MGZ | employment law

THE ADVOCATE

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Required Overtime . . . Is it allowed?

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- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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Introduction

In a recent case, ***Postal Workers Union of Aotearoa Inc v New Zealand Post Limited*** [2019] NZEmpC 47, a full Court of the Employment Court tackled the issue of availability provisions in employment agreements and concluded that while the amendments to the Employment Relations Act 2000 ("*ERA*") that occurred in 2016 effectively outlawed "*zero-hour*" contracts, the impact of those changes have a broader application.

At issue for New Zealand Post ("*NZP*") and the Postal Workers Union ("*PWU*") was whether or not the NZP could require posties, referred to as Delivery Agents, to be available to work overtime hours in addition to their normal rostered hours. The clause at issue in the Collective Agreement ("*CA*") between the PWU and NZP provided that:

"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 PWU's position was that this clause is an availability provision as provided under section 67D of the ERA. Accordingly, as there was no compensation for employees making themselves available to work overtime in this clause or elsewhere in the agreement, the clause is unenforceable, and employees could refuse to work under section 67E of the ERA.

NZP's arguments were threefold:

1 Firstly, the clause is not an availability provision under the ERA, as the applicable sections are limited to zero-hour contracts;

2 Secondly, section 67E does not apply to the clause, as under the CA there are no guaranteed hours of work; and

3 Thirdly, even if the clause is an availability provision, the employees are remunerated by salary which provides "*reasonable compensation*" to the employees for making themselves available (as required in section 67D(3)(b).

The Court examined each of these matters.

1. Limited to "*Zero-Hour*" Contracts

The Court stated this was a matter of interpretation of sections 67D and 67E. Submissions were made on behalf of NZP that the intent of Parliament was to ban "*zero-hour*" contracts. However, the Court was not convinced stating that the wording of section 67D had broader application. In particular the court stated that "*[i]f ss 67D and 67E were intended to be limited in application to waged employees on zero-hour contracts, there would have been no need to refer to salaried employees*" as provided in in section 67D(6)(e) and section 67D(7).

The Court then provided a broader analysis stating:

"[13] Looking more broadly, we are unable to discern anything in the objects to Part 6 (which is the Part of the Act in which these provisions appear), or in the other provisions within that Part, that supports the interpretation advanced by NZ Post.

[14] Relevantly, the immediately surrounding provisions, enacted at the same time as ss 67D and 67E, place broad constraints on two other employment practices – the cancellation of shift work without notice and without compensation (s 67G)4 and the prohibition on secondary employment without good reason, and even then only under strict conditions (s 67H). The notable feature of these provisions is that they address difficulties that can arise for employees under increasingly flexible models of employment, …

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson**, **Peter Zwart** or **Dean Kilpatrick.**

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[15] In terms of the statute itself, there is nothing which supports confining these sections to zero-hour contracts…"

While other arguments were advanced by NZP, overall the Court was not persuaded. In conclusion, the Court stated that:

"[24] Therefore, we cannot accept [NZP's] primary submission … that s 67D is limited to zero-hour contracts. Rather the intention appears to be to ensure that reasonable compensation is payable to [any] employees who, by agreement, hold themselves available for the employer's benefit…"

Having determined the above, the Court addressed the question of whether the clause is an availability provision. Section 67D(1) provides that:

"… an availability provision means a provision in an employment agreement under which—

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

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

The Court made short work of this issue stating that:

"[26] On its face, [the clause] meets the two limbs of the s 67D definition. It purports to require a delivery agent to accept work (overtime) when required by NZ Post (s 67D(1)(b)); the performance of that work (overtime) is conditional on the employer making that work (overtime) available (s 67D(1)(a)). The exception carved out in [the clause], for workers to exercise a choice about undertaking such work on non-rostered days, but to exercise no choice about undertaking such work on a rostered day, emphasises the point."

In summary, the Court held that the sections of the ERA are not limited to zero-hour contracts and the clause was an availability provision.

2. "*Engagement*" of Section 67E

The Court then went on to address the second argument of NZP that, the availability provisions of the ERA were not applicable because the CA did not provide for guaranteed hours of work but instead provided the hours of work would be set by roster and consequently the actual hours could, and did, fluctuate based on delivery requirements.

This flexibility was expressly provided for in the CA. Therefore, NZP argued as there were no guaranteed hours, section 67E was not "*engaged*" and employees could not refuse to work overtime.

The Court did not agree. It stated that the flexibility provided for in the CA did not support this proposition. The court stated in fact that it was *"quite the opposite*". The Court then went on to refer to other terms in the CA concluding that the *"[s]tandard hours*" in CA were the minimum hours agreed in the remuneration clause that provided an employee "*a minimum payment of 37 hours and 40 minutes per week*". The conclusion was therefore that section 67E was "*engaged*".

3. Compensation in Salary

Having determined the clause was an availability clause and section 67E did apply, the Court assessed whether the clause provided compensation consistent with section 67D(3)(b) (having decided the other requirements of section 67D had been met). NZP argued the salary paid was sufficient compensation to meet the requirements of section 67D(3)(b).

The Court did not agree. It stated that it was not convinced employees were paid by salary, as employees were paid differing hourly rates for work in excess of the hours provided in the remuneration clause. The Court went on to state that even if this was not the case, the evidence did not establish that the parties had agreed the *"remuneration includes compensation for*" employees being available as required in section 67D(7).

Conclusion

The case clarifies the law in respect of requiring employees to be available to undertake extra hours where required or overtime. If employers seek to require employees to be available, there must be provision for it in the applicable employment agreement and agreed compensation for employees making themselves available.

This may be as simple as stating the employee's pay provides compensation for being available where required. It may however require more compensation. In any case, in the absence of a specific provision, the risk is that any contractual requirement to work additional hours may be unenforceable without an availability provision.

We can assist in drafting clauses and advising on implementation, so please contact us for further advice.