

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 61
5365712

BETWEEN

FIRST UNION
INCORPORATED
Applicant

A N D

GENERAL DISTRIBUTORS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Peter Cranney, Counsel for Applicant
Jo Douglas, Counsel for Respondent

Investigation Meeting: 20 September 2012 at Auckland

Date of Determination: 21st February 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Union (the Union) brings this claim in respect to rest and meal breaks in terms of s.69ZD of the Employment Relations Act 2000.

[2] The Union represents workers employed by the respondent employer (General Distributors). Both parties are also parties to a collective employment agreement which came into force on 29 October 2007 (the 2007 agreement). Further, those same parties are also parties to a subsequent collective agreement (the 2009 agreement). The 2009 agreement continues in force because of the initiation of bargaining.

[3] Pursuant to s.69ZD of the Employment Relations Act 2000 (the Act) workers are entitled to paid rest and meal breaks on certain terms and conditions. However, the operative collective agreement does not provide for workers to have paid breaks.

General Distributors has not otherwise agreed to provide those boners with paid breaks.

[4] The Union seeks an order from the Authority requiring General Distributors to provide paid breaks to boners and also seeks back pay from 1 April 2009, the operative date of the amendment to the Act. In addition, the Union seeks an order varying the 2009 agreement such that provisions not in conformity with the 1 April 2009 amendment to the Act, have no force or effect.

[5] General Distributors resist the Union's claim on the basis that the boners concerned are paid on a piece rate pay system, that that pay system produces a significantly higher remuneration than the alternative waged structure, and that it was specifically negotiated to cover *all compensation for the period of work performed*.

[6] It is contended that, consistent with that position, the agreement provides amongst other things as follows:

*The piece work pay system is based on payment for production only.
The employee will not be paid if production is interrupted for any reason including plant or machinery breakdown, meetings, breaks, supply problems etc.*

[7] Critically, from General Distributors point of view, the pay rate was agreed by the team members concerned and the Union and has been in place for a number of years and over several collective agreement negotiations.

[8] The Authority notes that the issue is not about the availability of breaks; the boners affected by this claim have the same entitlement to breaks and observe the same break schedule as other workers; the issue is whether they have been remunerated for that break, or not.

The Authority's investigation

[9] The Authority heard brief evidence from witnesses put up by both parties. A representative member of the Union performing the work in question, Mr Jones, gave evidence of the nature of his obligations to General Distributors during the normal work period, noted that there was no pay at all for the breaks that he and his co-workers took, and sought compliance with the provisions of the Act.

[10] Ms Gay, a senior official of the Union in her evidence took exception to General Distributors claim that the piece rate included compensation for non-productive time. Ms Gay pointed to the words in the 2009 agreement as evidence for the contrary proposition that in fact there was no compensation for rest breaks included in the piece rate.

[11] Mr Brett Ashley a senior manager with General Distributors described for the Authority the switch to a piece rate system and noted that when the arrangements were originally put in place, it was agreed between the negotiating parties *that the boners would not be paid extra rates for rest and meal breaks*. Mr Ashley also told the Authority in his oral evidence that, if directed by the Authority, he could calculate the appropriate payment for the boners.

[12] Mr Doug Stewart the manager at General Distributors who was directly responsible for the boning rooms describes, in his evidence, the average earnings of the boners. He also describes the nature of the shifts worked by the boners, refers to the relevant provisions in the collective agreement and argues that increased costs in a business will thin margins, will ultimately negatively impact on both parties.

[13] Ms Jemma Rothwell is the Human Resource Manager for Progressive Enterprises Ltd, of which General Distributors is a wholly owned subsidiary. Ms Rothwell gives a detailed description of the negotiations between the parties over time.

General Distributor's position

[14] General Distributors say that the operative collective agreement ... *currently complies with s.69ZD*. This is because the boners in this dispute are paid the piece rates *which have incorporated into the rate of pay, provision for rest and meal breaks*. It follows that rest and meal breaks are, so the argument goes, paid for the purposes of the statute.

[15] The Authority is urged to *take a pragmatic approach to interpreting the collective agreement in light of the provisions of s.69ZD* and it is suggested that *the spirit and intention of the Act is met by the arrangements in place between the parties*.

[16] It is also suggested that *Parliament never intended to interfere with existing break provisions where they were adequate and freely negotiated* and that the

mischief the legislation was seeking to address was to provide appropriately for vulnerable employees working extended periods without breaks. Boners employed by General Distributors it is suggested, are not in that category.

[17] General Distributors encourage the Authority to *interpret* the agreement between the parties and they seek to rely on the Supreme Court decision in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] NZSC5 which mandates looking at the commercial context in which agreements were formed, and the subsequent conduct of the parties, going beyond the plain words of the agreement.

[18] Then, General Distributors look at the way statutory enactments apply to piece rates and after referring to *Idea Services Ltd v. Dickson* [2009] ERNZ 372 and the *obiter* comments of the Court at para.[68] of that judgment suggest that the Courts approach is to encourage pragmatism in respect to identifying whether minimum entitlements are being met for piece workers. General Distributors argue that the practical difficulties of identifying the quantum that should be paid to these workers, may militate against making any payment, particularly because they argue that because the boners are paid on average \$316.00 a day, ... *this means that there is sufficient payment to cover the minimum wage for eight and a half hours work.*

[19] Notwithstanding that submission from General Distributors that there would be difficulty in calculating what the boners ought to be paid if the Authority were to decide that they should be paid for meal and rest breaks, General Distributors' own witness, Mr Stewart, told the Authority that he thought he could work out a payment regime.

[20] General Distributors then submit although piece work is relatively uncommon in industry, *there could also be implications for other employees engaged in work ... paid on output not time* and they refer in that regard to workers paid on commission in particular.

[21] Finally, it is suggested that the objects of the Act are met by a conclusion from the Authority that the present arrangements meet the case and that no amendment to those arrangements is necessary. The 2009 amendment to the statute, General Distributors submit, is about rest breaks and not about payment for those breaks.

The Union's position

[22] The Union simply contends that the boners are entitled, by force of statute, to paid meal breaks but are not receiving them.

[23] The Union emphasises that the practicalities of any order made by the Authority can be left to the parties, thus obviating one of General Distributors central arguments that it is difficult to envisage how payment would be derived given the nature of the remuneration of these workers on a piece meal basis and the lack of any legislative guidance in the statute.

[24] The Union submits that because the new section s.69ZD is part of Part 6 of the statute, the objects of Part 6 relate. One of those objects is to *specify the rules for determining the terms and conditions of an employee's employment*.

[25] The statute defines when a work period begins and when it ends and s.69ZD, according to the Union's submission, mandates rest breaks and meal breaks in accordance with the statute.

[26] Critically, the Union rely on s.238 of the Act which simply provides that the entitlement has force and effect regardless of any contrary provision in an employment agreement. In other words, "contracting out" is specifically outlawed.

[27] The Union says it is common ground that there is no payment for breaks and that General Distributors entered into the most recent agreements with the Union *knowing about the legislation* and also on the last occasion *knowing about the Union's intention to litigate in relation to the legislation*.

Determination

[28] The Authority sees the matter in very simple terms. Despite its sympathy with the position of General Distributors, and the sterling efforts made on General Distributors' behalf by its counsel to make an argument out of nothing, the position is quite clear.

[29] The statute has been amended and the effect of that amendment is to create a mandatory provision creating the rest and meal breaks and payment for those rest and meal breaks as set out in the section. The language of the section is mandatory. Thus, sub-section 1 says for instance ... *the employer must provide the employee with, rest*

breaks and meal breaks in accordance with this part. There is no basis on which that can be varied by agreement.

[30] It follows, that any analysis of the arrangements between the parties, which General Distributors urge the Authority to undertake, is pointless because the intention of the parties and the terms and conditions under which they decided to conclude their bargain are neither here nor there.

[31] On general interpretation principles, the statute must take precedence and that view of matters is confirmed, if confirmation is required by the effect of s.232 of the Act which makes clear that the statute applies regardless of anything in the employment agreement. There is no ability to “contract out”.

[32] This may well be an unintended consequence of the passing into law of this amendment and it may also be the case that there are practical difficulties which devolve from this decision of the Authority, but the Authority is not empowered to make creative decisions which depart from usual legal principles.

[33] The emphasis put on the parties intentions by General Distributors is understandable but, in the Authority’s view, irrelevant to the determination of this matter, because the issue is not about the provisions of the applicable collective agreement but about the application of statute law. It just cannot be good law to contend that the parties to a collective employment agreement, however well intentioned, have the ability to abrogate by their agreement the clearly expressed decision of the Parliament.

[34] General Distributors may well be right when they say that the amendment is more about work rates than it is about payment but a proper construction of the relevant section is that it is actually about both and the Authority is simply not in a position to ignore one part of the provision because it is inconvenient.

[35] There will be an order in favour of the Union requiring the respondent to provide paid breaks consistent with the Act effective from the date of this determination and to back-pay previous breaks taken but not paid since 1 April 2009.

[36] The Authority also directs that the operative collective employment agreement between these parties is to be read so that it does not exclude, restrict or reduce any subject employee’s entitlement under s.69ZD of the Act and, for the avoidance of

doubt, where those provisions do exist in the operative collective employment agreement they are to have no force or effect.

[37] Counsel are to engage with each other with a view to establishing how these determinations of the Authority are to be implemented.

Costs

[38] Costs are reserved.

James Crichton
Member of the Employment Relations Authority