IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 51
3029098

	BETWEEN	OVATION NEW ZEALAND LIMITED First Applicant
		TE KUITI MEAT PROCESSORS LIMITED Second Applicant
	A N D	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION Respondent

Member of Authority:	T G Tetitaha
Representatives:	JBM Smith QC, R Brown and M Bialostocki, Counsel for the Applicants P Cranney and S Meikle, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	5 June 2018
Date of Determination:	6 June 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The tests under s178 of the Act have not been met. I decline to remove this matter.

Employment Relationship Problem

[1] By consent the parties seek removal to the Court of this entire matter pursuant to s.178(2)(a) to (b) and (d) of the Employment Relations Act 2000 (Act). They seek determination of their application on the papers.

[2] No evidence has been filed in support of the application. Submissions at a telephone conference were summarised in a Minute of the Authority dated 1 June

2018. The parties were directed to file any further documentation by 6 June 2018. A joint Memorandum of Counsel was filed on 5 June 2018.

Removal to Court

[3] The Authority's power to grant removal of this matter to the Employment Court is contained in s178 of the Act:

> **178 Removal to Court**
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> **[**(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.**]**
> (2) The Authority may order the removal of the matter, or any part of it, to the Court if—
> (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
> …
> (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[4] The parties must meet the tests set out therein before removal may occur.

Is an important question of law likely to arise in the matter other than incidentally? (s.178(2)(a)

[5] The parties submit the following important questions of law arise other than incidentally in this matter:

a) Whether the parties to an employment relationship agreement can agree that payment for rest breaks under s69ZD of the Act is incorporated within piece work rates; and

b) If so, whether the parties to this matter have so agreed as a matter of the correct construction of or implication of a term in the collective agreements concerned.

[6] The parties submit these questions remain "open" following the Court of Appeal decision in *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trade Union Inc* [2017] 2 NZLR 234, (2016) 14 NZELR 379.

Lean Meats Oamaru Ltd (Court of Appeal)

[7] The Court of Appeal dealt with a single question of law namely:

> Did the Employment Court err in deciding that the relevant provisions in Part 6D of the *Employment Relations Act 2000* required rest breaks to be paid at the same rate for which the employee would be paid to work?

[8] The Court of Appeal dismissed the appeal and expressly agreed with the lower Court's reasoning.

Lean Meats Oamaru Ltd (Employment Court)

[9] The Employment Court decision[1] addressed substantially more issues than the question of law that was dismissed on appeal. One issue the Court addressed was the incorporation of paid rest breaks into hourly rates or piece rates by agreement:[2]

> [54] I can deal shortly with a subsidiary submission which was advanced by Mr Churchman. It was to the effect that the minimum entitlements of the Act in relation to rest breaks would not, as a matter of law, be met even if an allowance for rest breaks had been incorporated in hourly rates or piece rates. The essence of Mr Churchman's submission was that such rates provided remuneration for work, not rest.
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> [55] In my view, whether an employee has been paid for his or her rest breaks is a question of fact. If such a payment is not identified, whether in an employment agreement or in a payslip (for example), it will be more difficult to conclude that provision for such a payment has been made. But it may be possible to infer that rest breaks are indeed compensated as required by the statute, for instance where an employment agreement provides for remuneration by way of salary.
>
> [56] In this instance, I have found for other reasons that there was no agreement that payment for rest breaks would be included in the payment for work. Had there been express evidence indicating that this was indeed the intention of the parties; there might well have been a different outcome. That, however, was not the case. In those circumstances I do not need to take the Union's alternative argument any further.

[10] The above dicta answers the question of law the parties allege arises in this matter. The Court has confirmed parties can agree to incorporate payment for rest breaks into piece work rates. Whether this has occurred is a question of fact (not law).

[11] Further the Court points to how parties can resolve this dilemma for future bargaining purposes – by identifying the paid rest break in their employment agreement. If they do not clearly identify the paid rest break in the agreement "it will be more difficult to conclude that provision for such a payment has been made."

Is the case of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court? (s.178(2)(b)

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[1] *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trade Union Inc* [2015] NZEmpC 176, [2015] ERNZ 986.

[2] See above at [54] to [55].

Is the Authority of the opinion that in all the circumstances the Court should determine the matter? (s.178(2)(d)

[12] Both parties seek removal under s 178(2)(b) and (d) upon the following grounds below:

a) The parties are currently unable to conclude bargaining for the new collective agreements due to disagreement about the treatment of rest breaks for piece rate workers

b) This is a significant issue for all parties that cannot be resolved without a definitive and authoritative judgment from the Court;

c) There is strong public interest in the parties being able to exercise collective bargaining rights promptly, effectively and efficiently, and in the context of a prompt, certain and final determination of the Court;

d) There is significant public risk to the public interest and to the parties if the parties cannot obtain prompt removal and resolution;

e) There is a strong public interest in effective and efficient use of the Court's resources in a case such as this and in having direct and prompt access to the Court;

f) There is an ongoing risk to other parties and to the public in the event of non-removal;

g) All parties agree that any determination of the Authority may be subject to challenge;

h) Parties forgo any right or challenge and have the matter heard at the Court at first instance;

i) Removal is proposed and supported by both sides.

Conclusion of bargaining quicker if removed

[13] The current status of the parties bargaining is unclear. At a telephone conference on 30 March 2018 the respondent Union confirmed the following:

a) Collective bargaining has been ongoing since February 2018; and

b) There are other outstanding issues for collective bargaining.

[14] The impression gained was that it is very early in the bargaining process for any reference to the Authority or Court for dispute resolution. Bargaining commenced in February 2018. There have only been 3 months of collective bargaining prior to this application being made. The statement of problem records the parties have not tried to resolve this issue using mediation. This would be insufficient to warrant any reference to facilitation. There is no evidence about what has occurred to create since intractability at such an early stage in the bargaining process.

[15] The resolution of this matter shall not resolve the collective bargaining between the parties. This is because the respondent acknowledges there are other issues still outstanding for collective bargaining. What those issues may be and whether they shall be easily resolved following removal is unclear.

Public Interest

[16] The availability of hearing time in this jurisdiction should meet public interest in the speedy low cost decision making. It should also allow the parties to promptly conclude bargaining this year.

[17] A different Authority Member from the Auckland Registry is available to hear this issue in June 2018. Given the three month statutory time limitation imposed upon the Authority, a decision shall be issued promptly. The Member to be allocated the file is known to be speedy and efficient in delivering her reserved determinations, if an oral decision is impracticable.

[18] The current collective agreement ended on 30 September 2017. There is no information but it is assumed this continues in force for the next 12 months under s.53 of the Act. If heard in June the Authority may be able to render a decision while the agreement remains in force between the parties, especially if an oral decision is given.

[19] There is no indication of the likely timeframe for resolution of this matter if removed. It is unlikely to be heard under the Court's adversarial system in June 2018.

[20] There is some merit in a less costly faster hearing occurring in the first instance before an experienced Authority Member whom has been involved in collective bargaining. It provides the parties (and Court) with an initial assessment of their respective cases and therefore the merit in filing a challenge. It may also be persuasive for ongoing collective bargaining purposes.

[21] It is in the public interest that I do not lightly dispense with the Authority's investigation.

Risks to other parties

[22] Given my finding regarding the question of law, the risks to other (interested) parties shall not be remedied by removal. The risks have already been identified by the Employment Court above. It is for the parties to resolve by collective bargaining or to seek dispute resolution and/or compliance orders through the Authority.

Challenge and Consent to removal

[23] The fact parties may challenge and/or support removal does not require the Authority to act accordingly upon an application. The tests under s178 of the Act have not been met. I decline to remove this matter. Given both parties sought removal, costs should lie where they fall.

T G Tetitaha
Member of the Employment Relations Authority