IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 704
3063092

BETWEEN	MARITIME UNION OF NEW ZEALAND INCORPORATED First Applicant
	GERALD SEYMORE Second Applicant
AND	ISO LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Simon Mitchell for Applicant Kate Ashcroft for Respondent
Investigation Meeting:	20 November 2019
Submissions Received:	22 and 26 November 2019 from Applicant 22 and 26 November 2019 from Respondent
Determination:	12 December 2019

DETERMINATION OF THE AUTHORITY

A. The application for compliances orders is declined.

B. Costs are reserved.

Employment relationship problem

[1] ISO Limited operates the Port in Tauranga. The work volumes at the port fluctuate and are dictated by external factors such as vessel availability and the

number of port calls per vessel. Fluctuating work volumes affect the availability of the number of hours for which employees can be rostered.

[2] ISO has an advance indication of what shipping schedules are likely to be, and it plans berthing details approximately one week in advance. However, variations to actual arrival times for ships can occur right up until the day the ship is actually in port.

[3] ISO has a team of Duty Managers who monitor the arrival of vessels and those arrival details are relayed to ISO's workforce coordinators who arrange staffing requirements. Workforce coordinators allocate available employees to work on vessels as they arrive and notify employees by text 24 hours in advance of their work times.

[4] Shift start times and the duration of shifts may change for a variety of reasons. These include labour shortages, vessels being delayed, cargo not being ready, crane or mechanical breakdowns, or where the cargo has run out.

[5] These changes affect the overall hours of work available to employees. ISO monitors the hours worked by each employee on a daily basis to ensure a fair distribution of hours taking into account any contractual obligations.

[6] The Maritime Union of New Zealand Incorporated (MUNZ) represents stevedores employed by ISO including Mr Seymour. The applicants claim ISO is in breach of ss 67C to 67F of the Employment Relations Act 2000 (the Act) and seek compliance orders. In addition the applicants seek compliance orders in respect of an Authority determination dated 23 November 2018.[1]

[7] MUNZ and ISO have been engaged in collective bargaining since October 2018. It was common ground at the investigation meeting that a barrier to concluding the bargaining included the question about availability provisions and guaranteed hours of work.

[8] Just prior to the investigation meeting ISO lodged an amended statement in reply in which it claims MUNZ has no standing as a party to these proceedings. This

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[1] *MUNZ & 10 Ors v ISO Limited* [2018] NZERA Auckland 368.

is because Mr Seymour is engaged pursuant to an individual employment agreement. ISO applied to have MUNZ struck out of the proceedings.

Issues

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

a) Whether MUNZ should be struck out as an applicant to the proceedings;

b) Whether compliance orders should be made in respect of the earlier determination of the Authority;

c) Whether ISO has or continues to breach ss 67D to 67F of the Act and if so, whether compliance orders should be made.

[10] 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 but all have been considered carefully in reaching my conclusions on the issues to be resolved.

MUNZ standing

[11] As the First Applicant in these proceedings, MUNZ seeks compliance orders in its own right in respect to the earlier determination and the provisions under Part 6 of the Act.

[12] MUNZ is neither a party to the individual employment agreements between the Mr Seymour and ISO, nor to a collective agreement. Despite that MUNZ is attempting to bring proceedings against ISO as a party in its own name and is seeking remedies.

[13] In my earlier determination I declined an application to strike out MUNZ as an Applicant on the grounds that MUNZ had the right to be heard, as the issues

addressed in the determination may have implications for MUNZ and other workplaces where MUNZ represents the collective interests of its members.[2]

[14] The difference between the earlier determination and these proceedings is that during the earlier proceedings MUNZ withdrew its application for a declaration because it was satisfied the 10 employee Applicants in that case all had sufficient standing.

[15] At the investigation meeting relating to these proceedings MUNZ was invited to reconsider its position in respect of its application for compliance orders and chose to continue.

[16] Section 137 of the Act sets out the powers of the Authority to order compliance where any person has not observed or complied with express provisions of the Act including Part 6 which deals with individual terms and conditions of employment including those sections currently in dispute, or any order or determination of the Authority.[3]

[17] Section 137(4) defines the persons who may take actions against another person for a compliance order. This section limits the categories of persons who may take compliance proceedings to those "affected" by the breach complained of.[4]

[18] There is no evidence MUNZ is affected by the alleged breaches. Accordingly, it has no standing to bring any claims for remedies against ISO. However, taking into account all of the circumstances of this matter, it is just to allow MUNZ to be heard on this matter and the application that it be struck out is declined.[5]

Compliance with earlier determination

[19] In my earlier determination I held that the applicable employment agreements included an availability provision and that the provision was inconsistent with s 67D of the Employment Relations Act 2000 (the Act).[6] I also found that s 67G of the Act did not apply.

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[2] Ibid at [12].
[3] Employment Relations Act 2000 (the Act), ss 137(1)(a)(ii) and 137(1)(b).
[4] The Act, s 137(4)(a).
[5] Followed *Prendergast v Associated Stevedores Limited* [1992] 1 ERNZ 737.
[6] Ibid.

[20] The statement of problem in the earlier proceedings did not seek any orders from the Authority and accordingly none were made. For that reason the application for compliance orders with the earlier determination is declined.

Breach of Part 6

[21] The applicants claim ISO has breached ss 67D to 67F of the Act and they seek compliance orders.

[22] Part 6 of the Act deals with individual terms and conditions of employment. One of the stated objects of Part 6 includes specifying the rules for determining the terms and conditions of employment.

[23] Section 65 sets out the form and content required in an individual employment agreement and includes a requirement that employment agreements include:[7]

> …any agreed hours of work specified in accordance with s 67C or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work…

[24] Section 67C of the Act requires individual employment agreements to specify the hours of work agreed by an employer and employee and defines hours of work as including any or all of the following:[8]

a) The number of guaranteed hours of work;

b) The days of the week on which work is to be performed;

c) The start and finish times of work;

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

[25] The applicable terms and conditions of employment for Mr Seymour are set out in three documents including an individual employment agreement and a 2015

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[7] The Act, s 65(2)(a)(iv).

[8] The Act, s 67C(2).

collective agreement between the Amalgamated Stevedore's Union Incorporated (ASU). The 2015 collective agreement has now expired. In my earlier determination I held that the terms set out in a document entitled Fair and Reasonable Guidelines for Work Allocation were incorporated into the collective agreement and therefore also forms part of the terms and conditions of Mr Seymour's employment.

[26] The documents containing the terms and conditions of employment applicable to Mr Seymour do not set out the days of the week on which work is to be performed, the start and finish times or any flexibility in the days of work.

[27] The expired collective agreement provides for hours of work in the following terms:

> Hours of work may vary and these are set out in the individual employment agreements. Working hours, shift rosters and schedules may reflect the requirements of a continuous 24/7 operation.

[28] The individual employment agreements do not specify hours of work but refer to the 24 hour, 7 day a week nature of the operations of ISO.

[29] There are also no guaranteed hours of work specified within the applicable terms and conditions. However, the parties have agreed to the payment of a four weekly "retainer". The retainer is an amount specified to be the guaranteed payment for a period of four weeks.

[30] When the employment agreements were first entered into, the retainer, when divided by the employee's hourly rate, amounted to a payment equivalent to 120 hours within the four week period.

[31] Where employees were allocated and worked less than or equal to 120 hours in the four week period they received the retainer payment in full. Where they worked more than the 120 hours they received payment for all hours worked at their applicable hourly rate.

[32] During the investigation into this application I have found that over time the number of hours covered by the retainer reduced each time Mr Seymour received a pay increase. This is because the retainer was not amended to align with the increased hourly rate. Mr Seymour was therefore no longer guaranteed to be paid for 120 hours

in the four week period. In 2018 Mr Seymour's retainer was increased to reflect the intention that he be paid a minimum of 120 hours each four week period.

[33] ISO has referred me to the recent Court decision of *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited* to support its submission that the guaranteed retainer effectively sets the guaranteed hours.[9] There, the Court held that a clause reflecting remuneration by reference to hours amounted to hours of work under s 67C of the Act.

[34] That case is distinguishable on its facts. The wording of the remuneration clause in the *Postal Workers* case expressly provided for remuneration for full time delivery agents to be a minimum payment of 37 hours and 40 minutes per week. There is no equivalent wording in the terms and conditions applicable to Mr Seymour. The employment agreement does not reference 120 hours, that figure has been arrived at by undertaking a simple calculation of dividing the retainer by the hourly rate.

[35] ISO cannot rely on the retainer to set the guaranteed hours of work. The number of hours covered by the retainer were fluid. ISO's practice has been to consistently increase the hourly rate for Mr Seymour without a requisite increase in the retainer meaning that during periods of his employment Mr Seymour was not guaranteed payment for 120 hours for the four week period.

[36] Records provided by ISO show that Mr Seymour's retainer currently amounts to payment for 120 hours in a four week period but that has not always been the case. For example in 2015 the number of hours covered by the retainer were just under 87 hours for a four week period.

[37] I am satisfied the terms and conditions applying to Mr Seymour do not include hours of work provisions that comply with the requirements of s 67C of the Act.

Availability

[38] Mr Seymour seeks a compliance order from the Authority preventing ISO from requiring him to perform work outside time requested by the employer, due to the lack of a compliant availability provision in the employment agreement and in the absence of reasonable compensation.

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[9] *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited* [2019] NZEmpC 47 at [41]-[42].

[39] In my earlier determination I held that the terms and conditions of employment contained availability provisions. This is because they allow ISO full discretion to determine the actual hours to be worked by employees. The written documents also provide for possible disciplinary action where an employee fails, without justification, to accept work offered.

[40] The Court stated in the *Postal Workers* case: [10]

> Section 67D(2) only allows employers to include availability provisions in an employment agreement if it specifies agreed hours of work and includes guaranteed hours. An employer must guarantee some work before it can have an availability provision.

[41] My view has not changed from my earlier determination that the employment agreement contains availability provisions that are unenforceable because they do not specify agreed hours of work and do not include guaranteed hours.

[42] I have accepted the evidence from ISO that since my earlier determination it has not applied the terms of the employment agreement to require availability and has allowed Mr Seymour to accept or reject work on a weekly basis without justification.

[43] Accordingly, I find that while the written terms of the employment agreement breach the requirements of s 67D of the Act, ISO has not applied the terms to enforce Mr Seymour's availability and has not relied on the provisions to require Mr Seymour to work any set hours. Mr Seymour's application for a compliance order is declined.

Adverse treatment

[44] Mr Seymour claims he was treated adversely when he exercised his rights under s 67E of the Act and refused to perform work. He says the adverse treatment is that he is offered hours of work differently to those employees who accept all hours offered to them. He seeks a compliance order from the Authority requiring ISO to cease treating him adversely.

[45] Sections 67E deals with the rights of employees where an availability provision does not provide for the payment of reasonable compensation for the employee making themselves available. Section 67F of the Act prohibits adverse treatment of employees who exercise their rights under s 67E.

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[10] Ibid at [22].

[46] Section 67E states:

> **Employee may refuse to perform certain work**
> An employee is entitled to refuse to perform work in addition to any guaranteed hours specified in the employee's employment agreement if the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the availability provision.

[47] Section 67F states:

> **Employee not to be treated adversely because of refusal to perform certain work**
> (1) An employer must not treat adversely an employee who refuses to perform work under section 67E.
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> (2) In this section, an employer **treats an employee adversely** if the employer—
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> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially the same qualifications, experience, or skills employed in the same or substantially similar circumstances; or
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> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
>
> (c) retires that employee, or requires or causes that employee to retire or resign.
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> (3) For the purposes of subsection (2)(b), **detriment** includes anything that has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[48] There is no dispute that the terms and conditions applicable to Mr Seymour do not contain a provision for the payment of reasonable compensation for Mr Seymour making himself available to perform work under the availability provision. Under s 67E he is entitled to refuse to perform work.

[49] The question to be determined is whether Mr Seymour has been treated adversely as a result of his refusal to perform work. I have been provided with the hours worked by Mr Seymour and other stevedores working for ISO for the months of April to July 2019 inclusive. It is apparent that Mr Seymour worked less hours than others. However, I am satisfied the situation arose due to Mr Seymour exercising his

right to refuse work rather than because ISO was not offering a similar number of hours to him as it offered to others.

[50] In relation to the allocation of hours of work, ISO operates an automated system that records the number of hours employees work on a daily basis and then allocates shifts based on the percentage of the hours worked by the employee compared to the retainer to be paid or any contractual guaranteed hours.

[51] The automated system creates a list of employees, showing those who have worked the lowest percentage of their hours (as compared to the retainer or contractual guaranteed hours) at the top of the list. These employees are the first employees to be offered shifts that become available. If an employee is allocated a shift and notifies that they are no longer available, the shift is usually reallocated to the next person on the list. There is no evidence to show that this method of allocation has been changed or varied.

[52] Other factors that have impacted on the number of hours of work available to be allocated include an unexpected drop in export log prices in June 2019 which caused a reduction in volume of work for ISO. The volume has not yet returned to previous levels. Announcements about the downturn in volume were made to employees in July and September this year. ISO's response to the downturn has included a reduction of roles nationwide and a reduction in available hours of work across the board.

[53] Mr Seymour has not established to my satisfaction any detriment suffered by him as a result of his refusal to perform work on any particular day.

[54] Mr Seymour's application for a compliance order is declined.

Compliant terms and conditions of employment

[55] The applicants seek orders from the Authority requiring ISO to comply with ss 67D to 67F inclusive of the Act by entering into an employment agreement that either does not contain an availability provision or that complies by:

a) Containing agreed hours of work at specific times that employees work each week; and

b) That provides for reasonable compensation to the employee for making themselves available for work outside those times.

[56] As mentioned earlier in this determination, MUNZ and ISO are currently in bargaining for a collective agreement. Employee availability is a topic related to the bargaining. The parties are due to attend mediation in an effort to conclude a collective agreement, within the next two weeks.

[57] ISO submits that the applicants are asking the Authority to make orders about matters relating to bargaining. Section 161(2) of the Act prohibits the Authority from intervening in the negotiations of a collective agreement and ordering a party to conduct itself by making an offer in a certain way or settle for the parties any outstanding issues and thus complete the new term or terms for them.[11]

[58] The application for compliance orders is not an application to determine existing rights and obligations.[12] The orders sought are related to the bargaining but they fall short of asking the Authority to fix new terms and conditions of employment.

[59] Through these and the previous proceedings both parties to the bargaining are keenly aware of their obligations under Part 6 of the Act. They are represented by competent and experienced Counsel and I have no doubt they will continue to bargain for a collective agreement that is compliant with all requirements of the Act.

[60] In the meantime Mr Seymour and others covered by the collective bargaining are bound by written individual terms and conditions of employment that are not compliant with Part 6 of the Act, although I have found that since my previous determination ISO is not enforcing the unlawful provisions. As yet no agreement has been reached as to how ISO will meet its obligations under Part 6 of the Act and that is a matter for the bargaining teams.

[61] In all of the circumstances it is not appropriate to make the compliance orders sought and the application is declined.

Costs

[11] *Canterbury Spinners Ltd v Vaughan* [2002] 1 ERNZ 255 at [41].
[12] See *Asure New Zealand v New Zealand PSA* [2005] ERNZ 747 at [19].

[62] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so ISO shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. MUNZ 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.

[63] 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