IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 47
EMPC 114/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	POSTAL WORKERS UNION OF AOTEAROA INC Plaintiff
AND	NEW ZEALAND POST LIMITED Defendant

Hearing:	29-30 January 2019 (Heard at Auckland)
Court:	Chief Judge Christina Inglis Judge J C Holden Judge M E Perkins
Appearances:	SR Mitchell and J Lynch, counsel for plaintiff H Kynaston and L Hercus, counsel for defendant G Pollak, counsel for E Tū Incorporated as intervener P Cranney and A Kent, counsel for New Zealand Council of Trade Unions as intervener P Kiely and S Worthy, counsel for Business New Zealand as intervener
Judgment:	2 May 2019

JUDGMENT OF THE FULL COURT

Introduction

[1] Delivery agents deliver mail to households and businesses throughout New Zealand. They are employed under a collective agreement, the operative one being the agreement of 2017-2020. Clause O20 of the agreement provides:

> 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.

[2] Can New Zealand Post Ltd (NZ Post) require delivery agents to perform extra hours of work in addition to their standard hours without compensating them for their availability? The answer hinges on s 67E of the Employment Relations Act 2000 (the Act). That provision states:

> An employee is entitled to refuse to perform work *in addition to any guaranteed hours* specified in the employee's employment agreement 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*.
>
> [emphasis added]

[3] The plaintiff Union (the Postal Workers Union of Aotearoa Inc) says that cl O20 is an availability provision for the purposes of s 67E because cl O20 purports to require delivery agents to make themselves available to work in excess of their guaranteed hours of work at NZ Post's behest (subject to limited health and safety exceptions). The Postal Workers Union then says that as neither cl O20 nor any other provision of the collective agreement provides for the payment of reasonable compensation for such availability, it follows that cl O20 is unenforceable and that a delivery agent may refuse to work overtime on rostered days.

[4] There are essentially three limbs to NZ Post's response. First, cl O20 is not an availability provision having regard to the scheme and purpose of the relevant statutory provisions. Rather, it says that the statutory provisions are directed at regulating what are colloquially known as "zero-hour" contracts. These are contracts which provide no guaranteed hours of work but which require an employee to remain available to accept work.[1] Second, s 67E only permits employees to refuse to perform work in addition to any guaranteed hours specified in an employment agreement. The collective agreement does not specify "guaranteed hours" of work and accordingly s 67E is not engaged. That means that a delivery agent is not entitled to refuse to work

---

[1] Collins English Dictionary (online ed, Harpers Collins): "A zero-hours contract is a contract where the employer does not have to provide regular work for the employee, but the employee has to be on call in case they are needed to work."

reasonable overtime under cl O20. Third, even if cl O20 is an availability provision, no issue arises because delivery agents are remunerated by way of salary, which incorporates reasonable compensation for availability.

[5] The New Zealand Council of Trade Unions, E Tū and Business New Zealand were granted leave to intervene and be heard. The Council of Trade Unions and E Tū supported the Postal Workers Union's arguments as to the legal position; Business New Zealand's submissions were primarily focussed on the correct interpretation of the sections of the Act dealing with availability provisions (being ss 67D and 67E), emphasising the underlying legislative purpose which was said to emerge from a reading of the pre-legislative material. Business New Zealand stressed the potential impact of any decision in this case and the desirability of confining it to its own facts.

[6] The Postal Workers Union's claim presents an opportunity for the Court to articulate the applicable legal framework to assist employers and employees, and their advisors, in understanding their respective rights and obligations. That is one of the reasons why a full Court was convened, and why the interveners were granted leave to appear and be heard. Having said that, we agree with Mr Kiely (counsel for Business New Zealand) 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.

Are availability provisions under the Act limited to "zero-hour" contracts?

[7] As the Interpretation Act 1999 makes clear, the meaning of words used in a statute are to be ascertained from their text and in light of their purpose.[2] During the course of submissions a considerable amount of attention was paid to the latter, including material pre-dating the enactment of ss 67D and 67E. We prefer to start with the actual words adopted by Parliament.

---

[2] Interpretation Act 1999, s 5(1). See also *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22].

[8] Section 67D provides:

67D Availability provision

(1) In this section and section 67E, 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.

(2) An availability provision may only—

(a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and

(b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

(3) An availability provision must not be included in an employment agreement unless—

(a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and

(b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

(4) An availability provision that is not included in an employment agreement in accordance with subsection (3) is not enforceable against the employee.

(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.

(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.

> (7) For the purposes of subsection (3)(b), an employer and an employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

[9] Section 67E provides:

> **67E Employee may refuse to perform certain work**
> An employee is entitled to refuse to perform work in addition to any guaranteed hours specified in the employee's employment agreement 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.

[10] As will be apparent, an availability provision may only be included in an employment agreement that contains both agreed and guaranteed hours of work (s 67D(2)). An availability provision may not be included in an agreement unless the employer has genuine reasons based on reasonable grounds for its inclusion and it provides for the payment of reasonable compensation for the availability (s 67D(3)). It follows that if an employment agreement contains no agreed and guaranteed hours of work, it cannot contain a requirement for employee availability. To put it another way, s 67D prohibits "zero-hour" contracts. That is not, however, its only function.

[11] As s 67D(1) makes plain, there are two parts to the definition of "availability provision": the employee's performance of work is conditional on the employer making work available to the employee; and the employee is required to be available to accept any work that the employer makes available. There is nothing in the wording of s 67D(1) to suggest that it only applies to zero-hour contracts; nor is there anything in s 67E which would support such a conclusion.

[12] Business New Zealand submitted that the inclusion of s 67D(7) reflected a Parliamentary intent to ban zero-hour contracts, which necessarily only affected waged employees. We do not read the provision in this way. We see the inclusion of subs (7) as reinforcing the point that the Act's provisions were intended to apply more broadly. If 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. Section 67D(7) simply provides that, in respect of such employees, the parties may agree that compensation for availability may be incorporated in the salary

negotiated for the position. The inclusion of s 67D(7) points squarely away from the narrow interpretation advanced by NZ Post and Business New Zealand.

[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),[3] 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, including part-time and casual work. In this regard it is becoming more common for workers (especially vulnerable workers) to undertake multiple jobs, juggling their commitments both to other employers and to their families and communities. Sections 67D and 67E, which limit the circumstances in which employees can be required by their employer to work outside their standard hours, sit within this framework.

[15] In terms of the statute itself, there is nothing which supports confining these sections to zero-hour contracts. We understood NZ Post's primary submission to be that what we will call the 'zero-hours qualifier' emerges when due regard is had to the pre-legislative material. Business New Zealand advanced a similar submission.

[16] In 2016 Parliament enacted a suite of changes to employment legislation, focussed on practices which were regarded as exploitative and lacking mutuality. While, as Mr Kynaston, counsel for NZ Post pointed out, the material is peppered with references to zero-hour contracts – either expressly or by implication – we are not

---

[3] The objects are to specify the rules for determining the terms and conditions of an employee's employment, as well as setting out a number of good faith requirements surrounding entering into and varying individual employment agreements, whatever the nature of those terms and conditions.

[4] It provides that where an employee is required under their employment agreement to undertake shift work, an employer must not cancel a shift unless the employment agreement specifies a number of strict conditions designed to protect and compensate an employee.

drawn to the submission that it reflects an intention to limit the reach of the proposed amendments to this particular class of agreement. The point that must be kept squarely in mind is that the purpose of referring to pre-legislative material as part of the statutory interpretation exercise is to discern *Parliamentary* intent – not the intent of a particular Minister in promoting the legislative amendment at issue, or the position articulated in advice from departmental officials. While we have read all of the material put before the Court, we did not find that references to the Minister for Workplace Relations and Safety's 2015 Cabinet paper, the Regulatory Impact Statement (8 June 2015), the Departmental Disclosure Statement (31 July 2015) or the Departmental Report to the Transport and Industrial Relations Committee (3 December 2015) were of any real assistance in discerning the Parliamentary intent underlying the reforms.

[17] In any event, we do not read the swathe of material as reflecting an intention to limit the impact of the amendments to zero-hour contracts, although it is clear that zero-hour contracts were a significant driver for the amendments.[5] The Cabinet Paper is, for example, entitled "Addressing zero hour contracts and *other practices* in employment relationships". And reference is more generally made to practices which have:

> … led to employees finding it difficult to plan their financial and personal lives, and access state-provided benefits and subsidies. They also tilt the playing field away from good employers and generally undermine productivity in the labour market.

[18] As Mr Mitchell, counsel for the Postal Workers Union, pointed out, agreements which purport to reserve to an employer the unilateral ability to require an employee to work past their usual hours *do* materially constrain a worker's ability to plan their life away from work. This was reflected in the evidence of Michael Hunter, a long-time postie and now a delivery agent, who described his involvement with community orchestras, and the difficulties he would face if he was unable to commit to attending rehearsals at particular times of the day because he might be required by NZ Post to undertake overtime, including without notice. He gave evidence, which we accept, that if cl O20 was enforced by NZ Post (which it has responsibly not done pending the

---

5 Refer to the discussion in *Fraser v McDonald's Restaurants (New Zealand) Ltd* [2017] NZEmpC 95, (2017) 15 NZELR 39 at [7].

outcome of these proceedings) he may be obliged to relinquish his involvement in the orchestras. Other difficulties were also referred to, including interference with family life, difficulties with childcare responsibilities, and with being able to commit to various personal activities and voluntary work within the community.

[19] In a nutshell, while it benefits NZ Post to have delivery agents holding themselves available to work overtime to enable it to meet its fluctuating business needs, this comes at a personal cost to the affected employee.

[20] Mr Kynaston particularly relies on what he says was the Minister's intention to address *new* practices that had arisen and that were of concern, rather than what he described as the longstanding and common practice whereby employees are sometimes required to work overtime. He submitted that had there been an intention to extend the reach to overtime practices, this would have been specifically referred to.

[21] There are three points that can be made in relation to this submission. The first is that it is tolerably clear that the provisions were intended to go some way towards redressing the balance in terms of contractual arrangements in employment, particularly for vulnerable workers with little bargaining power. It is true that zero-hour contracts were cited as an example of why the balance needed to be redressed, but there is nothing in the material to suggest that such contracts were the only instance of imbalance that was intended to be remedied. The simultaneous enactment of provisions relating to the prohibition on secondary employment and the cancellation of shifts reinforces the point about the broader underlying statutory purpose of the suite of Part 6 amendments.

[22] Second, it is notable that if the concern was to limit the reach of the availability provisions to "new" (zero-hours) practices and to avoid any impact on "long-standing" (overtime) practices, it might equally be expected that Parliament would make that clear. Quite the reverse is true. Section 67D(2) only allows employers to include availability provisions in an employment agreement if the employment agreement specifies agreed hours of work and includes guaranteed hours. An employer must guarantee some work before it can have an availability provision. If the intent was

only to prohibit zero-hour contracts, the section could have ended there. Instead, s 67D(3) imposes further requirements. Before an employer can have an availability provision, as defined by s 67D(1):

(a) the employment agreement must specify agreed hours of work that include guaranteed hours;

(b) the employer must have genuine reasons based on reasonable grounds for having an availability provision and for the number of hours of work specified in that provision; and

(c) the availability provision must provide for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

[23] Third, and in any event, it is not unknown for legislation (properly interpreted) to have unintended consequences. It remains open to Parliament to address any unforeseen impact as it considers appropriate. It is not for the Court to assume that something has gone wrong with the drafting in the face of unambiguous and apparently carefully chosen words, and to take on the drafting role itself. That would usurp the role of Parliament.

[24] Therefore, we cannot accept Mr Kynaston's primary submission (supported by Business New Zealand) that s 67D is limited to zero-hour contracts. Rather the intention appears to be 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 which could otherwise prevent them from being at the employer's beck and call. 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. We understood Mr Kynaston to accept that this was so.

Is cl O20 an availability provision?

[25] NZ Post submits that even if s 67D(1) extends beyond zero-hour contracts, cl O20 is not an availability provision; the Postal Workers Union says that it is an availability provision, but is unenforceable. It is convenient to repeat s 67D(1) and cl O20 here so they can be read together:

> s 67D(1):
>
> … 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.
>
> cl O20:
>
> 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.

[26] On its face, cl O20 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 cl O20, 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.

[27] Mr Kynaston submitted that the performance of delivery-agent work is not conditional on NZ Post making work available because delivery agents are not on standby or waiting for a decision by NZ Post to provide them with any work. Rather, they are working as rostered and are simply required to do additional work at the end of the day, as and when operational demands require. The difficulty with this approach is that it requires several qualifiers to be read into s 67D(1) which Parliament has not provided for. Neither s 67D(1)(a) nor (b) refers to a particular category of employee (such as an employee who is on stand-by waiting for a call to come into work). Both refer to "the employee". There is no express exclusion of employees who are already

at work but are being required to undertake additional work by the employer. Section 67D(1)(a) refers to "work", not any or all work; on the other hand, s 67D(1)(b) refers to "any work", suggesting that such work can include additional work on top of work already being performed by an employee.

[28] Mr Kynaston's overarching submission was that s 67D(1) ought not to be interpreted literally; otherwise it would apply to "every employment agreement, other than casual agreements, and therefore requires that guaranteed hours be included in the great majority of employment agreements." This, he said, would be contrary to the legislative purpose. We have already referred to the legislative purpose and do not need to repeat what has been said.

[29] The point to be emphasised is this. The availability provisions appear simply to reflect a statutory recognition that an employee's time is a commodity which has a value. That ought not to be regarded as a startling or novel proposition. And, as Mr Mitchell points out, payment for availability has been a feature of collective agreements for many years, including in respect of allowances for call-back. It seems to us to be self-evident that 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. We do not interpret s 67D as differentiating between the two scenarios.

[30] If 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 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.[6]

[31] If the requirements of the Act are not met, the result is that the employee can decline to make themselves available. Such a result may be said to sit comfortably

---

6 At s 67D(6).

with the underlying objects of the Act (including to redress the inherent imbalance of bargaining power between employer and employee),[7] and the evident broader purpose of the suite of amendments, underpinned by the notion of substantive mutuality in working relationships. It also sits comfortably with the modern trend of valuing an employee's right to a personal life free from unnecessary incursion by their employer;[8] and basic contractual principles more generally, including as to the payment of consideration in exchange for something of worth.

[32] Finally, we accept that various factors affect the time it takes to meet the operational delivery needs of NZ Post's business, including the day of the week; planned and unplanned delivery agent absences; the volume of product to be delivered and other contingencies. We accept too that some of these factors are outside of NZ Post's control and that some are within the control of individual delivery agents. While we appreciate that it is difficult for NZ Post to know with certainty what hours will be required to complete deliveries from day to day, we do not think that this factor materially assists in determining whether the requirements of s 67D are met. Rather, it neatly illustrates the sort of situation in which parties may wish to negotiate an availability provision, providing the employer with sufficient flexibility to satisfy fluctuating operational needs; and employees with reasonable compensation for making themselves available to enable this business imperative to be met.

Is s 67E engaged?

[33] Section 67E provides that an employee is entitled to refuse to perform work in addition to any "guaranteed hours" specified in the employee's employment agreement if the agreement does not contain an availability provision that provides for reasonable compensation to the employee for making himself or herself available to perform work under the availability provision.

[34] NZ Post argues that there are no guaranteed hours and therefore s 67E is not engaged. The difficulty for NZ Post is that if there are no guaranteed hours of work

---

7 Section 3(a)(ii).

8 Christina Inglis "The Intersecting Lines: Business Interests and Personal Autonomy" (paper presented to University of Waikato Employment Law class, September 2018), available on the Employment Court website: <www.employmentcourt.govt.nz/about/papers-and-speeches>.

then, pursuant to s 67D(2)(a), an availability provision such as cl O20 cannot be included in the collective agreement. The corollary of that is that NZ Post cannot require delivery agents to work overtime. In any event, for the reasons that follow, we do not accept the argument that there are no guaranteed hours.

[35] The provisions refer to both "guaranteed hours of work" and "agreed hours of work".

- Section 65 (Form and content of individual employment agreement) provides that an individual employment agreement must include "any agreed hours of work" specified in accordance with s 67C or, if no hours are agreed, an indication of the arrangements relating to the times the employee is to work.

- Section 67C (Agreed hours of work) refers to "[h]ours of work agreed by an employer and employee" and requires that any such hours be included in an employment agreement. Section 67C(2) sets out what agreed hours of work include, namely "any or all" of the following: (a) the number of guaranteed hours of work; (b) the days of the week on which work is to be performed; (c) the start and finish times of work; and (d) any flexibility in respect of (b) or (c).

- Section 67D(2) provides that an availability provision may only be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and relate to a period for which the employee is required to be available in addition to those guaranteed hours of work.

- Section 67E provides that an employee may refuse to perform work in addition to any guaranteed hours if the agreement does not contain an availability provision.

[36] There is no statutory definition of the terms "guaranteed hours of work" or "agreed hours of work". Importantly, there is no flexibility in respect of s 67C(2)(a)

(the number of guaranteed hours), only in the days/times when "hours of work" are to be performed. There is nothing to suggest that the quantum of each (agreed and guaranteed hours) cannot be the same.

[37] Mr Kynaston submitted that delivery agents have guaranteed work on guaranteed days. There is an expectation that the work will be completed within a delivery agent's standard hours over the course of a rostered week but there is no guarantee that this will be able to occur. Sometimes the work takes longer. It therefore takes an estimated, but uncertain, amount of time to complete. Accordingly, Mr Kynaston argues, the agreement, supported by the way it operates in practice, does not contain daily guaranteed hours of work. It was submitted that while the collective agreement provided for work to be set by a roster, including the start and finish times (which might otherwise indicate certainty as to hours of work), the reference to finish times had been inserted in error and it was clear from the parties' dealings over time that this had never been intended. These dealings should, he submitted, inform the proper interpretation of the agreement.

[38] NZ Post's need for flexibility in the work arrangements is embedded in the collective agreement. So, for example, cl C1 (Hours of Work) provides:

> New Zealand Post operates 24 hours a day. The Company needs to be flexible so that it can respond to customer needs. At times, the Company may consider it needs to alter an employee's hours of work to meet those needs.

[39] And cl C37 provides:

> This section and the Specific Conditions for Occupational Groupings give the broad basis on which hours of work are determined. These should not be regarded as inflexible and a reasonable tolerance is permissible to meet local business and delivery requirements. The Company recognises this flexibility by allowing an early release from work when local business and delivery requirements are met.

[40] The contractual acknowledgment of the need for operational flexibility in delivery services does not, however, support a submission that the parties' collective agreement contains no guaranteed hours of work – quite the opposite. As the above provisions reflect, flexibility is not contained within the guaranteed hours of work provided for (37 hours and 40 minutes per week, referred to as 37:40 hours) but in

terms of the agreed hours of work, including overtime as required and the days and times this might occur.

[41] "Standard hours" in the collective agreement are defined as meaning the *minimum number* of hours per week that an employee and the company have agreed. Clause O14 provides:

> Remuneration for Full Time Delivery Agents will be made up of a combination of calculated inside time or actual inside time as determined by the Company, and actual outside time with a minimum payment of 37 hours and 40 minutes per week.

[42] It follows that 37:40 are the hours that a full-time delivery agent can expect to work and those are the hours NZ Post must (as a minimum) pay for. There is nothing uncertain about the 37:40 hours.

[43] There is, as we have said, some flexibility built into how these hours, and any non-voluntary, overtime will be arranged. This is reflected in, for example:

- Clause O4: "The Company will use its best endeavours to size and maintain rounds at 37:40 per week, or as close to that as practical;"

- Clause O22: "Upon appointment the number of a Delivery Agent's weekly standard hours and the number of days on which the standard hours will be worked each week will be fixed by agreement between the delivery agent and the company. Actual days will be set by the roster."

- Clause O26:

  "***Span of hours***

  Set by roster. The starting and finishing times will be set to meet local delivery requirements."

- The definition of roster (cl B11), which provides that "Rostered Duty" or "Roster" means actual start and finish times; break times; days of the

week on which an employee is scheduled to work; and the number of days per week over which an employee's standard hours are scheduled to be worked.

[44] The parties have contractually acknowledged that there may be occasions where more than 37:40 hours of work are required during the course of a week, and have agreed additional hours to meet any such demands (non-voluntary on rostered days). Those additional agreed hours cannot be predicted in advance, and are whatever is required to get the job done. Delivery agents are paid for any additional hours worked under this part of the agreement, at the rate provided for. The fact that a particular figure in terms of numbers of hours for any necessary additional work cannot be attributed in advance, does not mean that they are not agreed hours of work for the purposes of s 67C; s 67C(2)(d) specifically injects flexibility into the concept of hours of work. Nor do we think that the discretion conferred on NZ Post to "allow" early release undermines the guaranteed hours analysis – a worker who is given permission to leave early remains legally entitled to be paid for 37:40 hours work (which is what occurs in practice).

[45] We return to Mr Kynaston's submission that the collective agreement should be interpreted in light of the parties' negotiations, and mode of operating, over time. This focussed on the reference to starting and finishing times in cl O26 (Span of Hours), which we have already referred to. It was said that the clause was intended by the parties to only refer to start times, the reference to finish times resulted from a drafting error, and the clause (when read against the background context) did not support an argument that the collective agreement provided for guaranteed hours of work. It is not strictly necessary for us to address this argument as it makes no material difference in terms of our analysis. We nevertheless deal with it for completeness.

[46] We first record that during the course of the hearing Mr Kynaston advanced an application for leave to file a second amended statement of defence, seeking orders of rectification (based on the alleged mistake) and under s 192(2). That application was opposed by the Postal Workers Union and was dismissed for reasons that can be briefly summarised. The application came at the 11th hour. If granted it would have (according to counsel for both parties) required an adjournment to enable further

disclosure to take place and for additional evidence to be given. The significant delay in bringing the application (in circumstances where the alleged mistake had been identified in evidence filed almost two months prior) was not satisfactorily explained; granting the application would have derailed the hearing; it would have prejudiced the parties and inconvenienced the intervenors; and a further two days of hearing for a full Court with multiple counsel could not readily be accommodated. Nor did it appear to us, in any event, that the defence NZ Post wished to pursue had much substantive merit.

[47] It is well accepted that context may be relevant to an assessment of the meaning to be given to provisions in a collective agreement. The plainer the words, the less likely the parties will be assumed to have intended a different meaning. This point is of particular relevance in the present case, where substantially the same wording appears in the collective agreement between NZ Post and another union party, E Tū. There is a need for considerable caution in using background dealings as an aid to interpretation where, as here, third party reliance is at play.

[48] Postal services have experienced a significant change over recent times, both as the demand for postal services declines and as technology advances. This led to NZ Post developing what was known as an integrated model for postal services, and the movement from the traditional role of postie to delivery agents. All of this formed part of the negotiations for the collective agreement in 2016, and the following year. Specific provisions relating to delivery agents were included for the first time (in cl N, now O). Although the present dispute centres on cl O20, a provision in identical form appeared in previous iterations of the 2016-2017 collective agreement (which was the first collective agreement to include delivery agents). There were no such provisions in previous agreements as delivery agents did not exist at that time.

[49] Mr Greene, industrial advocate for NZ Post, gave evidence that during bargaining for the collective agreement in 2016 there was express discussion and clear understanding about hours varying day to day and, on this basis, the parties agreed that the starting times, but not finishing times, would be set in the roster. He said that while the agreement to not include finishing times was recorded in terms of settlement, the reference to finishing times found its way into the collective agreement. This, Mr

Greene said, reflected a drafting error by NZ Post which was not picked up by either party at the time the agreement was drafted and later ratified. The wording also found its way into the parallel agreement between NZ Post and E Tū, although the circumstances surrounding the lead up to that agreement were not before the Court. Another witness for NZ Post, Mr Riordan, said that it was not until mid-way through 2017 that the Union began to assert that the roster set guaranteed hours. Mr Kynaston described the sequence of events as "powerful evidence" as to the true nature of the parties' agreement,[9] namely that the parties never intended set finish times and did not agree any daily guaranteed hours.

[50] Mr Hunter, the witness for the Postal Workers Union, who was also involved in the negotiations, did not recall events in precisely the same way, and the contemporaneous documentary evidence is of limited assistance. Mr Hunter gave evidence (which we accept) that his days and hours of work are set by roster, specifying the days and times he is working, as recorded in documentation before the Court. Mr Hunter knows with certainty the hours he will work from day to day and week to week. While the position in relation to Mr Hunter is clear, we are unwilling to draw any broader conclusions about other delivery agents.

[51] The reality is that the Court is being asked to find that there is sufficient clarity about the parties' intention to conclude that a key word contained within an earlier collective agreement, which re-appeared in the subsequent collective agreement; and which was incorporated in a separate parallel agreement with another party, E Tū, ought now to be read out of the agreement. We are not prepared to make an inferential leap of this magnitude on the basis of the evidence.

[52] We conclude that the contractual hours of 37:40 for a full-time delivery agent provided for in the parties' collective agreement are guaranteed hours for the purposes of s 67E.

---

9 Citing in support Tipping J's analysis in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, at [33].

If cl O20 is an availability provision, is reasonable compensation provided for?

[53] An employee is entitled to refuse to perform work in addition to any guaranteed hours specified in the employee's employment agreement 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). As s 67D(7) makes clear the parties may agree that reasonable compensation is incorporated in any salary payable under an agreement.

[54] NZ Post's third, alternative, argument was that delivery agents were paid a salary for the purposes of s 67D(7) and that the parties had agreed that the salary incorporated availability compensation. We agree with Mr Mitchell that this is a difficult argument to run given the evidence advanced on behalf of NZ Post as to the negotiations and the outcome of them. Moreover, it is inconsistent with the clear words of the agreement.

[55] We do not accept that the reference to "salary" in s 67D has a special meaning for the purposes of the availability provisions. There is nothing to suggest that it is intended to bear anything other than its ordinary meaning. Nor do we accept that delivery agents are paid by way of salary. The fact that the agreement provides for differing hourly rates for work in excess of the 37:40 hours, tells firmly against NZ Post's characterisation. Further, the uncontested evidence of Mr Hunter was that the parties discussed a salary model in the context of the 2016 negotiations and they agreed not to proceed with it.

[56] Even if these hurdles could be overcome, s 67D(7) requires agreement between the employer and employee that the employee's remuneration includes compensation for the employee for making herself or himself available to perform work under the provision. 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.

[57] It follows from the foregoing discussion 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.

Relief

[58] A suggestion was made at the hearing that, in the event that the plaintiff succeeded in its argument that cl O20 was an availability provision, the Court should (as a first step) refer the parties to facilitation rather than granting declaratory relief. The Court has no jurisdiction to refer the matter to facilitation. That is something the parties must do themselves, and the Authority would need to be persuaded there were grounds to accept the referral.[10] In any event, the Postal Workers Union is entitled to a clear statement of the legal position on its proceedings.

[59] We make the following declaration. Clause O20 of the collective agreement is an availability provision. It does not comply with s 67E of the Employment Relations Act. Delivery agents are entitled to refuse to perform work in addition to their guaranteed hours on rostered days.

[60] We see a value in the parties attending mediation, to assist them in resolving any residual issues arising as a result of this judgment. There is a direction accordingly.

[61] Costs are reserved.

Christina Inglis
Chief Judge
for the full Court

Judgment signed at 10.30 am on 2 May 2019

---

[10] See Employment Relations Act 2000, ss 50B, 50C.