IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 238
3085492

	BETWEEN	RAIL AND MARITIME TRANSPORT UNION INCORPORATED Applicant
	AND	NORTH TUGZ LIMITED Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Ben Thompson, counsel for the Applicant Ethelred Chey, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions and Further Information Received:	13 February 2020 from the Applicant and the Respondent 28 February 2020 from the Applicant 13 March 2020 from the Respondent 20 March 2020 from the Applicant 5 June 2020 from the Respondent 10 June 2020 from the Applicant	
Date of Determination:	19 June 2020	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties seek a determination from the Authority about whether clauses 8 and 9 of the North Tugz Limited (North Tugz) and the Rail and Maritime Transport Union (RMTU) Collective Agreement dated 01 July 2018 – 30 June 2019 (the Collective Agreement) satisfied the availability provision requirements in s 67D of the Employment Relations Act 2000 (the Act).

[2] The main difference between the parties is that North Tugz did not agree with RMTU that s 67D(2) of the Act limited the inclusion of availability provisions to agreements that specified at least some guaranteed hours that were to be undertaken on specified days and times.

[3] The RMTU represents transport workers in all aspects of the transport industry, rail, road, and port. It has fifteen members who are employed by North Tugz, which provides towage and pilotage services to customers in the Whangarei harbour.

[4] The parties are currently engaged in collective bargaining to replace the most recent Collective Agreement between them which expired on 1 July 2019, but which continues in force in accordance with s 53 of the Act. Bargaining was initiated by North Tugz on 23 May 2019 and is continuing.

Relevant clauses in the Collective Agreement

[5] The central issue between the parties is the way the Collective Agreement dealt with the allocation of work to employees. Work allocation is addressed in clauses 8 and 9 of the Collective Agreement, the combined effect of which can be briefly summarised as follows:

(a) Clause 8.1 states that North Tugz " *... will guarantee a minimum of 1300 hours per 12-month period ... for permanent full-time employees*";

(b) Clause 8.2 states that North Tugz "*... will guarantee full payment of minimum guaranteed hours at the end of each financial year if less than the minimum guaranteed hours have been made available ...";*

(c) Employees' hours of work are governed by the movements of vessels so could occur at any time over a 24-hour period, 365 days per year. The demands of the maritime industry required work to be undertaken on a 24/7 basis, as determined by North Tugz (clause 8.4);

(d) On each Wednesday North Tugz provided its employees with an approximation of the shipping expected for the following week (via the weekly shipping schedule – clause 9.1). North Tugz endeavoured to give employees at least eight hours' notice of an engagement, but there was no penalty to North Tugz if it gave short notice of work availability (clause 8.5);

(e) The actual start time for each engagement was advised to employees in advance on advice received from North Tugz. The start time may be brought forward or delayed at no penalty to North Tugz (clause 8.8);

(f) The employees' hourly rate recognised that employees could be called to work at any time over a 24-hour period, 365 days a year, including statutory public holidays (clause 8.9);

(g) Employees were paid a minimum of five hours at the specified hourly rate for engagements involving ship movements (e.g. bunkering and towing). Employees were paid a minimum of three hours at the specified hourly rate for engagements not involving ship movements (clause 8.7). The minimum number of hours applied even if the employee has worked less than the minimum number of hours;

(h) Employees were required to be contactable at all times. All employees absent from the Whangarei area or unavailable to work had to notify North Tugz of their absence. The marine employees were expected to remain within one hour of Marsden Point when a vessel serviced by North Tugz was in port, unless prior arrangements had been made with North Tugz (clause 9.2);

(i) Failure to accept any engagement offered without reasonable excuse could amount to serious misconduct justifying dismissal (clause 26.1(m)).

The availabilty provision

[6] The parties agreed that clauses 8 and 9 of the Collective Agreement constituted an "*availability provision*" for the purpose of s 67D(1) of the Act.

[7] Under s 67D(2) of the Act availability provisions may only be used where:

(a) The employment agreement specified agreed hours of work, with guaranteed hours of work being included among those agreed hours; and

(b) The availability provision related to a period for which the employee was required to be available that was in addition to those guaranteed hours of work.

[8] Although the parties have continued negotiating regarding proposed work cycle clauses for their new Collective Agreement, they have been unable to reach agreement because they each have a different view of what s 67D(2) of the Act requires.

[9] The parties have agreed that there would continue to be an element of notification of engagements (the work assignments defined in clause 4) within each of their proposed work allocation systems. However, the terms of such notification have not yet been able to be agreed to by the parties because of their differing views on what s 67D(2) required them to include in the Collective Agreement.

The parties positions

[10] The RMTU claimed that the current work allocation system in the Collective Agreement did not satisfy the s 67D(2) requirements in the Act relating to the use of an availability provision because it did not contain "*guaranteed hours of work*" and it did not specify pre-arranged days of work or times of work.

[11] RMTU alternatively submitted that even if the Collective Agreement did contain "*guaranteed hours of work*" then the availability provision related to all (emphasis added) work hours allocated and not just those hours that were in addition to any guaranteed hours of work, so it did not meet the requirements of s 67D(2)(b) of the Act.

[12] North Tugz submitted that "*agreed hours"* of work in s 67D(2)(a) of the Act meant the "*hours of work*", as defined in s 67C of the Act, that had been agreed to by the parties. North Tugz's position was therefore that the term "*guaranteed hours of work*" used in s 67D of the Act could simply refer to the quantity of guaranteed hours of work, so there was no requirement to include any guaranteed days or times of work in the Collective Agreement in order to comply with s 67D(2)(a) of the Act.

[13] North Tugz's position was that availability provisions in the Collective Agreement therefore complied with s 67D(2) of the Act, because there was no legislative requirement to include "*the days of the week on which work is to be performed*" (s 67C(2)(b)) or "*the start and finish times of work*" (s 67C(2)(c)) in the Collective Agreement, so the failure to do so could not be in breach of s 67D of the Act.

[14] North Tugz submitted that because the Collective Agreement specified the agreed total number of guaranteed hours (namely 1300 hours per 12 month period), then it had complied with the availability provision requirements of s 67D of the Act.

[15] The parties agreed that the current work allocation arrangements in the Collective Agreement and the new work allocation arrangements that each party had proposed during their ongoing collective bargaining process featured an "*availability provision*". That is, under both the current and proposed collective agreements' work allocation arrangements:

(a) Employees' performance of work was conditional on North Tugz making work available to them; and

(b) Employees were required to be available to accept any work that North Tugz made available to them.

[16] The RMTU's view is that s 67D(2) of the Act limits inclusion of availability provisions to agreements which specify (at least some) promised hours to be undertaken on specified days and times, which are arranged and notified to the employee in advance. RMTU said that these were the "*guaranteed hours of work*" referred to in s 67D(2) of the Act. Any availability provision could only relate to periods in addition to those guaranteed hours of work.

[17] RMTU said that because the current and proposed work allocation arrangements involving these parties featured no pre-arranged shifts – with a hundred percent of hours being subject to an availability provision - such an arrangement was contrary to the requirements of s 67D(2) in the Act.

[18] North Tugz said that s 67D(2) of the Act did not preclude the parties from agreeing to flexible working arrangements, which is what clauses 8 and 9 in the Collective Agreement did.

[19] The working arrangements recorded in the Collective Agreement involved a work allocation cycle advised to employees by roster, where employees were required to work on the days that they were rostered 'on' and during the start and finish times to be determined by North Tugz based on ship movements.

[20] North Tugz said that the flexibility specified in the Collective Agreement regarding the actual days and times employee could be required to work did not preclude the inclusion of an availability provision, because it had guaranteed 1300 hours of work for each employee during each financial year.

Relevant legislation

[21] Section 67C in the Act deals with agreed hours of work. It states:

67C Agreed hours of work

(1) Hours of work agreed by an employer and employee must be specified as follows:

(a) in the case of an employee covered by a collective agreement,—

(i) in the collective agreement; and

(ii) if section 61 applies, in the employee's additional terms and conditions of employment included under that section; or

(b) In the case of an employee covered by an individual employment agreement, in the employee's individual employment agreement.

(2) In subsection (1), **hours of work** includes 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:

(d) any flexibility in the matters referred to in paragraph (b) or (c).

[22] Section 67D in the Act addresses availability provisions. It states:

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.

[23] Section 67E of the Act sets out the circumstances in which an employee may refuse to perform work. It states:

> **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.

Issues

[24] The issues to be determined by the Authority are:

(a) Did the availability provisions in clauses 8 and 9 of the Collective Agreement satisfy the requirements of s 67D of the Act?

(b) Did s 67D(2) in the Act require the parties to include pre-agreed days and/or times of work in the availability provision in the Collective Agreement?

Did the availability provisions in clauses 8 and 9 of the Collective Agreement satisfy the requirements of s 67D in the Act?

[25] Hours of work is addressed in clause 8 of the Collective Agreement. Clause 8.1 states:

> The company will guarantee a minimum of 1300 hours per 12-month period from 01 July to 30 June (financial year) for permanent full-time employees.

[26] Clause 8.2 states:

> The company will guarantee full payment of minimum guaranteed hours at the end of each financial year if less than the minimum guaranteed hours has been made available by the company (pro-rated) if employment commences/ends part way through a year.

[27] Clause 8.4 states:

> The hours of work will be governed by the movement of vessels and could occur at any time over a 24-hour period, 365 days per year. The demands of the marine industry will require work to be undertaken on a 24/7 day a week basis as determined by the company.

[28] Clause 8.9 states:

> The hourly rate specified in the employee's individual letter of employment acknowledge the fact that employees may be called on to work at any time over a 24-hour period, 365 days a year (including statutory holidays).

[29] Clause 9 deals with "*availability*". Clause 9.1 states:

> The company will give to employees an approximation of what shipping is expected in the following week. This will be via the weekly shipping schedule provided to employees on Wednesday of each week.

[30] Clause 9.2 states:

> Employees are expected to be contactable at all times by home telephone, cell phone or pager. The company will provide either a cell phone or pager to enable employees to be contacted when away from home. All employees absent from the Whangarei area or unavailable for work are expected to notify the company of absence. Employees required and available for work are expected to remain within one hour of Marsden Point when a vessel serviced by the company is in port, unless prior arrangements are agreed to with the company,.

Does the Collective Agreement contain "guaranteed hours of work"?

[31] The term "*guaranteed hours of work*" is not defined in the Act.

[32] The RMTU submitted that "*guaranteed hours of work*" was a relatively narrow concept which sat within the broader concept of "*agreed hours"* of work, as used in s 67D(2)(a) of the Act.

[33] Section 67D(2)(b) of the Act says that an availability provision may only "*relate to a period for which an employee is required to be available* ***that is in addition*** *to those guaranteed hours of work*" (emphasis added).

[34] RMTU says that means that an employee's "*guaranteed hours of work*" cannot be subject to any availability provision. That is, an employee's performance of those particular hours of work (guaranteed hours) must not be dependent on the employer making work available.

[35] RMTU also submitted that performance of any hours of work that are **in addition to** (emphasis added) those guaranteed hours of work may be subject to an availability provision, and therefore can be dependent on the employer making work available.

[36] RMTU therefore said that s 67D(2)(b) of the Act required an employment agreement to specify two 'classes' of hours, for the purposes of allocating work to employees. The first 'class' of hours – the "*guaranteed hours of work*" – cannot be subject to an availability provision, so guaranteed hours of work must refer to promised hours that are to be allocated in another way, for example, by pre-arranged shifts.

[37] Clause 4 of the Collective Agreement dealt with "*engagements*" which is the assignment of work by North Tugz to an employee, including but not limited to vessel piloting, vessel movements, plant maintenance, administration, standby as a result of vehicle immobilisation, vessel towing, bunkering and/or adverse weather and training.

[38] North Tugz said that it had met its obligations under clause 8.1 of the Collective Agreement (to provide a minimum number of 1300 hours work per financial year for full time employees) by providing marine employees with a specified number of hours of "*engagements*".

[39] RMTU disputed that. RMTU said that notwithstanding the wording of clause 8.1 in the Collective Agreement there was no real guarantee to employees of 1300 hours' actual work per financial year.

[40] Clause 8.2 of the Collective Agreement envisaged that North Tugz may not have offered an employee 1300 hours of actual work in a financial year. RMTU's position therefore is that the contractual guarantee in clause 8.2 related to pay, as opposed to an offer of, or commitment to provide, 1300 guaranteed hours of work.

[41] Alternatively, RMTU said that even if there was a guarantee of 1300 hours of work being made available to an employee each financial year, there was still the fundamental problem that all of the hours of work offered were all subject to an availability provision.

[42] RMTU therefore said that clauses 8.1 and 8.2 of the Collective Agreement could not satisfy s 67D(2) of the Act because s 67D(2)(b) of the Act required the availability provision to relate to a period that was "*in addition to those guaranteed hours of work*." The Authority agrees with RMTU's submissions.

[43] Section 67D(2) permitted the use of an availability provision in the following limited circumstances, namely if:

(a) It was recorded in an employment agreement (s 67D(2)(a)); and

(b) The employment agreement specified agreed hours of work (s 67D(2)(a)); and

(c) The agreed hours of work included some guaranteed hours of work (s 67D(2)(a); and

(d) The period of availability was additional to the guaranteed hours of work (s 67D(2)(b)).

[44] RMTU correctly identified that s 67D(2) involves two 'classes' of hours of work, those that are agreed and those that are guaranteed.

[45] The words "*in additon to*" in s 67D(2)(b) of the Act have the same meaning as 'as well as', 'additionally', 'also', 'on top of' or 'over and above' which are all concepts that denote something extra or 'more than'. Therefore within the context of an availability provision, the guaranteed hours of work must be a subset of the agreed hours, because s 67D(2)(b) of the Act

requires the availability provision to relate to a period that is over and above the guaranteed hours.

[46] That finding means the parties must have a way of identifying what hours of work are the guaranteed hours of work (so the employee has certainty for at least some of their hours of work) and what hours are agreed hours of work that are the subject of the employees' availability (subject to 'on call' work), which the employer is under no obligation to offer but if offered then the employee must make themselves available to perform the work.

[47] The Collective Agreement does not address that difference because all hours worked by employees are subject to the availability provision. There is no distinction, so there is no way of being able to identify what hours are guaranteed and what hours are subject to agreed 'on call' work allocation.

[48] The Collective Agreement also fails to "*specify agreed hours of work*" as required by s 67D(2)(a) of the Act, because the employee can be required to work any hours 24/7, during all 365 days of the year. Because there is no limitation on the availability there is no way for an employee to know what days/times/hours they may be called by North Tugz to work and what hours they do not need to make themselves available.

[49] Clause 8.1 of the Collective Agreement is not a real guarantee that the employees will actually work at least 1300 hours each financial year. The parties have anticipated that less than 1300 hours work could be offered to an employee in a financial year, in which case the employee is entitled to have their wages topped up (ie compensated to the equivalent of 1300 hours worked) in certain circumstances.

[50] Clause 8.2 of the Collective Agreement guaranteed a minimum payment to employees each financial year, if North Tugz failed to meet its clause 8.1 obligation to make at least 1300 hours of work available to the employees each financial year.

[51] The Collective Agreement therefore does not contain a real guarantee of 1300 hours of actual work. It contains a guarantee of minimum income per financial year rather than guaranteed hours of work, because the payment is made only when the employee was available to work but had not been offered at least 1300 hours of work. It is therefore a minimum earnings clause (subject to certain circumstances being met), not a guaranteed hours of work clause in terms of s 67D(2) of the Act.

[52] North Tugz rightly pointed out that clause 8.2 did not provide a guaranteed payment per se under the Collective Agreement, because there was no payment obligation if it had provided sufficient work (meaning engagements as defined in clause 4 of the Collective Agreement) to an employee, but the employee failed to take up those engagements for whatever reason.

[53] If it offered 1300 hours work per financial year (even if the employee did not actually work that many hours) then North Tugz would have met its contractual obligation under clause 8.1 of the Collective Agreement, meaning no further payment would be due to an employee who had declined offers of work.

[54] The reference in clause 67D(2)(a) of the Act is that guaranteed hours of work must be included within the agreed hours of work, thereby suggesting that it is a subset, or at least separate, to the agreed hours of work. In this case the purported 1300 hours guarantee does not change the fact that every single hour worked by North Tugz employees is expressly subject to an availability provision.

[55] There is no category of hours of work that would enable the employees to have certainty on a particular day or shift or roster or week or month or pay period regarding their work hours. Because North Tugz employees must make themselves available to work 24/7, 365 days per year their entire employment is therefore subject to an availability provision.

[56] North Tugz's submissions that clause 8.1 and 8.2 together provided employees with "*guaranteed hours of work*" as specified in s 67D(2)(a) of the Act does not succeed.

[57] North Tugz has a contractual right under the current Collective Agreement to only engage marine employees when there was work available for them to do. Because the work availability is highly unpredictable and it is something that North Tugz cannot control, it was unable to guarantee that a minimum of 1300 hours work would actually be worked by any given employee in a financial year.

[58] However North Tugz can control the minimum payment that each employee will receive in a financial year, so that is what clause 8.2 of the Collective Agreement addresses.

[59] North Tugz's submission that the minimum payment equivalent of 1300 hours' work in a financial year was compensation for a breach of contract obligation is not accepted. Clause

8.2 of the Collective Agreement did not refer to compensation, nor did it establish that a failure to offer an employee 1300 hours work within a financial year would amount to a breach of contract. Quite the contrary.

[60] The wording of clause 8.2 in the Collective Agreement permitted the provision of less than 1300 hours work (in terms of offers of engagements to each employee) in recognition that North Tugz may not be able to meet the commitment in clause 8.1 of actually being able to offer each employee at least 1300 hours of actual work in any given financial year. Therefore, in such situations, there is a payment in lieu to be made instead of providing actual work, which is not the same thing as compensation for a breach of contract.

[61] If the provision of 1300 hours work was truly guaranteed there would not be any need for there to be any payment in lieu of the provision of actual work. North Tugz's claim that the 1300 hours referred to in clause 8.1 of the Collective Agreement fell outside the availability provision in clauses 8.4 and 9.2 of the Collective Agreement was not accepted.

[62] The 1300 hours were conditional on North Tugz making the work available and when that occurred the employees had to undertake the work North Tugz had allocated to them, regardless of when the work fell within a 24/7 365 days a year basis, unless the employee was on approved leave.

[63] Section 67D(2) of the Act does not permit 100 per cent of the hours of work to be subject to an availability provision in circumstances where there are no guaranteed hours of work.

[64] An employment agreement that contains an availability provision must therefore include at least some guaranteed hours of work. That could be done by providing an agreed roster which identifies the shifts, days, or hours of work that an employee is guaranteed to be able to work, to give the employee certainty.

[65] For there to be guaranteed hours of work as required by s 67D(2)(a) of the Act, the parties must first have agreed on what the actual hours of work will be. That has not occurred in this particular case.

[66] The Collective Agreement does not specify the days of the week, start and finish times, or any flexibility in those arrangements. The Collective Agreement requires the employee to

be available 24/7, 365 days a year, including statutory holidays. The collective agreement does not give employees the right (or guarantee) to work on particular days, shifts or hours of work as all of the hours of work that an employee is required to work are set exclusively by North Tugz.

[67] The reference to agreed hours of work being in addition to guaranteed hours in s 67D(2)(b) of the Act has to mean that there must be some agreed hours of work that requires the employee to be available in addition to (outside or on top of) their guaranteed hours of work.

[68] Ascertaining the meaning of s 67D(2) of the Act from its text and in light of its purpose, establishes that when there is an availability provision in an employment agreement there must also be at least some promised hours of work that are allocated to an employee in advance that are "*guaranteed hours of work*", meaning that the work is not subject to the employer's discretionary work allocation.

Did s 67D(2) in the Act require the parties to include pre-agreed days and/or times of work in the availability provision in the Collective Agreement?

[69] North Tugz submitted that the s 5 definition in the Act of "*agreed hours of work*" which meant "*the hours of work specified in accordance with s 67C(1)"* of the Act refers to the same concept as the definition of "*hours of work*" in s 67C(2) of the Act.

[70] Section 67C was inserted on 1 April 2016 by the Employment Relations Amendment Act 2016 (Amendment Act).

[71] Section 67C(1) of the Act requires agreed hours of work to be specified. Section 67C(2) defines "*hours of work*" as including any or all of the following:

(a) The number of guaranteed hours of work:

(b) The days of the week on which work is performed:

(c) The start and finish times of work:

(d) Any flexibility in the matters referred to in paragraph (b) or (c).

[72] North Tugz submitted that the reference of "*any or all of the following*" in s 67C(2) of the Act meant that it was not mandatory for parties to reach agreement on one or more of the

four components in s 67C(2) of the Act but that if "*any or all of*" the four components had been agreed to by the parties, then they needed to be specified in the employment agreement.

[73] That submission is not accepted.

[74] Section 67C(1) of the Act requires agreed hours of work to be recorded in an employment agreement. However s 67C(2) of the Act gives the parties the option of different ways of recording the hours of work they have agreed.

[75] Guaranteed hours of work may be the same as agreed hours of work or they may be a subset of the agreed hours of work.

[76] In this case the Collective Agreement does not meet any of the options in s 67C(2) of the Act regarding how the agreed hours of work may be recorded. The Collective Agreement does not specify the number of guaranteed hours of work, or the days of the week on which the work is to be performed, or the start and finish times of work, or any flexibility in terms of those matters.

[77] There are no "*agreed hours of work*" recorded in the Collective Agreement because the employees have to make themselves available 24/7, 365 days a year to accept all work North Tugz offers them.

[78] Under s 67D(2)(a) of the Act availability provisions can only be included in employment agreements that specify "*agreed hours of work*" and that include "*guaranteed hours of work*" among those agreed hours.

[79] The Collective Agreement must therefore enable those two classes of hours of work to be identifiable, although the quantum of each (agreed and guaranteed) may be the same.

[80] The s 67D availability provision legislation was implemented by the government to address inequalities created by an increasingly flexible employment models. Inherent in that purpose was recognition that:

(a) Agreements allowing employers to unilaterally dictate work hours beyond an employee's 'usual hours' materially constrained employees' ability to plan their life away from work;

(b) Whilst agreements requiring employees to hold themselves available benefit employers, the employees cannot engage in other activities that would prevent them from being at their employer's beck and call; and

(c) An employee has a right to a personal life free from unnecessary incursion by their employer.

[81] Limiting availability periods to agreements that specify at least some pre-arranged (agreed) hours of work fits with the purpose of the suite of legislative changes that were introduced in 2016 by the Amendment Act. It means that:

(a) Employees will have some certainty as to when they will be working, and therefore will retain some ability to plan and enjoy their personal lives; and

(b) Employers would be unable – simply by paying compensation – to make all of an employee's hours of work subject to an availability provision.

[82] When interpreting the requirements of s 67D the Authority must bear these purposes in mind.

[83] Section 67D of the Act limits the circumstances in which employees can be required to work outside of their guaranteed hours of work. It therefore follows that an employee must have a baseline number of guaranteed hours of work before an availability provision can be utilised in relation to additional hours that an employee may be required to make themselves available to work.

[84] The full Employment Court in *Postal Workers Union of Aotearoa Inc. v New Zealand Post Limited* involved a case in which the employees' "*standard hour*s" of work were 37 hours and 40 minutes per week. These were allocated by pre-arranged, rostered shifts that set out days, start and finish times of work.[1]

[85] The Employment Court held that these "*standard hours*" (as per the roster) constituted "*guaranteed hours of work*" because NZ Post at a minimum had to pay for them. The requirement to work overtime when offered by NZ Post constituted an availability provision because it was in addition to the standard hours of work, which were defined in that collective

[1] [2019] NZEmpC 47.

agreement as the minimum number of hours per week that the parties had agreed would be worked by employees.

[86] There was flexibility in the *Postal Workers Union* case regarding the way the standard (guaranteed) hours and non-voluntary additional hours (overtime) would be arranged, that was achieved by the use of rosters and rostered duties.

[87] The details of the actual hours to be worked in terms of the days, start and finish times, and number of days per week were contained in the rosters, not in that collective agreement. A separate rate was paid for overtime (additional hours) which could not be predicted in advance, but was instead allocated on an as required basis.

[88] The Court in *Postal Workers Union* recognised that s 67D(2)(d) of the Act allowed flexibility regarding the days and/or start and finish times of "*agreed hours of work*" so the collective agreement in that case did not have to record a particular figure in terms of numbers of hours for any necessary additional work.

[89] North Tugz submitted that the phrase "*agreed hours of work*" in s 67D(2) of the Act simply meant "*hours of work*" as defined in s 67C of the Act that had been agreed to by the parties. North Tugz's position is that the phrase "*guaranteed hours of work*" can refer to the quantity (number) of guaranteed hours of work and there is no requirement or condition to include any guaranteed days of work or any guaranteed start/finish times of work in the Collective Agreement.

[90] The Authority agrees with those submissions.

[91] Section 67C does not define *"guaranteed hours of work*" either for the purposes of s 67D, or for any other purpose. Rather, the phrase "*agreed hours of work*" is defined in s 5 of the Act. That in turn links to the concept of "*hours of work*", as defined by s 67C of the Act. They are, however, different concepts.

[92] Section 67C of the Act requires employment agreements to specify the "*hours of work*" that have been agreed to by the parties. Section 67C(2) of the Act sets out four different ways that the requirements of s 67C(1) of the Act can be met, which requires at least one or more of the following:

(a) Number of guaranteed hours of work;

(b) Days of the week on which work is to be performed;

(c) Start and finish times of work; and

(d) Any flexibility in the matters referred to in paragraph (b) or (c), i.e. relating to the start and finish times of work or the days of the week on which work is to be performed.

[93] Section 67C(2)(d) of the Act would involve a rostering situation or shift work where the days of the week to be worked and/or the start and/or finish times may change with the needs of the business. The flexibility in subsection (d) does not however relate to the number of guaranteed hours of work.

[94] The legislative purpose and intentions of the Amendment Act would not be met if the guaranteed hours of work requirement related to a financial year, as in this case. That does not provide any certainty to the employee and therefore does not assist them to manage their personal life and work life in a way that is more balanced than someone who is required to be on 24/7 call for 365 days of the year.

[95] Section 67D(2) of the Act is therefore interpreted to refer to a defined period of time, such as a roster, set shifts or a pay period. Interpreting s 67D9(2) of the Act in this way meets its underlying philospohical objectives, because it would enable employees to plan around working a specific number of hours in a narrowly defined period.

[96] North Tugz is correct in that only one of the elements in s 67C(2) of the Act needs to be met in order to comply with the agreed hours of work requirement in s 67C(1) of the Act. However, in this case the Collective Agreement did not meet any of the components of s 67C(2) of the Act, because there was no way to identify the "*agreed hours of work*".

[97] The point of requiring agreed hours of work to be recorded in an employment agreement is to provide certainty for the parties. The flexibility in s 67C(2)(d) of the Act enables parties to craft a solution that meets their needs, that may not involve identifying specific days of the week on which work is to be performed and/or the start and finish times of work in the employment agreement. Allocating work by way of rosters or shifts is an example of that flexibility.

[98] Although s 67C of the Act requires the Collective Agreement to record the agreed hours of work or the flexibility that relates to that, s 67C(2) does not require the number of guaranteed hours of work to be recorded in the employment agreement, unless it contains an availability provision. In which case there must be a way for the parties to identify guaranteed hours of work that fall within the agreed hours of work.[2]

[99] The concept and reference to "*guaranteed hours of work*" denotes security of hours for both parties. The employer has to provide these hours and the employee has to work those hours. It is this certainty of hours of work that enables an employee to better manage their work life balance.

[100] The Employment Court in the *Postal Workers Union* case recognised that there was nothing in s 67C(2)(a) of the Act that suggested that the quantum of each (agreed and guaranteed hours) could not be the same. The Court also recognised that there was no flexibility in respect of s 67C(2)(a) relating to the number of guaranteed hours and that the flexibility only arose regarding the day/times when the agreed "*hours of work*" are to be performed.

[101] The RMTU agreed that s 67C in itself did not require parties to agree any pre-arranged days of work and/or start/finish times of work. However RMTU pointed that s 67D of the Act is more prescriptive than s 67C in the Act in terms of work allocation arrangements, which did not mean that it was inconsistent with s 67C.

[102] RMTU's submission that the heightened prescription evident in s 67D in the Act reflected a specific legislative intent to more tightly regulate the circumstances in which employers could allocate mandatory work hours on an 'on-call' basis is accepted.

[103] The problem with the parties' Collective Agreement is that it did not contain any 'standard', normal, minimum or guaranteed hours of work that an employee could rely on working. It therefore contrasts with the fact situation in the *Postal Workers Union* case.

[104] It would be open to the parties to have agreed in the Collective Agreement that a specified number of guaranteed (or standard/normal/minimium) hours would be allocated to employees in each roster/shift/pay period.

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[2] See *Fraser re McDonald's Restaurants (New Zealand) Limited* [2017] NZEmpC 95.

[105] That would not have to include specified days of work and/or start and finish times of work because flexibility could be retained in respect of those matters (in accordance with s 67C(2)(d) in the Act), as long as there was some other mechanism (such as a pre-arranged roster or set shifts) that gave that certainty.

[106] As an example, an employment agreement that specified that an employee would be guaranteed work for;

(a) Two weekends every month, or three week days each week, or

(b) Based on a rotating shift pattern such as a week of night shifts, a week of early shifts and a week of day shifts each month; or

(c) Set shifts on a 4 on 2 off or a 3 on 2 off rotating shift pattern;

would comply with s 67D(2) in the Act. That would not require recording pre-agreed days and times of work regarding specific days and/or start and finish times to be recorded in the Collective Agreement if there was another mechanism such as a roster or shift pattern that enabled that information to be known.

[107] The Collective Agreement could also specify that the days and start/finish times of the guaranteed hours would be advised by pre-arranged roster that could then be crafted to meet the varying workflows. That arrangement would enable an employee to know they will (for example) be working two weekends in a month with the actual days and start and finish times to be advised to them by roster. The parties are free to negotiate the terms and conditions of availability, provided that at least some of the hours of work can be identifiable as guaranteed hours.

[108] What is important in terms of s 67D(2) is that there are work periods whereby the employee knows that they will be guaranteed work instead of just being indefinitely ‘on call’.

[109] There is no legal requirement specified in s 67D of the Act for the parties to record in the Collective Agreement the specific days of work and/or any start or finish times of work on any particular day, because s 67C gives parties flexibility to deal with those matters in another way - such as by rosters/shifts which may vary work days and start/finish times from period to period.

[110] The Collective Agreement in this case does not provide a meaningful degree of advance notification of work, thereby depriving employees of the assurance that they will be engaged to work during certain periods (such as rotating shifts, set shifts or rosters) even if the actual days and/or start and/or finish times of work they are required to perform are subject to flexibility in accordance with operational requirements. All work is at North Tugz's sole discretion.

[111] The work allocation system in the Collective Agreement is therefore an example of the burden of unpredictable workflows being disproportionately borne by employees. The lack of advance notification or knowledge as to when they will be next required to work undermines their ability to plan or commit to other activities in their personal or family lives.

[112] While the extremely flexible method of work allocation set out in the Collective Agreement benefits North Tugz in terms of enabling it to meet its fluctuating business needs, this appears to have come at the expense of work life balance for its marine employees, who are required to be available twenty-four/seven for 365 days of the year. That is precisely the sort of situation that the Amendment Act intended to address.

[113] The purpose of s 67D in the Act is best served by requiring an employer that wishes to use an availability provision to:

(a) Provide a guaranteed minimum number of hours work, that can be allocated via a pre-arranged roster; and

(b) Pay reasonable compensation for employees holding themselves available to undertake work in relation to any additional hours, meaning those hours outside and above the guaranteed hours of work which they would be required to perform on an on-call basis in accordance with an availability provision.

Outcome

(a) The availability provision in the Collective Agreement is insufficient to satisfy the requirements of s 67D(2) of the Act.

(b) The work allocation arrangements in the Collective Agreement do not satisfy s 67D(2) in the Act, because one hundred percent of the work hours are subject to the contractual availability provision and it is not clear what compensation has been paid for that availability.

(c) Compliance with s 67D(2) of the Act requires the Collective Agreement to include agreed hours of work (in terms of s 67C) and to identify what part of the agreed hours are guaranteed hours of work, so it is clear what additional hours of work are subject to the availability provision.

(d) The Collective Agreement does not have to include days and times of work in order to meet the requirements of s 67D(2) in the Act because s 67C(d) in the Act gives the parties some flexibility over such details.

(e) That means the guaranteed hours of work referred to in s 67D(2) in the Act can be allocated via a pre-arranged roster, that may include days of work and/or start and/or finish times but which does not have to do so. While there can be flexibility regarding rostered allocation of work it must fall short of one hundred percent 'on-call' work allocation by identifying at least some hours within each roster that the employee will be guaranteed work.

Costs

[114] The parties are encouraged to resolve costs by agreement. If that is not possible then RMTU may file a costs memorandum within fourteen days of the date of this determination. North Tugz then has fourteen days within which to respond.

Rachel Larmer
Member of the Employment Relations Authority