

discontinue their application. There is no objection to their withdrawal. E Tu Incorporated is struck out as a party. There is no order as to costs.

Relevant Facts

[4] Due to the decline in mail and increased parcel volumes nationally, NZ Post needed to change its delivery model. Over six years NZ Post invested time and resources to identify an appropriate delivery model. One part of the proposed delivery system involved the use of Paxsters. “Paxsters” are small four wheeled motorised vehicles with motorbike type handlebars for steering and a rear compartment for storing letters and parcels and can be driven on the footpath. They are used to deliver both letters and parcels to homes throughout Auckland.

[5] To be commercially viable and efficient, NZ Post needed Paxsters to operate for longer periods each day than Posties traditionally worked. As a result NZ Post it proposed 4 day rosters to replace the usual six day roster. The 4 day roster is viewed as essential to NZ Post’s new delivery system.

[6] In late 2013 a group known as the Delivery Working Group was formed. This comprised NZ Post and the Union and others. Its purpose was to engage with the Union and others about the new technology NZ Post wished to introduce. This included visits with the Union to Europe to view the new technology including Paxsters at work.

[7] In July 2015 when NZ Post altered its deliveries to every second day. A further group was then established known as the Network Working Group. Its purpose was to consider and consult over further changes known as ‘integrated delivery’ – merging the delivery of mail and parcels in urban residential areas and ‘processing innovation’- introducing automated sorting equipment.

[8] In August 2015 NZ Post began consultation about the proposed roster changes. It prepared a document setting out proposed delivery options with proposed roster changes.

Collective Agreement

[9] The parties were also negotiating a collective agreement that took effect on 1 April 2016.¹ The collective agreement anticipated the introduction of the new delivery system including the use of Paxsters. It did not at that time define the final roster to be implemented.

[10] Various mechanisms for overseeing the roster design were set out in the collective agreement. This included formation of the Integrated Delivery Working Group (IDWG). The purpose of the IDWG amongst other things was to monitor roster design. The collective agreement also included the below clause (now known as clause 8):²

Rosters shall be designed with a view to ensuring that the combination of hours per day and the pattern of working and non-working days are such as to minimise the potential for employee harm.

Rosters

[11] In June 2016 NZ Post sought to implement two types of four day rosters of involving 8 to 9 hours per day delivering mail using Paxsters. These were:

- a) “fixed day roster” (fixed four day roster pattern every month)
- b) “rotating roster” (where three different four-day roster patterns rotate every three weeks)

[12] Most branches are using the rotating roster pattern.

[13] The parties have now entered into a new collective agreement. Clause 3 (now clause 8) remains unchanged.

[14] On 14 March 2017 the Union filed a statement of problem seeking a finding that clause 8 had been breached by the implementation of the four day roster. It sought urgency which was declined.³ The substantive matter is now before me for determination.

¹ Collective Employment Agreement 2016-2017 between NZ Post, Express Couriers and E Tu.

² See above n1 clause 3 (now clause 8) Schedule N.

³ *The Postal Workers Union of Aotearoa & Anor v New Zealand Post Limited* [2017] NZERA Auckland 104.

Issues

[15] The allegations of breach have changed several times. Initially the Union's Statement of Problem sought to prosecute breaches of the Health and Safety in Employment Act. These were not pursued.

[16] At a teleconference on 17 July 2017⁴, the issues were defined as:

- a) Whether the parties had agreed to the four day rosters being fixed or floating?
- b) How the parties were to implement these four day rosters through the use of "Paxsters"?

[17] At hearing it became clear there was only one issue for determination. This is whether NZ Post has breached clause 8 of Schedule N of the Collective Agreement by implementing the rotating roster for full time delivery agents.

Does the design of the rotating roster breach clause 8?

[18] I have summarised the Union's below position from its closing submissions. It now submits the roster design breaches clause 8 because:

- NZ Post obligation is to "design a roster so as to minimise the potential for employee harm" and it made no attempt to do so when it designed the rotating roster;
- NZ Post did not assess the level of safety of each alternative roster
- The design of the current three week rotating roster is unsafe because of the:
 - It has six working days in a row, totalling 56.50 hours in two seven day periods
 - The work of Professor Drew Dawson and Brett Miller does not meet the obligation under clause 8
 - Did not take into account the effect of rostered and voluntary overtime
 - Impact of irregular hours upon employee social lives and fatigue

⁴ Minute dated 17 July 2017 paragraph [2].

Law

[19] The interpretation of clauses within a collective agreement requires establishing the meaning the parties to the agreement intended the words in dispute to bear.⁵

[20] The starting point is the provision itself and an assessment of the ordinary and natural meaning of the language used.⁶ A cross-check against the contractual context is required.⁷ If the words are ambiguous the inquiry will move to an assessment of relevant facts and circumstance.⁸

[21] The next stage is to ask whether the meaning would lead to a nonsensical result - whether it defies commercial (or employment relations) common sense or otherwise.⁹

[22] However, words can never be construed as having a meaning they cannot reasonably bear. The plainer the words used, the more improbable it is that the parties intended them to be understood in any other way than what they plainly say. The Authority will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to the clauses when aware of the circumstances in which the agreement was made.¹⁰

Clause 8 of the collective agreement

[23] The wording of clause 8 refers to roster design “with a view to” ensuring the combination of hours and days “minimise the potential for employee harm”.¹¹

[24] “With a view to” is not defined in the collective agreement. The dictionary definition of the phrase is “with the hope, aim, or intention of”.¹² “Minimise” and “potential” are also not defined in the collective agreement. “Minimise” means to

⁵ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

⁶ *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131 at [40].

⁷ *New Zealand Airline Pilots' Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 at [33] citing *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [40].

⁸ See above n 5 citing *Vector Gas* at [59] per McGrath J.

⁹ See above n 5 citing *Pyne Gould Guinness Ltd v Montgomery Wilson (NZ) Ltd* [2001] NZAR 789 (CA) at [18], [29].

¹⁰ See n 5 citing *Vector Gas* at [4], [22]; and at [61] citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

¹¹ See above n1 clause 3 (now clause 8) Schedule N.

¹² Oxford Dictionary online https://en.oxforddictionaries.com/definition/with_a_view_to.

“reduce (something, especially something undesirable) to the smallest possible amount or degree” and “potential” is defined as “having or showing the capacity to develop into something in the future”¹³.

[25] A plain reading of clause 8 requires rosters to be designed with the aim or intention of reducing to the smallest possible degree the capacity or development of employee harm.

[26] Clause 8 does not require the elimination of all potential harm. Common sense basis would indicate that to be impossible. It also does not expressly or impliedly require a comparative exercise of all possible rosters to find the safest roster possible.

How was the rotating roster designed?

[27] From the evidence the roster design process encompassed 3 years of research and consultation between NZ Post and the Union and others including site visits to overseas worksites operating with Paxsters.

[28] Specific consultation on roster design with the Union and smaller groups of affected Union employees occurred through various groups.

[29] I do not accept the Union’s submission the only work NZ Post undertook on assessing the safety of the roster design was that “the Respondent considered the attractiveness of the roster, and used its experience of its courier operating where long days were worked”. The evidence about the roster design was far more extensive.

[30] Patrick Greene, Industrial Advocate for NZ Post was involved in the early consultations and design process. He referred to the consultations with the Unions regarding roster design through 2015 to 2016. He also noted both parties had a shared purpose in the roster design that “safety and well-being as an overriding priority.”¹⁴ He recalled the Union proposing up to eight different rosters during the second half of 2015 and February 2016. The rosters were considered but determined to be impractical because the Union’s preference was for a five day roster yet NZ Post operated six days per week.

¹³ Oxford Dictionary online <https://en.oxforddictionaries.com/definition/minimize> and <https://en.oxforddictionaries.com/definition/potential>.

¹⁴ Paragraph 12 sworn brief of evidence P Greene.

[31] The parties collective agreement subsequently ratified an agreed roster design process with defined weekly hours and working days:

10. Standard Weekly Hours

Upon appointment the number of a Delivery Agent's weekly standard hours and the number of days on which the standard hours will be worked each week will be fixed by agreement between the delivery agent and the company. Actual days of work will be set by a roster.

Once IDA rosters have been fully implemented in a branch, the number of standard hours and the number of working days can only be changed by agreement with the Delivery Agent. Roster can be changed as required in order to meet business needs, subject to clause 3 of this section. Note that full implementation of IDA does not include transitional rosters, but refers to an end state based on minimal sorting and base rosters of 37:40 worked over 4 days.

A full time delivery agent will have standard hours of 37:40.

11. Working Days

Working days for Delivery Agents will be set by roster (rostered days). Rosters for full time Delivery Agent can be set over 4, 5 or 6 days per week, Monday to Saturday inclusive.

Working hours

[32] The working days clause 11 allows a rotating roster of 4 days per week between Monday to Saturday.

[33] The Union's submission about the possibility of regular rostered overtime occurring under the rotating roster was not supported by direct evidence. Michael Hunter, Secretary of the Union referred to a member complaining of excessive hours but did not produce any supporting evidence this was a regular occurrence. He also referred to a questionnaire the Union had undertaken of its members and replicated anonymous comments noting fatigue. I cannot give this evidence much weight. It is double hearsay.

[34] I understood NZ Post's evidence was that working "rostered overtime" in excess of the average 9 hours 30 minutes was unusual and carefully managed. I accept this evidence because it would also not be in NZ Post's interests to have

employees undertaking regular “rostered overtime” due to the penal rates that would apply.

[35] The Union’s argument that an employee is rostered to work 56.50 hours is based on 7 day week from Wednesday to Tuesday in the second week of the rotating roster. That is not a breach of the agreement because the parties have agreed in clause 11 to 40 hours work over 4 working days of the week between Monday to Saturday. The second week of the rotating roster complies with clause 11.

[36] The Union’s expert Dr Naomi Rogers does recommend 2 consecutive days off between weekly shift cycles. This is in line with clause 3 of the agreement that states:

Where practicable the roster for employees rostered to work over 4 or 5 days will provide for 2 consecutive days off each week.

[37] The current rotating roster only provides for 1 days rest between shift cycles in the second and third weeks. From the evidence it was understood there was a roster that could take provide 2 consecutive days rest breaks between shift cycles. That was not the preference of employees because the rotating roster currently in place provided 5 rest days off in the same week.

[38] Although the Union submits the obligation is to find the safest roster not the most popular, Dr Rogers makes no comment about the effect of a 5 day rest break between weeks one and two upon fatigue. A plain reading of clause 8 also does not expressly require the safest roster possible.

Professor Dawson/Derek Miller

[39] Professor Drew Dawson was engaged to assess the rotating roster and identify any inherent factors that could significantly impact upon fatigue. He considered the impact upon the social lives of employees as a factor. His report concluded on the balance of probabilities an increase in fatigue-related risk is unlikely. He goes on to recommend monitoring for 6-12 months post implementation.

[40] In my view Professor Dawson’s report indicates the rotating roster complies with clause 8 because there is no increase in fatigue-related risk then there had been previously.

[41] Derek Miller was engaged to undertake a fatigue risk assessment, implement a fatigue monitoring process and management tools to eliminate and minimise risk across the business but prioritising Integrated Delivery. E Tu Incorporated are engaging with Mr Miller in respect of the project. The Union is not. In my view Mr Miller's fatigue project is an integral part of the roster design that ensures future compliance with clause 8 i.e. minimises the potential for employee harm.

[42] In the circumstances, I am not satisfied NZ Post has breached clause 8 of the parties collective agreement.

[43] The application is dismissed. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority