

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 371
5644398

BETWEEN OLIVIA DORAN
 Applicant

AND CARRICK HOLDINGS
 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] Ms Doran’s application said an individual employment agreement she entered on 31 August 2016 included a term identifying her “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 her for making herself available but the agreement did not specify what hourly rate or other compensation she was to be paid for making herself available.

[3] The application said Ms Doran was unjustifiably disadvantaged by her employment agreement not complying with s 67D of the Act. She sought orders requiring her employer to comply with the Act and to reimburse her 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] Ms Doran also applied for her application to the Authority to be removed to the Employment Court. She did so on the grounds that important questions of law were likely to arise in determining her 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 Carrick Holdings Limited (CHL), which holds a franchise to operate the McDonald's restaurant in which Ms Doran works, 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 Ms Doran but also, in general, other parties to employment relationships.

[6] CHL denied, however, that s 67D of the Act applied to Ms Doran's circumstances. It said the term in an agreement she 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 Ms Doran 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 CHL had described the important questions of law in the following way:

- (i) Is the relevant term of employment an availability provision within the meaning of s 67D(1) of the Act?
- (ii) If it was, did the Authority have jurisdiction to make the orders sought by Ms Doran?

[11] During the conference call counsel for Ms Doran 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.

[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

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

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