shift" to mean a period of work performed in a system of work in which periods of work are continuous or effectively continuous and may occur at different times on different days of the week.[6]

[42] Each of the second applicants worked on the morning shift which usually commenced at 3.15 am with the afternoon shift starting at 3.15. I am satisfied the shifts were performed in a system of work which are continuous but did not vary from day to day or as between days of the week. It was common ground that the expected 3.15am start time may be pushed out to meet customer requirements, however for all intents and purposes the shift start times were static.

[5] Employment Relations Act 2000, s 67D(2).
[6] Ibid at s 67G(9).

[43] I find section 67G of the Act does not apply to the second applicants as the definition of a shift in s 67G(9) of the Act is not met.

[44] If I am wrong about that I am satisfied the parties have negotiated and must be held to have agreed on what constitutes reasonable notice and reasonable compensation for the cancellation of shifts through the ratification of the Fair and Reasonable Guidelines for Work Allocation document in 2015. This document sets out how shifts will be cancelled and the compensation to be paid in the event of a cancellation outside the required notice period.

Costs

[45] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the second applicants shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. ISO shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[46] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority