IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 168
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: 25 and 26 October 2011
(Heard at Auckland)

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

Judgment: 13 December 2011

JUDGMENT OF JUDGE C INGLIS

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[1] The plaintiff has brought a de novo challenge against a determination[1] of the Employment Relations Authority (the Authority). The challenge involves a dispute as to the interpretation, application, and operation of terms in the collective employment agreement relating to on-call postal delivery employees (on-call employees). The dispute essentially relates to the obligations owed by the defendant to on-call employees called in to cover for staff absences, and whether they are entitled to the same terms and conditions as those enjoyed by permanent postal workers (permanent posties), including the "job and finish" provisions in the collective agreement.

[1] AA204/10, 3 May 2010.

[2] The plaintiff's concerns stem from the way in which certain branches of the defendant company are said to have dealt with the pay and conditions for on-call employees, with particular reference to Rotorua and Tokoroa. It was contended that the approach adopted in these branches was contrary to the applicable provisions of the collective employment agreement.

[3] The question of interpretation stated by the plaintiff is:

> When a permanent postie is absent from a branch and as a consequence the respondent calls in an On Call Employee to carry out all of the work of that absent permanent postie, is the respondent required (in terms of clauses M and N (Specific Conditions – Delivery) of the Collective Agreement) to specify as the hours to be worked by the On Call Employee the rostered hours of the absent permanent postie and to pay the On Call Employee in accordance with all of the provisions of part N (Specific Conditions – Delivery) of the Collective Agreement?[2]

[4] This is a narrower question than the one posed for the Authority's determination, namely:

> When a permanent postie is absent from a branch and as a consequence the respondent calls in an On Call Employee, is the respondent required (in terms of clauses M and N of the Collective Agreement) to specify as the hours to be worked by the On Call Employee the rostered hours of the absent permanent postie?

[5] The Authority held that the plain words of cl M8 of the collective agreement did not require the defendant to specify any particular number of hours to an on-call employee. The Authority also held that on-call employees miss out on the certainty of work and hours that their co-workers enjoy. They are not entitled to rostered hours and nor are they obliged to report for rostered hours of work. They work at variable times and for variable periods. It was held that cl N2 ("Specific Conditions – Delivery") applies to any employee who works standard daily hours and could not be applied to on-call employees.

[6] It is common ground that on-call employees are engaged for a variety of purposes and not necessarily to carry out the work of an absent permanent postie. An on-call employee may, for example, be called in where there is a particularly high

[2] While the defendant had earlier raised an issue in respect of the alteration in wording to the question posed in the Employment Relations Authority, the challenge was argued on the basis of the amended question.

volume of mail for delivery on a particular day or to cover a pre-planned or unplanned absence, on or without notice. The plaintiff did not argue a requirement to specify rostered hours in all such circumstances. Rather the question was narrowly focussed on the circumstances in which an on-call employee was called in to cover for all of the work of an absent permanent postie.

[7] There are two aspects to the question. First, is the defendant required to specify the rostered hours that would have been worked by the permanent postie as the hours for the on-call employee's assignment? Second, is the defendant required to pay the on-call employee in accordance with Part N of the collective agreement?

[8] The plaintiff submits that on-call employees who are filling in for a permanent postie's position on a particular day should be paid the full time rostered hours of the branch for the day they are called in on. It was submitted that such an interpretation is consistent with the provisions of the collective agreement and the defendant's obligation to treat employees fairly.

The defendant submits that it is entitled to offer such hours of work that it considers appropriate and that while those hours may be the same as the hours rostered for an absent employee there is no obligation to equate the two. The defendant submits that an on-call employee's hours of work are provided for in Part M of the collective agreement, rather than Part N, and that the number of hours offered to an on-call employee is dictated by the needs of the branch and not by the hours of work that may have been rostered for an absent postie on a particular day.

Principles of interpretation

[9] The Court must apply a principled approach to the interpretation of employment agreements. As the authors of *Law of Contract in New Zealand*[3] note, language is inherently uncertain and few words have fixed meanings. They can only be properly understood in context. Moreover, their context may reveal that the literal meaning of the contract would have such absurd consequences that the parties could not have intended it.

[3] Burrows, Finn & Todd (3rd ed, LexisNexis NZ Ltd, Wellington, 2007) at p160.

[10] In *Vector Gas Ltd v Bay of Plenty Energy Ltd*[4] McGrath J cited Lord Hoffman's five principles of interpretation set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society,*[5] summarising them as follows:[6]

> … interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[11] Although *Vector* related to the interpretation of a commercial agreement, McGrath J's summary was regarded as helpful by the Court of Appeal in *Silver Fern Farms v New Zealand Meat Workers etc Trade Unions*[7] (an appeal involving the interpretation of a collective employment agreement).

[12] As Tipping J observed in *Vector*:[8]

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' mind. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[13] Tipping J considered that extrinsic evidence may be admissible as an aid to interpretation if it tends to establish a fact or circumstance capable of demonstrating

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[4] [2010] NZSC 5, [2010] 2 NZLR 444.
[5] [1998] 1 WLR 896 at 912-913 (HL).
[6] At [61].
[7] [2010] NZCA 317 at [36].
[8] At [19].

objectively what meaning both or all parties intended their words to bear, or where it tends to establish an estoppel or an agreement as to meaning. He went on to make the point that there is no logic in ascribing meaning to the parties if it is objectively apparent that they have agreed what their meaning should be.[9]

The collective employment agreement

[14] The defendant operates a 24 hour per day business which involves marketing and personal communication, document and information management, the distribution of goods, and banking and payment. The terms and conditions of employment for employees are set out in the collective agreement. It covers four occupational groupings – administration, retail, operations and delivery. Posties are part of the delivery group.

[15] As the collective agreement makes clear, flexibility is required to enable the defendant to respond to customer needs. In this regard provision is made for the appointment of both temporary and on-call employees. Such employees "may be used for leave relief, special projects or to meet the local delivery and business requirements of the company": cl M1.

[16] Clauses M8 to 12 relate expressly to on-call employees. Clause M8 is a pivotal provision. It states that an on-call employee is "designated by the company as such and has an ongoing relationship with the company but who is *employed on a purely as and when required basis with no guarantee of any number of hours in a given period*" (emphasis added).

[17] Clauses M2 to 7 relate expressly to temporary employees. They are employed on a continuous basis for a fixed term of employment. Clause M4 states that: "[e]xcept as set out below, temporary employees are covered by the terms and conditions of the agreement." Clause M5 provides that the "standard hours of work" for a temporary employee will be set out in their employment offer letter and that the standard hours of work must fall within the specific conditions for the Occupational

[9] At [32]-[33].

Grouping within which the employee is employed. Clause M6 provides for the leave entitlements of temporary employees.

[18] The provisions relating to temporary employees can be contrasted to those applying to on-call employees. In relation to on-call employees there is no reference to standard hours of work, or reference to the applicability of other provisions of the collective agreement.

[19] Part M provides that where an on-call employee is engaged for a period in excess of two weeks and fits the criteria of a temporary or fixed term position they will be afforded the same benefits as a temporary employee (such as annual and sick leave). In such a case the provisions relating to temporary employees, including those relating to standard hours and applicable specific provisions for the delivery operational group, apply by virtue of cl M4.

[20] It is clear that on-call employees do not enjoy the same contractual benefits and entitlements as other employees. The surplus staffing and redundancy provisions do not apply (cl M11). While they are entitled to sick leave under cl M17 (provided they have been offered and accepted work for the day in question before falling ill) they cannot apply for certain types of leave available to other employees (specified in cl M18). These provisions reflect the different status of on-call employees, the nature of the work they do, and the flexibility required in terms of their working arrangements. Importantly, while on-call employees have no certainty as to the hours, or work, that they may be called in to do, they are not obliged to accept any particular assignment offered to them.

[21] On its face, cl M8 unambiguously provides that an on-call employee can have no expectation of particular hours of work in any given period. The only requirement is that the hours for a particular assignment be specified before the assignment begins.

Do the Part N provisions alter the position?

[22] Part N sets out a number of provisions relating to the four different groupings, including delivery. The plaintiff argues that, notwithstanding the wording of cl M8, it is to be read subject to the provisions of Part N: Specific Conditions - Delivery. Clause N2 (Delivery) (on which the plaintiff particularly relies) provides that the standard daily hours are set by roster up to 7 hours 30 minutes each day, provided that employees will be released from work when all mail for delivery has been delivered and that any such early release will not result in a reduction in pay. Clause N7 (Delivery) provides that posties may be required to work reasonable overtime in excess of their standard hours, provided that overtime is voluntary on days which are otherwise non-rostered days for an individual employee.

[23] It is submitted that the reference to the word "specific" in the heading to Part N indicates that Part M is to be read subject to the provisions in Part N, including the start and finish and overtime provisions.

[24] While on-call employees are part of the delivery group it does not follow that each of the conditions set out in Part N applies to them. When the provisions of Part N are read in context it is clear that a number of the clauses contained within it have no application to on-call employees and are directed at full time employees. That is reflected in the various references to standard hours of work, full time weekly hours, and standard daily hours set by roster. So, for example, cl N1 (Delivery) provides for full time weekly hours of 37 hours, 40 minutes; cl N2 (Delivery) provides for standard daily hours "set by roster for up to 7 hours 30 minutes each day"; cl N3 (Delivery) refers to working days, up to a maximum of 6 days each week; cl N4 (Delivery) refers to the span of hours "set by roster"; and cl N7 (Delivery) provides that posties may be required to work overtime in excess of their standard hours in certain circumstances.

[25] Standard hours of work are provided for in Part C. Clause C2 clearly refers to permanent employees, both full and part-time. It provides:

> Upon appointment, the number of an employee's standard hours will be fixed by agreement between the employee and the company. These standard hours may then only change by agreement. Standard hours may not exceed the full-time week hours as set out in the Schedules for Occupational Groupings. Part-time employees are employees whose standard hours are less than the prescribed full-time weekly hours.

[26] Rosters provide for the standard hours to be worked (cl C3); they are prepared at least 14 days in advance (cl C4); and the published roster is to show the days to be worked and the start/finish times over which the employee's standard hours are to be worked (cl C5). The fact that the roster is published well in advance and provides for standard hours of work reflects the fact that the roster is directed at permanent posties and supports an argument that cl N2 (Delivery) does not apply to on-call employees.

[27] Overtime is also referred to in Part C, again by way of reference to an employee's "standard hours" of work. Clause C10 provides that overtime may be required in accordance with Part N of the agreement. Relevantly, N7 (Delivery) refers to both standard hours of work and non-rostered days. Clause N2 (Delivery) specifies standard hours of work for a delivery employee as being seven hours and 30 minutes in one day. In contrast, the hours of work for on-call employees are expressly provided for in Part M. They are to work the number of hours "assigned" and have no guarantee of the hours that they will be given for any particular assignment. There is no reference in those provisions to standard hours. The position in relation to on-call employees can further be contrasted to the position of temporary employees, whose "standard hours" are specifically referred to in cl M5.

[28] The provisions relating to on-call employees reflect the fact that they are not employed for standard hours of work. That is because, as the Employment Relations Authority observed, there is no certainty as to what a "given period" (in terms of cl M8) might be. It could be a day, a week, or a month. The period will be at the discretion of the manager, having regard to the operational needs of the branch.

[29] One current on-call employee gave evidence. He works in Auckland, so not in the area that has given rise to the issues underlying the current proceedings. He also made it clear that he was only aware of his own situation, and not the position in

relation to any other on-call employee. Mr Ma's evidence was that his hours are not stated in advance but that he is aware of the rostered hours for the branch. He said that if he finishes his work before the rostered hours for the day he is free to go home without any loss of pay. Accordingly he receives the full rostered hours for the day for the purposes of calculating pay. He said that if he works in excess of the rostered hours he is paid overtime. The approach adopted in relation to Mr Ma was referred to by the plaintiff as an example of how the applicable provisions of the collective agreement should operate in practice.

[30] Mr Behan-Kitto no longer works with the defendant company but had worked from time to time as an on-call employee in Rotorua. He said that as an on-call employee he was only paid for the hours he worked, and had not been given access to the job and finish conditions that Mr Ma enjoys. The plaintiff pointed to the way in which Mr Behan-Kitto had been dealt with as an example of a misapplication of the relevant provisions of the collective agreement.[10]

[31] Mr Behan-Kitto also gave evidence that his hours of work had not originally been specified in advance but that this changed following a partial settlement in March 2009. Ms Adler, Rotorua Mail Centre Manager, confirmed that the partial settlement was directed at the requirement to advise on-call employees of the hours being offered for a particular assignment in advance. Mr Behan-Kitto accepted in cross-examination that as an on-call employee he had been paid for any hours he had worked, including any hours worked over the time specified for a particular assignment.

[32] Another witness for the plaintiff, Mr Newsome, has had a considerable amount of experience as a postie. The relevance of the evidence he was able to give in relation to the way in which on-call employees are dealt with was constrained. He was employed on a casual basis some 14 years ago, and much of what he said was anecdotal (although no objection was taken to his evidence). He said that as a casual he was paid the rostered hours for the day when he was called in to cover for a

[10] At para 13 of the Amended Statement of Claim the plaintiff seeks a direction from the Court that the defendant reach an agreement with Mr Behan-Kitto in relation to payment arrears owing to him. That issue only arises if the answer to the question posed for the Court is in the affirmative.

planned absence, irrespective of his finish time, and that if he worked past the rostered hours he would be paid overtime.

[33] Mr Newsome referred to a number of conversations that he said had taken place over the years (including some which took place up to 10 years ago) in relation to the way in which on-call employees were dealt with, and his understanding of what the applicable obligations were.

[34] The interrelationship between various provisions of the collective agreement is predominantly informed by the wording of the agreement itself. Evidence as to what an individual party subjectively intended or understood their words to mean is not relevant.[11] In any event, there is a dispute as to the nature of the conversations referred to. Those disputes are not able to be resolved. Many of the people with whom Mr Newsome is said to have spoken did not give evidence. Mr Thornley, Delivery Leader, who did give evidence, did not accept Mr Newsome's summary of a conversation that had occurred between them some two years ago. In particular he refuted suggestions that he had told Mr Newsome that management had issued an instruction in relation to on-call employees. Ms O'Neil, Auckland Regional Delivery Business Leader, gave evidence that she was unaware of any such instruction having been given. Mr Thornley said that he recalled a casual conversation with Mr Newsome in a carpark relating to the circumstances surrounding a specific employee only and that he could not recall the precise details of the conversation. The uncertainties surrounding the conversation, and what was said, are not surprising given the passage of time.

[35] What is clear from the evidence is that different branches of the defendant company have different resourcing requirements, and that the operational needs of the business are met in a variety of ways. The application and allocation of on-call resources varies and is at each Mail Centre Manager's, or Delivery Leader's, discretion having regard to the day to day operational demands and particular circumstances of the branch.

[11] See [12], above.

[36] Ms Adler, Ms Nikora (Rotorua Delivery Leader) and Ms O'Neil made the point that on-call employees are employed on an as and when required basis and that they do not have a minimum number of standard hours of work. They explained that this was because of the nature of the role, and the need for flexibility in terms of assessing how day to day workloads ought to be managed.

[37] It was clear that on-call employees may be offered the hours that a permanent postie would have been rostered for, but that this was not the invariable practice. As Ms Adler pointed out, not every pre-planned absence is covered by an on-call employee. Alternatives included "cutting-up" the work and sharing it out between existing employees or getting an on-call employee in to undertake specific duties. Whether the assistance of an on-call employee is sought, the nature of the tasks they are required to do and the hours they are employed for will be dependent on the branch's requirements at the relevant time.

[38] This practice is supported by relevant clauses of the collective agreement which emphasise the direct relationship between the volume of mail for delivery, the number of delivery employees available in the branch on a given day, the actual hours required to deliver the mail, and the ability to allocate and reallocate delivery rounds: see, for example, cls N10 and N12 (Delivery).

[39] The plaintiff contended that when an on-call employee is called in to replace an absent full time position the hours have already been "specified" (in terms of cl M8) by the roster and under the standard daily hours requirements of cl N2 (Delivery). Accordingly it was submitted that the defendant may not second guess the hours set out in cl N2 (Delivery) and seek to specify a lesser number of hours for the on-call employee who is doing the same workload as all other posties on that day.

[40] One of the principal difficulties with this submission is that cl M8 is expressed to relate specifically to on-call employees and makes it clear that there is no guarantee of any number of hours of work in a given period. It requires only that the given number of hours to be worked be specified before the assignment begins. Unlike for temporary employees, there is no link through to other provisions of the collective agreement, or reference to standard hours or the roster.

Underlying need for flexibility and Part C

[41] Clause C34 (under the heading "flexibility") refers to the specific conditions relating to occupational groupings as giving the "broad basis" on which hours are to be determined. Clause C34 goes on to state:

> These [conditions] should not be regarded as inflexible and a reasonable tolerance is permissible to meet local business and delivery requirements. The company recognises this flexibility by allowing an early release from work when local business and delivery requirements are met.

[42] The latter part of cl C34 is relied on by the plaintiff as indicating that the provisions in Part N (start and finish times) apply to on-call employees.

[43] However, cl C34 must be read with cl C36 which relates specifically to the position of on-call employees. It provides that where an on-call employee receives an assignment for work which is subsequently cancelled on the day it was to have been performed (late notice cancellation) the on-call employee will be paid for the cancelled hours as though they had been worked.

[44] It is axiomatic that on-call employees do not have standard hours of work. This is reinforced in cl M8, which makes it clear that they are called in when necessary and have no guarantee of number of hours. Requiring the defendant to specify standard hours, according to a roster set in advance, in relation to work to be done by an on-call employee brought in to provide cover for a full time employee would impose a guarantee of hours and type of work that is not provided for by the collective agreement and which is expressly disavowed in cl M8. It would undermine the flexibility of the on-call arrangements that have been expressly provided for in the collective agreement.

Does the fact that the disciplinary provisions apply affect the position?

[45] Some provisions in Part N plainly do have application to on-call employees, such as cls 16 and 17 (Delivery) (relating to disciplinary action that may

be taken for non delivery of mail).[12] The plaintiff submitted that the fact that on-call employees can be disciplined for failing to deliver mail reinforced the argument that cl N2 (Delivery) applies to on-call employees. It was submitted that on-call employees would be placed in an invidious position if, for example, 6.5 hours had been specified but the on-call employee had not completed their mail delivery within that timeframe. They would not be obliged to work past the specified hours but would be liable to disciplinary action if they did not complete the round.

[46] I do not consider that the disciplinary provisions give rise to the anomaly suggested or that the provisions relating to discipline materially assist in determining the question that has been posed. As counsel for the defendant pointed out, delivery of the mail is fundamental to the work of a postie, whether permanent, part-time, temporary or on-call. Clause N18 (Delivery) sets out a number of steps an employee may take in circumstances when they are left with residual mail (including returning the item to the branch and notifying the reason for the non delivery) and cl N20 (Delivery) makes it clear that the way in which each case is to be treated will depend on the circumstances and is to be approached on a fair and reasonable basis.

[47] Nor is it apparent that there is an issue in practice in relation to these provisions. There was no evidence that any on-call employee had been expected to work past their hours in order to deliver mail but had not been paid for it. Nor was there any direct evidence that an on-call employee had been disciplined for failing to complete a mail run once their specified hours had expired. Indeed Ms Adler was unaware of any disciplinary action having been taken in such circumstances in Rotorua or Tokoroa. The evidence from a number of managers was that they would pay for any hours worked by an on-call employee in excess of the number of hours that had been specified in advance of the assignment. Mr Behan-Kitto accepted in evidence that if he worked for more than the hours originally specified for an on-call assignment he was paid for them.

[12] Non delivery of mail is identified as an example of misconduct referred to at Part I and cl M12 provides that the defendant may terminate the employment of an on-call employee for reasons of poor performance or discipline.

[48] Conversely, the defendant rightly accepted that it is obliged to pay on-call employees for the hours that have been specified in advance, whether or not there is sufficient work to fill that time. And cl C36 provides that where there is late notice cancellation of an assignment the on-call employee will be paid for the cancelled hours as though they had been worked.

Obligation of fairness

[49] It was submitted that the job and finish provision should apply to on-call and permanent employees alike as a matter of fairness. Reference was made to cl A14 in this regard, which provides that the defendant company has an employment philosophy of treating people fairly and with respect. It was said that it is unfair that permanent posties are permitted to go home once their deliveries are completed but on-call employees are not. That perceived inequity is what has given rise to the dispute. It was submitted that it was "only fair" that when an on-call employee was called in to provide cover for a permanent postie and to do the work that a permanent postie was otherwise rostered to do they should enjoy all the provisions that would apply to that position, including the "job and finish" provisions (cl N2 (Delivery)).

[50] While the collective agreement makes reference to fairness it also makes it plain that on-call employees do not enjoy all of the benefits that a permanent employee enjoys. There is no certainty as to the nature, timing or length of assignments they might be offered. The fact that an on-call employee is engaged to cover the work of a permanent postie does not alter their status and nor is a proper application of the applicable contractual provisions to on-call employees (which may not result in the same beneficial outcomes) unfair.

[51] Adopting the interpretation advanced on behalf of the plaintiff would mean that on-call employees would be treated for payment and other purposes as if they were permanent rostered employees. It would likely lead to difficulties in assessing in advance the extent to which an on-call employee was being called in to cover for a permanent postie's position and to debates about the nature of the work being undertaken during the assignment. This would cut across the intended flexibility of the on-call arrangement and the discretion conferred on managers to deal with

resourcing issues as and when they arise, in order to meet the demands of the business.

[52] An on-call employee may be engaged to cover for an absent permanent postie, and this may (but need not) involve them being offered the same hours rostered for the absent permanent postie's position. It may (but need not) involve an on-call employee being required to undertake the same mix of work that would have been performed by the permanent postie had he/she been present. The collective agreement does not provide that where an on-call employee is engaged in such circumstances the specified hours for the assignment must be those rostered for the permanent postie. An on-call employee is paid for the hours of work specified in advance for the particular assignment. The hours and nature of work is a matter for the defendant. That is made plain in the collective agreement in cl M8, which provides that on-call employees are to work as and when required.

[53] The answer to the question posed by the plaintiff is accordingly "No".

[54] Costs are reserved. If they cannot be agreed between the parties they may be the subject of exchanged memoranda, with the defendant filing and serving a memorandum within 60 days of the date of this judgment. Any memorandum in response is to be filed and served within a further 30 days.

C Inglis
Judge

Judgment signed at 2.30 pm on Tuesday 13 December 2011