

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2011] NZEmpC 158  
ARC 58/10**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                THE POSTAL WORKERS UNION OF  
AOTEAROA  
Plaintiff

AND                        NEW ZEALAND POST LIMITED  
Defendant

Hearing:                By memoranda of submissions filed on 27 October and 1 and 4  
November 2011

Counsel:                Paul Blair, advocate for plaintiff  
Penny Swarbrick, counsel for defendant

Judgment:              30 November 2011

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**INTERLOCUTORY JUDGMENT OF JUDGE C INGLIS**

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[1]      The plaintiff has applied for leave to file additional submissions after the conclusion of the hearing.

[2]      The application is principally advanced on the basis that it is necessary to correct an error of fact that is said to have been made by counsel for the defendant during her closing submissions, and which Mr Blair omitted to address during his submissions in reply.

[3]      The application is opposed. Ms Swarbrick makes the point that Mr Blair had a full opportunity to present the plaintiff's case and to respond to any issues that may have arisen in relation to matters advanced on behalf of the defendant.

[4] Ms Swarbrick opposes the application on the additional basis that the proposed submissions in reply go further than correcting an alleged error of fact and purport to introduce fresh evidence through Mr Blair, as advocate.

[5] Mr Blair was provided with the opportunity to respond to Ms Swarbrick's submissions, by way of reply. He should have pointed out any concerns about the evidential basis for counsel's submissions at that time. Mr Blair says that inexperience and oversight were to blame. In the circumstances, if a significant error was made it may be said to be desirable, in the interests of justice, for it to be drawn to the Court's attention. However, for the reasons that follow, I do not consider that Ms Swarbrick's submission, when read in context, was based on a misstatement of the evidence.

[6] The matters which Mr Blair wishes to refer to relate to a partial settlement of the claim. The partial settlement was an issue that a number of witnesses gave evidence about, including Mr Behan-Kitto and Ms Adler. Mr Behan-Kitto also gave evidence about his pay and hours during the periods he acted in an on-call capacity.

[7] As I understood Ms Swarbrick's submission, it was directed at the evidence given about issues underlying the partial settlement, relating to whether people being called in to work were being advised of their hours in advance, and that it was that issue that had effectively been settled. Ms Swarbrick went on to submit that Mr Behan-Kitto's payslips, which were referred to by him in evidence, did not reveal why he had been called in on certain days and how they might represent a departure from what the plaintiff contended was proper practice. I do not consider that such submissions materially misstate the evidence.

[8] Further, I agree with counsel for the defendant that Mr Blair's application faces an additional difficulty, namely that the further submission sought to be advanced contains a number of assertions of fact that are not referenced back to evidence that was presented by, or on behalf of, either party in Court.

[9] The application is accordingly declined. Costs are reserved.

C Inglis  
Judge

Judgment signed at 2.30 pm on Wednesday 30 November 2011