

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 263
3067434

BETWEEN	JAMES HASTIE First Applicant
AND	STEPHEN McPHERSON Second Applicant
AND	MARK POURAU Third Applicant
AND	PETER MATHIS Fourth Applicant
AND	MURRAY DEAN Fifth Applicant
AND	DEAN BROWN Sixth Applicant
AND	ERIC BASS Seventh Applicant
AND	GARTH SHAW Eighth Applicant
	IAN CHRISTIE Ninth Applicant
AND	OJI FIBRE SOLUTIONS (NZ) LTD Respondent

Member of Authority: Eleanor Robinson

Representatives: Lou Yukich, advocate for the Applicant
David France, counsel for the Respondent

Investigation Meeting: 8 and 9 June 2022 in Rotorua

Submissions and/or further
evidence 9 June 2022 from the Applicant and from the Respondent

Determination: 22 June 2022

Employment Relationship Problem

[1] James Hastie claims that the Respondent, Oji Fibre Solutions (NZ) Limited (Oji) has breached s 67D, and/or s 67E and/or s 67F of the Employment Relations Act 2000 (the Act) by requiring Mr Hastie to be on call during his rostered days off and by not paying him reasonable compensation to be available.

[2] Mr Hastie is joined in his claim by a further seven Applicants.

[3] Oji claims that an availability provision as a term of employment does not arise in this case because the Applicants have agreed to work their rostered hours plus 175 extra hours. In consideration for that agreement, they are paid for their rostered hours plus 175 extra hours, irrespective of whether they work the extra hours or not.

The Authority's investigation

[4] During the course of the investigation I received written evidence from Mr Hastie, Mr McPherson, Mr Bass, Mr Pourau and Mr Christie for the Applicants, and heard oral evidence from all except Mr Pourau who was unable to attend the investigation meeting due to ill health. However his written evidence was in accordance with that of the other Applicants.

[5] I received written and oral evidence for the Respondent from Mr Edwyn Pilkington, HR Consultant, Mr John Patterson, Business Unit Manager - Pulp Mill and Mr Steven Dunn, Business Unit Manager – Steam and Recovery.

[6] I have also read the statement of problem, statement in reply and submissions of the representatives, including additional material from Mr Yukich which was the submission of New Zealand Council of Trade Unions submitted in respect of *Postal Workers Union Aotearoa v New Zealand Post*.(NZ Post)¹

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

¹ *Postal Workers Union Aotearoa v New Zealand Post* [2019] ERNZ 78.

Issue

[8] This is essentially a dispute as to whether or not the Applicants' terms and conditions of employment must have an availability provision that requires payment of reasonable compensation. The issue requiring determination is whether or not Oji is in breach of sections 67D – 67F of the Act.

Background

[9] Oji manufactures kraft pulps, packaging papers and a range of packaging materials for local and global markets in New Zealand.

[10] Oji operates the Kinleith Mill, a pulp and paper mill in Tokoroa which had been owned by Carter Holt Harvey Limited. On 1 December 2014 Carter Holt Harvey Pulp and Paper Limited purchased Carter Holt Harvey Pulp Paper and Packaging Business which included Kinleith Mill (the Mill). At that date the employment of all Mill employees with Carter Holt Harvey ended and all employees commenced employment with Carter Holt Harvey Pulp and Paper Limited which subsequently changed its name to Oji.

[11] The Mill operates 24 hours, 365 days a year. It produces approximately 330,000 tonnes of paper grades per year plus 254,000 tonnes of predominantly bleached pulp.

[12] The Mill employs 295 production workers. All the production workers are union members. 278 are members of E Tū; 8 are members of First Union; 2 are members of the Amalgamated Workers Union (AWA). The remainder are members of the Central North Island Pulp and Paper Workers Union Inc (CNIPPWU).

[13] The Applicants were members of E Tū, First Union, or the AWA during the term of the collective agreements. However in 2015, before the expiry of the collective agreement, the Applicants resigned from their unions and became a member of the Central North Island Pulp and Paper Workers Union Inc (CNIPPWU). Upon resigning from their unions, the Applicants became employed on an individual employment agreement (IEA) based on the terms and conditions of the 2013-2015 Collective Agreement by which they had been covered (the Employment Agreement).

[14] The terms and conditions of employment in the IEA were based upon the expired 2013-2015 Kinleith Mill Collective Agreement 2013 between the company and three union parties, the NZ Amalgamated Engineering Printing and Manufacturing Union (the EPMU, now E Tū), First Union and AMU (the 2013-2015 Collective Agreement).

[15] In 2015 a new collective agreement was entered into between the company and Oji and the three unions. The terms of the 2013-2015 collective agreement and those of the 2015-2018 collective agreement are materially the same.

[16] The relevant clauses in the Applicants' individual employment agreements are:

12.1. The Kinleith Mill operates on 365 days a year. Employees should ensure they are available to meet the requirements of their roster and any extra hours that may be required under the provisions of clauses 13.7 and 14.9 — Extra / Unrostered Hours. The employer shall ensure that staffing is sufficient to enable employees to meet the provisions of this clause.

13.1 — Shift employees shall work a four on, four off, 12 hour shift roster as provided in Schedule 2-Rosters.

13.2 — Normal hours of work shall be 0800 to 2000 (day shift) and 2000 to 0800 (night shift). Start and finish times may be varied by agreement.

13.7 Extra / Unrostered Hours for Shift Work: The salaries provided in Schedule 1 — Remuneration incorporate 175 extra un-rostered hours (this is eight percent of rostered hours). These hours may arise from but are not limited to; day shut start-ups or any other start-up or shut; unplanned absence from the workplace such as sickness or bereavement; off-job training; meetings; projects".

[17] Mr Hastie is a shift worker on B Shift. Pursuant to his IEA he works a four-on, four-off 12-hour Shift Roster (the rostered hours). The other Applicants work the same rostered hours in the particular shift group they work within.

[18] As set out in clause 13.7 of the IEA the Applicants are required to be available for their rostered hours and for any extra hours required under cl 13.7.

[19] Clause 13.7 sets out that the Applicants' salaries include payment for 175 extra unrostered hours which is 8 percent of the rostered hours. The requirement to work the extra unrostered hours as set out in cl 13.7 arises due to operational requirements of the Mill such as: "day shut start-ups or any other start-up or shut; unplanned absence from the workplace such as sickness or bereavement; off-job training; meetings; projects".

[20] Although cl 13.7 of the IEA states that the salaried amount paid for the additional 175 hours is 8 percent of the rostered hours, Oji states that the percentage of the Applicants' salaries in respect of the 175 extra unrostered hours is calculated at 10 percent of each of the Applicants' salaries.

[21] Mr Patterson said Oji does not operate any formal on-call systems at the Mill and any available qualified operator can be asked to cover an absence, provided the health and safety requirements are met (e.g. around fatigue).

[22] The process for calling unrostered employees in, when there is an unplanned need on short notice to do so, is different depending on which production area needs the resource. In some areas, the shift managers will call around to find an operator to come in. In others, there are informal systems to help the shift managers know who is providing cover for a particular shift. Mr Patterson said that those informal systems were set up by the workers together with the shift managers.

[23] Mr Patterson said that having an on-call system does not reflect the likelihood that someone will actually be called. For example, in the #1 Pulp Mill, #2 Pulp Mill and Chemical Plant, there would have to be two absences from a shift in order for the shift manager to have to call anyone.

[24] All parties accepted that the Applicants are not required to be available on all their rostered days off. It was also accepted by the parties that historically the number of extra unrostered hours the Applicants have been required to work is small, although it was accepted that some of the hours could be attributed to shift handovers. Mr Hastie said that some shift handovers took longer especially if there had been operational issues on the previous shift which required information to be fully provided before the incoming operator could safely take over.

[25] The Applicants who gave evidence acknowledged that the IEA set out the requirement to work 175 extra unrostered hours, and whilst they did not object to that, their concern was the lack of certainty about when they might be contacted and asked to attend for work. This was more pronounced in the areas of the Mill which do not have rosters in place.

[26] As a result the Applicants said their leisure time could be interrupted by a requirement to attend for work on their rostered days off. They said this was distressing to them, interrupted family time, and there was no availability provision and reasonable compensation in place for this requirement.

Is OJI in breach of availability sections of the Act?

Availability provisions as set out in the Act

[27] As observed by the Court in *NZ Post* it is necessary to carefully assess the wording of an agreement to be able to determine whether or not a clause is an availability clause, and if so,

if it is enforceable.² Accordingly it is necessary that the clauses of the IEA are analysed against the wording of s 67C and s 67D of the Act.

i. Agreed Hours of Work

[28] As an initial step there must be agreed hours of work.

[29] Section 67C of the Act relates to agreed hours of work. It provides:

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).

[30] To comply with s 67C of the Act, the IEA must specify the hours of work in accordance with s 67C(2). The relevant clauses in the IEA are clauses 12.1, cl 13.1, cl 13.2 and 13.7.

[31] The Applicants submit that the hours of work are the rostered hours. These are 'guaranteed' hours because they know when they are to be worked in conjunction with a roster. However it is submitted that the 175 hours are not guaranteed hours because they may or not be worked depending on necessity, although the Applicants confirm that payment for the 175 hours is guaranteed in that it is paid irrespective of whether or not they work the extra hours.

[32] Oji submits that pursuant to the terms of employment as set out in the IEA, the Applicants' contractual hours of work are the rostered hours plus the 175 extra hours, i.e. the guaranteed hours of work refer to the hours that have been agreed between the parties that the employee can work and for which the employee is paid.

² Above n 1 at [6].

[33] It submits that the number of guaranteed hours has been agreed between it and the Applicants as the rostered hours plus the extra hours. They are specified in cl 13.1 and 13.7 of the individual employment agreement.

[34] Section 67C(2) it defines the hours of work as including ‘guaranteed hours’. As also noted in *NZ Post*:

There is no statutory definition of the terms “guaranteed hours of work” or “agreed hours of work”. ... There is nothing to suggest that the quantum of each (agreed and guaranteed hours) cannot be the same.³

[35] I note that s 67C(2) of the Act states that hours of work “includes any or all of the following” which in s 67C(2)(a) includes guaranteed hours.

[36] I find that cl 13.1, 13.2 and 13.7 in conjunction set out the quantum in respect of the number of hours the Applicants may be called upon to work. These are the rostered shift hours (2184 hours per annum based on a four on four off 12 hour shift roster: cl 13.1 and cl 13.2, plus 175 extra unrostered hours to be worked when they arise as specified in cl 13.7).

[37] These are the hours agreed by the employer (Oji) and the employee (the Applicants), and therefore constitute the ‘agreed hours of work’. These are the hours which are guaranteed for payment by agreement between Oji and the Applicants.

[38] The individual employment agreement also sets out the days of the week work is to be performed and the start and finish times of work and therefore I find it complies with s 67C (2)(b) and (c) of the Act.

[39] In respect of s67C(2)(d) I find flexibility is denoted by the description of the 175 extra hours as ‘unrostered’.

[40] I find that the clauses in the IEA comply with s 67C of the Act.

ii. Availability provision

[41] Sections 67D(1) and (2) of the Act set out the requirements for an availability provision:

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.

³ Above n 1 at [36].

- (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.

[42] An availability provision therefore has two elements as set out in s 67D (1) (a) and (b). The first is that the employee's performance of the work is conditional on the employer making the work available to him or her. The second is that the employee is required to be available to accept any work that the employer makes available.

[43] There are two further stipulations set out in s 67D (2) (a) and (b). The first is that the availability provision must be included in an employment agreement that specifies agreed hours of work and includes guaranteed hours. Secondly that the availability provision relates to a period for which the employee must be available in addition to the agreed hours of work.

[44] The IEA clauses must comply with s 67D (1) (a) and (b) to constitute an availability provision. The first requirement as set out in s 67D (1) (a) is that the employer makes work available to the employee. I find the Oji does make work available to the Applicants.

[45] Secondly the IEA clauses must comply with s 67D(1)(b): the employee is required to be available to accept any work made available. I find there is no requirement in the IEA that the Applicants accept any work that Oji makes available.

[46] This is because the IEA limits such acceptance to the rostered hours plus 175 hours of extra unrostered hours. On that basis the Applicants are not required to accept any work made available by Oji that exceeds the combination of the rostered hours and the 175 extra hours as agreed between the parties.

[47] In relation to s 67D(2)(a) I find the IEA clauses do specify the agreed hours of work, however in respect of s 67D(b) there is no requirement on the Applicants to work outside these agreed hours of work.

[48] Having considered all aspects, I find that there is no availability provision in the IEA covering the Applicants.

[49] I determine that the clauses in the IEA are not an availability provision.

Costs

[50] On the basis that this issue before the Authority was a dispute, there is no order for costs.

Eleanor Robinson
Member of the Employment Relations Authority