IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 677
3177739

BETWEEN	E TŪ INC Applicant
AND	NEW ZEALAND STEEL LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Garry Pollak, counsel for the Applicant Carter Pearce, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and/or further evidence	15 September and 2 November 2022 from the Applicant 11 October 2022 from the Respondent
Determination:	19 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, E Tū Inc (E Tū), has applied to the Authority for a reopening of an investigation pursuant to clause 4 of Schedule 2 to the Employment Relations Act 2000 (the Act).

[2] The basis for E Tū's application to reopen is that the determination, ([2022] NZERA 166) is unclear and there is some ambiguity in it. E Tū claims that it was not aware that the respondent New Zealand Steel Limited (NZSL) held a divergent view about the findings in the Determination and how they were to be applied until after the 28 challenge period had elapsed.

[3] E Tū claims that NZSL has acted in a misleading and deceptive manner, and it did not act in good faith, by not revealing it held a different view of how the Determination should be applied. As a result, NZSL has introduced a new policy based on its view of the Determination.

[4] NZSL does not agree that determination [2022] NZERA 166 is unclear and denies that it has not acted in good faith, or indulged in misleading and deceptive behaviour. In particular NZSL submits that it has not introduced a new policy. It does however intend putting a policy together and to that end, it has invited E Tū to collaborate in that process, without an acceptance of the invitation from E Tū.

[5] Whilst not agreeing that determination [2022] NZERA 166 is unclear, NZSL it does not oppose the reopening application since the parties do not agree on how to apply the Determination.

Issue

[6] The issues requiring investigation are whether or not:

- a reopening of should be granted
- identification of the key principles in the determination

Should the application for a reopening be granted?

[7] Under clause 4 of the second schedule of the Act the Authority may order an investigation to be reopened upon such terms as it thinks reasonable.

[8] E Tū seeks a reopening on the basis of ambiguity in the Determination, NZSL does not consider there is any ambiguity.

[9] Finality in litigation is important and a reopening should not be granted if there are grounds for believing that an application to reopen is made solely to provide an opportunity to relitigate points already decided.

[10] I consider that determination [2022] NZERA 166 has clearly set out the Authority's view on the main issues which were before it.

[11] However it appears that E Tū's claim that determination [2022] NZERA 166 is ambiguous is presenting a problem in the workplace where NZSL wants to introduce a policy in reliance on the Authority's findings.

[12] Accordingly for the purpose of enabling the parties to move on with clarity in the manner in which clause 80.6.1 is enforced, I consider that it is appropriate to reopen. The investigation is reopened purely for the purpose of clarifying the main points of the determination.

Identification of the findings in the Determination

[13] The Determination addressed the following two pertinent questions in the dispute presented to the Authority:

i. what is the correct interpretation of clause 80.6.1 of the Collective Agreement?

ii. How is make-up pay to be applied when an employee is going into or coming out of the Critical Path?

What is the correct interpretation of clause 80.6.1 as set out in the Determination?

[14] Clause 80.6.1 of the Collective Agreement between E Tū and NZSL states:

> **80.6 MAKE-UP PAY**
>
> 80.6.1 Where an employee is requested to work outside his/her established or ordinary hours of work and as a result is unable to complete his/her ordinary hours of work, he/she shall be paid make-up pay for those lost ordinary hours, paid at expected weekly/hourly earnings as defined above.

[15] In para [19] of [2022] NZERA 166 I stated that if an employee is requested by NZSL to work other hours and as a result cannot fulfil their ordinary hours, the employee will be recompensed for that by being paid 'make-up' pay.

[16] I stated my understanding of clause 80.6.1 is to ensure the relevant employee is not financially penalised as a result of not completing their ordinary hours of work through no fault of their own. Whilst clause 80.6.1 does not state that specifically, I find that it is the logical explanation of the rationale for the clause.

What are the key principles as set out in the determination?

[17] In paragraph [21] of determination [2022] NZERA 166 it is stated that the ordinary hours for workers other than clerical workers, are set out as being 40 per week.

[18] In paragraph [25] it is stated that I considered that 'ordinary hours' and 'established hours of work' are either 40 hours per week, or 40 hours as defined in with start and finish times as set out in clause 11.2 of the Collective Agreement i.e. for Day Workers the 40 hours are further defined as not more than 8 hours per day Monday to Friday. However in the case of Day Roster and Shift Employees, the 40 hours are not so restricted and can occur on any 5 days across a 7 day working week.

[19] In each case, they are the hours a particular employee is expected to work as stated in paragraph [29] of determination [2022] NZERA 166.

[20] E Tū submits that an employee cannot be deemed to have worked 40 ordinary hours if a portion of them are overtime hours attracting a penal rate.

[21] As set out in paragraph [29] of determination [2022] NZERA 166 the Authority's interpretation is that if an employer works overtime which attracts a penal rate, clause 80.6.1 is engaged if the employee has not completed 40 ordinary hours, but is not engaged if the employee completes the 40 ordinary hours, even if some of those hours have attracted a penal rate. The hour has nonetheless been worked and thus there is no shortfall below the ordinary hours.

[22] E Tū may disagree with that determination, and in that case it could have challenged the Authority's findings as it was entitled to do.

[23] However I do not accept there is a lack of clarity or ambiguity in the finding of the Authority. It also appears that this is E Tū attempting to relitigate a contention already considered in paragraphs [27] to [29] of determination [2022] NZERA 166 and determined in paragraph [29] of the determination.

[24] For the sake of clarity, the principle remains as stated by the Authority in determination [2022] NZERA 166.

[25] In paragraphs [33] to [45] of determination [2022] NZERA 166 the application of clause 80.6.1 to the situation of an employee going on to or off the Critical Path was analysed.

[26] The varying practices across NZSL were considered in the determination as was E Tū's argument regarding 'custom and practice' in this area, see paragraphs [41] to 45].

[27] In paragraph [45] that issue was determined in accordance with the previous finding in paragraph [31] that the employee is to be recompensed for any shortfall in the ordinary hours in a week that ensued as a result of complying with the Critical Path request by NZSL.

[28] The principle remains that no employee should suffer financially as a result of obeying a request by NZSL to work different hours, that is the situation to which clause 80.6.1 of the Collective Agreement is intended to resolve.

[29] In conclusion whilst E Tū may disagree with the Authority's determination, I do not accept that it lacks clarity. However, this determination should resolve any lingering confusion and enable the parties to progress their bargaining discussions.

Costs

[30] Costs are reserved. However, the parties may consider that this matter could be considered as falling within the category of matters not subject to the daily tariff.

[31] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[32] 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