

## Hours of work and availability provisions continue to cause tensions

### How do you dictate your employee's hours of work and do they require compensation for remaining available for overtime?

Hours of work clauses come in all shapes and sizes, because the labour needs of employers varies so significantly. When it comes to working hours, some employers can easily identify, manage and agree on employees' hours upfront; while others require maximum flexibility and struggle to create compliant hours of work clauses.

The current legislative framework does not easily translate for those employers needing more labour flexibility. In this article we take a look at two recent cases on this point.

#### Reciprocity at work

##### Background

In 2016 laws relating to hours of work clauses were drastically changed. Since that time, the idea of reciprocity is fundamental to any hours of work arrangement. For example,

- If any employer can only guarantee 20 hours per week, the employee only needs to make themselves available for 20 hours a week.
- If the employer guarantees 50 hours per week, the employee must be paid for 50 hours, even if the employer does not need the employee for 50 hours that week.
- If the employer cannot guarantee any hours, then all hours will be by agreement week to week, and the employee is free to refuse any hours they don't wish to work.

This can create headaches for some employers, particularly where work is impacted by seasonal fluctuations, weather, or is generally unpredictable.

##### Overtime - requested versus required?

Most employers also need to contemplate the potential for overtime or extra work. There are two categories of extra hours:

- Where extra hours can be **requested** but the employee is not obliged to accept the work, or
- Where extra hours can be **required** and an employee has no choice but to either stay late or return to work when asked.

Being "required" to work extra hours is an example of what is now known as an "availability provision". An availability provision is a provision that requires an employee to keep themselves available to work hours outside their usual hours, but with no guarantee that there will be extra hours required.

These clauses are commonplace in salaried employment agreements – they often saying something like *"Your usual hours of work will be 40 hours per week, however we may require you to work additional hours, and your salary compensates you fully for all hours worked."*

However, if an employer includes an availability provision in a waged employment agreement, there are strict requirements. One requirement is the inclusion and payment of "availability compensation".

Availability compensation is compensation purely for remaining available in case additional work arises. It should not be confused with an overtime payment. The compensation is payable regardless of whether the extra work eventuates or not. The Employment Relations Act 2000 sets out a number of factors to be considered when deciding what reasonable compensation might look like in each situation.

##### What remedies can be sought

Two recent cases have shed more light on this area. Both cases involved non-compliant availability

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## Hours of work and availability provisions continue to cause tensions (Continued)

provisions and established that the employees were disadvantaged in their employment.

### ***Employment Court – Mr Stewart***

Mr Stewart worked in a small service department of a meat works. His employment agreement stated he was required to work extra if needed. He was paid for any extra hours worked but he did not receive any availability compensation for remaining available to his employer.

The Court held the clause in his agreement was non-compliant because it required him to stay available, but it did not provide any availability compensation. The Court held Mr Stewart was disadvantaged.

The employer argued Mr Stewart could have turned down the extra work since he was aware the clause in his agreement was non-compliant. The Court stated in reality Mr Stewart could not decline the overtime, this would have placed undue stress on his small team of co-workers.

In terms of how much the availability compensation should have been, we have little guidance in this space to date. The Courts are somewhat restricted as they are not allowed to set or fix terms and conditions in employment agreements.

Mr Stewart, therefore, raised a claim of quantum meruit (being what one has earned, or a reasonable value of services). These claims are relatively rare in the employment jurisdiction and seek to recover the reasonable value of or reasonable remuneration for services performed. The Court held that it is entitled and will hear such a claim.

In this case Court has sent the parties away to attempt to resolve the issues in the first instance. If the parties cannot agree, it may come back before the Court.

### ***Employment Relations Authority – Mr Lye***

Mr Lye was a Stevedore who claimed his employment agreement required him to be available 24/7 without

any payment of reasonable compensation. His work arrangements including being informed the day prior whether he was working or not the next day.

As a consequence, Mr Lye was unable to make commitments in his personal life including care arrangements for his son, or committing to attending school activities.

The Authority accepted that the non-compliant provision disadvantaged Mr Lye.

When it turned to remedies, a calculation was made and backdated to 2020, based on 50% of Mr Lye's wage for the hours he was required to be available. The authority awarded him \$22,500 for his loss of benefit and inability to enjoy commitments in his personal life. The authority further awarded Mr Lye \$15,000 in compensation for humiliation, loss of dignity and injury to feelings.

## Summary

If an employer requires its employees to be available outside of their usual hours of work then careful consideration needs to be given to the hours of work and availability provisions in the employment agreement.

## Want to know more?

If this article raises any questions or concerns, please get in touch with one of our [Employment Team](#) and we will be "available" to help.