



## Zero Hours Contracts

It appears that we will soon receive some clarification from the Employment Court concerning the application of section 67D of the Employment Relations Act, which is the provision introduced by the amendments made to the Act in April 2016 in relation to “zero hours contracts”.

The Employment Relations Authority in **Fraser v. McDonald’s Restaurants (New Zealand) Limited** have granted an application to have a matter concerning the interpretation of s 67D removed to the Employment Court. In the application Mr Fraser (the employee) alleges he has entered into an individual employment agreement on 31 August 2016 which included an “agreed availability” provision.

The provision concerned required payment of reasonable compensation for the employee making himself available to work, however the individual employment agreement did not expressly provide what hourly rate or other compensation he would be paid for making himself “available” in accordance with that provision.

Mr Fraser has claimed that the “availability” provision in the individual employment agreement does not comply with the requirements of s 67D of the Act. He has also claimed that he has been unjustifiably disadvantaged (also in accordance with the changes introduced by the 1 April 2016 amendments) by this non-compliance. Mr Fraser has sought orders requiring McDonalds to comply with the Act and to reimburse him a sum equal to an availability allowance of \$5 for every hour of availability.

McDonalds have however denied that s 67D of the Act is applicable to Mr Fraser because he is a member of the Unite Union and consequently is bound by the provisions of the Collective Agreement entered into between McDonalds and Unite which was not due to expire until 31 March 2017.

This matter will hopefully provide the Employment Court with an opportunity to clarify the requirements of the Employment Relations Act concerning availability provisions. We will keenly await the outcome of this decision given the potential application of this determination to many of your employment agreements. We will report on the outcome as soon as it is available.

## Payment for Rest Breaks

The Court of Appeal has recently delivered its judgment in **Lean Meats Oamaru Limited v. NZ Meat Workers & Related Trades Union Inc** concerning a dispute over the meaning of the phrase “paid rest breaks” as specified in the Employment Relations Act. Section 69ZD provides:

**“69ZD Employee’s entitlement to rest breaks and meal breaks**

- (1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that—
- (a) provide the employee with a reasonable opportunity, during the employee’s work period, for rest, refreshment, and attention to personal matters; and
  - (b) are appropriate for the duration of the employee’s work period.”

The provision in dispute concerned a clause contained in a Collective Agreement (which the Union never signed) which provided:

“8. REST PERIODS AND MEAL BREAKS

- a. Employees will be allowed three breaks during any one day, two fifteen minute breaks and a half hour lunch break. The timing of the breaks shall be scheduled to suit operational needs.
- b. A daily recovery payment of \$7.00 will be paid to cover the two ten minute breaks. If a short day occurs and there has only been one break taken the full payment of \$7.00 will be paid.
- c. On Saturday processing only one break will be paid.”

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## 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**.

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The Union claimed that this provision did not comply with s 69ZD of the Act because the payment provided for paid rest breaks was significantly less than the employee's hourly rate. The Employment Court agreed with the Union and determined that the section required rest break to be paid "at the same rate for which the employee would be paid to work".

Lean Meats challenged that finding claiming that the legislation permits an employer to pay different rates for different types of work and that it is permissible to include different rates in Collective Agreements. Further Lean Meats argued that it was not bound to pay rest breaks at the current work rate and that it was open for the parties to agree to a special rate.

The Court of Appeal reviewed the provisions in the Employment Relations Act providing for meal breaks and noted that between March 2013 until 5 March 2015 there was a prescriptive provision which provided for breaks to be taken at specific times (between two and four hours – one ten minute 'paid' rest break; between four and six hours – one ten minute 'paid' rest break and one thirty minute break; between six and eight hours – two 'paid' ten minute rest breaks.) The Court of Appeal recognised that these provisions were replaced with more flexible requirements which came into force on 6 March 2015 as set out above.

The Court of Appeal noted that despite the difference between the legislative provisions the Act at all relevant time provided for "paid rest breaks". In reaching a determination on this the Court of Appeal noted:

*"[12] We turn first to consider whether there is a clear meaning for the words of s 69ZD. The text of s 69ZD indicates nothing more than a payment being made for the 10-minute rest break. The word "paid" is not qualified or explained. Theoretically a payment of one cent could meet the requirement as there would be a sum "paid". Obviously that is not the intended meaning. On the other hand the section concerns the "employee's work period". The entitlement for a "paid rest break" arises when an employee has been working for more than a certain period of time. Given that the required "break" is from the employee's "work" and it is to be "paid", a natural inference is that what is to be paid for the break is that which is being paid for the work at the time. The worker is paid through the break as if it had not been taken.*

*[13] Mr Quigg for Lean Meats resists such an interpretation. As the submissions developed before us, he submitted that "paid" could be seen as meaning "paid at the amount agreed between the parties". He argued this construction would be consistent with the principle of freedom of contract. He also pointed to there being a detailed formula for payment of employment relations education leave at s 79 of the ERA and also descriptive formulas in the Holidays Act 2003.[15] So Mr Quigg submits Parliament has chosen not to prescribe any rate in s 69ZD, leaving it open for parties to agree on an appropriate rate.*

*[14] The meaning of the text must always be cross-checked against the purpose, and it is necessary to consider the conflicting interpretations against the wider context of the ERA. Before s 69ZD was enacted the position was that employees had no statutory right to rest breaks at all, and certainly no right to be paid for them. The explanatory note that accompanied the Bill that led to the enactment of s 69ZD stated:*

*The objective of these amendments is to create minimum standards for a modern workforce in respect of ... the provision of rest and meal breaks. Further, these amendments support government policy concerning the choices of employees, particularly regarding their work-life balance and caring responsibilities.*

*[15] The purpose of creating a statutory requirement for rest breaks was considered by this Court in Jetstar Airways Ltd v Greenslade.[18] It was stated:*

*... pt 6D of the ERA is concerned solely with requirements for rest and meal breaks for employees during work periods as defined. It creates specific entitlements for employees where none existed before under the ERA. It applies to all employees irrespective of who their employers may be or the industries in which they may be employed.*

*[16] As the Court noted, the purpose of the new minimum standards for rest and meal breaks was to benefit employees by providing for a better work-life balance. Parliament's intention was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during work periods. Parties are not permitted to contract out of the entitlement.*

*[17] Employees may not benefit if employers have an unrestricted choice of what rate they will pay for rest breaks. If employers pay employees less than the amount they would otherwise be paid for the break period, employees will lose money, and may choose to take no break at all (there is no requirement for employees to take their rest breaks). If employees do not take their rest breaks, the purpose of improving their work-life balance is defeated. The purpose of this part of the Act is only met if employees are not penalised for taking a break."*

The Court of Appeal concluded that the Employment Court did not err in its original finding and determined that "The relevant provisions of pt 6D of the Employment Relations Act required rest breaks to be paid at the same rate for which the employee would be paid to work".

It is prudent to note that this case deals with paid rest breaks; there is no course no legislative obligation to pay for meal breaks.