



Employment Court of New Zealand

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Lye v ISO Limited [2021] NZEmpC 189 (3 November 2021)

Last Updated: 8 November 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 189](#)

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: On the papers
Appearances: SR Mitchell, counsel for plaintiff
K Ashcroft and JN Steele, counsel for
defendant
Judgment: 3 November 2021

JUDGMENT (NO 3) OF JUDGE K G SMITH

[1] George Lye sought a compliance order against ISO Ltd. He did so because the employment agreement they have does not comply with [pt 6](#) of the [Employment Relations Act 2000](#) (the Act).

[2] The difficulty with the employment agreement is that it contains an availability provision that does not comply with [s 67D](#) of the Act. The agreement does not provide for agreed hours of work or guaranteed hours of work as required by [s 67D\(2\)\(a\)](#) and

(b) of the Act.

[3] This dispute has had a protracted history. It began in 2018 when Mr Lye and several other stevedores successfully sought a determination from the Employment

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Relations Authority that the employment agreements under which they were employed by ISO did not comply with [s 67D.1](#)

[4] That determination was followed by another one in 2019 reaching the same conclusion about the employment agreement.² Two judgments of this Court followed. The first of them was issued in December 2020 and also held that the employment agreement was non-complying.³ There were two reasons for that decision. The first of them was that the 2018 determination was not challenged so that the subsequent attempt by ISO to dispute the conclusions reached by the Authority were not open to it. The Court also agreed with the Authority's conclusions. The second reason was that, while ISO argued that it had materially changed its work practices, the Act was still breached.⁴

[5] The second judgment was issued on 5 August 2021.⁵ It dealt with the ability of the Court to consider granting the

compliance order sought by Mr Lye, concluding that it was possible. At that time, however, a compliance order was not made because two difficulties emerged that required further attention. The first of them was that the relief sought by Mr Lye in his pleading went further than was permissible under [s 161\(2\)](#) of the Act.⁶ The second difficulty was that the relief assumed that responsibility for correcting the non-complying provision in the employment agreement rested solely with ISO.

[6] While a conclusion was reached that a compliance order could not be made in the terms originally sought, that did not mean one should not be made. The challenge to the determination was reasonably broad and, as recorded in the August 2021 judgment, the issue between Mr Lye and ISO over the availability provision had been fully explored.⁷ It was, therefore, possible to contemplate that an order might be made that satisfied [ss 137\(2\)](#) and [161\(2\)](#) of the Act while not purporting to compel ISO to

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

2. *Maritime Union of New Zealand Inc v ISO Ltd* [2019] NZERA 704 (Member Campbell). The application for a compliance order was unsuccessful.

3 *Lye v ISO Ltd* [2020] NZEmpC 231, [2020] ERNZ 551.

4 At [41].

5 *Lye v ISO Ltd* [2021] NZEmpC 120.

6 At [93].

7 At [96].

make an offer to Mr Lye or otherwise to intervene in bargaining between his union, Maritime Union of New Zealand Inc (MUNZ), and the company in an impermissible way.

[7] The parties were provided with an opportunity to file memoranda expressing their views about what an order might look like, if one was made. Mr Mitchell, counsel for Mr Lye, filed a memorandum proposing a compliance order in the following terms:

2.1. An order that the Defendant cease proposing terms and conditions of employment for the Plaintiff that contain an availability provision in circumstances where the Agreement does not contain:

2.1.1. Agreed hours of work at guaranteed times (by way of actual days and hours);

2.1.2. Reasonable compensation for any further availability required of the Plaintiff in addition to those hours.

[8] Mr Mitchell's submissions offered no further comment about the state of the pleadings or the proposed order.

[9] Ms Ashcroft, counsel for ISO, filed a memorandum opposing the draft order in Mr Mitchell's memorandum on the grounds that the Act did not require agreed hours to include "guaranteed times (by way of actual days and hours)". Her submission was that the proposed wording went beyond complying with the Act.

[10] The effect of Ms Ashcroft's submission was that any compliance order in respect of the terms of employment for Mr Lye must not extend further than the requirements in ss 67C and 67D.

[11] I consider that a compliance order should be made. In 2018, ISO had the benefit of an Authority determination explaining why the individual employment agreements it had with the stevedores, including Mr Lye, did not comply with the availability provisions in the Act. Each of the subsequent decisions has reinforced that conclusion.

[12] Nevertheless, ISO's position remains unaltered from where it was in 2018. It continues to require the flexibility of an availability provision but has not proposed a solution to the non-complying status of the individual employment agreement.

[13] While there has been no change to the individual employment agreement there have been negotiations between MUNZ and ISO attempting to conclude a collective agreement that would cover Mr Lye's work. That bargaining has stalled on the issue of an availability provision. MUNZ made an unsuccessful offer to ISO to attempt to deal with the availability provision proposed to be included in a collective agreement. Dean Carter, ISO's General Manager Human Resources, acknowledged at the hearing earlier this year that the collective agreement ISO offered to MUNZ was very much in line with the individual employment agreement Mr Lye has with the company. No significant changes were being proposed by the company.

[14] Under s 137(1)(a)(ii) a compliance order is available where the provisions in pt 6 of the Act have not been complied with. Section 67D is in pt 6. Under s 137(2) the power conferred is as follows:

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

[15] Given that this proceeding is a challenge the power conferred on the Authority is exercised by the Court.⁸

[16] An availability provision within the meaning of s 67D is a provision in an employment agreement where:

(a) the employee's performance of work is conditional on the employer making work available to the employee; and

8. See *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 (EmpC).

(b) the employee is required to be available to accept any work that the employer makes available.

[17] Section 67D(2) limits the circumstances in which an availability provision may be included in an employment agreement. The section reads:

(2) An availability provision may only—

(a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and

(b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

[18] If ISO intends to have an employment agreement with Mr Lye that includes an availability provision, or to enter into a collective agreement covering his work that includes one, s 67D(2) means it must include agreed hours of work and guaranteed hours.

[19] The reality is that ISO is the driving force behind the situation which Mr Lye now finds himself in. There is a consistent theme in ISO's position which emerged in its opposition to the application in 2018 and its subsequent steadfast maintenance of that position. It has gone so far as to reflect its attitude about the availability provision in the terms and conditions of the proposed collective agreement it offered to MUNZ.

[20] The company knew that the union (and through it Mr Lye) was interested in securing a collective agreement that contained a complying availability provision but, as Mr Carter accepted, offered anything but that. Between 2018 and when the non-complying proposal was made to the union in late 2020, ISO continued to operate its business expecting the benefit of Mr Lye making himself available to work without accepting it could only do so if s 67D was complied with.

[21] Recognising the limits Ms Ashcroft identified, a compliance order could not compel ISO to make an offer of employment to Mr Lye or, for that matter, to propose a collective agreement to MUNZ. However, s 137(2) contemplates an order that may require a person to do any specified thing or to cease any specified activity for the purpose of preventing non-observance or non-compliance with the Act.

[22] I am satisfied that ISO should be prevented from making any offer of employment to Mr Lye, or that will apply to him, containing an availability provision that does not comply with s 67D of the Act.

[23] I order that, pursuant to ss 137(2) and 67D of the Act:

(a) ISO cease offering proposed terms and conditions of employment that apply to Mr Lye that contain an availability provision in circumstances where the terms and conditions of employment do not:

(i) specify agreed hours of work and include guaranteed hours of work among those agreed hours; and

(ii) relate to a period for which Mr Lye is required to be available that is in addition to those guaranteed hours of work.

(b) Under s 137(3) of the Act, the order in paragraph [23](a) takes effect immediately.

[24] Leave is reserved to apply, if necessary, to vary the terms of this order.

[25] Costs are reserved. Mr Lye may apply for costs within 20 working days. ISO may respond within a further 10 working days. All submissions are to be less than 10 pages.

K G Smith Judge

Judgment signed at 12 pm on 3 November 2021