IN THE SUPREME COURT OF NEW ZEALAND

SC 91/2012
[2013] NZSC 15

BETWEEN	NEW ZEALAND POST LIMITED Applicant
AND	POSTAL WORKERS UNION OF AOTEAROA INCORPORATED First Respondent
AND	LINDA STREET Second Respondent

Court: Elias CJ, William Young and Chambers JJ

Counsel: R J McIlraith and A G Service for Applicant
S R Mitchell for Respondents

Judgment: 13 March 2013

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $2,500 to the respondents plus reasonable disbursements to be fixed by the Registrar.

REASONS

[1] Section 9(1) and (3) of the Holidays Act 2003 provided:

> **9 Meaning of relevant daily pay**
>
> (1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave,—
>
> (a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and
>
> (b) includes—
>
> ...

(ii) payments for overtime if those payments would have otherwise been received on the day concerned:

...

(3) If it is not possible to determine an employee's relevant daily pay under subsection (1), the pay must be calculated in accordance with the following formula:

$$\frac{a}{b}$$

where—

a is the employee's gross earnings for—

(i) the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or

(ii) if, the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made

b is the number of whole or part days during which the employee earned those earnings in the 4 calendar weeks, or longer period (as the case may be) including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

[2] In issue is the inter-relationship between subs (1)(b)(ii) and subs (3) where it is uncertain whether overtime payments would have been derived if the employee had worked on the day in question. Postal delivery workers receive overtime when their delivery rounds take longer to complete than allowed for. While most delivery rounds are completed within the time allowed, sometimes workers take longer, due perhaps to more mail than usual, meetings, road works, bicycle failures and the like. The problem with the application of s 9 to such workers is that it usually cannot be said with confidence whether he or she would have completed the round within the allocated time.[1]

[3] Section 9(3) was repealed in 2011[2] and replaced with a new s 9A which is broadly to the same effect as the earlier s 9(3) save that:

---

1 Sometimes it can be said that this would not have happened, for instance where a meeting was scheduled for the day.

2 Holidays Amendment Act 2010, s 5.

(a) the averaging period is the preceding 52 weeks rather than the preceding four weeks;

(b) it is cast in permissive rather than mandatory terms: "An employer may ..."; and

(c) it is broader in its application than the former s 9(3) as it applies if either it is not possible or practicable to apply s 9(1) or the employee's daily pay rate varies during the pay period when the holiday or leave falls.

Section 9(1) was otherwise not changed.

[4] The interpretation of s 9 favoured by the Employment Court (which heard the case before the enactment of the 2011 amendments) was that unless the worker could show – on the balance of probabilities – not only that he or she would have worked overtime but also how much he or she would have earned, s 9(1)(b)(ii) would not apply and instead, under s 9(1)(a), the worker's "daily pay" would be calculated on the basis of an ordinary day's pay. Section 9(3) was not seen as being applicable in this situation.[3]

[5] The Court of Appeal disagreed.[4] It considered that where the employer could establish what the worker would have received if he or she had worked, s 9(1)(b)(ii) applied. But if it was not possible to do this, s 9(3) applied. It considered that the Employment Court's approach left s 9(3) redundant. In reaching this view the Court treated as irrelevant the subsequent legislative history (including an explanatory memorandum to the Bill which formed the basis of the 2011 amendments).

[6] Given the amendments made in 2011, the correct interpretation of s 9(1) in relation to the former s 9(3) is principally only of historical interest. How s 9(1) is to be applied in relation to the new s 9A will have to be determined if and when issues

---

3 *Postal Workers Union of Aotearoa v New Zealand Post* [2010] NZEmpC 136, (2010) 8 NZELR 162.

4 *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66.

arise as to their application. Both applicant and respondent could plausibly draw some support from the legislative history if it were relevant, thus reducing considerably what might otherwise be the importance of the question whether such history should be taken into account in interpreting the former provisions. Accordingly, the case does not give rise to any question of public or general importance. As well, there is no appearance of a miscarriage of justice.

Solicitors:
Russell McVeagh, Auckland for Applicant
Oakley Moran, Wellington for Respondents