



**THE EMPLOYMENT COURT OF NEW ZEALAND  
TE KÓTI TAKE MAHI**

**2 May 2019**

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**POSTAL WORKERS UNION OF AOTEAROA INC V NEW ZEALAND POST LIMITED**

**(EMPC 114/2018) [2019] NZEmpC47**

**PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at [www.employmentcourt.govt.nz/judgments/judgments-of-note/](http://www.employmentcourt.govt.nz/judgments/judgments-of-note/)**

Postal delivery agents are employed by New Zealand Post Ltd under a collective agreement. Clause O20 of the agreement provides 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 Court was asked to consider whether New Zealand Post can require delivery agents to perform extra hours of work in addition to their standard hours of work without compensating them for making themselves available.

Section 67D of the Employment Relations Act 2000 sets out the limited circumstances in which an availability provision can be included in an employment agreement. An employer must have genuine reasons based on reasonable grounds for requiring an employee to make themselves available, and the agreement must provide for the payment of reasonable compensation for the employee’s availability. An employee is entitled to refuse to perform work in addition to any guaranteed hours of work if the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the availability provision (s 67E).

The Court rejected New Zealand Post’s primary argument (which was supported by Business New Zealand) that s 67D was intended to be limited to what are colloquially known as “zero-hour” contracts. Rather the Court found that Parliament’s apparent intention was to ensure that reasonable compensation is payable to employees who, by agreement, hold themselves available for the employer’s benefit, thereby making themselves unavailable to accept other work or engage in personal activities.

New Zealand Post and Business New Zealand submitted that if s 67D was not limited to zero-hour contracts it would have significant unforeseen consequences. The Court emphasised that the availability provisions appear to reflect a statutory recognition that an employee's time is a commodity which has a value. That, it was said, ought not to be regarded as a startling or novel proposition. 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 forgoing opportunities in their private life.

If the requirements of the Act are not met, the result is that the employee can decline to make themselves available. The Court observed that such a result may be said to sit comfortably with the underlying objects of the Act (including to redress the inherent imbalance of bargaining power between employer and employee), and the evident broader purpose of the suite of amendments which included ss 67D and E, underpinned by the notion of substantive mutuality in working relationships. It was also said to sit comfortably with the modern trend of valuing an employee's right to a personal life free from unnecessary incursion by their employer; and basic contractual principles more generally, including as to the payment of consideration in exchange for something of worth.

Where an employer wishes to rely on being able to *require* an employee to work overtime, as opposed to it being a voluntary exercise, it must comply with the requirements of the Act, including by providing reasonable compensation for the availability the employee has committed to providing for the employer's benefit.

The Employment Relations Act sets out the range of factors which are relevant to an assessment of the quantum of reasonable compensation for employee availability, including the number of required hours and the nature of any resulting restrictions. Although not needing to decide the point, the Court observed that the way in which compensation is to be calculated suggests that the greater the span of agreed availability, the larger the compensatory payment should be.

The Court found that cl 020 purported to require a delivery agent to accept work (overtime) when required by NZ Post and was an availability provision. In reaching this conclusion the Court noted that the particular wording of an agreement will likely be pivotal in any analysis and will need to be carefully assessed in determining whether a clause is an availability provision within the meaning of the Act and, if it is, whether it is enforceable.

The Court did not accept New Zealand Post's alternative argument that if cl O20 was an availability provision, it was enforceable because it provided for reasonable compensation. New Zealand Post argued that its employees were on a salary and that it included reasonable compensation for their availability. The Court did not accept that they were paid by salary. Even if they were, s 67D(7) requires agreement between the employer and the employee that compensation for being available is included in the salary. Clause O20 says nothing about compensation. Nor was there any evidence before the Court that the money payable to delivery agents incorporated any element of compensation for availability. That being so, there was no evidence as to the reasonableness of the amount to be attributed to availability.

The Court concluded that while cl O20 of the parties' collective agreement is an availability provision, it is unenforceable. No provision is made for reasonable compensation. Delivery agents are accordingly entitled to refuse to perform work in addition to their guaranteed hours on rostered days.

The Court directed New Zealand Post and the Postal Workers Union to mediation, to assist them in resolving any residual issues arising as a result of its judgment.

Contact person:

Mima Bobot, Employment Court Registrar (09) 9166359