

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 204/10
5164147

BETWEEN BARBARA WHITNEY AND
 OTHERS
 Applicants

AND NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Paul Blair for Applicant
 Penny Swarbrick for Respondent

Investigation Meeting: 6 October 2009

Submissions received: 20 October 2009 from Applicant
 30 October 2009 from Respondent

Determination: 3 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns a dispute about the effect of parts M and N of the Collective Employment Agreement (1 July 2008 – 31 March 2011) between New Zealand Post and the Postal Workers Union of Aotearoa. The parties advised at the outset of the Authority's investigation that any question of a wage claim for the applicants would be deferred until the dispute had been determined.

Issue

[2] During the course of the Authority's investigation the parties agreed to narrow the question for determination to the following:

“when a permanent postie¹ is absent from a branch and as a consequence the respondent calls in an On Call Employee, is the respondent required (in terms of clauses² M and N of the Collective Agreement) to specify as the hours to be worked by the On Call Employee the rostered hours of the absent permanent postie?”

[3] The applicants say that the answer to this question is “yes.” They say that in the circumstances outlined, because they are doing the same job as the person they are replacing, on call posties should be specified and paid the hours that the absent person had been rostered to work. They also say that their interpretation is consistent with the provisions of the collective agreement read as a whole.

[4] The respondent disagrees. It says that the plain meaning of the words in the agreement cannot support the applicant’s interpretation. It also says that it rarely, if ever, calls an on-call employee in to perform the specific duties of an absent postie. It says that the hours of work specified for an on call postie may be the number of hours of an absent permanent employee, or they may be different, depending on the operational requirements of the branch on the day in question, and nothing in the collective agreement requires NZ Post to specify any particular number of hours.

The applicant’s argument

[5] The applicants argue that the collective agreement must be regarded as “*one integrated document*” with the relevant parts and subparts interconnecting, and rely on the principle that the general does not derogate from the specific.

[6] Part M deals with “*Temporary and on Call employees.*” Clause M8 is set out under the sub heading “*on call employees.*” It provides:

“8. An on call employee is an employee who is designated by the company as such and has an ongoing relationship with the company but who is employed on a purely as and when required basis with no guarantee of any number of hours in a given period, provided that for any particular assignment the hours to be worked will be

¹ Because the parties usually use the term “postie” to describe postal delivery workers that term is also used here.

² In this determination, to avoid confusion, I refer to “part” M and N and identify clauses within those parts by letter and number, for example, “M8.”)

specified before the assignment begins. It is a condition of being designated “on-call” that the employee make themselves reasonably available and repeated non-availability when offered work may result in the loss of on-call status or termination of the relationship.”

[7] The applicants say that the hours to be specified when an on call postie is called upon to replace an absent postie must be the “*standard daily hours*” set out in the roster for that absent postie. Thus the requirement to specify hours for an on call postie will be satisfied “*when the rostered hours of the postie being replaced are conveyed to the on call postie.*”

[8] The applicant also relies on Part C of the Collective Agreement, which deals with Hours of Work. Clause C2 provides:

“Standard Hours

2. Upon appointment, the number of an employee’s standard hours will be fixed by agreement between the employee and the company. These standard hours may then only change by agreement. Standard hours may not exceed the full-time week hours as set out in the Schedules for Occupational Groupings. Part-time employees are employees whose standard hours are less than the prescribed full-time weekly hours.”

[9] Standard hours are also defined in the “*Words and phrases*” section of clause B “*Scope*” as follows:

“Standard hours” means the minimum number of hours per week that an employee and the company have agreed to.”

[10] Clause C3 provides:

“3. Rosters may provide for standard hours to be worked:

a. continuously or in broken periods

b. on 1 or 2 or 3 or 4 or 5 or 6 days per week...

4. *The Company will publish any changes to the roster at least 14 days in advance of the start of the roster...*

5. *The published roster will show:*

- *the days to be worked and the start/finish times over which the employee's standard hours are to be worked [standard hours roster]..."*

[11] The “Schedules for Occupational Groupings” are otherwise described as “Specific conditions for occupational groupings” and are set out in Part N. Of the four occupational groupings for which specific conditions are set out only “delivery” (the relevant occupational grouping in this case) contains reference to standard daily hours. This is at clause N2 (*delivery*) which provides that standard hours are to be:

“2. Set by roster up to 7 hours 30 minutes each day, provided that:

- *employees will be released from work when all mail received for delivery that day is correctly delivered and, where necessary, acquittances obtained; and*
- *such early release will not result in a reduction in pay.”*

[12] N16, N17 and N18 of the specific conditions (*delivery*) deal with “Non Delivery of Deliverable Mail.” They provide:

“16. Action from the company for non delivery of deliverable mail could range from invoking the poor performance procedure to using the disciplinary procedure.

17. Disciplinary action may be taken for a deliberate serious incident of non-delivery or for persistent repeated non delivery where the individual failures may not on their own have warranted disciplinary action.

18. *If an employee becomes aware that they have failed to deliver deliverable mail on a given day or round, it then becomes of paramount importance that they promptly take the appropriate steps which may include:*

- a. returning to the appropriate delivery point and delivering the item, or*
- b. the use of a satchel provided for depositing the item in the last designated acquittance point, or*
- c. notification and reason for non delivery to be recorded on the time docket*
- d. return of the items on that day to the branch, or*
- e. such other procedure as has been notified to them by their manager.”*

[13] The applicants say that the early release provision is the “quid pro quo” for what they say is an obligation to work and deliver all mail, even beyond the specified hours. They assert that:

“Specifying a lesser number of hours is not available in that situation [of on call posties] as the on call postie has a contractual obligation not to finish after the lesser hours have been worked, but is obliged and expected to deliver all deliverable mail.”

[14] The applicants note that:

“The levels of accuracy in round-sizing form part of the rationale behind the ‘job and finish’ provisions”

and

“actual finish times for posties are reasonably close to the rostered standard daily hours for any given postal delivery round on a particular day.”

[15] Nonetheless the applicants submit that if the question for determination is answered in the affirmative, it would lead to situations where:

- i. *“an on call postie could be called in to replace an absent permanent postie for a smaller number of hours than the rostered hours for the absent postie with the consequence that they were under a contractual obligation, with serious consequences for failure, to work beyond those hours”* and
- ii. *“an on call postie could be called in to replace an absent permanent postie for a smaller number of hours than the rostered hours for the absent postie, with the consequence that the on call postie would not benefit from the early release provisions without loss of pay...”*

The respondent’s view

[16] The respondent rejects any assertion that all parts of the “Specific Conditions-Delivery” apply to all posties irrespective of status and disputes that on-call posties should be treated for payment purposes as if they were permanent rostered posties.

[17] Respondent witnesses explained that when a permanent rostered postie advises that he or she is unable to attend work on a particular day, the team leader may cover that absence in a number of different ways. If possible the work will be managed without bringing in an on call worker - by rearranging what needs to be done amongst the permanent staff. If not, an on call postie will be contacted, but this step is often still accompanied by some rearrangement. The person called in may end up doing some of the work the absent worker would have done that day, all of that work, or none of it, and might be specified the same hours, fewer hours or even (depending on the operational requirements of the branch) more hours. The latter scenario might apply for example where more than one permanent rostered postie is absent and only one on call postie is brought in.

[18] In short, the respondent’s evidence was that on-call posties are used as required by the company. How and when they are employed, and for how many

hours, are all determined by the workload on any given day. The respondent says that this is entirely consistent with N10 and N11 (*Delivery*) which provide:

“10. There is a direct relationship between the volume of mail for delivery, the number of delivery employees available in the branch on a given day and the actual hours required to deliver that mail.

11. Rounds may be allocated or reallocated ...according to business need and best utilisation of staffing to meet delivery volume.”

[19] In relation to the relevant contractual principles, the respondent notes that the CEA as a whole applies to other categories of employees, not just posties. It also distinguishes between on call, temporary, full time and part-time rostered employees. Clause M9, for example, provides that an engagement which is two weeks or longer will entitle the on-call employee to the same benefits as a temporary worker in relevant circumstances. The respondent asserts:

“29...it is clearly contemplated by the parties to the CEA that on-call employees’ conditions are generally less beneficial than those of other categories of employee.

30. This is reinforced by the fact that other benefits do not apply such as surplus staffing and redundancy (M11) anticipated annual leave, extended absences for childcare, representation leave, study leave, or extended leave without pay (M18.) Such provisions are entirely consistent with the different status of employees who are not permanent and not obliged to accept engagement on any particular day...

...

40. In accordance with well-established principles of interpretation, the specific words of M8 cannot be overridden by the general provisions of N1 and N2. If that were the case there would be no point in providing at M8 for “as and when” hours, as all posties would have full-time weekly hours set by roster up to 7 hours 30 minutes per day...

...

42. The roster does not apply to on-call employees – the roster is posted in advance of the working week...”

[20] In relation to N16 (delivery) the respondent submits:

“part N itself contemplates that there may well be circumstances where the postie may not be able to deliver all the mail- in the case of an on call employee, that may be because the number of hours for which he or she was contracted was insufficient.”

[21] The respondent sums up by saying that:

“45. On the plain meaning of the words of the CEA, it is entirely proper for the Respondent to engage on-call posties on the basis that they are paid only for the hours of work for which they are engaged.

46. M8 clearly defines an on-call employee. There is no basis for reading into that definition any obligation on the company to contract the on-call employee to undertake any particular work, or for any particular length of time....

48. The general provisions of Part C or Part N of the CEA do not override the specific provisions of M8, either by reason of the working of those provisions or as a matter of proper contractual interpretation.”

[22] One final point must be noted regarding what I understand to be the respondent’s current position on the “job and finish” issue. It is that while the job and finish arrangements set out in Part N do not apply to on-call posties, such posties will be paid for the hours specified at the time of the call out should they not be needed for all of those hours.

Determination

[23] One party has characterised Part N as containing general provisions and Part M specific provisions and the other has argued the reverse. I consider both are wrong. While Parts B and C contain general provisions (as do other parts of the collective agreement) Parts M and N both contain specific provisions (in that each applies to a

specific subset of employees.) On call posties are members of both subsets, so that the provisions of Parts M and N both come into play (where relevant and applicable) over those of Part C. Clauses C2 and C3 are not therefore of relevance here.

[24] The plain words of M8 (on their own) clearly cannot require the respondent to specify any particular number of hours to an on call worker: the phrase “a given period” could be a day, a week or indeed any length of engagement (short of a fortnight whereupon the on call postie becomes a temporary one.)

[25] So: do clauses N2 (standard daily hours) and clauses N16 and N17 (non delivery of mail) add anything to those plain words to require a certain number of hours to be specified in the particular circumstances postulated in the question before the Authority?

[26] N2 provides that standard daily hours are to be set by roster. The purpose of a roster is to let individuals know, in advance, what their hours of work will be. A roster is set at the moment of publication. If it does not relate to named individuals and provide a degree of certainty it cannot be called a roster at all. It is not possible to identify, when the roster is set, the on call posties who might be called upon to work two weeks or more into the future. Nor is it possible to establish whether an on call postie who is offered work will accept the assignment.

[27] On call posties miss out on the certainty of work and hours that their permanent co-workers enjoy. They are not entitled to rostered hours nor are they obliged to report for rostered hours of work. They work at variable times for variable periods. N2 applies to anyone who works standard daily hours. It cannot be applied to on call posties at all.

[28] Clauses N16 and 17 of the delivery provisions can be applied to on call posties: clearly the core obligation of any postie is to deliver mail. However, there was no evidence of on-call workers being expected to work on past their specified hours in order to deliver all their mail. The respondent also acknowledged that N16 and N17 do not impose an obligation on an on-call postie to work beyond the specified hours.

[29] This was one aspect of the applicants' proposition that on-call workers were treated like permanent workers. The other was the suggestion that the hours specified were not the minimum hours paid for on call workers. Again, however, there was no evidence to support the assertion that this was current practice.

[30] Overall, I find the respondent's submissions more persuasive. The answer to the question for determination is "no."

[31] The issue of costs is reserved. Any application for costs must be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority