IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA

[2025] NZERA 218
3302520

BETWEEN	DAVID JOYCE First Applicant
	ETHAN YARR Second Applicant
AND	MCKAY LIMITED Respondent

Member of Authority:	Davinnia Tan
Representatives:	Lou Yukich, advocate for the Applicant David Grindle, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	6 March 2025 from the Applicant 27 February 2025 from the Respondent
Determination:	17 April 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] David Joyce and Ethan Yarr (the applicants) are employed by McKay Limited (McKay) as electrical and instrument technicians at the Oji Fibre Kinleith Pulp and Paper Mill (the Mill).

[2] The applicants are members of the Independent Electrical Workers Union 1995 (Inc) ("the Union") and are parties to the McKay Limited and Independent Electrical Workers Union 1995 Inc Collective Agreement – 1 April 2023 to 31 March 2026 (the CEA).

[3] The applicants say they had to provide "round the clock cover" from 20 – 22 May 2024 for a startup at the mill.

[4] The applicants allege their timesheets were subsequently changed without authorisation and they were paid for one 0.5 break as opposed to two, for that time in May. The applicants believed they were entitled to be paid for two 0.5 breaks based on clause 3.5.4 of the CEA which provides the following:

> Where there is a need for ongoing work outside the normal hours of work due to breakdowns, shuts or other operational requirements one regime will be used to remunerate employees and to ascertain hours of work. Around the clock and start up cover is for breakdown repairs or for periods of start ups where the work required by the client is between 8pm to 8am or other hours specified by the client.
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> Work from 8am to 8.00pm will be considered normal time and overtime/penal time rate of T1.5 will apply.

[5] The applicants claimed that on "every previous occasion the applicants were paid for the 12-hour shifts without deduction" and "in accordance with the expressed term of the commercial agreement" between McKay and Oji. The applicants also claimed that the applicants' manager at McKay made assertions that Oji instructed McKay to cease payment for "round the clock" cover to McKay's employees.

[6] McKay's position is that the timesheets were not "erroneously amended" and that in fact, they had "errors" which were "rectified".

[7] The applicants' substantive claim is an arrears of wages claim and unjustifiable disadvantage claim. The applicants' Statement of Problem 6 June 2024 named Oji as a "second respondent controlling third party" and described the "problem" that it wished the Authority to resolve as:

> recovery of arrears of wages arising from non-compliance with the customary approach to interpretation and application of the RTC provisions of the applicable collective agreement

[8] On 1 July 2024 Oji opposed the application to join it as a controlling third party.

[9] On 2 July 2024, the parties were referred to mediation by an Authority Officer.

[10] On 12 August 2024, Member Fuiava convened a case management conference (CMC) with the parties to discuss Oji's decision not to attend mediation. In directing the applicants and McKay to mediation, Member Fuiava stated:

> Ordinarily, I would direct all parties to an employment problem to attend mediation but in the present case, the applicants have simply applied to join the second respondent as a controlling third party.
>
> Until the Authority grants leave to that application, I am not able to direct a prospective controlling third party to attend mediation. This is the natural and ordinary meaning of s 115A(5) of the Employment Relations Act 2000 (the Act) in which the relevant finding precedes mediation and not the other way round.
>
> However, there is no difficulty directing the applicants and the first respondent to attend mediation. Section 159 of the Act makes clear that the Authority must, where a matter comes before it, direct mediation be used before the Authority investigates unless exceptions apply. The Authority believes that mediation between the applicants and the first respondent would contribute constructively to resolving their matters. For now, mediation involving the second respondent will need to wait.

[11] The applicant sought an adjournment of the mediation until the issue of joinder of Oji as a controlling third party is addressed and requested an investigation into the application of Oji as a controlling third party be timetabled.

[12] In response, McKay submitted that the matter under enquiry before the Authority is a "contractual interpretation issue" and does not arise from Oji's actions.

[13] On 11 December 2024, I convened a CMC with the parties and considered that before the Authority can determine whether Oji is a controlling third party, it first needed to determine, as a preliminary issue, whether the employment relationship problem is based on an action derived "solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision" of the employment agreement[1] (dispute) or a "personal grievance"[2].

Preliminary issue

[14] This determination deals with the following preliminary issue:

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[1] Employment Relations Act 2000, s 103(3).
[2] Employment Relations Act 2000, s 103(1).

whether the employment relationship problem is based on an action derived "solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision" of the employment agreement[3] (dispute) or a "personal grievance"[4].

[15] Section 103(3) of the Act sets out that:

> … unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[16] Section 129 of the Act sets out that:

> (1) Where there is a dispute about the interpretation, application, or operation of an employment agreement, any person bound by the agreement or any party to the agreement may pursue that dispute in accordance with Part 10.
>
> (2) If the dispute relates to a collective agreement, the person or party pursuing the dispute must ensure that all union and employer parties to the agreement have notice of the existence of the dispute.

[17] When sections 103(3) and 129(1) of the Act are read together, this means that a person is prohibited from pursuing a personal grievance over what is in substance a dispute about the CEA.

[18] As stated in my notice of direction of 11 December 2024, if I find that the matter concerns a dispute, Oji cannot be joined as a party.[5] It was agreed that the preliminary issue would be determined on the papers. Both parties lodged written submissions.

McKay's submissions

[19] McKay's submitted that to determine the claim the Authority can only rely on the terms of the CEA. Therefore anything else such as the commercial contract and actions of purported third party are irrelevant as CEA is the full record.

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[3] Employment Relations Act 2000, s 103(3).
[4] Employment Relations Act 2000, s 103(1).
[5] Employment Relations Act 2000, s 129.

[20] Therefore it was submitted that the actions of McKay Limited derive solely from the interpretation of the CEA and the applicants and thus prevented from bringing a personal grievance.

Applicants' submissions

[21] The applicants' argument is that the issue is not solely derived from the interpretation of the CEA.

[22] The Applicants state that the issue is that the timesheets were "erroneously amended without consultation" and therefore the problem is not about not being paid in accordance with the CEA.

Analysis

[23] The applicants framed their substantive claim primarily as one of underpayment of wages in breach of clause 3.5.4 of the CEA. Their statement of problem specifically referred to "non-compliance with the customary approach to interpretation and application" of the CEA.

[24] While the applicants also included a reference to an "unjustifiable disadvantage," they did not identify any distinct conduct by the employer that could give rise to such a grievance independent of the alleged underpayment other than that their timesheets were "erroneously amended."

[25] The central issue is whether, on the facts alleged, the applicants were entitled to additional payments (two 0.5 breaks instead of one) under the relevant provisions of the CEA. This issue turns entirely on the correct interpretation and application of clause 3.5.4 and the employer's established practice under the agreement.

[26] The dispute, therefore, is not about adverse conduct taken against the applicants in a disciplinary or detrimental sense, but rather about whether the employer's approach to the contractual provisions concerning compensation was correct.

[27] I am persuaded that the essence of the claim is contractual in nature. The problem arises solely from the application or interpretation of the CEA, and is therefore a dispute under section 129 of the Act. It does not constitute a personal grievance under section 103.

Conclusion

[28] I find that the employment relationship problem raised by the applicants is a dispute as defined in section 129 of the Employment Relations Act 2000, arising solely from the interpretation and application of the parties' Collective Employment Agreement.

[29] As the issue is not a personal grievance, the joinder of Oji as a controlling third party is not appropriate at this time, as Oji's involvement is not relevant to the contractual dispute between the applicants and their direct employer, McKay Ltd.

[30] The matter will now proceed as a dispute between the applicants and McKay Ltd, with directions to follow concerning the timetable for investigation.

Costs

[31] Costs are reserved.

Davinnia Tan
Member of the Employment Relations Authority