EMPLOYMENT LAW

Must employees be paid for overtime availability?

By Catherine Stewart and William Fussey

In the eagerly-awaited decision of *Postal Workers Union of Aotearoa Inc v New Zealand Post* [2019] 114/2018, the full bench of the Employment Court has held that statutory obligations around availability provisions are not limited to zero-hours contracts.

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In other words, if employers require staff to be available to work beyond the guaranteed hours in their employment agreements, employees must be given reasonable compensation for their availability or the requirement will be unenforceable.

The court emphasised "the availability provisions appear simply to reflect a statutory recognition that an employee's time is a commodity which has value".

According to the judgment, New Zealand Post's delivery agents are employed under a collective agreement with a clause beginning: "Delivery agents may be required to work reasonable overtime in excess of their standard hours".

The Employment Relations Act 2000 defines an availability provision in s 67D as an employee's work being conditional on the employer making work available and the employer being required to accept such work.

On its face, the NZ Post clause meets both limbs of the definition. However, NZ Post argued that based on parliamentary intention, the availability provisions apply only to the situation where employees have no guaranteed hours but are required to make themselves available – ie, zero-hours contracts. This was rejected by the Employment Court.

The court assessed parliamentary intention and concluded the purpose of s 67D was to ensure any employee who agrees to be available for work the employer might require outside their set hours would be compensated for his or her availability.

The court reasoned that employees' availability has an opportunity cost, as making themselves available for work means forgoing opportunities in their private life.

The judgment affirmed "the modern trend of valuing an employee's right to a personal life free from unnecessary incursion" and noted it should not be "a startling or novel proposition" for an employee's time to be seen as "a commodity which has value".

So, for an employer to rely on the ability to require an employee to be available to work overtime, the employer must include an availability provision in the employment agreement that complies with the legislative requirements, providing its reasons for doing so also comply with the legislation.

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If employers are not prepared to include compliant availability provisions, they could consider including a clause allowing them to request additional hours from employees but accepting that the employees would be entitled to decline.

The statutory requirements of availability provisions are not necessarily onerous but complying with them is essential. The key elements are that an employee must have guaranteed hours of work with the agreed hours specified in the employment agreement, the employer must have genuine reasons based on reasonable grounds for requiring an employee's availability, and the employment agreement must provide reasonable compensation to the employee for his or her availability.

In considering whether there are genuine reasons based on reasonable grounds, an employer must consider all relevant matters, including whether it is practicable to meet business demands without an availability provision, the number of hours the employee would need to be available, and the ratio of agreed hours to available hours.

The Employment Relations Act 2000 also requires reasonable compensation to be assessed against a non-exhaustive list of factors, such as the number of hours the employee is required to be available and the nature of any restrictions resulting from the availability provision.

Reasonable compensation is likely to be considered differently, depending on whether the employee is waged or salaried.

For waged employees, it is likely to be a set hourly rate for the hours the employees are required to be available but it is common for an employee's salary to be determined by the amount of overtime he or she is likely to do each week.

Where this occurs, it is common for employers to ensure compliance by including wording in the clause that states "the employee's salary includes compensation for the employee being available to perform work under this provision".

In the case, NZ Post argued the clause in the collective agreement was enforceable because employees were on a salary, compensating them for their availability. The court held that even if the employees were salaried (which it considered not to be the case), NZ Post did not meet the requirement that the employer and the employee agree that compensation for availability has been included in the salary.

The *New Zealand Post* case brings into sharp focus several important considerations, both for employers who require employees to be available and for employees who are required to work beyond their guaranteed agreed hours.

Employers requiring employees to be available for work beyond their guaranteed agreed hours should check that their employment agreements contain enforceable availability provisions.

Where this is not the case – for example, because the employees are still employed on employment agreements entered into before the legislative requirements of availability provisions took effect – the employer should get the employee's agreement to amend his or her employment agreement.

To reduce the chance of an employee refusing to sign the amendment, make any pay rise conditional on the employee signing the amended agreement.

Continued on page 10

Continued from page 5, "Must employees be paid for overtime availability?"

Employees who are required to be available to work beyond their guaranteed hours should check whether there is a legally-compliant availability provision in their employment agreement. If not, they can refuse to be available on the basis that their availability provision is unenforceable.

Another point for employers and employees to check is that the availability provision has not inadvertently led to the minimum wage being breached

Another point for employers and employees to check is that the availability provision has not inadvertently led to the minimum wage being breached. Where a person is on a low salary, works long hours and has an availability provision, there is a risk that working extended hours could be a breach of the minimum wage. For example, if an employee earns a salary of $45,000 and works 49 hours or more in a week, the hourly rate will be calculated as being below the current minimum wage for that week and may breach the Minimum Wage Act 1983.

Ultimately, the *New Zealand Post* decision highlights the importance of employers including legally-enforceable availability provisions in the employment agreements of the employees it applies to, and being able to demonstrate they have a genuine need for such a provision.

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Continued from page 6, "Privacy Commissioner visits ADLS' Employment Law Committee"

The Bill will streamline this process by empowering the commissioner, after an investigation under Part 4 Subpart 1, to issue a legally binding determination on an agency or entity to provide information requested by an individual under s 96A. Agencies and entities then have the burden of appealing this determination to the Human Rights Review Tribunal.

This reduces the burden on individuals to prove why they should have access to information; instead, the agencies will be required to justify their reasons for not releasing it. The Bill also provides a time-frame for challenging the determination under s 111, allowing 10 days from the date of notification for appeal.

An agency or entity can refuse to give personal information to an individual if the information is purely evaluative as per s 53(1). This serves as a protection for those who volunteer information in exchange for a promise of confidentiality. However, those who provide information in the ordinary course of their business (for example, providers undertaking psychometric testing on individuals) are not protected, as specified under s 53(1)(b).

There is an anomaly in relation to a request for access to information. The wording of s 50(1) provides for a response – but not the information itself - to be given within 20 working days.

The commissioner advises there is a statutory obligation to provide information as soon as practically reasonable. If there is found to be no reason to separate the obligation to respond from the provision of information itself, the commissioner will find it is an "undue delay".

This was seen in the High Court case of *Winter v Jans* (6 April 2004) HAM CIV-2003-4190854J. It is unusual to receive damages for delays in access to information. Instead, damages are more likely to be awarded for denying access to the information itself.

Criminal offences

The new Bill introduces several criminal offences for privacy-related issues.

These are important for employment purposes as organisations with access to personal information are vulnerable to exposure and manipulation. For example, section 212(2)(c) creates an offence for those who impersonates an individual or authority to (i) gain access to an individual's information, or (ii) alter or destroy an individual's information. Section 212(2)(d) creates an offence for those who destroy any document containing personal information, knowing that a request has been made in respect of that information.

Significant powers and territorial reach

Concerns have been raised about principles of natural justice because of the commissioner's significant powers to issue binding determinations.

The commissioner stressed that OPC continues to be bound by the Human Rights Act which embodies these principles. This means all processes are focused on fairness and the commissioner adopts an inquisitorial process before making a determination, as per s 88.

The commissioner delegates investigatory powers to OPC staff. Although final determinations are made on paper, the commissioner can conduct several inquiries through face-to-face or Skype discussions to ensure all aspects of a complaint are thoroughly explored.

Although not unlimited, the Privacy Bill will have a territorial reach. It will apply to overseas organisations doing business in New Zealand, even those with no physical operations base here. For example, organisations such as Facebook which operate and deal with personal information will be bound under New Zealand privacy legislation. There will also be restrictions on the ability to transfer personal information to people in other jurisdictions under s 193.

Further Information

The Office of the Privacy Commissioner provides online resources, which can be found at www.privacy.org.nz. These include interactive e-learning materials, outlining how privacy issues may impact the employment sphere, and AskUs, an FAQ database.