

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 84
3074598

BETWEEN

UNITE UNION
INCORPORATED
Applicant

AND

HOYTS CINEMAS (NZ)
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Duncan Allan, counsel for the Applicant
Tim McGinn, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 8 November 2019 from both parties
9 December 2019 from the Applicant
9 December 2019 from the Respondent

Date of Determination: 25 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hoyts Cinemas (NZ) Limited (Hoyts) runs a number of cinemas throughout New Zealand. Unite Union Incorporated (Unite) represents members who work in the cinema industry.

[2] Hoyts and Unite have been parties to various collective agreements for a number of years. They are currently parties to a collective agreement dated 1 April 2018 that expires on 31 March 2020 (the collective agreement).

[3] The current collective agreement covers Cinema Workers, Kitchen Workers, Shift Assistants and Duty Managers who are provided with guaranteed hours of either 8, 16, 20, 24

or 30 hours per week, to be worked within days and times that have been nominated by the employee.

[4] Prior to 2015 only Duty Managers had guaranteed minimum hours of work each week. All other employees were not guaranteed minimum hours and were required to be available to be rostered to work on Friday nights, Saturday, Sunday and public holidays.

[5] The parties' 2015-2016 collective agreement introduced guaranteed hours of 30 per week for a limited number of employees who met certain conditions.

[6] The parties' 2016-2017 collective agreement was negotiated against the backdrop of the 2016 amendments to the Act (that introduced ss 67C-67H and) that went into effect on 1 April 2016. That resulted in cinema attendants being guaranteed a minimum of either 8, 16, 24 or 30 hours per week based on their work patterns leading up to ratification of the 2015-2016 collective agreement.

[7] During the 2015-2016 bargaining the parties agreed that instead of including an availability provision as contemplated by s 67D of the Act, additional hours over guaranteed minimum hours would be filled in the roster on a voluntary basis.

[8] Unite's members were therefore assigned guaranteed hours in one of four bands based on an assessment of the average hours each member had worked. New employees were guaranteed hours in one of the four bands.

[9] The parties' 2017-2018 collective agreement introduced a fifth band of minimum guaranteed hours of 20 per week.

[10] An additional clause (clause 14.13) was added to the 2017-2018 collective agreement that enabled Unite's members to move to a higher band of minimum guaranteed hours if they had consistently worked additional voluntary hours in line with the appropriate higher band, if the employee worked average hours within that higher band for six months.

[11] The 2017-2018 collective agreement was settled on the basis that the parties *“recognised that the hours of work clause has been radically altered due to legislative change and agreed to review and potentially vary this clause after six months of application or expiry of collective agreement whichever is sooner”*.

[12] During bargaining for the 2018-2020 collective agreement, the parties were unable to reach agreement on changes that would clarify the operation of the hours of work clause, insofar as it related to voluntary hours and the application of ss 67D-67F of the Act.

[13] The 2018-2020 collective agreement was therefore settled on the basis that the parties “*agreed to promptly work to resolve a variation of the hours of work clause affecting the rostering of voluntary hours*”.

[14] The material parts of the hours of work clauses, relating to this dispute, are clauses 14.4 and 14.5 of the collective agreement, namely:

14.4 At commencement of employment new employees shall state their availability for hours that the employer will rely upon to roster minimum guaranteed hours and any additional voluntary hours to be worked. An employee may vary or withdraw availability no later than the Friday 5pm before the roster is posted the following Monday. Employees are encouraged to volunteer additional availability for work during the school holidays.

NOTE availability should not be varied to allow for “one off” absences when the availability is otherwise intended to remain in place. In one off cases the employee should either apply for leave or unpaid leave in which case the period of absence in question, as it affects hours that would otherwise have been rostered, will be counted as part of the guaranteed hours for the week in question.

14.5 Where an employee reduces their availability in accordance with clause 14.4 the employee acknowledges that the employer is no longer bound to roster minimum guaranteed hours, which will then be reduced in proportion to the reduction of availability, making allowance for impact of reduced availability on peak period availability. If original state of availability is restored then guaranteed hours will be adjusted accordingly.

[15] The parties advised the Authority that they had exhausted options for a mutually agreed outcome regarding the operation and application of their current hours of work clauses, so they asked the Authority to determine their dispute.

[16] Sections 67D of the Act governs the use of “*availability provisions*.” An availability provision consists of an employee’s work being conditional on the employer making work available to the employee, in circumstances where the employee is required to accept the work offered by the employer.

[17] The parties agreed that they did not intend for their collective agreement to contain an availability provision, as defined by s 67D of the Act.

[18] The hours of work clause in the collective agreement does not meet the requirements of s 67D of the Act, because employees are not required to accept “*any work*” that Hoyts makes available to them, they are only required to work shifts that they are rostered to work that fall within the days/times the employee has advised Hoyts that they are available to work.

[19] Under s 67E of the Act an employee can refuse to perform work over their guaranteed hours if their employment agreement does not contain an availability provision that provides for reasonable compensation for making themselves available to work in accordance with the employer’s requirements.

[20] Unite claimed that s 67E of the Act permitted its members to decline to work any hours Hoyts had rostered them to work that were more than their minimum guaranteed hours of work.

[21] Because Hoyts’ rosters did not separately identify what shifts on each roster had been allocated to an employee as “guaranteed hours” and what had been allocated as additional “voluntary hours”, Unite believed its members could decline to work any of their rostered hours, at any time, including rejecting shifts after the rosters had been posted.

[22] Hoyts disputed that s 67E of the Act applied.

[23] Hoyts said s 67E did not override the specific contractual provisions, as recorded in clause 14 of the collective agreement, regarding the allocation of voluntary hours of work to employees.

[24] Hoyts said that the collective agreement set out a specified timeframe for an employee who wanted to work additional voluntary hours, over their guaranteed hours, to withdraw their offer or to refuse to work hours over their guaranteed hours in any given week.

Outcome

[25] Hoyts is correct that s 67E does not apply to this situation. This is because it is the employee who can unilaterally decide when they will and will not be available in any given week to accept work from Hoyts.

[26] This is not a situation where Hoyts is dictating the days and hours of work to an employee who must then accept any work they are offered. The contractual cut off time of 5pm

Fridays for an employee to indicate when they will be available to accept work in the upcoming week does not create an availability provision, as defined by s 67D of the Act.

[27] An employee is not required by Hoyts to be available for anything other than the employee's guaranteed minimum hours. Whether or not the employee wants to be allocated additional voluntary work, by way of rostered shifts that are over and above their guaranteed hours, is up to the employee's own discretion. They can make their own decision about that every week if need be.

[28] Employees are therefore free to change their availability every week if they choose to do so, provided they notify Hoyts of that by 5pm on Fridays. Hoyts is then contractually obligated to provide each employee with guaranteed hours that fall within the employee's nominated availability, regardless of the business needs (clause 14.10).

[29] If an employee wanted to preserve the availability period they agreed to (clause 14.1) when they commenced employment then they can do so by applying for leave to cover particular one off periods when they do not want to be available to be rostered to work (clause 14.11).

[30] Clause 14.11 of the collective agreement provides that minimum guaranteed hours included annual leave, sick leave and default or failure to work rostered hours.

[31] The Full Employment Court in *Fraser v McDonald's Restaurants (NZ) Limited* considered whether a roster that provided for a combination of minimum guaranteed hours and voluntary hours amounted to an availability provision under s 67D of the Act.¹

[32] McDonald's asked employees to indicate when they would be available to accept rostered hours. Rosters were then created that allocated employees their minimum guaranteed hours and additional hours within their previously nominated period of availability. Employees could then elect to reject the additional rostered hours, within a reasonably lengthy specified notice period.

[33] The fundamental difference between the way McDonald's and Hoyts operated their respective rosters was that a McDonald's employee could reject additional rostered hours that McDonald's had "requested" them to work after the roster had been created while Hoyts

¹ [2017] NZEmpC 95.

employees are required to work additional voluntary hours they had been rostered to work after the roster had been posted by 6pm on Mondays, unless the employee was on approved leave.

[34] However, it was the employee and not Hoyts who set the period during which the employee could potentially be rostered to work additional voluntary hours, so any work they were rostered to do outside their nominated period could be rejected by the employee.

[35] In this case the parties had agreed on a specified period in advance of the roster being created within which the employee could exercise their unilateral right to choose when and how they could refuse to do any extra voluntary work that was on offer.

[36] It is this ability of employees on an ongoing weekly basis to decline to accept extra work from Hoyts that means employees are not in fact making themselves available to work under an “*availability provision*”, as defined by s 67D of the Act.

[37] The Full Court in *McDonald’s* did not consider s 67E of the Act, but it did observe that the mere fact that minimum guaranteed hours have been included in an employment agreement does not automatically create an availability provision as defined by s 67D of the Act.

[38] The Authority is not aware of any other cases that have addressed “how” and “when” an employee’s right to refuse additional hours of work offered to them under an employment agreement relates to s 67E of the Act.

[39] Section 67F of the Act prohibits an employer from treating an employee adversely because they have refused under s 67E of the Act to perform work the employer offered them. Section 67F(a) defines adverse treatment and s 67F(3) defines “*detriment*”, as it is used in s 67F(2)(b) of the Act.

[40] Unite claimed that the way Hoyts was operating the hours of work clauses in practice meant that Unite members were being treated adversely and/or suffering detriment if they declined to work voluntary hours over their guaranteed hours, after the 5pm on Fridays deadline. Unite therefore claimed that the way Hoyts operated its roster in effect created an unlawful availability provision.

[41] Those submissions were not accepted. Hoyts was operating the roster as agreed at the outset of the employment relationship and as prescribed by the hours of work clause in the collective agreement.

[42] Having agreed to advise Hoyts of their availability to accept work in a given week by a specified time in advance of the roster being prepared, Unite's members were then contractually obliged to be available to work the shifts they had been rostered to work, in accordance with their stated availability.

Summary

[43] The hours of work clause in the collective agreement does not fall within the definition of an "*availability provision*" in s 67D of the Act.

[44] Hoyts rosters employees in accordance with the employees' stated availability (meaning periods during which the employee has advised Hoyts that they are available to accept offered work).

[45] The parties have agreed in clause 14.4 of the collective agreement on a mechanism that recognises Unite's members' right to refuse to work any additional voluntary hours over their minimum guaranteed hours.

[46] The parties have agreed on a timeframe for Unite's members to advise Hoyts that they are not available to work additional voluntary hours, namely by 5pm on Fridays.

[47] Employees who do not alter their availability by the clause 14.4 agreed deadline have effectively elected not to refuse to accept work that they are then rostered to do during the upcoming week, provided their rostered shifts fall within their nominated period of availability.

Costs

[48] As this case involved new issues not previously tested in the employment institutions, this is an appropriate case for costs to lie where they fall. Accordingly, although Hoyts was the successful party, costs do not follow the event in this particular matter.

Rachel Larmer
Member of the Employment Relations Authority