IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 102
3198779

	BETWEEN	DANSKE MOBLER LIMITED Applicant
	AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Stephen Langton, counsel for the Applicant Michelle Brown, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions and Other Information Received:	18 November 2022 from the Applicant 8 December 2022 from the Respondent 16 December 2022 from the Applicant	
Date of Determination:	3 March 2023	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Danske Mobler Limited (Danske) has lodged an objection with the Authority to an Improvement Notice that the Labour Inspector issued Danske on 11 January 2022. Danske has now applied to remove that substantive matter it filed in the Authority to the Employment Court to hear in the first instance.

[2] Danske sought removal under s 178(2)(a) and (d) of the Employment Relations Act 2000 (the Act). Section 178(2)(a) of the Act permits removal of an Authority matter to the Employment Court if there is an important question of law that is likely to arise other than

incidentally. Section 178(2)(d) of the Act allows a matter to be removed if the Authority believes that should occur.

[3] Danske identified two important questions of law it said would arise other than incidentally regarding the substantive matter, namely:

(a) Whether the calculation of relevant daily pay (RDP) under s 9 of the Holidays Act 2003 (HA03) must include overtime performed by the employees, where they agree to perform it but were not required to do so (this was referred to as the "*RDP question*" by the Applicant); and

(b) Whether under s 223D of the Act:

(i) A Labour Inspector can have "*reasonable grounds*" to believe that an employer is failing or has failed to comply with a provision of a relevant Act (as defined in s 223(1) of the Act) where there is a genuine legal dispute regarding the meaning of that provision; and

(ii) Where a Labour Inspector does have reasonable grounds to believe that there has been such failure, an Improvement Notice can require an employer to comply with the Labour Inspector's interpretation of relevant provisions under the HA03, for a period that is longer than the employer is required to retain records under s 81(4) of the HA03.

(These two questions were together referred to as the "*s 223D question*" by the Applicant.)

[4] The Labour Inspector opposed the removal application on the grounds that:

(a) No important question of law arose other than incidentally to the facts of the substantive matter;

(b) No useful purpose would be served by removing the proceedings to the Court;

(c) The RDP question was not a question of law but was a mixed question of the application of the law to a set of facts; and

(d) The issue of the length of the remediation period that may be identified in an Improvement Notice was recently determined by the Employment Court in *Enterprise Motor Group (New Lynn) Limited v Labour Inspector*.[1]

[5] Danske filed its removal application prior to the Court's decision in the *Enterprise Motor Group* case. Danske therefore advised the Authority that it had "*reframed the s 223D question from that previously stated, in order that the question of law accurately represents the issues in the proceedings*."

Authority's investigation

[6] By agreement, the removal application was determined on the papers. Both parties filed submissions and Danske filed an affidavit from its financial controller, Mr Shyamal Govind.

Issues

[7] The following issues are to be determined:

(a) Are the questions identified by Danske important questions of law that arise other than incidentally?

(b) If so, are there any reasons why removal should not be granted?

(c) What costs and disbursements should the successful party be awarded?

Material facts

[8] The Applicant predominantly employs full-time employees who are paid an hourly wage under individual employment agreements. From time to time, these employees may be offered work that arises in addition to their contracted hours of work.

[9] These employees are free to decline any additional hours of work that may be offered to them and the number of additional hours on offer (and who they will be offered to) will vary depending on the nature of the work required. An employee who is offered additional hours of work over their normal contracted hours of work is free to accept or decline that offer.

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1 [2022] NZEmpC 194.

[10] When these employees took bereavement leave, alternative holidays, worked on a public holiday or took sick leave (together referred to as "*BAPS leave*") Danske calculated the RDP based on the employee's normal contractual hours of work for the day in question.

[11] That meant the amount paid to employees reflected the number of hours the employee would have worked, and been paid for, if they had only worked their normal contractual hours on the day concerned. The employees were not paid for overtime they would have worked but did not in fact work because they had instead taken BAPS leave.

[12] Danske claimed its approach was compliant with s 9 of the HA03, while the Labour Inspector disagreed.

[13] The Improvement Notice required the Applicant to remedy the breaches that the Labour Inspector had identified. Danske was therefore required to calculate the correct RDP for the periods identified in the Notice, by ensuring that its calculation was based on the amount the employee would have earned had they worked on the leave day concerned. Alternatively, if RDP was not appropriate, then the BAPS leave day needed to be calculated using ADP.

[14] The Labour Inspector said that after investigating the manner in which Danske had been paying its employees, she concluded it had breached ss 49, 60 and 71 of the HA03 by failing to pay BAPS leave at a rate equivalent to employees' RDP or average daily pay (ADP) for each leave day taken.

[15] Because Danske's calculations had been based on the contractual pay rate for ordinary hours of work, it had not taken into account any overtime that the employee may have agreed, and been scheduled, to work on the leave day in question.

[16] The Labour Inspector said that s 9(1)(b)(ii) of the HA03 provided that payments for overtime must be included in the RDP calculation if they would otherwise have been received had the employee worked on the day concerned.

[17] The Labour Inspector said that s 9 of the HA03 did not make a distinction between whether overtime was voluntary rather than contractual or had been required by the employer, so a determination about whether overtime payments had been included in an RDP calculation had to be made by reference to the specific facts of the case. That required an inquiry into what hours the employee would have worked, had they not taken BAPS leave.

[18] The Labour Inspector acknowledged that while Danske had amended the s 223D question since becoming aware of the Employment Court's decision in *Enterprise Motor Group*, that variation did not change her opposition to the removal application because s 81(4) of the HA03 effectively mirrored the obligation in s 130(2) of the Act that an employer had to retain records for a period of six years.[2]

[19] The Labour Inspector therefore said that the Court's decision in *Enterprise Motor Group* could easily be applied to the HA03, so it would be a waste of the Court's resources to seek a decision from it that was in essence exactly the same as the *Enterprise Motor* decision it had made about the time limits in the Act, but which involved the HA03 instead of the Act.

The law

[20] Section 178 of the Act permits the Authority to remove part or all of a matter to the Employment Court without the Authority having investigated it. The Authority must exercise its removal discretion in a principled manner. The potential grounds of removal are set out in s 178(2) of the Act.

[21] Although Danske sought to rely on s 178(2)(d), namely that the Authority was of the opinion that the matter should be removed, that is not an applicable ground in this case because the Authority did not initiate the removal.

[22] It was therefore up to the Applicant to meet the removal ground in s 178(2)(a) it relied on, namely that there were important questions of law that arose other than incidentally, before the Authority could consider exercising its discretion to remove this matter to the Court.

[23] The Authority was therefore required to identify the questions of law that were said to have arisen, decide the importance of those questions, and if importance was established then consider whether there were particular factors that meant that removal was not appropriate, notwithstanding one of the tests in s 178(2) of the Act had been met.

Are there important questions of law that arise other than incidentally?

The RDP question

[24] The test for whether the overtime should be included in the BAPS leave day RDP calculation for a particular employee was specified in s 9(1)(b)(ii) of the HA03. That required

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overtime to be included in the RDP calculation of the payments that would otherwise have been received, had the employee worked on the day concerned.

[25] Danske agreed that it had calculated BAPS leave based on the employee's usual contractual hours of work, meaning employees who were scheduled to work overtime on a day in which they took BAPS leave were not paid for the overtime that they would have worked, but for the BAPS leave.

[26] The Authority therefore considered the substantive problem to be a predominantly factual dispute about whether or not the manner in which Danske paid its employees had complied with s 9 of the HA03.

[27] The key factual issue was whether a particular employee's overtime on a particular day did or did not fall within the s 9 of the HA03 calculation, where overtime was not contractually required, the employee had voluntarily agreed to work it and had not been instructed by Danske to work the overtime in question. The material factual issue was therefore whether or not the employee would have been paid overtime on the day in question, had they not taken BAPS leave.

[28] Although a question of law regarding how s 9 of the HA03 should be interpreted would arise, the Authority considered that would arise incidentally to the factual issues, because it would be the particular facts that were determinative of the matter.

[29] The Authority agreed with the Labour Inspector's submission that whether the correct RDP (or applicable ADP) had been paid for a particular employee on a particular day will be a mixed matter of statutory interpretation and a question of fact, as many questions considered by the Authority are.

[30] However, the Authority considered that the RDP/ADP question in this case has been formulated as an important question of law when the focus would mainly be factual, to determine whether or not the s 9 HA03 requirements had been met.

[31] The Labour Inspector said there would not be that many employees who will be affected because the breaches were related to one class of employees, so it was likely that the overall number would be low.

[32] It was therefore also not an important question of law because the decision was likely to be limited to Danske's employees and to the particular facts that applied to each employee, rather than being more generally applicable to employment law overall.

[33] The Labour Inspector pointed out that there was no distinction in the wording in s 9 of the HA03 about whether the overtime is required to be worked by the employer or if the parties had voluntarily agreed that the employee will work the overtime on the day in question.

[34] The Employment Court in *New Zealand Pilots' Association Inc v Mount Cook Airlines Limited* stated:[3]

> […]
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> How the relevant daily pay is to be assessed under s 9(1) in any given case will vary and depend very much on the particular factual circumstances.

[35] The Court of Appeal in *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited* noted that s 9 of the HA03 must be interpreted in a way that made the legislation work in a practical manner.[4] It further noted:

> The employee who regularly (but not invariably) worked unrostered overtime or exceeded productivity targets would be entitled to higher relevant daily pay than those who did so less often or only occasionally. That outcome reflects the legislature's evident intention to ensure that minimum entitlements of employees under the Act include not only their basic or ordinary time pay, but also other items of remuneration they would ordinarily receive include unrostered overtime.

[36] While the *Postal Workers Union* case is not directly on point, the above quote can assist the Authority in how it determines Danske's objection to the Improvement Notice. It is therefore not a situation where there is no case law or guidance for the Authority to apply.

[37] Accordingly, this question was not an important question of law that should be removed to the Court before the Authority could determine it. The Authority was well placed to investigate and determine, for any particular employee on any particular BAPS leave day, whether or not it was possible to calculate their s 9 entitlements using RDP, or if it was a case in which ADP would apply.

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3 [2012] NZEmpC 218 at [36].
4 [2012] NZCA 481 at [32].

Section 223D questions

[38] Section 223D(1) of the Act provides that a Labour Inspector may issue an Improvement Notice where they have reasonable grounds to believe that an employer is failing or has failed to comply with a provision of the relevant Acts, as identified in s 223(1) of the Act.

[39] Part one of Danske's two-part s 223D question was whether a Labour Inspector could have reasonable grounds to believe that an employer was failing to, or had failed to comply, with any provision of the relevant Acts where there was a genuine legal dispute over the meaning of the provision in issue.

[40] The Respondent's position was that the trigger for issuing an Improvement Notice was the Labour Inspector's 'reasonable grounds to believe', therefore a dispute over the interpretation of the provision should have no bearing on whether or not a Labour Inspector was legally entitled to issue an Improvement Notice.

[41] The Authority considered that whether or not the Labour Inspector had "*reasonable grounds*" to issue an Improvement Notice in this case was predominantly a matter of fact, which fell within the Authority's normal purview to determine. There was no need for that issue to be removed to the Employment Court in the first instance.

[42] The second part of the s 223D question was whether or not the Labour Inspector could require an employer to remediate for a period that was longer than it was required to retain the relevant employment records.

[43] That issue was decided by the Employment Court in *Enterprise Motor Group*, which made it clear that the six-year limitation applied, being the period for which an employer was legally required to keep employment records.[5] Although that decision by the Court applied to an interpretation of s 130(2) of the Act, it applied equally to s 81(4) of the HA03, which mirrors those same provisions.

[44] Accordingly, that question was not an important question of law because the answer to it was already known.

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Finding on the questions of law

[45] The Authority was not satisfied that the questions posed by Danske were important questions of law that arose other than incidentally. One of the s178(2) grounds for removal was not established, so removal was declined.

[46] This is a matter that should be investigated by the Authority in the first instance. That was consistent with the Authority's speedy, low-level approach to resolving employment relationship problems and it also preserved both parties' rights of challenge against a substantive determination.

[47] The substantive claim involved an objection to an Improvement Notice that the Labour Inspector issued to the Applicant requiring it to remedy breaches of the Act and the HA03. An Improvement Notice is an enforcement tool used for minor breaches of employment legislation.

[48] Taking into account that the objective of the Act was to reduce any judicial intervention, it was appropriate for this substantive matter (i.e., the objection to the Improvement Notice) to be determined by the Authority in the first instance, as that would be the most efficient way to resolve that problem.

[49] The Labour Inspector's investigation was commenced as a result of a complaint received from one of the Applicant's former employees back in January 2020. While that complaint was not upheld, it did result in the Labour Inspector conducting further investigations into the way in which the Applicant had been paying its employees, by auditing its records for a sample of employees. The findings of that audit were communicated to Danske on 29 March 2021, and it responded on 22 April 2021.

[50] The Improvement Notice was issued by the Labour Inspector on 11 January 2022. There has therefore been considerable delay since these matters were first raised with the Labour Inspectorate. There are good reasons for this matter to remain with the Authority, to ensure it is resolved in a low level, timely and cost-effective manner.

What if any costs and disbursements should be awarded?

[51] The Labour Inspectorate, as the successful party, is entitled to a contribution towards its legal costs. Costs will be assessed in accordance with the Authority's usual notional daily

tariff-based approach to costs. Because this matter was dealt with on the papers, it will be treated on a pro-rata basis as a half-day investigation meeting.

[52] Accordingly, the starting point for assessing costs is $2,250. The Authority is not aware of any factors that should result in the notional daily tariff being adjusted, so Danske is ordered to pay the Labour Inspectorate $2,250 towards its legal costs within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority