HOLD STILL, THIS MIGHT HURT

In a shock decision* earlier this month the Employment Court ruled that availability provisions are not limited to zero hours contracts but apply whenever an employee is forgoing opportunities in their private life. It did not matter whether they were waiting to be called in for work or on the offchance they might be required to undertake additional hours of work at the end of their usual working day (emphasis added).

* Postal Workers Union of Aotearoa Inc v New Zealand Post Limited (EMPC 114/2018) [2019] NZEmpC47.

The judgement is available here –
https://www.employmentcourt.govt.nz/assets/Documents/Decisions/EMPC-114-2018-Postal-Workers-Union-of-Aotearoa-Inc-v-New-Zealand-Post-Ltd-002.pdf

The case
NZ Post has a collective agreement with The Postal Workers Union of Aotearoa (PWU), in terms of which –

> *"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 union claimed that that provision of the collective was an availability provision under section 67D of the Employment Relations Act, which meant that work was conditional upon the employer making it available, the employees were required to be available, and they had to accept the work when offered.

The union said that availability provisions could only be used if the employment agreement set out agreed hours of work, and guaranteed hours of work, together with reasonable compensation for being available.

NZ Post's view that delivery agents were not on standby, but already working as rostered, with the possibility of overtime to follow, was rejected.

The Court decided that the availability rules (to coin a phrase for section 67D) went further than zero hours contracts and affected salaried and waged employees equally. It agreed with the union's view and said that the availability provision was unenforceable in the absence of a compensation arrangement.

NZ Post and Business New Zealand said that if the availability rules were not limited to zero-hour contracts it would have significant unforeseen consequences. The Court must have agreed, because it published a media release with the judgement, to explain the judgement.

The media release is here –
https://www.employmentcourt.govt.nz/assets/Documents/Decisions/EMPC-114-2018-Postal-Workers-Union-of-Aotearoa-Inc-v-New-Zealand-Post-Ltd-Media-Release.pdf

So, in summary

- Overtime can only be required if the employment contract sets out agreed and guaranteed hours of work
- The employee must be paid reasonable compensation for being available for overtime (in addition to payment for the time worked)

- Employees can refuse to work overtime if these conditions are not met.

The Court emphasised that the availability rules seems to show that the law recognises that an employee's time is a commodity that has a value. Whether the employee is waiting for a call-out or working overtime at the end of their working day, they are forgoing opportunities in their private life.

The Court saw this as consistent with -

- the underlying objectives of the Act (including to redress the inherent imbalance of bargaining power between employer and employee)
- the idea of "substantive mutuality in working relationships"
- the modern trend of valuing an employee's right to a personal life free from unnecessary incursion by their employer, and
- basic contractual principles including the payment of consideration in exchange for something of worth.

The Court recognised NZ Post's difficulty in knowing for certain what hours will be required to complete deliveries from day to day, but said that that showed how a negotiated availability provision would provide the employer with operational flexibility and employees with reasonable compensation for agreeing to work to make that possible.

The effect for NZ Post

This decision means that PWU members can now refuse overtime that their union explicitly agreed in the current collective agreement with NZ Post.

Some detail to look at

A few other parts of the availability rules are important -

First – (subsection 3(a)) An employer must have genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision (subsection (5)).

In considering whether there are genuine reasons based on reasonable grounds for including an availability provision, an employer must have regard to all relevant matters, including the following:

a) whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision
b) the number of hours for which the employee would be required to be available
c) the proportion of the hours referred to in paragraph (b) to the agreed hours of work.

Second - (subsection 6) compensation payable under an availability provision must be determined having regard to all relevant matters, including the following:

a) the number of hours for which the employee is required to be available
b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work
c) the nature of any restrictions resulting from the availability provision
d) the rate of payment under the employment agreement for the work for which the employee is available

e) if the employee is remunerated by way of salary, the amount of the salary.

With regard to salaried employees, subsection 7 provides that employer and employee may agree that the employee's salary includes compensation for an availability provision.

Third – (section 67F - in edited form below) discourages knee-jerk reactions by prohibiting employers from treating employees adversely if they refuse overtime. The provision is very wide –

(1) An employer must not treat an employee who refuses to perform work under section 67E, adversely.

(2) An employer treats an employee adversely if the employer—

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially the same qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or **subjects that employee to any detriment**, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) retires that employee or requires or causes that employee to retire or resign.

(3) For the purposes of subsection (2)(b), **detriment includes anything that has a detrimental effect on** that employee's employment, job performance, or **job satisfaction**.

See the members' section of the Association website for updated Advicewise templates for permanent and fixed term contracts, and the guide to Employing Staff and Contractors Section 1 – Employing Staff.

This article is brought to you by the WGANZ free employment helpline 0800 692 384. If you have any questions or would like to discuss the article above, please call Philip or Anthony on the helpline.