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Are you available?

In the February 2017 Advocate (No 263), we referred to an Employment Relations Authority case on '*zero hours'* which had been referred to the Court for a decision. The case or cases; ***Fraser v. McDonalds*** and ***Doran v. Carrick Holdings*** have now been determined by the Court. Both cases have near identical facts and together are the first Court decision on the availability provisions as introduced by April 2016 amendment of the Employment Relations Act.

The amendment defined hours of work provisions and then went on to address the so called '*zero hours'* issue by providing for '*Availability Provisions'* to be introduced into employment agreements. Zero hours were described in the Parliamentary debates as *"one of several practices that were identified as lacking sufficient reciprocity, providing an employer with more flexibility and less risk than an employee."*

"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. . . ."

Fraser was employed by McDonalds at Lincoln Road from 31 August 2016. Doran was employed by Carrick Holdings, a McDonalds franchisee that operates a McDonalds restaurant in Pt Chevalier, Auckland. She was employed on 30 August. On 16 September Fraser joined the Unite Union, Ms Doran did the same on 1 November 2016. From those dates they were both covered by the McDonalds Unite Collective Agreement. The case refers to the limited timeframes when both were employed on identical individual employment agreements, the relevant terms of which are set out below. Note that these agreements were drawn up by McDonalds after the March 2016 amendment and are obviously done so as to address, in a somewhat elaborate manner, the requirements of the new availability provisions:

"2. WORK SCHEDULING

From 1 October 2015, all McDonald's employees will be offered 80% security of hours, up to a 32 hour weekly cap, based on the average of the previous fixed quarterly worked hours.

Unless otherwise agreed, new employees will have their quarterly 80% hours average calculated, based on the minimum hours agreed at time of hiring, until they have worked a full fixed quarter (1 Jan — 31 Mar / 1 Apr — 30 Jun / 1 Jul — 30 Sep / 1 Oct — 31 Dec).

Permanent availability change requests need to be approved in writing by the Restaurant Manager or Franchisee. If approved, the 80% hours average will be applied based on the new minimum hours agreed, until they have worked a full fixed quarter (1 Jan — 31 Mar / 1 Apr — 30 Jun / 1 Jul — 30 Sep / 1 Oct — 31 Dec).

A permanent change of availability would be greater than 2 weeks.

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

Contact Details:

Ground Floor

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Neil McPhail
Email neil@mgz.co.nz
Mobile 0274 387 803

Raewyn Gibson
Email raewyn@mgz.co.nz
Mobile 0274 387 802

Peter Zwart
Email peter@mgz.co.nz
Mobile 0274 367 757

This clause will not apply where a reduction in hours exists that are outside of the control of restaurant manager, and when hours have been reduced equitably. This includes, but is not limited to:

- *new restaurants where a pattern of trade has not been established;*
- *an extraordinary marked & sustained downturn in sales;*
- *natural disasters or other such extraordinary circumstances.*

Your initial minimum hours (security of hours) will be: ____ per week

Your initial minimum hours (security of hours) is based on the following agreed availability:

	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
Start time							
Finish time							

You will be rostered according to your availability.

Following the posting of your schedule by Tuesday, if your schedule includes hours over and above your security of hours number, you have 24 hours from the posting of your schedule to advise if you are not able to work these additional hours. If you are unable to work these additional hours we may either reduce these additional hours, or reissue your schedule at our discretion. We will continue to ensure that your security of hour's conditions are met, and that all shifts offered meet with your pre-agreed availability."

Mr Fraser agreed to a minimum of 16 hours per week and Ms Doran to 20 hours. In the above chart they both indicated times when they would be available to work. A brochure attached to the offer went on to explain some of the terms stating, among other things:

*"**Work scheduling***

As a fast service restaurant we experience periods of varying customer demand. Therefore our work schedules need to be flexible. However, as far as possible, our objective is to recognise the desire of staff to have more certainty over the number of hours they are scheduled each week.

Your work availability is declared on your employment application form or as subsequently amended in your personal letter. Your availability is fixed and may not be changed without your Restaurant Manager's/Franchisee's agreement, except where you want to extend your availability.

Your work scheduling arrangements are as written in your personal letter. Unless otherwise agreed, you will not be scheduled to work: . . ."

"From time to time you may be requested to work hours in addition to [your] work schedule. The Employer recognises that rostering hours is a difficult and contentious issue and will endeavour to ensure restaurant managers are aware of the importance of rostering employees fairly and reasonably."

Witnesses for Carricks and McDonalds explained how this system works in practice:

"- *When employment is agreed upon with an employee, we record agreed availability in an offer of employment letter that is signed by both McDonald's and the employee.*
- *Before an offer of employment is made, we agree what the employee's minimum hours (security of hours) are. These are also recorded in the offer of employment letter.*
- *These are the hours of work that McDonald's is required to provide to the employee each week. These are the guaranteed hours.*
- *We then provide these minimum hours (security of hours) within the agreed availability. So, we do not roster employees to work outside the times they have indicated they are available.*

"- *Employees may be offered hours of work that are over and above their minimum hours (security of hours). However, they do not have to and are not required to work these additional hours. They are free to turn them down and this does not affect their existing minimum hours (security of hours).*
- *We post our rosters on a Tuesday. Employees have to let us know within 24 hours if they are unable to work any hours of work that are over and above their minimum hours (security of hours).*
- *Sometimes we do offer employees extra work over and above what is in the roster, either to cover someone else's shift or if we have an unexpected busy period. However, employees are not obliged to accept this extra work. This work will be offered within the times they have said they are available, but may be over and above their minimum hours (security of hours). Employees don't have to work more than their minimum hours (security of hours) figure.*
- *It is correct that employees don't have fixed shifts, in the sense that they don't work the same times and days every week. However, we will often try to fit crew into similar patterns of work each week."*

The claim for both plaintiffs was worded by the Court as a Dispute to determine whether or not the individual employment agreements contained an availability provision, and if so whether or not the provision was in breach of the Act, at least in part because it did not provide for compensation.

The plaintiffs claimed that:

". . . the wording in the offer, in combination with the standard terms, means that the employee is required to work the hours rostered in addition to the initial minimum hours referred to as "security of hours" in the agreement, or "guaranteed hours of work" as specified in s 67D. [They] submitted that "requested" in the standard terms means contractually required. . . . [and that] these interpretations are consistent with the overall tenor of the rostering scheme adopted by McDonald's and the franchisees to force workers to take on employment beyond guaranteed hours. This . . . was to suit the employers' requirements of availability without making payment to the employees for their requirements."

They submitted that the system imposed pressure or compulsion on employees to work both the guaranteed hours and the extra rostered hours. They argued that the rostering regime provided the employer with disproportionate flexibility and less risk than the employee.

Ultimately the Court rejected these views:

"The provisions of both the letter of offer of employment ("you will be rostered according to your availability") and the Work Scheduling Clause ("employees will be rostered according to their availability"), emphasised that employees could indicate they would not be available; and as the evidence which has been presented makes clear, this is in fact what happened."

"We would be inclined to agree with that submission of [the plaintiff] as thus giving rise to an availability provision under the Act, if this were a case where the employees were simply unilaterally provided with the required hours of availability and required to work them beyond the agreed guaranteed hours. As we have found, that is not the case both from the evidence we have heard and our analysis of the correct interpretation of the contractual provisions."

The Court held that:

"The decision to be made in this case is that which counsel primarily focussed upon in their submissions. It is whether Ms Doran and Mr Fraser were compelled to be available for the hours included in the periodic rosters beyond the guaranteed hours. As a matter of detail, the focus was on the words "reissue your schedule at our discretion" contained in the clause of the letter of offer."

"The oral evidence of the various witnesses becomes relevant to this point because it shows that in fact shifts referred to in Ms Doran and Mr Fraser's individual employment agreements were to be negotiated under a genuine consensus process. There was no single example of compulsion. The word "requested" in the work scheduling provisions meant what it said: employees could be asked, but not compelled to be available for the hours rostered beyond the guaranteed or "security of hours". Otherwise, the word used would be "required"."

The Court did not accept the further argument that the contracts provided for low hours and high availability:

"We do not accept that such a "mischief" exists in this case. Here, the prospect of wide availability with the possibility of employees being able to arrange substitutes to work their shifts introduced flexibility for them. The evidence establishes that many of the employees are students or transitory workers who may also be working in alternative employment. These arrangements were as much to their advantage as they were to the employers. Accordingly, there was no disproportionate advantage to the employers as Mr Cranney has submitted was the case. Nor, as we stated earlier, do we consider there was an element of compulsion arising from the method of quarterly rostering of hours adopted by the defendants.

The arrangements which applied to Ms Doran and Mr Fraser may be summarised as follows. McDonald's and its franchisees operate restaurants where peaks and troughs in demand occur, as is well known. They employ a large number of workers in the restaurants, the majority of whom are likely to be young and transitory. In order to maintain flexibility in the way it rosters employees for the purposes of maximising profit by reducing wage overheads, it introduced a system which it insists is in compliance with the statutory regime. This is not a case where the employer laid down mandatory hours of availability unilaterally, but rather where it requested potential employees to indicate in advance when they would be available to accept rostered hours. Within those periods of availability indicated by the employees rather than mandated by the employer, McDonald's and the franchisees then establish a roster for the employees which includes periods of guaranteed hours as required, but also nominates additional hours within the periods of pre-indicated availability with the employees having the right to reject the additional hours if they wish. A reasonably lengthy notice period is required if the additional hours are to be rejected. That is not unreasonable in view of the fact that the employer (if the extra hours are rejected) needs to arrange employees in substitution to perform the work."

The Court therefore reached the decision that the agreements did not have an availability provision and, moreover that they did not need one. McDonalds and other similar industries were the focus of the 2016 '*zero hours'* legislation, and for that reason they have obviously decided on an elaborate and thorough way to ensure compliance with the legislation. In the end the issue came down to the question of whether or not staff were required or requested to do additional hours.

All employers, whether or not they use rostering systems to cover work, need to understand their obligations under this legislation and ensure that their contracts meet these requirements.

Where employees are required to work additional hours, some form of availability provision and compensation will need to be present in the employment agreement.

Are your Employment Agreements Compliant?

The amendments to the Employment Relations Act, introduced by the Employment Standards legislation may require changes to a number of provisions in existing individual employment agreements, including:

- Hours of Work
- Overtime
- Salaried Payments
- Conflict of Interest; and
- Deductions from Remuneration provisions.

For existing employees **1 April 2017**, was the deadline for ensuring that your individual employment agreements comply with the new legislation. The team at MGZ are available to undertake a review of your employment agreements to ensure compliance.