

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 370
5644368

BETWEEN	MATTHEW FRASER Applicant
AND	MCDONALD'S RESTAURANTS (NEW ZEALAND) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Peter Cranney, Counsel for the Applicant Kathryn Beck and Tim Oldfield, Counsel for the Respondent
Investigation:	On the papers
Determination:	11 November 2016

DETERMINATION OF THE AUTHORITY

- A. Under s 178 of the Employment Relations Act 2000 this matter is removed to the Employment Court to hear and determine without prior investigation by the Authority.**

Employment Relationship Problem

[1] This matter is one of two applications lodged at the same time by two workers employed in two different McDonald's restaurants. The problem they each seek to have resolved concerns the application to their terms of employment of section 67D of the Employment Relations Act 2000 (the Act). The section was among amendments to the Act made to regulate against so-called "zero hours contracts". It came into effect from 1 April 2016.

[2] Mr Fraser's application said an individual employment agreement he entered on 31 August 2016 included a term identifying his "agreed availability" and that was a provision within the meaning given to such provisions under s 67D(1) of the Act. It

said the section required payment of reasonable compensation to him for making himself available but the agreement did not specify what hourly rate or other compensation he was to be paid for making himself available.

[3] The application said Mr Fraser was unjustifiably disadvantaged by his employment agreement not complying with s 67D of the Act. He sought orders requiring his employer to comply with the Act and to reimburse him a sum equal to an availability allowance of \$5 for every hour of availability. Such a payment would be different from the hourly rate paid for hours actually worked.

[4] Mr Fraser also applied for his application to the Authority to be removed to the Employment Court. He did so on the grounds that important questions of law were likely to arise in determining his application that concerned the interpretation of section 67D of the Act and other provisions in Part 6 of the Act about individual employees' terms and conditions of employment.

[5] In reply McDonald's Restaurants (New Zealand) Limited (McDonald's) did not oppose the application for removal of the entire matter to the Court. It agreed important questions of law would arise other than incidentally and answers to those questions, from the Court, would assist not only it and Mr Fraser but also, in general, other parties to employment relationships.

[6] McDonald's denied, however, that s 67D of the Act currently applied to Mr Fraser. It said that, as Mr Fraser was a member of the Unite union, he was bound by the terms of a collective agreement between McDonald's and Unite which was not due to expire until 31 March 2017. It said the term in an agreement he had signed, in acceptance of an offer of employment, was not an availability provision within the meaning of s 67D(1) of the Act. It also denied the Authority would have jurisdiction to grant the remedies sought. It said the orders Mr Fraser sought were matters related to bargaining or fixing new terms and excluded from the Authority's jurisdiction under s161(2) of the Act.

The Authority's investigation

[7] By consent the Authority has determined the application for removal on the papers, being the statement of problem and statement in reply lodged by the parties, after a case management conference with counsel.

[8] During the conference call I discussed with counsel whether the applications, which had not yet been the subject of mediation, should be directed to mediation. They agreed mediation was not likely to contribute constructively to resolving these particular matters until the interpretation questions were answered. In those circumstances it was not appropriate to make a direction to mediation.

Removal to the Employment Court under s 178 of the Act

[9] Grounds on which the Authority may order the removal to the Court of a matter, or any part of it, include where “an important question of law is likely to arise in the matter other than incidentally” or “the Authority is of the opinion that in all the circumstances the Court should determine the matter”.¹

[10] In its reply to the removal application McDonald’s had described the important questions of law in the following way:

- (i) Does 67D of the Act currently apply to Mr Fraser by virtue of the transitional provisions in clause 3 of Schedule 1AA of the Act concerning collective agreements in force at the time amendments to the Act came into effect in 2016?
- (ii) If so, was the relevant term of employment an availability provision within the meaning of s 67D(1) of the Act?
- (iii) If it was, did the Authority have jurisdiction to make the orders sought by Mr Fraser?

[11] During the conference call counsel for Mr Fraser questioned whether the first question applied to the particular facts and proposed that, for the purposes of determining whether or not to order removal of the matter to the Employment Court, the important question of law should be described more broadly as being: “what is the meaning of s 67D”?

[12] On either party’s description the relevant questions were important and central to resolution of the applications, so were likely to arise other than incidentally. The Court’s interpretation of this newly enacted provision could assist not only the parties but also guide employers, workers and their unions generally in daily workplace arrangements and in bargaining on terms and conditions.

¹ Employment Relations Act 2000, s 178(2)(a) and (d).

[13] As discussed with counsel it was likely, on removal, that the specific wording of the questions may need to be developed or refined by the parties, in discussion with the Court, before proceeding to hearing. Meanwhile however, for the Authority's purposes of exercising its discretion in deciding whether to remove the matter, the identified questions of law were important, arose other than incidentally and, in all the circumstances, the Court should determine the matter.

[14] In exercising the discretion to order removal I also considered whether there were any other factors that, in the circumstances, weighed against removal and concluded there were not.

[15] As a result the applications are to be removed to the Court for hearing and determination with a prior investigation by the Authority.

Robin Arthur
Member of the Employment Relations Authority