

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 126
EMPC 114/2018**

IN THE MATTER OF proceedings removed from the Employment
Relations Authority

BETWEEN POSTAL WORKERS UNION OF
AOTEAROA INC
Plaintiff

AND NEW ZEALAND POST LIMITED
Defendant

Hearing: 18 December 2018
(Heard at Auckland)

Appearances: S R Mitchell and J Lynch, counsel for plaintiff
H Kynaston, counsel for defendant

Judgment: 11 September 2019

JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment resolves a dispute about the interpretation and operation of the overtime provisions applicable to delivery agents employed by the defendant, New Zealand Post Ltd (NZ Post), and covered by the collective agreement in force between NZ Post and the plaintiff, the Postal Workers Union of Aotearoa Inc (the Postal Workers Union).¹ The collective agreement continues in force until 31 March 2020.

[2] The Postal Workers Union says delivery agents are entitled to be paid overtime for any time worked outside their rostered hours. It says that, for hours between the

¹ A post-hearing application was made, which was resolved by *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited (No2)* [2019] NZEmpC 80.

delivery agent's rostered hours and 40 hours, overtime is paid at normal time rates; beyond that, payment is at the rate of time and a half.²

[3] NZ Post says that overtime generally is payable on a weekly basis. It says overtime is payable to delivery agents when the hours actually worked cumulatively across a full week exceed 40 hours; daily overtime is payable only when the delivery agent works more than 11 hours on a given day.

The parties rely on the same principles of interpretation

[4] The Supreme Court has addressed the principles governing the interpretation of collective agreements in several recent decisions, with the ultimate goal being to determine objectively what the parties meant by the provision or provisions in issue.³ Both parties refer to the decision *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand*, where the Supreme Court confirmed that:⁴

While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

The collective agreement includes several relevant clauses

[5] The Collective Agreement 2017-2020 includes clauses of general application and a section that specifically applies to delivery agents engaged under NZ Post's Delivery Agent Pay Model (Section O(III)). The collective agreement specifies that, where there is a conflict between anything contained in Section O(III) and other parts of the collective agreement, the provisions in Section O(III) will prevail.

² Both parties accept that hours worked in excess of 11 hours per day are paid at a double-time rate.

³ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432; *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212; and *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948.

⁴ *Zurich* at [63] (footnote omitted).

[6] The remuneration of delivery agents is governed by Section O(III), clauses 14 and 15. Clause 14 provides:

Remuneration for Full Time Delivery Agents will be made up of a combination of calculated inside time or actual inside time as determined by the Company, and actual outside time with a minimum payment of 37 hours and 40 minutes per week.

[7] Clause 15 specifies the hourly rates payable. It provides:

Unless otherwise specified in this IDA schedule, each hour of work (calculated or actual as the case may be) is paid in accordance with the following remuneration scale ...

[8] In relation to overtime, Section O(III) provides:

Overtime

20. Delivery Agents may be required to work reasonable overtime in excess of their standard hours (subject to safe operating procedures), provided that work is voluntary on days which are otherwise non-rostered days for an individual employee.

21. Overtime at the rate of T 1.5 will apply when hours worked on rostered days exceed 40 in a week, except in the case of delivery agents whose standard hours exceed 40, in whose case the time at which OT shall apply will be agreed at the time the additional standard hours are agreed.

[9] Section O(III), clause 22 then provides:

Standard Weekly Hours

22. Upon appointment the number of a Delivery Agent's weekly standard hours and the number of days on which the standard hours will be worked each week will be fixed by agreement between the delivery agent and the company. Actual days of work will be set by a roster.

[10] Section O(III) also includes the following terms on hours of work:

Working Days

25. Working days for delivery agents will be set by roster (rostered days). Rosters for full time delivery agents can be set over 4, 5 or 6 days per week, Monday to Saturday inclusive.

Span of Hours

26. Set by roster. The starting and finishing times will be set to meet local delivery requirements.

[11] The general provisions of the collective agreement refer further to rosters. In the glossary, in Section B, clause 11, it provides:

“Rostered duty” or “Roster” means the:

- actual start and finish times;
- break times;
- days of the week on which an employee is scheduled to work; and
- number of days per week over which an employee's standard hours are scheduled to be worked.

[12] The requirements for notifying changes to the roster, at Section C, clause 4, are:

The Company will publish any changes to the Roster at least 14 days in advance of the start of the roster except in the case of changes arising from an employee exercising their right to take an alternative holiday/day in lieu on 14 days' notice in which case no less than seven (7) days' notice will be given.

[13] Section C, clause 5 provides:

The published Roster will show:

- The days to be worked and the start/finish times over which the employee's standard hours are to be worked (standard hours' roster) ...

[14] Section C, clause 5 also makes provision for pre-agreed overtime, which, once rostered, must be provided by NZ Post and worked by the employee concerned.

Delivery agents have a roster, but work hours vary

[15] On appointment, a delivery agent's “standard hours” are fixed by agreement between the delivery agent and NZ Post. This includes the number of days of the week that the delivery agent works. NZ Post develops the rosters.

[16] In practice, delivery agents' actual finish times may vary. NZ Post can require delivery agents who have finished their deliveries to assist other delivery agents, or to perform other work. NZ Post may also allow delivery agents to finish work early. Regardless, delivery agents are paid their standard hours as a minimum.

[17] For its part, NZ Post has an obligation to use its best endeavours to size and maintain rounds at 37 hours and 40 minutes per week (for full-time delivery agents), or as close to that as practical.

There are difficulties with NZ Post's argument

[18] NZ Post says if a delivery agent is not required to work all the hours scheduled for a particular day, those unworked hours can be offset against hours worked later in the week and no overtime pay is due until the delivery agent's actual worked hours exceed 40. NZ Post says the text of Section O(III), clause 21 supports its argument – the word “worked” is used: “when hours worked on rostered days exceed 40 in a week...”. It says this wording recognises that actual working hours may vary day to day, and confirms that it is weekly hours worked that determine overtime.

[19] NZ Post says the rosters for delivery agents do not need to contain start and, especially, finish times. It says the rosters need only say the daily number of hours and their outer parameters: so, for example, a roster could say the delivery agent will work 7 hours between 7 am and 7 pm. It says that actual start and finish times are set to meet local delivery requirements and do not need to be in the roster; where they are included, they are indicative only.

[20] The first difficulty with this submission is that it runs counter to other provisions of the collective agreement. The general provisions require rosters to include start and finish times, and include a process for changing the roster. The provisions in Section O(III) specific to delivery agents are not inconsistent with those general provisions. Clause 26 (in Section O(III)) says that a delivery agent's span of hours is to be in the roster. The clause then immediately refers to starting and finishing times. This also indicates they will be in the roster, but set to meet local delivery requirements.

[21] Section O(III), clause 20 too supports overtime being able to be identified daily. It refers to delivery agents being required to work reasonable overtime in excess of their standard hours (subject to safe operating procedures), but on NZ Post's interpretation, because overtime would not come into play until the delivery agent has

worked beyond his or her weekly standard hours, questions of reasonableness and safety could not arise in respect of a day early in the working week. Such a result is inherently unlikely.

[22] The second difficulty is that, even on NZ Post's submission, where a delivery agent works more than the daily number of hours provided for in the roster, he or she is working in excess of his or her standard hours, which Section O(III), clause 20 indicates would be overtime.

[23] The third difficulty is that NZ Post's argument amounts to a submission that delivery agents work flexible hours, as determined by NZ Post, so that they effectively have no recognised daily hours of work – they can be sent home early on one day of the week, and then the time not required to be worked can be set off against additional time worked on another day that week.⁵

[24] It is fundamental that an employer is obliged to pay an employee for contracted hours, except where non-payment is authorised by law or by the employment agreement itself. This is the starting point of cases that then go on to consider whether employers also must provide work.⁶

[25] The argument put forward by NZ Post runs counter to that fundamental obligation as, if a delivery agent's additional hours on one day just 'make up' time that he or she did not work on another day that week, the delivery agent either is not being paid for the contracted hours, or not being paid for the additional hours. Neither proposition is tenable.

[26] In any event, if that much flexibility was envisaged, it would be expected to have been spelled out in the collective agreement, especially as it would have required a departure from the general roster provisions. More formality around the sending home of delivery agents would also be expected.

⁵ Meaning also that the pay for delivery agents required to make up work would be the same as for delivery agents not so required.

⁶ *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641, [1995] 2 ERNZ 398 (CA) at 406; *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* (1995) 1 ERNZ 672 (EmpC) at 695; *Turner v Sawdon & Co* [1901] 2 KB 653 (CA) at 656–657 per A L Smith MR, 658 per Vaughan Williams LJ.

The Postal Workers Union's interpretation is correct

[27] Overall, read in the context of the collective agreement as a whole, clause 21 must be read in the way the Postal Workers Union suggests. That is, delivery agents have a roster that sets out their hours of work, including daily start and finish times that meet local requirements; NZ Post sets those rosters using its best endeavours to size and maintain rounds at 37 hours and 40 minutes per week (for full-time delivery agents), or as close to that as practical; full-time delivery agents are to be paid for all their rostered hours (even if not required to work them all), or 37 hours 40 minutes as a minimum; if a delivery agent works beyond his or her daily rostered hours, that is overtime; overtime worked beyond rostered hours is paid at normal hourly rates until rostered plus additional hours total 40 in a week; overtime beyond those 40 hours in a week is paid at time and a half.⁷

Costs reserved

[28] Costs are reserved. If they cannot be resolved between the parties, the Postal Workers Union may apply to the Court within 20 working days of the date of this judgment. NZ Post then has 14 working days within which to file and serve its response, with any reply from the Postal Workers Union to be filed within a further five working days.

J C Holden
Judge

Judgment signed at 2 pm on 11 September 2019

⁷ Again, with the additional point at n 2.