IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 233
EMPC 103/2023

IN THE MATTER OF	an application for special leave to remove a matter to the Employment Court
BETWEEN	DANSKE MOBLER LIMITED Applicant
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Hearing:	24 October and 6 November 2023 (Heard at Auckland and on the papers)
Appearances:	S Langton and RL White, counsel for applicant M Brown, counsel for respondent
Judgment:	19 December 2023

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Danske Mobler Ltd (DML) has applied for special leave to remove an objection to an improvement notice from the Employment Relations Authority to the Court for hearing and determination. It is contended that two important questions of law are likely to arise other than incidentally. Leave is required under s 178 of the Employment Relations Act 2000 (the Act) because the Authority previously declined to remove the matter.[1]

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[1] *Danske Mobler Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2023] NZERA 102 (Member Larmer).

[2] The first question of law which it is asserted will arise concerns employees who may be offered additional hours of work and who choose to accept that offer. Should those hours be included in a relevant daily pay (RDP) assessment under s 9 of the Holidays Act 2003 (HA) for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave or family violence leave? DML says any such analysis should include hours an employee is contracted to perform, but not those an employee volunteers to perform. The Labour Inspector says hours worked in excess of contracted hours must be taken into account.

[3] The second question of law which it is asserted will arise relates to the issuing of an improvement notice by the Labour Inspector. If a genuine dispute exists between an employer and a Labour Inspector as to a relevant legal matter, can a Labour Inspector issue an improvement notice?

[4] The two legal questions have been framed as follows:

(a) whether the calculation of relevant daily pay (RDP), under s 9 of the HA, must include overtime performed by employees where overtime is only performed by separate agreement and employees are not required (by their employment agreement) to be available to perform it otherwise; and

(b) whether, under s 223D of the Act, a Labour Inspector has the power to issue an improvement notice where an employer genuinely disputes the meaning and application of the legislation the Inspector requires the recipient of the notice to comply with in that notice.

[5] I was advised from the bar that the number of employees affected by the present argument is 20 in an upholstery group, and 35 in a woodwork group. Plainly, the issues have potential significance for the parties.

Grounds of the application and opposition

[6] Turning to the parties' respective positions in more detail, DML submitted each of these questions of law is important. It was argued for the company that the first question:

(a) concerns the interpretation of s 9 of the HA, which section has immediate application to, and will determine, the matters in dispute in the proceeding and will also have wider application to other employment relationships across New Zealand;

(b) was not addressed by the Court of Appeal in a leading authority which considered s 9 in an earlier form, *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*,[2] as relied on by the Authority; that case considered and determined the interpretation of s 9(2) in its then form; moreover, it considered whether overtime should be included in the calculation of employees' RDP where the employees were *required* by their employment agreement to perform overtime from time to time – no issue of choice arose;

(c) has not previously been determined by this Court or any higher court.

[7] It was argued that the second question:

(a) concerns the interpretation of s 223D of the Act, and what amounts to "reasonable grounds" for a Labour Inspector to issue an improvement notice, and whether such grounds could be said to exist where there is a genuine dispute over the meaning of the statutory provision in respect of which an Inspector seeks compliance from an employer;

(b) has immediate application to, and will determine, the matters in dispute in this proceeding and will have wider application to employers who

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2 *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66.

genuinely dispute the meaning of the legislation a Labour Inspector seeks their compliance with under such a notice; and

(c) has not previously been considered and determined by this Court or any higher court.

[8] Mr Langton, counsel for DML, submitted that all the relevant criteria for special leave to remove the matter to the Court in s 178 of the Act are established.

[9] The Labour Inspector's opposition to the application is that:

(a) no important question of law arises in this case other than incidentally to the facts; and

(b) no useful purpose would be served by removing the matter to the Court.

[10] With regard to the first question:

(a) Other sections of the HA provide that where an employee is required to be paid for public holidays, sick leave, alternative holidays and bereavement leave (BAPS), an employer is required to pay an employee not less than their RDP or average daily pay (ADP).

(b) Section 9(1)(b)(ii) of the HA provides that payments for overtime must be included in a calculation of RDP if those payments would have otherwise been received if the employee had worked on the day concerned. There is no distinction within the section between whether overtime is worked by agreement or choice.

(c) Any determination about whether overtime payments should be included in an RDP calculation needs to be made by reference to the specific facts of the case and as such is a matter that can be resolved by the Authority.

(d) In the event it is not possible or practicable to determine RDP or an employee's daily pay varies within the pay period, an employer may use ADP as a calculation method.

(e) The calculation method for ADP requires the use of "gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made".

(f) The purpose of ss 9 and 9A of the HA is to ensure that employees who take BAPS leave are paid a minimum daily sum based on the pay they would otherwise have received if they had worked on the day or days concerned; failure to take into account overtime or extra hours worked in a work week when calculating RDP or ADP would be contrary to this purpose.

[11] With regard to the second question of law raised by the applicant:

(a) A Labour Inspector has the power to issue an improvement notice where they believe on reasonable grounds that an employer is failing or has failed to comply with any provision of the relevant Acts. This is a subjective test based on a Labour Inspector's reasonable grounds of belief.

(b) Any interpretation that would prohibit a Labour Inspector from issuing an improvement notice unless an employer agreed with the meaning and application of the relevant legislation would undermine the purpose and intent of s 223D of the Act.

[12] Ms Brown, counsel for the Labour Inspector, says that in light of these considerations the Authority would be well placed to deal with the issues, which are for the most part factual.

The applicable statutory provisions relating to the two questions

[13] Sections 9 and 9A of the HA provide:

9 Meaning of relevant daily pay

(1) In this Act, unless the context otherwise requires, relevant daily pay, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave,—

(a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and

(b) includes—

(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned:

(ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned:

(iii) the cash value of any board or lodgings provided by the employer to the employee; but

(c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

(2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave if the rate is equal to, or greater than, the rate that would otherwise be calculated under subsection (1).

(3) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

9A Average daily pay

(1) An employer may use an employee's average daily pay for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave if—

(a) it is not possible or practicable to determine an employee's relevant daily pay under section 9(1); or

(b) the employee's daily pay varies within the pay period when the holiday or leave falls.

(2) The employee's average daily pay must be calculated in accordance with the following formula:

$$\frac{a}{b}$$

where—

a is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made

b is the number of whole or part days during which the employee earned those gross earnings, including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

(3) To avoid doubt, if subsection (2) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

[14] Section 223D of the Act provides:

223D Labour Inspector may issue improvement notice

(1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.

(2) An improvement notice issued under subsection (1) must state—

(a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and

(b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and

(c) the nature and extent of the employer's failure to comply with the provision; and

(d) the steps that the employer could take to comply with the provision; and

(e) the date before which the employer must comply with the provision.

(3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

(4) An improvement notice may be issued—

(a) by giving it to the employer concerned; or

(b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.

(5) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.

(6) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.

Legal framework for special leave application

[15] The removal provisions of s 178 of the Act state:

178 Removal to court generally

(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.

(2) The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

...

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

…

[16] In summary, the application to the Court is one for special leave, which is governed by the criteria of s 178(2)(a)–(c).

[17] This case focuses on the first of the stated criteria under s 178(2)(a).

[18] Dealing with the specifics of that paragraph of s 178, a question of law does not need to be complex, tricky or novel to warrant being called important.[3] It may be important if the answer is likely to have a broad effect or could assume significance in employment law generally. But previous cases have made it clear that it is not necessary for the issue to have an impact beyond the particular parties. A question may be regarded as important if it is decisive of the case, or some important aspect of it, or is strongly influential in bringing about a decision in the case, or a material part of it.[4]

[19] In assessing the s 178 criteria, there is no presumption in favour of or against removal. To do so would undermine Parliament's clear intent that while some matters ought to be dealt with in the Authority, for others, because of their nature or circumstances, that is not the appropriate approach.[5]

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3 *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].

4 *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 (EmpC) at [35].

5 *Johnston*, above n 3, at [21]; and *Auckland District Health Board*, above n 4, at [44].

[20] While there is no discretion available to order removal, the Court retains a discretion to decline an application for special leave.[6] Exercising this discretion may require an assessment of context or any other matter relevant to the statutory ground relied on in order to determine whether special leave should be declined.

[21] Finally, no inference may be drawn as to prospects of success of either party, from the outcome of an application for special leave.

Analysis

First question

[22] For the purposes of the first question, the scene may be set by noting the approach that was taken by the Authority, and initially by counsel in the present case.

[23] The Authority referred to the *Postal Workers* case, where the Court of Appeal held:[7]

> [An] employee who regularly (but not invariably) worked unrostered overtime or exceeded productivity targets would be entitled to higher relevant daily pay than those who did so less often or only occasionally. That outcome reflects the legislature's evident intention to ensure that the minimum entitlements of employees under the Act include not only their basic or ordinary time pay but also other items of remuneration they would ordinarily receive including unrostered overtime.

[24] The Authority stated that this quotation could assist it in determining the legal issue which had been raised in this case. It concluded it was not, therefore, a situation where there was no case law or guidance for the Authority to apply.[8] This influenced the conclusion it reached as to whether the case should be removed.[9]

[25] When the application for special leave came before the Court, it became evident that consideration had not been given to a subsequent decision in the *Postal Workers* litigation, in which the Supreme Court considered whether leave should be

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6 *Johnston*, above n 3, at [30]–[33].
7 *Postal Workers Union of Aotearoa Inc*, above n 2, at [32].
8 *Danske Mobler Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment*, above n 1, at [36].
9 At [37].

granted to appeal the Court of Appeal's decision.[10] The Supreme Court noted that s 9 had been amended in 2011 and that a new s 9A had been introduced which was broadly to the same effect as the earlier s 9(3) save that:[11]

(a) the averaging period is now the preceding 52 weeks, rather than the preceding four weeks;

(b) the new section is cast in permissive, rather than mandatory, terms: "An employer may …"; and

(c) the new section is broader in its application than the former s 9(3) as it applies if either it is not possible or practicable to apply s 9(1), or the employee's RDP varies during the pay period when the holiday or leave falls.

[26] The Supreme Court observed that given these amendments, the correct interpretation of s 9(1) in relation to the former s 9(3) was principally of historical interest only. Moreover, how s 9(1) would be applied in relation to the new s 9A would have to be determined if and when issues arose as to their application.[12]

[27] When I drew counsel's attention to the discussion in the Supreme Court about the distinction between the former and current provisions, Mr Langton submitted that the points made by the Court provided strong support for DML's removal application.

[28] He said there was now an issue, which had not been considered previously, as to how s 9A informs, or does not inform, s 9(1) and how the word "would" in s 9(1)(a) should now be interpreted. He submitted that an aspect of the issue would be how these interlocking provisions would operate where there was no contractual obligation for an employee to work overtime.

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10 *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc* [2013] NZSC 15.
11 At [3].
12 At [6].

[29] Mr Langton went on to say that the conclusion reached by the Court of Appeal in the *Postal Workers* case was relatively straightforward because the original formula was mandatory; now it is discretionary.

[30] He also submitted that, since the 2011 amendments, the possibility of parties agreeing availability provisions had also been introduced. This was relevant because changes had been made to the Act in 2016, limiting the circumstances in which availability provisions may be included in an employment agreement. Mr Langton submitted that this had resulted in a greater proportion of employment agreements being settled with overtime arrangements similar to those which had been agreed in the present case.

[31] Finally, Mr Langton said that the Court's consideration of the 2011 amendments to ss 9 and 9A, by a full Court in *GD (Tauranga) Ltd v Price*, involved a wholly different factual scenario.[13] The Court had not reached conclusions that were relevant to the first question even if it did discuss some aspects of statutory intent.

[32] For her part, Ms Brown submitted that whilst s 9A could be used as an aid to the interpretation of s 9, the amendments had not amended s 9(1), which did not distinguish between rostered and unrostered overtime. She stated that the following dicta from the Court of Appeal in the *Postal Workers* case remained valid:[14]

> The plain intention of the Act was to provide to employees who had not worked on a public holiday or while taking bereavement or sick leave, a statutory entitlement to a minimum daily sum based on the pay the employee would otherwise have received if he or she had worked on the day or days concerned. Relevantly for present purposes, the legislature specifically provided that the relevant daily pay was to include payment for overtime if the payment would have otherwise been received on the day concerned. *No distinction was drawn in s 9(1)(b)(ii) between rostered and unrostered overtime.*

Discussion on the first question

[33] Distilling these opposing points, several conclusions can be reached on a preliminary basis.

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13 *GD (Tauranga) Ltd v Price* [2019] NZEmpC 101, [2019] ERNZ 304.

14 *Postal Workers Union of Aotearoa Inc*, above n 2, at [27] (emphasis added).

[34] The Court of Appeal in the *Postal Workers* case was plainly dealing with provisions that have since been altered. There may now be an issue as to how s 9(1) should be interpreted – that is, whether the reference to the amount of pay that an employee would have received had the employee worked on the day concerned, including overtime, is intended to be a reference to contractual arrangements only and not to voluntary arrangements which are outside the scope of the contract. However, it may be noted that s 9(1) was not altered; it may be the case that the underlying policy of these provisions also remains unaltered – that employees should have all their daily pay, as received, assessed under s 9(1). Accordingly, there may be an issue as to whether Parliament's intent changed.

[35] It is to be noted that the Supreme Court specifically reserved the question of how ss 9 and 9A should interact.

[36] The dicta referred to by Ms Brown may not now be on point given Parliament's apparent intention to introduce a more flexible regime than had applied previously, as is apparent from this Court's consideration of the legislative history in *GD (Tauranga) Ltd*. In that case, however, the Court was not required to consider the interpretation issues now raised for DML. It is apparent that the facts in that case and this are different.

[37] I also acknowledge that the legislative history was not drawn to the attention of the Authority and thus not considered by it. This is not a situation where the Court is being asked to reconsider an issue on the same basis as was considered by the Authority in its removal determination.

[38] I am satisfied the first question is an important question of law that is likely to arise in this matter other than incidentally. On a preliminary basis, I observe that the applicant's case will face difficulties. However, whatever the outcome, the answer will be important to the present parties, and possibly to others also. It will also be decisive of an important aspect of the case.

[39] The final consideration is whether I should use my residual discretion to decline removal. I observe that there will need to be a factual assessment which the Authority is well able to undertake.

[40] However, I make two points in this regard. First, I consider there is a mixed question of fact and law of some importance.

[41] Second, it is more likely than not that whatever determination might be made by the Authority, the point of law is of sufficient importance that one party or the other may well choose then to challenge the Authority's determination, so that the Court would ultimately be required to consider the issue in any event.

[42] In short, special leave should be granted in respect of the first question. It would be artificial not to remove the entire proceeding, as sought, given the centrality of the first question to the objection raised by DML.

Second question

[43] Because of the conclusion I have reached regarding the first question as to removal, it is not, strictly speaking, necessary to consider the second question. However, I intend to consider the careful submissions raised about it for completeness, and in case the matter goes further.

[44] Mr Langton elaborated on the content of the application by stating that the second question raised an issue as to whether an employer should be exposed to a penalty action for failing to comply with an improvement notice when there was a genuine legal dispute as to the legal basis for it. He submitted that the effect of s 223D was that the legal dispute should be resolved first before a notice was issued, so that if the employer lost the dispute, it would then have an opportunity to remedy its breaches before an improvement notice or penalty action was issued.

[45] I note that a full Court has already considered the purpose and text of this provision in some detail: *Labour Inspector v IT-Guys NZ Ltd*.[15] In a discussion as to

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[15] *Labour Inspector v IT-Guys NZ Ltd* [2019] NZEmpC 115, [2019] ERNZ 337.

the way in which the enforcement mechanisms of pt 11 of the Act were to operate, it noted that ss 223A–223G were intended "to widen the tools available to Labour Inspectors, including to provide broad and practical tools that could be used to encourage employers to comply with the relevant legislation".[16] One of the tools was an improvement notice. Such a notice can be issued without consultation with an employer, provided the Labour Inspector reasonably believes that the employer is failing or has failed to comply with the provision of one of the relevant Acts. The Court also specifically noted that there was a mechanism for an employer to object to an improvement notice.[17]

[46] There is no provision in s 223D, or elsewhere in pt 11, that states there is a fetter on the Labour Inspector's ability to issue a notice if there is a genuine dispute as to its content. The machinery for dealing with that issue is, as the full Court noted, to raise an objection.

[47] In summary, the considerations of purpose and text, which have already been undertaken in some detail by a full Court, militate against a conclusion that there is still a live issue which would warrant special leave for removal being granted.

[48] There is a further consideration which also impacts on the question as framed, which is whether it is important because it would be decisive of the case. This issue requires a focus on practicalities.

[49] Determination of the first question may well provide the answer to the second question, which is whether the Labour Inspector had reasonable grounds to issue the improvement notice.

[50] If DML succeeds in persuading the Court that its approach to ss 9 and 9A is correct, then the improvement notice will fall away. Any prejudice with regard to DML having to raise an objection to the notice in the Authority could be dealt with as a costs issue.

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16 At [23].
17 At [40].

[51] If DML does not succeed in those primary assertions, then the improvement notice will stand and would remain enforceable.

[52] Accordingly, the proposed second question would have no practical impact.

[53] In these circumstances, I would have declined to remove the proceeding on the basis of the second question.

Result

[54] I grant special leave to remove the proceeding to the Court on the basis of the first question, but not the second question.

[55] I reserve costs. Since there was a mixed outcome, my provisional view is that costs should lie where they fall. If, however, one party or other chooses to file a costs application, I will receive memoranda.

[56] The applicant should file a statement of claim by 4 pm on 7 February 2024.

B A Corkill
Judge

Judgment signed at 11.30 am on 19 December 2023