IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 118
3027652

	BETWEEN	POSTAL WORKERS UNION OF AOTEAROA INC Applicant
	AND	NEW ZEALAND POST LIMITED Respondents

Member of Authority:	Eleanor Robinson
Representatives:	Simon Mitchell, Counsel for the Applicant
	Hamish Kynaston, Counsel for Respondent
Investigation Meeting:	On the papers
Determination:	16 April 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Postal Workers Union of Aotearoa Inc (PWUA) has two heads of claim before the Authority, both relating to overtime although different grounds apply to the grounds for the application for removal.

[2] Pursuant to s 178(2) of the Employment Relations Act 2000 (the Act) the grounds for removal to the Employment Court are:

a. an important question of law is likely to arise in the matter other than incidentally; or

b. the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

c. the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

d. the Authority is of the opinion that in all the circumstances the court should determine the matter.

[3] Mr Mitchell for PWUA submits that the availability issue which is before the Authority raises important questions of law pursuant to s 178(2)(a) and it should be removed.

[4] New Zealand Post consents to PWUA's application for removal of these matters to the Employment Court.

Brief Background Facts

[5] The Union and New Zealand Post Limited (New Zealand Post) are parties to a Collective Employment Agreement which is in force from 2017 until 2010 (the Collective Agreement).

[6] The Collective Agreement includes coverage for IDAs who are front line employees delivering mail to households and businesses throughout NZ.

[7] The Collective Agreement provides a compulsory overtime provision for Integrated Delivery Agents (IDAs). Clause 20 of the IDA Section of the Collective Agreement states:

> Delivery Agents may be required to work reasonable overtime in excess of their standard hours (subject to safe operating procedures) provided that work is voluntary on days which are otherwise non-rostered days for an individual employee.

[8] The parties are in dispute as to whether the compulsory overtime provision is enforceable, or whether employees can elect not to work overtime, relying on the provisions of Section 67E of the Act.

[9] PWUA claims that the Collective Agreement does not contain an availability provision, or provide reasonable compensation to employees for making themselves available to perform work under the compulsory overtime provision.

[10] The Collective Agreement provides for rostered hours, with overtime reasonable in addition to those hours. It is compulsory pursuant to the provisions of clause 20.

[11] PWUA's view is that the provisions of Section 67E apply therefore IDAs can decline overtime on days they are rostered to work due to:

- The Collective Agreement not containing an availability provision that provides payment of reasonable compensation to the employee for making themselves available to perform work;
- The clause of the Collective Agreement being a provision to which Section 67E of the Act applies.

[12] New Zealand Post disputes that the 'compulsory overtime provision' (clause 20 of the Collective Agreement) is an availability provision as defined by s 67D of the Act.

[13] It claims that having regard to both the plain meaning and purpose of s 67D, clause 20 of the Collective Agreement is not a provision under which:

a) The IDAs performance of work is conditional on New Zealand Post making work available to the IDA; and

b) The IDA is required to be available to accept any work that New Zealand Post makes available.

Submissions on behalf of PWUA

[14] Mr Mitchell for PWUA submits that the first head of claim, the availability issue, raises important questions of law. Section 67E is clearly intended to address situations where employees can be required to work overtime (being work in addition to guaranteed work). The provisions are intended to protect employees from unreasonable terms and conditions of employment.

[15] It is submitted that a ruling in this matter will be of assistance to many employees and employers, in understanding the obligations that they have to one another.

[16] The issue is important, as the matter is part of the minimum code, designed to protect employees who are vulnerable.

[17] While it is not a requirement for removal, PWUA submits that there is little in the way of authority to assist employees and employers in applying S 67E of the Act.

[18] Whilst the full Employment Court considered availability provisions in *Fraser v McDonald Restaurants (New Zealand) Limited*[1], this case is of limited assistance as it is specific to the Collective Agreement considered by the Court in that case.

[19] The type of question for removal was considered by Chief Judge Colgan in *Flights Attendants & Related Services (NZ) Association Limited v Air New Zealand* and which states:

[1] [2017] NZEmpC 95

> ... Section 178(2)(a) does not refer to whether important questions of law can be determined by established legal precedents. Rather, the test is that an important question of law likely to arise in the matter (first limb of the test) will do so "other than incidentally" (second limb). That second limb is not whether there is precedential guidance for the determination of those legal questions. The latter test applied by the Authority addresses the significance of the important question or questions of law in the case. ...[2]

[20] It is submitted that in this instance, the question is significant. Parliament has put in place protections for vulnerable employees to protect them from terms and conditions of employment that are unfair. Therefore the issue of the availability provisions meets the test set out in S 178(2)9a) of the Act.

[21] It is further submitted that the issue of the calculation of overtime should also be removed. It is accepted that the calculation issue could be seen as only relevant to IDAs and New Zealand Post. As it is a matter of interpretation is does not raise any important question, or have application beyond the parties in this matter.

[22] However it is submitted that in addressing the s 67E proceeding, the Authority or Court will need first to address the nature of the obligations that arise between the parties pursuant to the Collective Agreement. The need for the Authority or Court to first interpret the Employment Agreement has been clearly identified in the *McDonalds* case.

[23] Mr Mitchell submits that the submissions filed to date identify disputes about these issues. New Zealand Post does not accept that an IDA is entitled to work his or her rostered hours, and that work in excess of those hours on a daily basis is work of the type referred to in s 67E of the Act. Further that if work is required outside guaranteed hours, New Zealand Post appears to submit that this is only upon the completion of 37.40 hours per week.

[24] PWUA considers that s 67E would apply at the conclusion of the rostered hours on a daily basis.

[25] Therefore in determining the availability issue, the Authority or Court will need to first determine that nature of the obligation, the meaning of guaranteed hours for IDAs and whether the Collective Agreement requires IDAs to work in excess of guaranteed hours.

[26] Consequently it is submitted that the proceedings for calculation of overtime should be removed under s 178(2) (c) of the Act on the basis that it is best for both proceedings to be determined together as the issues are similar or related.

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[2] {2013] NZEmpC 125 at [28]

[27] In addition the Authority has a discretion pursuant to s 178(2)(d) and it would be appropriate to remove the calculation of overtime proceedings using this general discretion. It is submitted that there is benefit to the parties both in terms of cost reduction, but also by resolution of all issues if matters were heard together.

Submissions on behalf of New Zealand Post

[28] New Zealand Post agrees with PWUA's submission in support of removal of the availability dispute on the ground that: "*an important question of law is likely to arise in the matter other than incidentally*".[3]

[29] New Zealand Post submits that whether a provision providing for compulsory overtime (subject to exceptions) is an 'availability provision' is an untested issue, important to the parties, and of significant interest to numerous employees and employers.

[30] New Zealand Post agrees that the issues relevant to the 'issue of calculation' and availability dispute are related, and they should be heard together. The calculation issue involves the interpretation of many of the same contractual provisions as the availability dispute, and some of the same evidence is relevant, as reflected in the parties' 'Agreed Statement of Facts'.

[31] Therefore New Zealand Post agrees that if the availability dispute is removed to the Employment Court, the calculation dispute should be removed also, but on the ground pursuant to s 178(2)(c), namely that: "*the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues*".

[32] New Zealand Post also agrees with PWUA's submission that the Authority should exercise its discretion to order that in all the circumstances the Employment Court should hear the matter.[4] It submits that would be both helpful and cost effective for the two issues to be heard and determined together.

Removal Application and discussion

General Principles of Removal

[33] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

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[3] Section 178(2)(a) of the Act.
[4] Section 178 (2)(d) of the Act-

[34] In the event that the party or parties applying for removal satisfy the tests set out in s.178(2)(a) – (c) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[5].

Determination

[35] I am satisfied that important questions of law are likely to arise other than incidentally in this matter, which will be decisive of important aspects of the case.

[36] I am also satisfied that the question as to whether or not a clause providing for compulsory overtime (subject to exceptions) is an availability provision is an untested issue. As such, determination of it will be of assistance for employees and employers and I consider it is important to have direction from the Employment Court.

[37] I am further satisfied that the two issues, namely the availability dispute and the overtime dispute, should be heard together as they are closely interlinked and connected, and hearing them together will be efficient and in addition, would be cost-effective for the parties.

[38] Finally, I am satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2) (a), (b) and (d) of the Act.

[39] In all the circumstances the Employment Court should determine these matters.

Costs

[40] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, they may lodge and serve memoranda as to costs within 28 days of the date of this determination. No application for costs will be considered outside this time frame without prior leave.

[41] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority

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[5] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [38]