PWUA
REDBACK
POSTAL WORKERS UNION OF AOTEAROA
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PWUA successful in 'availability for overtime' case at the Employment Court

The legal advice that the PWUA gave to its members in September 2017 that Delivery Agents are entitled to refuse to work overtime has been upheld by the Employment Court in an emphatic judgement in favour of the PWUA.

The Court has declared:

"Delivery Agents are entitled to refuse to perform work in addition to their guaranteed hours on rostered days."

The Union's legal advice sent to NZ Post nearly two years ago had concluded:

"...the provisions in clause 20 of the Collective Agreement in relation to Delivery Agents are unenforceable by Post. While Post may be in a position to require overtime, the employee is entitled to decline such overtime."

NZ Post's refusal to accept the PWUA's legal advice without itself providing any opposing legal opinion led to the Court case held in Auckland on 29 and 30 January before a full bench of three Employment Court Judges.

This issue of Redback carries a PWUA report on the decision released by the Employment Court on 2 May.

Availability provision unlawful, unenforceable

The PWUA case before the Employment Court was based on clause O20 for Delivery Agents in the Collective Agreement (CA). The union claimed that the clause was an "availability provision" that was unlawful and was therefore unenforceable.

An availability provision is essentially a clause that requires employees to perform work in addition to their guaranteed hours of work. The law requires that, in order to be lawful, an availability provision must provide for the payment of reasonable compensation to the employees for making themselves available to do additional work, and if it does not do so then the clause is unenforceable by the employer.

Clause O20 (page 78 of the PWUA Collective Agreement) says:

"Delivery Agents may be required to work reasonable overtime in excess of their standard hours (subject to safe operating procedures), provided that work is voluntary on days which are otherwise non-rostered days for an individual employee".

The CA provides no compensation to Delivery Agents for being available to work overtime, so the PWUA claimed in the Court that the clause was unlawful and therefore unenforceable.

NZ Post told the Court it had three arguments why the company thought the clause was lawful and enforceable. (See the company's three arguments below.)

NZ Post unsuccessful in its three arguments in the Court

First argument: NZ Post told the Court that Collective Agreement clause O20 was lawful and enforceable because the law about availability provisions was intended by Parliament to apply only to "zero-hour" contracts where employees had no guaranteed hours of work but had to keep themselves available for work.

The Court flatly rejected this argument:

"... there is nothing which supports confining these sections [of the law] to zero-hour contracts."

Second argument: NZ Post said that Delivery Agents do not have any guaranteed hours of work, so the protection of the law does not apply to DAs.

The Court said:

"We conclude that the contractual hours of 37:40 for a full-time delivery agent provided for in the parties' collective agreement are guaranteed hours ...".

Third argument: NZ Post's third argument was that Delivery Agents were actually paid a salary and that the union and the company had agreed that the salary included compensation for availability. The Court dismissed the company's argument, saying:

" ...it is inconsistent with the clear words of the agreement" and *"Nor was there any evidence before the Court that the money payable to deliver agents incorporated any element of compensation for availability."*

NZ Post fails to postpone the Hearing

NZ Post tried to derail the entire two-day Hearing by telling the Employment Court, at the start of the first day, that there was a mistake in the wording of the Collective Agreement which had been there since 2016. NZ Post would need to delay the whole Hearing while the company filed new proceedings to rectify the alleged mistake.

The Court dismissed NZ Post's application which would involve postponing the Hearing, saying the company's delay was not explained; the three Employment Court Judges and the nine lawyers attending the Hearing would be inconvenienced; it would be difficult to find a new Hearing date; and that there did not appear to be much merit in NZ Post's case.

"Availability" case taken by PWUA alone

NZ Post has issued statements that have led some people to believe that the E tū union was also a party to the Employment Court case about Availability.

The case was taken by the PWUA alone. E tū did not apply to join the case.

The Employment Court approached E tū and asked if they had anything to say to the Court about the Availability case.

A lawyer from E tū came to the Hearing and said that E tū agreed with the PWUA.

The PWUA appreciates that E tū verbally supported the PWUA's case in the Court. However it was the PWUA which ran the case, and the PWUA which won the case.

It is PWUA members who have carried the legal costs of winning this case - an important judgement for all workers in almost all industries in New Zealand.

Employment Court states reasons for its judgement

In the course of issuing its decision, the Employment Court made a number of statements which underpin the reasons for its judgment, including:

- *"In a nutshell, while it benefits NZ Post to have delivery agents holding themselves available to work overtime to enable it to meet its fluctuating business needs, this comes at a personal cost to the affected employee."*
- *"It seems to us to be self-evident that the value of an employee's otherwise private time applies equally whether they are waiting to be called in for work or on the off-chance they might be required to undertake additional hours of work at the end of their usual working day. In either case the employee is foregoing opportunities in their private life."*

The Employment Court concluded its decision by making a declaration: ***"Delivery Agents are entitled to refuse to perform work in addition to their guaranteed hours on rostered days."***

The deadline for appealing the Employment Court's decision has now passed and NZ Post has not applied to appeal this emphatic decision delivered in favour of the PWUA.

Postal Workers Union of Aotearoa
Website: www.pwua.org.nz

(Northern)
(pwua.northern@gmail.com)

Freephone	**0800 224 611**
Organiser	**021 798 244**

(Southern)
(pwu@tradeshall.org.nz)

Wellington:	**(04) 385 8264**
Freephone:	**0800 469 798**
Central North Island:	**(06) 952 3738**
Nelson:	**0800 469 798**
Canterbury:	**021 679 673**
Otago:	**022 353 0408**
Southland:	**022 353 0408**

Application of Court decision to other NZ Post employees

The PWUA has written to NZ Post listing other groups of the company's employees whose conditions of employment should now have changed following the Employment Court's decision on availability. The PWUA says the three groups affected include:

Standard Pay Model Posties:

These employees have an identical availability provision to Delivery Agents (with no compensation), and the same guaranteed hours of 37:40 per week.

Their daily start and finish times are also set by roster. Therefore they are entitled to refuse to work overtime in addition to the daily rostered hours.

Postie Pay Model Posties (PPM):

These employees have an availability provision with no compensation *[O(1)10: Employees must undertake and complete all assigned workload.]* They also have guaranteed hours of 37:40 of calculated workload per week.

Unlike Delivery Agents and Standard Pay Model Posties they do not have *daily* rostered hours so the Court's decision means they are entitled to refuse to complete more than 37:40 of calculated workload in any week.

Managers and specialists on salaries:

If the individual employment agreements of these employees include an availability provision then the Court held that:

"s67D(7) requires agreement between the employer and employee that the employee's remuneration includes compensation for the employee for making herself or himself available to perform work under the provision."

The application of the Court's decision to these employees on salaries will depend on the content of each employment agreement. The employment agreement must include a clause that the salary includes compensation for any availability for overtime required, and also the identification of a stated portion of the salary that is agreed to be reasonable compensation for the amount of availability required.

If these requirements are not met then the employee can refuse to work beyond their guaranteed hours.

If there are no guaranteed hours in the employment agreement then the employee can refuse to work any overtime.

NZ Post had backtracked on saving ink on postmarks - but still failed to postmark some school trustee votes

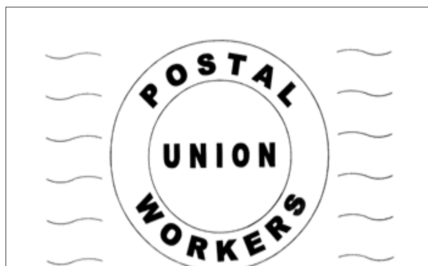
NZ Post told RadioNZ on 5 June that a fault at the Manawatu Mail Centre on 23 May meant that "about 1,000" envelopes had not been postmarked.

This statement from the company was in response to a RadioNZ interview the previous day with the School Trustees Association president explaining that voting forms were arriving at schools without postmarks - it was not then possible for the schools to determine which votes had been posted before the ballot legally closed on Friday 31 May.

However on the very day of that public assurance from NZ Post - 5 June, letters with postage stamps without postmarks were still being taken out by posties on delivery - eight business days after the breakdown.

Last year, NZ Post, in wanting to save money on ink, had decided to stop postmarking stamps. The company was well aware that members of the public could reuse the uncancelled stamps. (It is possible that the stamps could be peeled off and used on multiple occasions.)

Philatelists were unhappy - they were complaining that postage stamps were not being postmarked. It is only after negative feedback that the company reinstated the postmarking of stamps.



The Southern District of the Postal Workers Union proudly uses a postmark on its business cards, based on the design of the union's flag (above).

The PWUA is deeply concerned that NZ Post's sole focus on cost cutting has exposed the company to public ridicule for appearing to be unconcerned about its own revenue stream.

The company's failure to maintain the infrastructure for postal voting led to the PWUA making two submissions to Parliamentary Select Committees.

The PWUA's first submission in February 2017 followed the removal of road-side posting boxes, before, after and even during the postal vote for the 2016 Local Authority Elections.

In a further written and oral submission in November 2018 the PWUA called on the Government to specifically direct NZ Post to maintain the infrastructure for postal voting.

NZ Post has never made any comment on the PWUA submissions on postal voting and didn't turn up to the Select Committee hearing when invited to do so by the PWUA.

REDBACK is published by the Postal Workers Union of Aotearoa ◆ Trades Hall, 126 Vivian St, Wellington 6011 ◆ pwu@tradeshall.org.nz