IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA

[2023] NZERA 631
3219599

	BETWEEN	WARREN WILLIAMS First Applicant
	AND	NICHOLAS SHEARER Second Applicant
	AND	ALLAN FINN Third Applicant
	AND	CHIEF OF DEFENCE FORCE Respondent

Member of Authority:	Davinnia Tan
Representatives:	Peter Cranney and Duncan Allan, counsel for the Applicant Channy Mao, counsel for the Respondent
Investigation Meeting:	10 August 2023 in Wellington
Submissions received:	31 August 2023 from the Applicant 21 September 2023 from the Respondent
Determination:	25 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants were employed with the New Zealand Defence Force (NZDF) as 'Regional Technical Managers' (RTMs) within its Communications Information Services (CIS) branch for until 31 December 2020 when their roles were disestablished.

[2] The applicants say that as RTMs they were required to be available outside standard business hours to support NZDF's information communications technology (ICT) 24/7

operations but NZDF did not and continues to refuse to pay them reasonable compensation as required under s 67D of the Employment Relations Act 2000 (the Act).

[3] The applicants say that the 'hours of work' clause in their individual employment agreements (IEAs) is an availability provision requiring their availability to perform work in addition to their guaranteed hours, but it is non-compliant with the requirements of s 67D of the Act because it does not provide for reasonable compensation. As such the applicants seek a determination from the Authority declaring their IEAs non-compliant for the purposes of s 67D of the Act.

[4] NZDF deny that the 'hours of work' clause is an availability provision and say that it was open to the applicants to decline to perform work outside standard business hours on the basis that their IEAs did not provide for reasonable compensation. NZDF does not deny that the clause is not compliant with s 67D but says that the applicants were not required to be available outside standard business hours.

The Authority's investigation

[5] During the investigation meeting, the Authority heard evidence from each of the three applicants and NZDF's witnesses, former Deputy Director of ICT operations (CIS branch), Keith Tasker, and former Manager of Employee Relations, Karamea Dorset. All witnesses provided witness statements prior to the investigation meeting and answered questions under oath or affirmation from me and the parties' representatives. Following the investigation meeting the parties lodged written submissions.

[6] 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.

Background

Employment history with NZDF

[7] The applicants had been long-serving employees of NZDF in a number of uniformed and civilian roles.[1]

[1] Mr Finn began employment with NZDF in 1976, Mr Williams in 1985, and Mr Shearer in 1999.

[8] Immediately prior to becoming RTMs, both Mr Williams and Mr Finn had been in the role of 'Senior Computer Support Technician' where they reported to an RTM and received a $20 a day on-call allowance under a different prior employment agreement for rostered on-call work.

[9] Neither party was able to produce a copy of this prior agreement at the investigation meeting but following the investigation meeting, counsel for NZDF provided a copy of the variation (dated 30 November 2009) to Mr Shearer's previous IEA when he was a 'Computer Support Technician'. This agreement stipulated that he agreed to work on a rotational shift roster three times a week over Monday to Friday and twice over the weekend. His roster allowance was 27% of his base salary.

[10] Both Mr Williams and Mr Finn subsequently became RTMs and following an internal change process, were reconfirmed into that role in October 2010 under a new individual employment agreement known as the IEA10. Mr Shearer was also confirmed into that role on 7 April 2017 under the IEA10.

[11] The 'Hours of Work' clause in the IEA10 stated:

> **Hours of work**
> You will work on average a minimum of forty (40) hours per week.
> Standard business hours are between 7am and 7pm Monday to Friday.
>
> You are required to work such hours and days as are reasonably necessary to achieve the performance expectations established in your Position Description, your Performance and Development Plan, those directed by your manager and those required by the NZDF to generally meet operational needs.
>
> […]
>
> Over time: Overtime will not be paid. Time off in lieu will not be granted.

Responsibilities of a 'Regional Technical Manager'

[12] The responsibilities of the RTM role included management of staff who were Network Engineers and Computer Support Technicians, approving their rosters and spreadsheets for on-call payments, general administration and responding to calls from the NZDF service desk or its Networking Information Operation Centre (NIOC) which operated on a 24/7 and 365 days a year basis. RTMs are part of the escalation process for IT faults occurring and requiring escalation after standard business hours

[13] RTMs reported to the 'National Service Delivery Manager' of the CIS branch who in turn reported to the 'Deputy Director of ICT Operations' for the CIS branch. For the most part, Mr Tasker was the Deputy Director during the relevant period. He had been employed in this role since 2011. Mr Tasker went on secondment briefly in 2018 until December 2018. During Mr Tasker's secondment, his role was covered by Pat Beath.

How the roster and escalation process operated

[14] A duty roster was updated on a rotational basis and listed the names of personnel who were on-call and known as 'first responders' who reported to the RTMs. At the bottom of the roster were the names of the applicants as escalation points for their respective regions. RTMs were the first escalation point for all urgent faults which were known as 'Priority 1 or 2', known as P1 or P2 issues. The next layers of escalation were the National Service Delivery Manager followed by the Deputy Director. The main purpose of the roster was to inform service desk and NIOC who to call to respond to IT faults.

[15] As the first layer of escalation, typically RTMs would receive a call from service desk or NIOC and be required to provide direction or instructions. Depending on the nature of the fault, RTMs would also be required to remotely access NZDF sites and facilities, or to call other personnel to attend to these faults and provide instruction.

[16] There was also a standard operating procedure in place for rostered staff whereby they were required to contact their respective RTM once they were unable to resolve a fault after three hours to seek further direction, support and advice from the RTM. It would then be up to the RTM to either advise or contact their manager, the Deputy Director of ICT Operations or others as part of the reporting and escalation process.

Manager's expectation for RTMs to be on call 24/7

[17] On 26 September 2015, National Service Delivery Manager, Briar Johnson (who was the RTMs' manager at that time and has since passed away), signed a letter addressed to Mr Tasker, in which she explained that the RTMs took work vehicles home because of the "expectation" on them to be on call "24/7" and that this had been "custom and practice for some time". Her letter was intended to "formalise" existing arrangements as between her and the RTMs. Mr Tasker does not recall responding to this letter or raising the matter with anyone at that time. Ms Johnson's letter noted:

> … I would like to formalise to you some agreements we had made as a local management team, Will, Allan, and I.

> […]
>
> I also understand the vehicle issue has raised its head, in that Regional Technical Managers take their vehicles home. This has been custom and practice for some time, given the geographical areas they cover and the expectation of being on call 24/7. It has shown to be the most effective use of their time, the resource and provides the best support to our team and customers.
>
> I thank you for your assistance in supporting Will and Allan and allowing me the opportunity to formalise our agreements, so neither men are placed in a position defending a decision we made to assist me and for our team.

The $50 on-call allowance from 1 April 2017

[18] On 1 April 2017, s 67D of the Act came into effect.

[19] To comply with the requirement to provide reasonable compensation under the collective agreement, NZDF and the Public Service Association (PSA) agreed on an on-call allowance described as being calculated on the basis of $50 per day for personnel who performed work on an on-call basis under the collective employment agreement (CEA). NZDF also offered the $50 per day on-call allowance to non-union members under a variation to the IEA10. When the variation was introduced, the RTMs were asked to get personnel who reported to them to sign the variation agreement on the basis those personnel were 'first responders' on the roster.

[20] The IEA variation provided an annual allowance of $18,200.00 for staff rostered on 52 weeks of the year which equated to the $50 per day allowance provided for in the CEA. The allowance was pro-rated on a sliding scale for staff rostered on for fewer weeks per year.

[21] The three RTM roles did not form part of NZDF's consideration and assessment of personnel entitled to reasonable compensation at that time.

RTMs query entitlement to reasonable compensation

[22] On 19 July 2017, Mr Finn emailed an HR representative asking if the new IEA variation should also apply to him, citing that he had been providing "permanent on call/standby support". On 21 July 2017, Mr Finn was advised by the HR representative to discuss the matter directly with his manager and that "there was comprehensive work undertaken with the members of the CIS management team to assess who fits the criteria to receive an on call allowance."

[23] On 24 July 2017, Mr Finn emailed Mr Tasker seeking confirmation that RTMs should be receiving the new "on call allowance". He explained:

> […]
>
> As the…team are now going through a process to apply a "pro rate" remuneration as part of a new CIS Variation affecting all CIS On Call staff…I would ask if this also applies in principle to the support being given up to now and going forward by Will and myself as well as other management pers carrying out this support role?
>
> If this is the case then I assume we will expect this process to be more defined and respectively be remunerated appropriately…
>
> If this is incorrect and the expectation is that this support should not be considered as part of the role and the escalation points for the respective support teams should be referred, or deferred… then I can act responsibly and ignore all out of normal business calls as a none required duty or responsibility of our respective roles.
>
> For your advice, comment and support?

[24] In his response to Mr Finn on 24 July 2017, Mr Tasker stated that he was not sure about the 'comprehensive work undertaken' (referring to the HR advisor's email of 19 July 2017), and that the information management requested and provided to HR was "based on existing on-call rosters" to help them determine who should get an on-call allowance. Mr Tasker advised that he would refer the matter to the Chief of Staff for an answer.

[25] On 27 October 2017, the Chief of Staff, Lieutenant Colonel Jim Dryburgh (LTCOL Dryburgh) emailed Mr Finn, stating that a "formal minute will be raised… to request a review of the manager's call out requirement and potential associated allowances on the basis that the institution of the MIM ('major incident management process') has changed the circumstances regarding expectations on Technical managers." He did not however advise Mr Finn whether he could, or should, ignore all out of standard business hours calls.

[26] Although LTCOL Dryburgh alluded to changes regarding the expectations on RTMs, no evidence was provided or given to demonstrate whether there were any such changes regarding the expectations on RTMs arising from the "MIM" changes.

[27] Some time in 2018, Mr Tasker went on secondment and was replaced by Pat Beath for that period under December 2018.

Manager's continuing expectation of RTMs' on-call availability

[28] There is a lack of evidentiary material for the period 2018. It appears there was agreement by Mr Beath in November 2018 to recompense the applicants for their on-call availability and work performed outside standard business hours.

[29] In her email dated 12 April 2019 and addressed to a distribution list ‘‘CIS.OPS.RSS.RTMS’, Ms Tuxworth-Grant wrote:

> It appears to be done and backdated to November 2018…This is the reasoning BTW:
> Because of geographical constraints, the RTMs will continue to be expected to answer calls and deploy staff, on as close to 100% of the time, as we can. Indeed, we currently rely on their goodwill to continue doing this when on vacation. If we had higher staffing levels maybe we would operate differently, but we don’t, so 100% each it continues to have to be. And it was all to do with Pat’s approval from back then, so you may wonder what has happened since. I don’t know.

[30] In a lengthy email to Mr Tasker on 30 May 2019, Ms Tuxworth-Grant stated:

> …The RTMS acknowledge that they have been providing after-hours availability as expected (or at least perceived to be expected) by management…
>
> Given the evidence…it is evident that management knew that the RTMs have been providing the equivalent of Rota A (1 in 1). SOPs and other documentation indicate that the RTMS are part of after-hours communication, safety & approval channels.
>
> Pat Beath agreed in November 2018 that the RTMs should be recompensed for their time and also noted that it is unlikely there will be any ability to create a different roster…until staffing/role changes are made through CTP[.]
>
> The law change in April 2017 made it a legal requirement to pay staff for out-of-hours support. Subsequent to this change, the RTMs have not been requested to desist, in fact further SOPs have been and continue to be provided (e.g. MIM) showing the RTMs as being on-call and an escalation point.
>
> […] Given that we clearly know what they have been and continue to do so and have done so predating the legislative change, have written their presence in to processes, not told them to stop and had financial outcomes that would not have been possible without their work, I suspect that we do owe them full Rota A back-dated to April 2017 and should confirm our appreciation of their commitment and dedication to producing the optimum outcome for NZDF. Whether we wish to continue this practice until the role is disestablished, is a financial decision that has to be made by CIS management…

Verbal instruction to ‘cease and desist’ on-call work

[31] Following the email above, a meeting was arranged for 31 May 2019 where the director of ICT operations, Roger Broadhurst, verbally instructed the applicants to cease all on-call work. This instruction was not followed by in writing, nor was a rationale provided to the applicants.

Negotiations for 'reasonable compensation'

[32] On 22 July 2019, PSA Organiser, Sheryl Cooney, wrote to Mr Tasker, stating that it had come to the attention of the PSA that some NZDF individual agreements were not consistent with s 67D of the Act noting that they provided for "employees to do on-call work without the inclusion of an availability provision or reasonable compensation". The letter stated PSA were seeking to negotiate the inclusion of an availability provision and reasonable compensation on behalf of the applicants.

[33] On 17 October 2019, HR Advisor, Jo Siegel, emailed the applicants, their PSA representatives and Ms Dorset, setting out her understanding of the issues "so Management can sign off the monies involved". Ms Siegel noted that there was now a proposal to address the on-call coverage provided by the applicants and financial recognition from 1 April 2017 to 31 May 2019, to "reflect a change in [the] Employment Relations Act 2000 67D for On Call payment." She attached and referred to Ms Johnson's letter of 2015 to Mr Tasker, and Ms Tuxworth-Grant's email of 30 May 2019 to Mr Tasker, and Ms Cooney's letter of 22 July 2019, as supporting documentation. Ms Siegel also noted that "Ms Tuxworth-Grant's email confirms Standard Operating Procedures and other documentation indicate that the RTMs are part of after-hours communication, safety and approved channels. Ms Siegel also confirmed CIS agreement in November 2018 to compensate the RTMs for their time from April 2017." Ms Siegel also noted that the RTM roles were to be disestablished and that the new proposed future 'Regional Field Service Manager' role would have an on-call component in the position description.

[34] On 21 November 2019, Human Resource (HR) advisor, Brent Nixey, emailed the applicants, copying in the applicants' PSA reps, and Ms Dorset, stating that he had been:

> […] authorised by NZDF to offer a 5% variation to cover the period (as agreed to) 1 April 17 – 31 May 19. The payment will address the fact that the RTMs where [sic] providing a non-rostered On Call coverage to their respective geographical areas.
>
> I now require your acceptance of this variation to action it on your behalf.

[35] The applicants did not accept this offer on the basis they did not consider this to be 'reasonable compensation' and considered the $50 per day allowance agreed under the CEA and IEA variation a more appropriate quantum.

[36] The RTMs roles were then disestablished on 31 December 2020.

[37] At a negotiation meeting on 20 January 2020, NZDF continued to offer 5% of applicants' salaries to them as back payment for the relevant period. The applicants again rejected the offer.

[38] The parties have continued to disagree on whether the applicants were required to be available outside core hours of work under the clause in the IEA10, and what, if any, compensation should be paid for making themselves available and undertaking on-call work outside core hours during the relevant period.

[39] On 23 March 2023 the matter was lodged with the Authority for investigation and determination.

The issues

[40] The issues for investigation and determination are (i) whether the applicants were required to be available to perform work in addition to their guaranteed hours, and (ii) whether the clause in the IEA10 is an 'availability provision'; if so, is it compliant with the requirements of s 67D of the Act?

Were the applicants required to be available to perform work in addition to their guaranteed hours?

[41] The applicants say that they were required to be available outside standard business hours and that this was the expectation of the RTM role. Specifically, RTMs were required to be available for escalation calls on a 24/7 basis 365 days a year, except when they were on leave, to support NZDF's ICT operational needs.

[42] The applicants' evidence is that calls were made to them from NZDF's service desk and networking information operating centre (NIOC) which together operated as NZDF's 24/7 ICT support capability to support NZDF's domestic and international operations.

[43] The applicants say that this was a longstanding custom and practice of the role which predated the IEA10. They considered this aspect of the job was a function of the RTM role from observing their predecessors and other former managers before that. RTMs were named at the bottom of the roster as escalation points on a 24/7 basis. The purpose of this was for service desk or NIOC to contact them in the event they were unable to contact the rostered 'first responders', which occurred.

[44] The RTMs' respective teams were also required to contact their RTM at the 'three hour escalation point' for direction and obtain advice as part of the standard operating procedure. The applicants also referred to NZDF's core values several times, which are 'courage', 'commitment', 'comradeship', and 'integrity' and considered that these values also informed the nature of their RTM role. At no time did they consider that the on-call component of the job was optional, nor was it to be performed on a volunteer basis.

[45] A key piece of evidence supporting the applicants' case is Ms Johnson's letter of 26 September 2015 to Keith Tasker in which she expressly referred to the expectation of RTMs "being on call 24/7" as a longstanding custom and practice. This is further substantiated by Ms Tuxworth-Grant's email of May 2019 in which she acknowledged the applicants had been working on-call in addition to guaranteed hours "as expected", and that they had not been requested to stop doing so after introduction of s 67D. Ms Tuxworth-Grant stated that NZDF had positive financial outcomes because of the work performed by the applicants. Ms Tuxworth-Grant also stated:

> It is evident that management knew that the RTMs have been providing the equivalent of Rota A (1 in 1).
> SOPs and other documentation indicate that the RTMs are part of after-hours communication, safety & approval channels.
> Pat Beath agreed in November 2018 that the RTMs should be recompensed for their time…

[46] Ms Tuxworth-Grant's reference to 'Rota A' is a reference to the IEA variation providing for an annual allowance of $18,200.00 for staff rostered on 52 weeks of the year. In other words, she accepted that the RTMs had been providing the equivalent level of support as first responders rostered on 52 weeks of the year. In February 2019, Ms Tuxworth-Grant proposed to HR that RTMs received 100% of the "prevailing on-call allowance", which equates to the $50 per day allowance provided for in the CEA and IEA variation.

[47] Mr Tasker gave evidence that NZDF only employed three RTMs at any time to support the three regions. He agreed that the applicants were named as escalation points on the roster provided to service desk and NIOC for on-call operations outside standard hours. He agreed that it was the nature of the RTM role to be available outside standard business hours. Mr Tasker added that as Deputy Director of ICT operations, he was also a point of escalation on the roster and would expect escalation calls as part of his role as it was "the nature of the role". Mr Tasker advised that the roster was relied on to conduct NZDF's ICT operations which include its international operations.

[48] Mr Tasker's stated that there was an expectation to fix 'events' occurring outside standard business hours and explained that a 'Priority 1' or 'P1' event (which required escalation to an RTM) was most significant and would indicate that most NZDF services would be down or a significant network failure. If a P1 event occurred after hours, it would activate a team. He accepted that manager call-outs were a requirement.

[49] NZDF say that because the clause in the IEA10 did not provide for reasonable compensation, the applicants were entitled to refuse to perform the work under s 67E of the Act, and that the applicants had carried out "non-authorised on-call duties". The applicants reject this.

[50] When Mr Finn first queried the RTMs' entitlement to reasonable compensation in 2017, he also asked if he should stop answering calls made to him after standard business hours, but he was not advised to stop or whether he could do so.

[51] When I asked Mr Tasker what would happen if any of the applicants did not answer a call outside hours, he said that "culturally they would be seen to be less of a team player". His evidence was that this would be inconsistent with expectations of the role.

[52] Mr Shearer stated that he would "hate to know the consequences of not being available to talk to their war fighters" because he had refused to take a call simply because it was outside standard business hours in New Zealand.

[53] Notwithstanding Mr Broadhurst's instruction of 31 May 2019 to cease all on-call work, the applicants' evidence was that the escalation calls continued to be made to them outside standard business hours and the applicants continued to respond to these calls. The evidence given at the investigation meeting was that neither the NZDF service desk or NIOC were advised of the 'cease and desist' instruction to the applicants, and nothing was operationally put in place to stop after hours call being made to the applicants. Despite the 'cease and desist' instruction, in reality, NZDF's operations continued as it did prior to this 'instruction'. In other words, it was not feasible for the parties to 'refuse' to perform work in addition to their guaranteed hours because they were still receiving calls after standard business hours. Operationally, the escalation process and standard operating procedure remained unchanged and therefore the applicants continued to be responsible for responding to calls after hours.

[54] There is no evidence to suggest that it was 'optional' for the applicants to answer the escalated calls to address the urgent faults requiring fixing. The escalation process formed part of the Duty Roster which was relied upon by NZDF's 24/7 IT capability in order to support NZDF's operations. If there was no operational need for an escalation process after hours, the list of RTMs would not need to be on the roster.

[55] I consider it artificial for NZDF to simply rely on the absence of reasonable compensation to say the applicants were entitled to decline the afterhours phone calls to support its 24/7 ICT operations. Such an entitlement must be a genuine right for the employee to refuse work.[2]

[56] A genuine entitlement to decline performing work beyond their guaranteed hours would not entail NIOC calling the applicants in the middle of the night to ascertain if an urgent fault will be responded to. The entitlement to decline would be made from the outset with the effect that the applicants could decline being listed on the afterhours escalation process. However no such entitlement was offered to the applicants.

[57] I have considered whether the applicants were "requested" to be available beyond their guaranteed hours as opposed to "required". In *Fraser v McDonald's Restaurants (New Zealand) Ltd*,[3] the Employment Court concluded that the employees were requested and not required or compelled, to work the additional hours and therefore their agreements did not have to contain an availability provision. I am satisfied that this is not the case here.

[58] The current facts are distinguishable from those in *Fraser v McDonald's Restaurants (New Zealand) Ltd* [4] where workers were not obliged to work additional hours offered and were in fact given the opportunity to advise if they were unable to work additional hours offered, which is not the case here. In the applicants' circumstances, they were never advised of an option to decline being available after standard business hours despite explicitly asking if that was available to them from the outset in 2017 and no answer was provided. It was not until the matter was escalated to an employment relationship issue that the applicants were then instructed to "cease and desist" all on-call work in 2019. However as discussed in paragraph 53, this did not change the status quo operationally. The instruction was never confirmed in writing and there was no change in practice.

---

[2] Cabinet Paper "Addressing zero hour contracts and other practices in employment relationships" (May 2015) CAB 8/9.
[3] *Fraser v McDonald's Restaurants (New Zealand) Ltd* [2017] NZEmpC 95.
[4] *Fraser v McDonald's Restaurants (New Zealand) Ltd* [2017] NZEmpC 95.

[59] Accordingly, I do not accept that there was a genuine ability for the applicants to refuse availability outside NZDF's standard hours during the relevant period.

[60] I accept the applicants' evidence that they answered calls in the middle of the night and attended to all priority 1 and 2 faults. I also accept that their availability after standard business hours was a known requirement of the role because RTMs' names and contact details were listed as escalation points for NIOC and other staff. This was also a known requirement from observing prior managers in the role and was an important component of ICT's 24/7 operations. There was also clear and consistent evidence that every manager of the RTMs and Mr Tasker, supported and expected this of the RTMs. There was no contrary evidence produced by NZDF.

[61] I therefore accept the applicants' view that while NZDF claims the applicants could refuse to answer the calls made outside standard business hours because no reasonable compensation was provided, the reality of NZDF's operational requirements was that they could not refuse. The evidence given by Mr Tasker and the applicants is that any refusal to take those calls would be adversely viewed and likely become a performance issue, both for the applicants as individuals, but also for NZDF's operations. As an aside, it should be borne in mind that an employer must not treat adversely an employee who refuses to perform work in such circumstances under s 67F of the Act.

[62] The on-call component of the RTM role was a longstanding requirement that predated the enactment of s 67D in April 2017 and continued to be an expectation of the role. As such I accept that this requirement formed part of a longstanding custom and practice of NZDF's ICT 24/7 operations. There was no evidence to suggest this practice had changed during the relevant period or even after the seemingly abrupt 31 May 2019 'cease and desist' instruction.

[63] Having reviewed the evidence, I find that the applicants were required by NZDF to be available to perform work outside standard business hours in addition to their guaranteed hours.

Is the 'hours of work clause' an availability provision?

Purpose of 'availability provisions'

[64] One of the purposes of 'availability provisions' was to address the problem that existed where employees were being required to be available for work without being given

the opportunity to receive work or payment for that availability, and to provide greater certainty prohibiting such practices in the employment agreement.[5]

[65] Section 67D(1) provides that an availability provision means a provision in an employment agreement under which the employee's performance of work is conditional on the employer making work available to the employee; and the employee is required to be available to accept any work that the employer makes available.

[66] Section 67D(2) provides that an availability provision may only be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

[67] Section 67D addresses the employment practice where an employer may want an employee to be available above their contracted hours. Where this occurs, s 67D creates a requirement on employers and employees to agree that employees can turn down the work or agree to compensation rates up front in the employment agreement. The incentive is for parties to agree in the employment agreement what is expected and how they are compensated for that. [6]

The 'hours of work' clause

[68] The first limb of the clause provides:

> You will work on average a minimum of forty (40) hours per week. Standard business hours are between 7am and 7pm Monday to Friday.

[69] The second limb of the clause provides:

> You are *required* to work such hours and days as are reasonably necessary to achieve the performance expectations established in your Position Description, your Performance and Development Plan, those *directed by your manager, and those required by the NZDF to generally meet operational needs* (emphasis added).

Parties' submissions

[70] The applicants submit that the clause's reference to "required" is the same word used in s 67D(1)(b); and that although the contractual provision refers to a requirement to work

[5] Cabinet Paper "Addressing zero hour contracts and other practices in employment relationships" (May 2015) CAB 8/9.
[6] Cabinet Paper "Addressing zero hour contracts and other practices in employment relationships" (May 2015) CAB 8/9.

on such hours and days as are reasonably necessary, there is no real difference and that the employee is in fact required to be available to work, and to accept any work the employer makes available.

[71] NZDF disputes that the clause is an 'availability provision' under s 67D. It stated that only positions that are on a rostered shift or 'rostered on-call' roles were either on the collective employment agreement (CEA) or required a variation to the IEA10, both of which provided for the $50 a day allowance as 'reasonable compensation'. Without this variation, the applicants could not rely on the IEA10 as an 'availability provision'.

[72] NZDF submits that the parties never intended for the clause to be an availability provision and that the clause is designed for flexibility for both parties, especially where the employee' personal circumstances mean that they require different start/finish times.

Interpretation of the clause

[73] The clause provides that the applicants' guaranteed hours are set at a minimum average of 40 hours per week. They can do this during standard business hours which is within a 12-hour window each day, Monday to Friday. The first limb therefore provides that while there is a total of 60 hours in NZDF's standard business hours from Monday to Friday, the applicants are only guaranteed a minimum of 40 hours.

[74] The second limb then sets out a "requirement" to work non-specified hours and days that are either "reasonably necessary to achieve the performance expectations established" in their position description, or "directed by the manager" or "required by the NZDF to generally meet operational needs".

[75] If the second limb was intended to qualify or capture only the guaranteed 40 hours per week, then the reference to standard business hours in the first limb would be redundant. There would be no need to limit the performance of guaranteed hours to standard business hours if performance could take place on any other day or hours. Conversely, if there was no requirement to work additional hours in addition to guaranteed hours, the second clause would be redundant in its entirety. Logically therefore, the second limb must provide for something other than what is already provided for in the first limb.

[76] Although NZDF says that the second limb was designed for flexibility for the parties I am not persuaded by this submission given that the first limb already achieves this flexibility by stipulating a 12-hour period on its standard business days to provide for applicants'

guaranteed hours. I am also not persuaded by this submission because the second limb is qualified by the requirement to work the hours and days "as are reasonably necessary to achieve the performance expectations established in your Position Description, your Performance & Development Plan, those directed by your manager, and those required by the NZDF to generally meet operational needs".

[77] I am further unconvinced by NZDF's submissions that the parties never intended for the clause to be an availability provision. The clause in the IEA10 predated the introduction of s 67D of the Act and could not have been designed with the requirements of s 67D in mind.

[78] Section 3 of the Employment Relations Amendment Act 2016 (the 2016 Act) makes clear that s 67D of the Act applies to an individual employment agreement entered into before the commencement of the 2016 Act from 1 April 2017.

[79] NZDF says that where it has provided for an availability provision, it has done so by amending the CEA following its negotiations with the PSA for reasonable compensation in the CEA and variations to IEAs for non-managerial personnel. Prior to the introduction of s 67D, managerial roles which included the RTMs were not covered by the CEA or the existing IEA variations (such as the one which applied to Mr Shearer in his prior role as a 'Computer Support Technician').

[80] This, however, should not mean that the clause in the applicants' existing IEA10 escapes scrutiny on whether it required them to be available in addition to their guaranteed hours.

[81] As such, NZDF's omission to amend the IEA10 as it applied to the applicants is not probative evidence on the issue.

[82] Ms Dorset acknowledged that she was in receipt of Ms Johnson's and Ms Tuxwroth-Grant's emails that had been attached in an email to her on 17 October 2019 and that both managers had set out their expectations that the RTMs were required to be on-call. However, she said that HR had concerns from a health and safety perspective about the RTMs being on-call on a 24/7 basis and required Mr Tasker's approval or "sign-off" in order to determine whether the RTMs had an entitlement to be paid on call. Ms Dorset said that his "sign-off" had not been given at that time and therefore the HR could not approve the RTMs' entitlement to the on-call allowance.

[83] Ms Dorset accepted Mr Tasker's evidence given at the investigation meeting where he agreed the RTMs were required to be available beyond their guaranteed hours of work, but she stated that he had not provided that level of clarity at that time.

[84] Based on Ms Dorset's evidence, I was not convinced that HR had fully assessed the substance of the RTM role, particularly their responsibilities when it came to the ICT escalation process and how that related to NZDF's obligations under s 67D. The question that NZDF's HR department considered, was not whether the RTMs were required to be available as part of their role at that time, but as Ms Dorset stated, whether HR had received the necessary approvals for the RTM's "entitlement to an on-call payment".

[85] Notwithstanding supporting documentation from the RTMs' direct managers that there was a longstanding and continuing requirement on the RTMs to be available outside standard business hours, based on Ms Dorset's evidence, I find it more likely that the applicants' IEA10 was not amended to include reasonable compensation because of a failure in NZDF's processes to properly assess the substance of the RTM role, rather than intention of the parties as to the requirements of s 67D.

[86] In the absence of contrary evidence, on its plain and ordinary meaning, the clause in the IEA10 provides for a requirement to work any hour or day in the circumstances stipulated and is not limited to the applicants' guaranteed hours within the standard business hours.

[87] Therefore, I find that the clause is not compliant with s 67D because it required the applicants to be available to perform work in addition to their minimum guaranteed 40 hours, but it did not provide for reasonable compensation.

Findings

[88] Accordingly, my findings are set out as follows:

a. The applicants were required to be available to perform work in addition to their guaranteed hours;

b. The clause is an availability provision which required the applicants to be available to perform work in addition to their guaranteed hours; and

c. The clause is not compliant with the requirements of s 67D of the Act because it does not provide for reasonable compensation and there was no genuine entitlement to refuse to perform work that was in addition to guaranteed hours.

Costs

[89] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[90] If they are not able to do so and an Authority determination on costs is needed the applicants may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum NZDF would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[91] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[7]

Davinnia Tan
Member of the Employment Relations Authority

[7] See www.era.govt.nz/determinations/awarding-costs-remedies.