IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 73
EMPC 24/2023

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to extend time to file a challenge
BETWEEN	E TŪ INCORPORATED Plaintiff
AND	NEW ZEALAND STEEL LIMITED Defendant

Hearing: On the papers

Appearances: G Pollak, counsel for plaintiff
C Pearce, counsel for defendant

Judgment: 16 May 2023

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for leave to extend time to file a challenge)

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[1] The plaintiff, E Tū Incorporated (E Tū) seeks to challenge two determinations of the Employment Relations Authority (the Authority).

[2] The first determination was issued on 28 April 2022. It concerned a dispute between the parties that had arisen over the application, operation and interpretation of provisions in the collective agreement between E Tū, Northern Amalgamated Workers Union Inc, and the defendant, New Zealand Steel Ltd and SteelServ NZ Ltd (NZ Steel). The dispute centred on how "make-up pay" applied in the situation in

which employees go on to or come off a "Critical Path" roster.[1] A Critical Path roster is a 24/7 roster that is put in place to ensure NZ Steel's plant is able to return to normal working as quickly as possible following a shutdown.[2]

[3] The second determination was issued on 19 December 2022. It reopened the Authority's investigation, with the Authority saying it was reopened "purely for the purpose of clarifying the main points of the determination".[3]

[4] E Tū filed its challenge in the Court on 20 January 2023. NZ Steel takes no issue with the filing in respect of the second determination but says E Tū is out of time to challenge the first determination.

The dispute concerns cl 80.6.1 of the collective agreement

[5] Clause 80.6.1 of the relevant collective agreement provides:[4]

> Where an employee is requested to work outside his/her established or ordinary hours of work and as a result is unable to complete his/her ordinary hours of work, he/she shall be paid make-up pay for those lost ordinary hours, paid at expected weekly/hourly earnings as defined above.

[6] The question that triggered the dispute is how that clause applies to employees who are asked to move onto a Critical Path roster more than once during a shutdown. The parties disagreed about the Authority's findings

The parties disagreed on what the first determination meant

[7] After the first determination was issued, issues arose between the parties as to what it meant. E Tū claimed that it was not aware that NZ Steel held a divergent view about the findings in the first determination and how they were to be applied until after the 28-day challenge period had elapsed.[5]

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1 *E Tū Inc v New Zealand Steel Ltd* [2022] NZERA 166 (Member Robinson) [*First determination*].
2 At [11]–[13].
3 *E Tū Inc v New Zealand Steel Ltd* [2022] NZERA 677 at [12] (Member Robinson) [*Second determination*].
4 At [14].
5 Second determination, above n 2, at [2].

[8] E Tū applied to have the Authority reopen its investigation as it claimed the first determination was unclear and that there was some ambiguity in it.[6] NZ Steel did not disagree with that approach. While it did not agree that the determination was unclear, it did not oppose reopening the investigation so that any misunderstanding could be resolved, and the parties could move on.

[9] As noted, the Authority agreed to reopen the investigation, accepting that E Tū's claim, that the first determination was ambiguous, was presenting a problem in the workplace where NZ Steel wanted to introduce a policy in reliance on the Authority's findings.

[10] In the Authority's conclusions in the second determination, the Authority Member said she did not accept that the first determination lacked clarity. However, she addressed the issues again and said the second determination should resolve any lingering confusion and enable the parties to progress their bargaining discussions.[7]

The parties disagree on whether E Tū can challenge the first determination

[11] E Tū's primary position is that leave is not required to challenge the first determination. It says the first determination and the second determination are the same employment relationship problem; they are the same dispute and are inseparable.

[12] In the alternative, it says its challenge to the second determination means the whole dispute is able to be fully resolved by the Court.

[13] If neither of those propositions is accepted, E Tū applies for leave to file the challenge to the first determination out of time, saying that is in the interests of justice.

[14] NZ Steel says E Tū was required to file any challenge to the first determination within the usual 28-day period following issue; it cannot challenge it outside that period by filing a challenge to a later determination.

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6 Second determination, above n 2, at [8].
7 At [29].

[15] It says the determinations do not deal with the same employment relationship problem, although obviously they are linked. It says the Authority treated them as two separate employment relationship problems; the problem dealt with in the first determination was "the application, operation and interpretation" of clause 80.6.1 of the applicable collective agreement; the problem dealt with in the second determination is described as an application "for a reopening of an investigation".

[16] NZ Steel opposes leave being granted to file a challenge to the first determination out of time.

Both determinations are before the Court

[17] The issue before the Court comes about because the second determination is not expressed to replace the first determination, but to clarify it. As a result, there are now two separate determinations, both of which deal with the dispute and address the same issues.

[18] The difficulty with NZ Steel's principal proposition is that, irrespective of how it is described, the second determination did not just deal with the application for a reopening of an investigation; the application to reopen is dealt with as a preliminary issue in the second determination, and then, having found the investigation should be reopened, the Authority went on to reconsider the original employment relationship problem, and clarify and confirm its findings.

[19] I consider E Tū's second proposition to be the correct one. That is, the challenge is to the second determination, but given the second determination reopened and then amplified and/or clarified the findings in the first determination, the content of, and reasoning in the first determination will need to be considered in the challenge to the second determination. Any other approach to a challenge to the second determination would be artificial and would not provide the Court with the full picture.

[20] For the avoidance of doubt, however, and given the approach that NZ Steel has taken to this issue to date, if, in order to be considered by the Court, the first determination needed to be separately challenged, I would have granted E Tū leave to

challenge it out of time. That is what the interests of justice require in the particular and unusual circumstances of this case.[8]

[21] Accordingly, the Court will proceed on the basis that all matters contained in both determinations are before it on this challenge. A directions conference will now be arranged to progress this matter.

J C Holden
Judge

Judgment signed at 1 pm on 16 May 2023

[8] *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].