IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 231
EMPC 491/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GEORGE LYE Plaintiff
AND	ISO LIMITED Defendant

Hearing:	28 July 2020 (Heard at Tauranga)
Appearances:	SR Mitchell and J Lynch, counsel for plaintiff K Ashcroft and C Gray, counsel for defendant
Judgment:	17 December 2020

JUDGMENT OF JUDGE K G SMITH

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[1] George Lye works for ISO Ltd in Tauranga as a stevedore. In 2018 Mr Lye, and nine of his colleagues, raised an employment relationship problem with ISO about whether their individual employment agreements complied with the availability provisions of the Employment Relations Act 2000 (the Act).

[2] What followed were two determinations of the Employment Relations Authority concluding that the employment agreements did not comply with the Act.[1] Despite that conclusion the Authority declined to make a compliance order against the company. It is the decision to decline to make an order that has led to this challenge.

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[1] *Maritime Union of New Zealand Inc v ISO Ltd* [2018] NZERA 368 (Member Campbell) (2018 determination); *Maritime Union of New Zealand Inc v ISO Ltd* [2019] NZERA 704 (Member Campbell) (2019 determination).

[3] At the centre of this dispute is ISO's desire for flexibility in rostering its workforce and Mr Lye's uncertainty over his roster.

The determinations

[4] The first determination was delivered on 23 November 2018.[2] The Authority held that Mr Lye's employment agreement did not comply with s 67D of the Act. That was because it had no set entitlement to particular days, shifts or hours of work unless otherwise agreed.[3] While the Authority reached these conclusions, no orders were made because no remedies were sought beyond a finding about complying with the Act.

[5] That was where matters stood until a subsequent application was decided in December 2019.[4] Gerald Seymour, one of the ten employees involved in the November 2018 proceeding, applied to the Authority for an order that ISO comply with the Act. His union, Maritime Union of New Zealand Inc (MUNZ), was also a party in that proceeding. Building on the successful claim of the previous year, they sought an order to compel ISO to comply with the determination and pt 6 of the Act.

[6] The Authority remained satisfied that the individual employment agreement contained an unenforceable availability provision by not specifying agreed hours of work and guaranteed hours.[5] However, it declined to make a compliance order for two reasons. It would not do so relying on the 2018 proceeding because the statement of problem initiating that claim had not sought such an order.[6] As to the new application, it declined to make an order because ISO had changed its practices. The Authority accepted ISO's evidence, that it had not applied the offending terms and conditions of the agreement requiring availability and had allowed employees to accept or reject work without having to justify that decision.[7] The Authority was also

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2 2018 determination, above n 1.
3 At [38].
4 2019 determination, above n 1.
5 At [41].
6 At [20].
7 At [42].

conscious that ISO and MUNZ were then (and are now) bargaining for a collective agreement where providing for availability was an issue.[8]

[7] This challenge arises from the second determination and a desire to obtain a compliance order. The proceeding has followed an unconventional path. Mr Lye was one of the stevedores who successfully applied to the Authority in 2018, but he was not a party to the 2019 proceeding nor was he an original party to this challenge. He successfully sought leave to be joined as a party and, with Mr Seymour resigning from ISO and MUNZ being struck out as a party, he was the only plaintiff.[9]

[8] It was, however, commonly understood that the outcome of this challenge will affect all of the stevedores still employed by ISO who were involved in the 2018 investigation and determination. That is because all of those stevedores are employed on the same terms and conditions as Mr Lye.

[9] The whole of the 2019 determination was challenged.[10] The relief claimed was a compliance order requiring ISO to comply with the availability provisions in ss 67D and 67E of the Act by:[11]

(a) rostering the plaintiff only at times that are both agreed and guaranteed; and

(b) rostering any additional hours only if agreed.

[10] The Authority's 2018 determination has never been challenged.

[11] Despite the determinations, ISO and Mr Lye have not entered into a new employment agreement or varied the old one. ISO continues to dispute that its employment agreement with Mr Lye breached s 67D.

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8 At [56].
9 *Maritime Union of New Zealand Inc v ISO Ltd* [2020] NZEmpC 49.
10 Commonly called a de novo challenge.
11 The reference to s 67E in the pleadings may have been intended to be to s 67G. The former allows work to be declined in certain circumstances and the latter deals with shift cancellation.

The issues

[12] With that background the issues in this proceeding are:

(a) Does the employment agreement between Mr Lye and ISO comply with ss 67D, or the balance of pt 6 of the Act?

(b) If the agreement does not comply, are ISO's changed work practices material?

(c) If the agreement does not comply with the Act, and the changed work practices are not material, should a compliance order be made?

Compliance with the Act?

[13] Mr Lye's claim is straight-forward: the Authority has already concluded that the employment agreement between him and ISO does not comply with the Act and the only issue, therefore, is whether a compliance order should be made.

[14] ISO does not share that view. Despite not challenging the 2018 determination, it pleaded that the employment agreement did not contain an availability provision. Ms Ashcroft, ISO's counsel, made submissions that this subject remained alive because of the Authority's analysis in the 2019 determination that reconsidered and confirmed its earlier conclusions. I disagree. All the Authority did, in referring to and confirming its previous analysis, was to provide an adequate background to explain why a compliance order was sought and to give context for the decision being made. Accepting ISO's argument would have the effect of undermining the 2018 determination by allowing an inappropriate collateral attack on the decision.

[15] The short answer to this point is that the employment agreement has been held to be non-complying and that decision cannot now be revisited. It follows that the employment agreement does not comply with the Act.

[16] An explanation of the employment agreement, and ISO's work practices, is still necessary to inform the decision on the challenge to the Authority's determination declining to make a compliance order.

Changed work practices material?

[17] Mr Lye began working for ISO on 1 July 2016, after it purchased the business of his former employer. He accepted employment on the basis of his existing individual employment agreement and his employment was treated as continuous. He is a permanent employee.

[18] Mr Lye was a member of the Amalgamated Stevedores' Union (ASU) until 8 June 2017. The Authority held that the employment agreement had to be read in conjunction with a collective agreement between ISO and ASU dated 9 December 2015 and a company policy, known as the Fair and Reasonable Guidelines. The ASU collective agreement with ISO expired on 8 December 2018.[12] These conclusions were not disputed.

[19] Recognising that ISO operated what was described as a "24/7" operation, the employment agreement required Mr Lye to be prepared to work varying hours and/or day and night shifts. The reality was that, when he was allocated work, it was to the company's morning shift beginning at 3 am. The shift is usually 12 hours long.

[20] Under the agreement, the actual hours of work depended on ISO's operational requirements. ISO was to "endeavour" to provide as much notice as possible of the actual hours to be worked. Critically, the agreement included this sentence:

> [Mr Lye] has no set entitlement to particular days, shifts, or hours of work unless otherwise agreed in writing with the Employer.

[21] The remuneration for agreeing to these flexible hours was a retainer (described by the parties as a guarantee) for each fortnight period during which Mr Lye was available for work. It was calculated by multiplying his hourly rate by 60, representing the basic expected number of hours anticipated to be worked in the period. The

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[12] 2018 determination, above n 1, at [28].

agreement provided that, if his earnings in that period were less than the retainer, the whole of it would be paid to him. If he worked more hours, he was paid for all of them.

[22] Mr Lye is notified of work being allocated to him by text message sent by 11 am on the day before he is to work. If he is not required to work no text is sent. Any delay to the starting time of the shift is usually notified on the day of the shift.

[23] Mr Lye tends to work at the beginning of the first week and towards the end of the second week of the pay period. Often that results in several intervening days when he is available to work and waiting to be advised if he is needed.

[24] Work is allocated from a list created from the pool of available employees. As might be expected, the list is organised by skills and training. It includes the hours already worked by each employee in that fortnight, each person's shift preference, those employees who have not worked six consecutive days in the previous eight days, and those who do not have an allocation in the following ten hours and have not been allocated to work in the prior ten-hour period. Those employees who have taken approved leave are not listed.

[25] Recently the company accepted that all stevedores, including Mr Lye, have access to "planned time off". This time off is accessed by stevedores advising ISO that they do not wish to be assigned a shift on a particular day. Taking planned time off sees a corresponding reduction in the retainer, but the stevedore remains eligible to be allocated to other shifts in the pay period (and the pay for working them).

[26] Dean Carter, ISO's General Manager of Human Resources, explained the rationale for the company's method of allocating work. There was no significant disagreement between Mr Carter and Mr Lye about how work is allocated. He explained that ISO's work volumes are dictated by external factors beyond its control like the weather, berth availability, the export market, exchange rates, seasonal changes, the inability to routinely schedule ship arrivals and freight costs. The nature of this industry means that the company does not operate to a timetable where the arrival and departure of vessels can be precisely timed. These unpredictable work

patterns and volumes were said to mean that work could not be rostered in advance, which supported the need for flexibility.

[27] As has already been mentioned, since 2018 ISO has altered its work practices and that change lies behind the Authority's decision to decline a compliance order. The change was introducing planned time off without adverse consequences for the employee. Mr Carter said, and I accept, that there was no instance where the company had disciplined a stevedore for not being available to work beyond the guaranteed hours.

[28] While accepting changes have been made, I am not persuaded that they are material. Section 65 of the Act requires an individual employment agreement to be in writing and to contain such terms and conditions as the parties to the agreement think fit.[13] If flexible working hours are intended, pt 6 requires that an agreement must include any agreed hours of work, in accordance with s 67C or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work.[14]

[29] An availability provision may only be included in an agreement that specifies agreed hours of work that includes guaranteed hours among those agreed hours. Additionally, it must relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.[15]

[30] At the time of the 2018 determination, the only decision from the Court that dealt with availability provisions was *Fraser v McDonald's Restaurants (New Zealand) Ltd*.[16] Since then there has been another full Court decision on the subject: *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*.[17] In that case the Court dealt with availability provisions relating to overtime, but the comments which it made are pertinent. To begin with, the Court accepted the obvious proposition that

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13 Section 65(1)(a)–(b).
14 Section 65(2)(a)(iv).
15 Section 67D(2)(a)–(b).
16 A decision of the full Court: *Fraser v McDonald's Restaurants (NZ) Ltd* [2017] NZEmpC 95, [2017] ERNZ 539.
17 *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2019] NZEmpC 47, [2019] ERNZ 78.

an availability provision may only be included in an employment agreement containing both agreed and guaranteed hours of work.[18] The Court went on to say that, while s 67D prohibits what were colloquially referred to as zero-hour contracts, that was not its only function. There are two parts of the definition to availability provision: the employee's performance of work is conditional on the employer making work available to the employee and the employee is required to be available to accept any work that the employer makes available.[19]

[31] The employment agreement in this case is entirely about providing ISO with flexibility for its business. That flexibility can only be achieved because the agreement makes Mr Lye available to work. Under that agreement, and in practice, he must make himself available to work for the company and does not know from one day to the next whether he will be working until a text message arrives. He is not paid for that flexibility and the imposition on him, created by the agreement, has not been altered by providing for planned time off. At other times he is still required to be available.

A compliance order?

[32] The Authority has power to make an order compelling compliance with any employment agreement or pt 6 of the Act.[20]

[33] Sections 67C and 67D are in pt 6 and are, therefore, susceptible to being the subject of a compliance order.

[34] Mr Mitchell drew on s 137(2), which gives the Authority power to order a person to do any specified thing, or cease any specified activity, for the purpose of preventing further non-observance or non-compliance with the breached provision. The section reads:

> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of

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18 At [10] and by reference to s 67D(2).
19 At [11].
20 The power in s 137(1) is extensive.

> preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

[35] Relying on the broad language of s 137(2), and the observations in *New Zealand Resident Doctors v Otago Area Health Board*, Mr Mitchell's argument was that the jurisdiction to make an order is broad, but, before it can be exercised, the Court should consider the following:[21]

(a) Is the party non-compliant?

(b) If so, how is that party non-compliant?

(c) What specified thing would address the non-compliance?

(d) Is such an order appropriate taking into account that compliance orders contain an element of discretion?

[36] Examples were given where the Court used compliance orders to restrain an employer from acting in breach of obligations said to be similar to the situation in this case.[22]

[37] Mr Mitchell argued that the order sought simply required compliance with the Act, when that had not happened despite the Authority's first determination and the effluxion of time since then. The consequence of not making an order was said to be that Mr Lye would continue to be bound by an unlawful employment agreement. At its bluntest, the point was that ISO is getting a benefit in Mr Lye's availability it is not paying for while he bears the burden of making himself available.

[38] In contrast, Ms Ashcroft argued that there was no basis for a compliance order. Aside from arguing that there had been no breach, one of her concerns was that the

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[21] *NZ Resident Doctors Assoc v Otago Area Health Board* [1991] 1 ERNZ 1206 (LC). The Court, while not mentioned in s 137, has jurisdiction to make a compliance order in this situation; see *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union* [2009] ERNZ 342 (EmpC) at [37]; applied in *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111, [2014] ERNZ 434 at [116].

[22] *Central Clerical Workers' Union v Safe Air Ltd* [1990] 2 NZILR 879.

litigation was intended to force ISO to bargain with MUNZ, Mr Lye's union, to conclude a collective agreement where one has not yet been settled despite on-going bargaining. It was common ground that there are other proceedings between the union and ISO before the Authority, although the exact nature of them was not discussed at the hearing.

[39] Ms Ashcroft argued that a compliance order is discretionary and, before the discretion can be exercised in favour of making an order, what has to be established is whether:[23]

(a) there has been a breach or non-observance with some relevant part of the Act;

(b) further non-compliance is likely; and

(c) whether the plaintiff has been affected by the non-compliance giving rise to a proceeding.

[40] From this analysis the conclusion invited was that, if a breach had occurred, the Court's discretion should be exercised against making an order. Ms Ashcroft drew on practical examples to attempt to illustrate that there is no risk of ongoing non-compliance. Those examples included Mr Lye's ability to use planned time off, the employment agreement providing for a retainer based on availability to work, the voluntary nature of extended hours, the right to refuse them and Mr Lye having previously declined work.

[41] I accept Ms Ashcroft's formulation of what must be considered before an order is made. The Authority has already decided that pt 6 has been breached. That breach is ongoing, because no attempt has been made to amend the employment agreement and the changed work practices are insufficient to cure the non-compliance.

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[23] *Infinity Automotive Ltd v Lorigan* [2018] NZEmpC 133 at [10].

[42] I do not accept Ms Ashcroft's submission that there is no risk of further non-observance or non-compliance with the Act. The reality is that ISO has consistently resisted efforts to amend, or replace, the employment agreement despite being on notice from as long ago as November 2018 that it does not comply. The company persists with this method of allocating work for a competitive advantage. While changes have been made, the company still expects Mr Lye to make himself available without any certainty that he will be offered work. I find that there were past breaches, they continue and it is reasonable to conclude there is a risk of ongoing breaches.

[43] The final question is whether the discretion should be exercised in favour of making a compliance order. There is one significant impediment to exercising that discretion; the collective bargaining underway since October 2018.

[44] While Mr Lye's case concentrated on his circumstances, it was obviously in the nature of a test for all of the stevedores employed by ISO who succeeded in the 2018 determination.

[45] If a compliance order was to be made now it could only be satisfied if ISO was compelled to bargain with MUNZ, in order to secure a complying employment agreement. That restriction comes from s 32(1)(d)(ii) of the Act, which precludes the company from negotiating directly with Mr Lye while bargaining for a collective agreement is underway. Instead of compelling a separate agreement between ISO and Mr Lye, the practical effect of such a compliance order would be to force the situation by requiring collective bargaining to continue. There would be a risk in taking such a course of action that the bargaining would, in reality, only take place against the backdrop of the compliance order and where one party would be able to exert significant pressure on the other. That pressure would come, at least partly, from the fact that a compliance order must stipulate a time by which it is to be satisfied and a failure to satisfy it in that time exposes the defaulting party to the risk of sanctions under s 140(6) of the Act.

[46] Given that there are collective bargaining issues, I think it is reasonable to assume that, as well as having to deal with providing for availability provisions that comply with the Act, there are likely to be flow-on effects that require consideration.

[47] The on-going bargaining justifies the Court taking a cautious approach to this challenge. While the order sought by Mr Lye was confined to rostering at agreed times and for additional hours, making it would be significant given how work is now managed. It is reasonable to assume that other changes to ISO's business may be needed to make the flexible work arrangements complying. In turn, there may be consequential effects that the parties will need to consider and, potentially, bargain over. The potential for flow-on effects might be seen as an obvious and unavoidable outcome of rectifying non-compliance and, therefore, not something to be concerned over. However, compelling bargaining where the parties know sanctions might be imposed against one of them if agreement is not achieved would be unsatisfactory. While the result might be complying availability provisions, other consequential agreements may have to be reached but under the sort of pressure that would not usually accompany bargaining.

[48] I consider it is preferable to encourage the parties to reach a comprehensive settlement of the collective agreement before making an order. For that reason I have decided to declare that the employment agreement is non-complying, confirming the Authority's determination, and to leave the parties with an opportunity to conclude their collective bargaining before finally deciding whether an order might be appropriate and/or be necessary.

Outcome

[49] The proceeding will be adjourned for four months to enable the parties to have an opportunity to conclude their bargaining. At that time the Registrar will arrange a telephone directions conference the subject of which will be whether it is necessary for an order to be made, and if that is so, to decide if additional evidence and/or submissions are necessary. Pending that conference the parties are to provide memoranda reporting as to progress in the bargaining no later than **4 pm on 5 February 2021**.

[50] Costs are reserved.

K G Smith
Judge

Judgment signed at 3.50 pm on 17 December 2020