

C. Costs are reserved.

What is the employment relationship problem?

[1] George Lye is a stevedore, working for ISO Limited (ISO or the company) at the Port of Tauranga. He is a member of the Maritime Union of New Zealand (MUNZ or the union) and has been involved in bargaining to obtain a first collective employment agreement between the union and ISO.

[2] ISO is an international port logistics company that provides stevedoring, marshalling, and other services at ports throughout New Zealand.

[3] Mr Lye seeks remedies for a personal grievance under s 103(1)(h) of the Employment Relations Act 2000 (the Act), namely that he has been disadvantaged by his employment agreement not being compliant with the availability provisions of the Act. ISO's initial response to the claim was that Mr Lye had not been disadvantaged in his employment and there was no basis for an award being made to him.

What happened with the Authority's investigations and Employment Court proceedings?

[4] Since 2018 MUNZ has been involved in bargaining with ISO for a collective agreement. Late last year the Authority accepted a referral to facilitation sought by MUNZ.¹

[5] A major focus in bargaining has been a disagreement about an availability provision, with MUNZ arguing that ISO's individual employment agreements contain unlawful availability provisions and the company at least at some point seeking a similar provision in the collective agreement. This has generated substantial litigation.

[6] Parts of the lengthy history of litigation and other interactions connected with this case are as follows:

- (a) In 2018 another Authority Member determined that provisions in Mr Lye and other employees' individual employment agreements were

¹ *Maritime Union of New Zealand v ISO Limited* [2021] NZERA 465.

availability provisions and not compliant with the requirements of ss 67D of the Act;²

- (b) There followed a second determination in a claim brought by the union and one of the other employees seeking a compliance order with ss 67D to 67E of the Act. The Authority Member declined the application as it was seen as not seeking a determination of existing rights and obligations, as the parties were still in bargaining, including about availability;³
- (c) Mr Lye challenged the second determination to the Employment Court;
- (d) The Employment Court held that the finding of non-compliance in the Authority's first determination had not been challenged and could not be revisited.⁴ ISO's changed work practices were examined and found not to be material. This is discussed in more detail below. Rather than impose a compliance order which would have the practical effect of requiring collective bargaining to continue, the parties were left with the opportunity to conclude their bargaining before a decision was made about whether an order was appropriate and/or necessary;
- (e) On 24 December 2020, a grievance was raised on behalf of Mr Lye. ISO continued to operate on the same basis. On 27 January 2021 ISO replied, denying any basis for Mr Lye's claims;
- (f) In February 2021 Mr Lye's personal grievance claim was lodged in the Authority, awaiting the Court process;
- (g) The Court proceeding resumed in mid-2021 to consider whether a compliance order could or should be made.⁵ There were difficulties with the relief sought; and
- (h) The Court later decided that a compliance order should be made, requiring ISO to cease offering proposed terms and conditions of employment that applied to Mr Lye which contained an availability provision without specifying, in summary, agreed hours of work including guaranteed hours

² *Maritime Union of New Zealand Inc v ISO Limited* [2018] NZERA 368.

³ *Maritime Union of New Zealand Inc v ISO Limited* [2019] NZERA 704.

⁴ *Lye v ISO Limited* [2020] NZEmpC 231.

⁵ *Lye v ISO Limited* [2021] NZEmpC 120.

and relate to a period for which Mr Lye is required to be available above those guaranteed hours.⁶

[7] In terms of this proceeding, an application for removal of Mr Lye's personal grievance claim was made but later withdrawn once an investigation meeting date was agreed. The meeting was set for 8 March 2022 in Tauranga but had to be adjourned due to a COVID situation. It was agreed that the meeting could be held in Auckland and a new date was set.

[8] The investigation meeting was held on 21 March 2022. Evidence was heard from Mr Lye and from ISO's General Manager, Human Resources Dean Carter.

[9] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[10] The issues to be investigated are:

- (a) Does Mr Lye's employment agreement accord with s 67D of the Act regarding availability, including consideration of whether this question has already been decided by the Court?
- (b) If not in accord, was Mr Lye disadvantaged by that?
- (c) If Mr Lye establishes a grievance, what remedies (if any) should he receive?

What does the Act require?

[11] In 2015 a group of measures were proposed to eliminate employment practises lacking sufficient reciprocity, providing the employer with more flexibility and less risk than the employee.⁷ One such practice became known as zero-hours contracts.

⁶ *Lye v ISO Limited* [2021] NZEmpC 189.

⁷ Cabinet paper from Michael Woodhouse, Minister of Workplace Relations and Safety, <https://www.mbie.govt.nz/assets/e1f87d6c1e/cabinet-paper-2015-addressing-zero-hours-contracts.pdf>, initially leading to the Employment Standards Legislation Bill 2015, later part of the Employment Relations Amendment Act 2016.

[12] The amendment to the Act which came into force on 1 April 2016, included restrictions on availability provisions. Availability provisions are defined by s 67D(1) as provisions 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.⁸

[13] Availability provisions are permitted but only, under s 67D(2), if the following requirements are met:

- (a) the employment agreement 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.⁹

[14] Further, under s 67D(3) availability provisions are precluded unless there are genuine reasons based on reasonable grounds to include one and the provision provides for 'reasonable compensation' to the employee for making herself or himself available to perform work.¹⁰

What does Mr Lye's employment agreement provide?

[15] Mr Lye works under an individual employment agreement (IEA) entered into with a predecessor of ISO, New Zealand Associates Limited. The IEA is dated 24 December 2010 and specifies in clause 6 on hours of work:

- 6.1 The Employer operates a 24 hours a day/7 days a week operation. As such, the Associate [Mr Lye] will be required to work varying hours and/or day and night shifts as required.
- 6.2 The Associate's actual hours of work will be determined by the Employer's operational requirements, which in turn will be determined by shipping volumes and related factors. The Employer will endeavour to provide as much notice as possible of the actual hours the Associate is required to work, although the hours of work notified to the Associate may be changed at short

⁸ The Act, s 67D(1), as amended by section 10 of the Employment Relations Amendment Act 2016.

⁹ The Act, s 67D(2).

¹⁰ The Act, s 67D(3).

notice to accommodate the needs of the business. The Associate has no set entitlement to particular days, shifts, or hours of work unless agreed in writing with the Employer.

- 6.3 To meet the requirements of the position the Associate may be required to work or travel during hours additional to those set out in the roster. The Associate will be paid at his/her usual hourly rate for any such additional hours.
- 6.4 The Associate must personally notify their Workforce Coordinator if he/she is unable to work during any scheduled working hours. Failure to report to work for any scheduled working hours without reasonable excuse may result in disciplinary action, including summary dismissal.
- 6.5 This agreement is for permanent employment and any failure on the part of the Associate to accept work offered without justification may result in disciplinary action.

[16] The remuneration provision, clause 8, sets a guaranteed retainer, outlined below. The retainer may be reduced under clause 8.5 to:

account for any period of time during which the Associate is unavailable for work other than as a result of authorised and paid annual leave, sick leave or bereavement leave.

What are Mr Lye's work arrangements?

[17] Mr Lye's main duties are driving cranes and diggers on the non-containerised part of the port. ISO has contracts to discharge and load logs, kiwifruit and other commodities into vessels.

[18] ISO says that the work is, of its nature, unpredictable due to external factors such as the export market, exchange rates, seasonal changes and freight costs. Shifts are cancelled due to the weather or late arrival of vessels.

[19] Under the employment agreement ISO guarantees Mr Lye a retainer payment based on 120 hours of work in a four-week period, although rostering and payment arrangements are currently based on 60 hours in a two-week period.

[20] Historically Mr Lye worked more than 60 hours a fortnight but his sense is that he has been offered fewer hours in recent years. Mr Carter acknowledges there has been a significant and ongoing downturn in volume.

[21] There is no guarantee in the agreement of any particular hours for Mr Lye, either in terms of length of shifts, timing of shifts or days of the week on which they fall.

[22] In theory Mr Lye could be required to work day or night although in practice ISO only requires him to work day shifts. He usually works 12-hour shifts from 3.15am to 3.30pm. However, shorter length shifts in the six to twelve hour range are sometimes specified by ISO. His shifts can be on any day of the week; Monday to Sunday.

[23] The criteria used by ISO in shift selection include the percentage of a worker's guaranteed hours worked that fortnight.

Notification of shifts

[24] In addition to the employment agreement clauses, Mr Lye's work was also covered by the self-styled Fair and Reasonable Guidelines for 24/7 availability for staff, introduced by ISO from 1 September 2016. No agreement was reached with Mr Lye regarding making these guidelines part of his terms and conditions.

[25] Mr Carter says the guidelines are no longer applicable as they have been overtaken by the 2018 collective employment agreement with the in house union, even though that document does not apply to Mr Lye and ISO does not seem to have given him a copy of it. Mr Carter indicates that those covered by the in house collective agreement have a guaranteed retainer of 80 hours a fortnight compared to Mr Lye's 60 hours.

[26] In any event some of the practices from the guidelines seem to continue.

[27] The guidelines provide for a shift notification on one day, for those required to work the next day. Stevedores are stated to be required to be available 24/7 and that they cannot "checkout" without agreement from the company.

[28] At the start of almost every day Mr Lye awaits information about whether he will be working. By around 11.15 am he can assume he is not working the next day if he has not received a text confirming work to be undertaken. The arrangement is a little different for weekend work, with Sunday shifts being confirmed around 4pm on Friday afternoons.

[29] As detailed below, Mr Lye describes not being able to make plans for any day, until around 11.15am the day before.

[30] Under the guidelines, and still seemingly operationalised currently, shifts can be cancelled and as long as two hours' notice is given, no minimum call out payment is made.

Changes

[31] Mr Carter gave evidence that ISO introduced changes after the Authority's 2018 determination. Surprisingly no written policy or amended guidelines or correspondence or the like were provided to the Authority in support of this assertion. Mr Carter also indicated the change related to the collective agreement with ISO's in house union in December 2018. There was also an absence of detail in Mr Carter's witness statement regarding this change.

[32] In the witness statement, Mr Carter says that the change related to requiring employees to work hours in excess of the guarantee and ISO:

... communicated its position regarding hours of work and availability to MUNZ, on several occasions. I expect this message was passed on to George by his union as George's previous colleagues, who were (at the time) MUNZ members, took up the opportunity to decline shifts on that basis.

[33] Mr Carter continues that ISO does not enforce the availability requirements of Mr Lye's employment agreement and respects his right under s 67E of the Act, to decline shifts. Further, the company does not enforce any provisions relating to disciplinary action for not working allocated shifts.

[34] Mr Carter suggests that as well as having the right to decline any shift he is rostered for, Mr Lye retains the other benefits provided for in the employment agreement, including the guarantee. That meant that Mr Lye would still receive payment for 60 hours of work even if ISO is unable to offer sufficient work. However, most of those examples in the information provided turned out to be instances where Mr Lye was on an ACC return to work programme. It has not been established that they were more widely applicable.

[35] Mr Carter accepts that if Mr Lye declines a shift, cannot make it up and thus fails to work 60 hours during the relevant fortnight, his fortnightly pay will be

reduced. Thus if Mr Lye declines one of the usual 12 hour shifts, ISO reduces his retainer payment from 60 hours to 48 hours. Potentially he could be offered an extra shift which would make up for the shift refused, but there is no obligation on ISO to make that offer.

[36] Mr Carter accepts that Mr Lye does not know if a further shift will be offered. Further, it was not a true choice given the guaranteed retainer is not likely to be made up in the fortnight.

[37] Mr Lye is mostly too concerned about receiving less than his usual pay to risk declining a shift, unless he has already worked his 60 hours in that fortnight. His belief is that in recent times he does not very often get offered more than 60 hours work a fortnight.

[38] A system referred to as Planned Time Off (PTO) is discussed below. Mr Lye denies having ever filled out an application for or specifically requested a PTO. He accepts that it was possible that sometimes ISO representatives may have recorded his reported absence on that basis. No examples of him specifically asking for PTO were provided.

[39] Mr Lye had been hopeful that the Authority and Court decisions in his favour would mean that his situation improved. However, he does not see that as having eventuated.

What is required for this grievance?

[40] The grievance under s 103(1)(h) of the Act is that the employee has been disadvantaged by the employer's agreement not being in accordance with certain provisions. Here it is s 67D, the availability section.

[41] The first question here is whether ISO's employment agreement accords with s 67D of the Act? The inclusion of an invalid provision in Mr Lye's employment agreement with ISO does not appear to automatically establish a grievance as s 103(1)(h) refers to disadvantage. A disadvantage must be established. Given however, that s 67D gives statutory protection against problematic working arrangements, little more may be required other than any degree of negative impact.

Does the agreement comply with s 67D?

[42] The issues here are:

- (a) whether clause 6 of the agreement amounts to an availability provision under s 67D(1); and
- (b) if so, whether the requirements in s 67D(2) are met; and
- (c) whether the provision is precluded by the s 67D(3) limitations.

[43] Mr Carter acknowledges that ISO's employment agreement with Mr Lye does not contain a valid availability provision. However, despite recognising that the agreement's wording was not compliant, submissions for ISO still argued that the s 67D(1)(b) element is not met as Mr Lye was not required to accept any work the employer makes available. This came close to suggesting that I was not bound by the Court's judgments in this instance. It was also argued that Mr Lye was not disadvantaged.

[44] I turn to look at whether the Court's decisions apply here.

[45] The judgments were not in the context of a personal grievance claim. However, the grievance relies at least in part on whether the agreement complies with the Act's requirements and so the decisions are directly relevant to that part of the grievance.

[46] In the first judgment, the Court concluded that:

- (a) The Authority's first determination had found the employment agreement to be non-complying and that was not challenged; and
- (b) Despite changing its work practices after the first determination, ISO still breached the Act.¹¹

[47] The second Court judgment confirmed that the agreement was non-complying and availability was still being required, noting with reference to the first decision:

...The changes made to ISO's practices did not alter the fact that, under the terms and conditions of the agreement, Mr Lye is required to make himself

¹¹ *Lye v ISO Limited* [2020] NZEmpC 231 at [15] and [41].

available for work without any certainty that he would be offered any and without compensation for that availability.¹²

[48] In the third judgment the position did not change.¹³

[49] These decisions took into account changes in practice which are the same as those put before me in evidence. These included the PTO system.¹⁴

[50] The Court decisions relate to the same employment agreement as that covered by the current personal grievance claim. The practice changes relied on by ISO have already been considered by the Court. I am bound by the Court's decisions that Mr Lye's agreement with ISO contains an availability provision which does not comply with the requirements of the Act.

[51] Even if I was not bound in this instance by the Court decisions, I would still have found:

- (a) the agreement includes an availability provision as Mr Lye's work is conditional on ISO making work available and he is required under clause 6.1 to be available for work;
- (b) the requirements under s 67D(2) are not met as the agreement does not specify Mr Lye's agreed hours of work nor guaranteed hours amongst agreed hours. The agreement simply requires Mr Lye to be available at "varying hours and/or day and night shifts as required";
- (c) the provision is precluded under s 67D(3) as it does not provide for any (let alone reasonable) compensation to Mr Lye for making himself available. For completeness I note there is no suggestion that ISO does not have a genuine reason based on reasonable grounds to include an availability provision in its employment agreements; and¹⁵
- (d) Any changes of practice by ISO cannot take away from the fact that the employment agreement it has in place with Mr Lye does not comply with s 67D.

¹² *Lye v ISO Limited* [2021] NZEmpC 120 at [19].

¹³ *Lye v ISO Limited* [2021] NZEmpC 189.

¹⁴ *Lye v ISO Limited* [2020] NZEmpC 231 at [25].

¹⁵ The Act, s 67D(3).

What is the impact on Mr Lye?

[52] Having found that there is an availability provision which is not in accordance with s 67D, I move on to look at whether Mr Lye was disadvantaged by that.

[53] Mr Lye finds the rostering arrangements difficult. He never knows when he will be working in advance and so cannot make commitments in his personal life. He may sometimes have a few days off in a row but will not know that in advance and so cannot safely make plans.

[54] Mr Lye has a seven year old son from a previous relationship. He cannot make commitments to see him on a regular basis as he is never able to confidently say whether or not he will be at work. Mr Lye cannot commit to picking his son up from school. The boy needs to be picked up but it does not work for Mr Lye to only be able to confirm his availability to do the pick up the day before. When Mr Lye has his son in his care, he has to agree with his ex-partner that the boy can be there until Mr Lye is called back to work. This may be one, two or three days. This makes life difficult for all three involved.

[55] Mr Lye also cannot commit to school activities with his son and feels like he is letting his son down. He would like to be able to commit to have his son and be involved in his activities on a regular basis but cannot do so. Mr Lye wants to be able to develop his relationship with his son but finds the inability to ensure he can commit to events, does not assist.

[56] In order to be certain of his availability Mr Lye needs to book, and be granted, annual leave. He cannot have even a couple of days away without booking leave.

[57] Mr Lye describes this inability to make plans in his life as affecting every aspect of his life. Partners can expect attendance at family and other events. The work arrangements mean Mr Lye cannot commit to joining a sports team or any other social activity that involves meetings on a regular basis. Even very ordinary activities like arranging a service of the car or a haircut become difficult because of the need for an appointment. The Covid environment has exacerbated this. Mr Lye struggles to find appointments at the last minute on the days he ends up being off work.

[58] Mr Lye previously played in a paintball team. However, he had to give this up as the team had tournaments and training and he could not commit to those as he did not know if he was going to be able to attend.

[59] Things like taking his partner out to dinner can become impossible. Mr Lye increasingly finds he socialises with other ISO workers as it is more difficult to maintain other friendships or even stay involved in family arrangements.

[60] Sometimes Mr Lye declines invitations to events, such as a show, concert or sports game as he does not know whether he will be able to attend. He is reluctant to buy tickets as he may not be able to use them. This leaves him feeling sad and deflated if he ends up not working and has missed out on the event. Mr Lye suffers frustration and embarrassment, feeling like he has no control over his own life.

[61] Mr Lye does not receive any or reasonable compensation for his availability.

Other options

[62] ISO did not dispute that there are uncertainties involved in Mr Lye's work for the company. It largely avoided arguing that Mr Lye's difficulties outlined above were not a result of its work practices.

[63] What ISO did do was to argue that Mr Lye had other options he could use to effectively increase his level of certainty. These were either seeking annual leave or since late 2018, seeking a planned time off (PTO) day, if he needed time off to do something in particular. Mr Lye acknowledges that he could seek annual leave. However, that is hardly feasible to ensure he is able to pick his son up from school on a regular basis.

[64] There appears to be a requirement to plan ahead with annual leave applications needing to be put in 14 days before the leave day sought.

[65] Mr Lye does not generally use the PTO system as he understands that PTO days can be cancelled by ISO. Mr Carter says that PTOs are not cancelled once they have been approved, although added that they "generally stand" and are "typically not cancelled". However, in the absence of any written evidence of ISO's system or of its communication to Mr Lye, I accept that Mr Lye has operated on the basis of his belief that PTOs could be cancelled.

[66] Mr Carter recognises that some workers chose not to use PTOs as it could affect their guarantee. If Mr Lye chose to use a PTO and was not offered an additional shift that fortnight, he would likely be paid 48 hours in that pay period.

[67] Mr Carter also understands that there was a limit to how many PTOs could be applied for a year, believing it was 42. On the basis of there being 48 weeks of work a year, after four weeks' annual leave are taken, that would allow a little less than one day as PTO per week.

Conclusion on disadvantage

[68] Mr Lye is disadvantaged by that, both in terms of the lack of agreed hours of work involving certainty of days or times and in terms of not being compensated for making himself available. The PTO system does not detract from the disadvantage as:

- (a) If Mr Lye uses a PTO and is not offered an additional shift in that fortnight he will be paid less than his guaranteed retainer;
- (b) There is a lack of certainty as to whether a PTO will be recognised by the company as they can be cancelled; and
- (c) there are limited number of PTO days which can be sought.

Does Mr Lye have a grievance?

[69] The written employment agreement contains an availability provision and that provision does not comply with the requirements in s 67D. Mr Lye has been disadvantaged by that.

[70] Mr Lye's grievance is established.

What remedies are sought?

[71] Mr Lye seeks:

- (a) Compensation, based on the amount of compensation he should have received as a result of the availability provision of his agreement, being the loss of a benefit he may reasonably have expected to obtain if the personal grievance had not arisen, under s 123(1)(c)(ii) of the Act; and

(b) Compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Should Mr Lye receive compensation for loss of a benefit?

[72] Under the Act, availability provisions must not be included in employment agreements unless the provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.¹⁶

[73] The Court in *Postal Workers Union of Aotearoa Inc v NZ Post Limited* recognised that employees' time is a commodity which has value, with employees foregoing opportunities in their private life.¹⁷

[74] ISO provides no compensation to Mr Lye for requiring his availability. This is a benefit which he has lost as a result of his grievance.

[75] There is assistance provided in s 67D(6) of the Act which requires compensation payable to have regard to all relevant matters including a list of factors which I set out below.

[76] Although these factors are for the purposes of assessing whether any payment offered meets the 'reasonable compensation' test, they are also relevant and helpful in assessing what benefit Mr Lye has lost.

Mr Lye's claim

[77] His submissions emphasised the significant restrictions on Mr Lye's life and factors which favour a higher level of compensation being reasonable. Compensation at \$15.25 per hour, being half the agreed hourly rate for each 12 hour period is sought. This is described as a generous concession.

[78] Further, consideration is sought of ISO's actions in taking what are described as no steps to address the unlawful employment agreement and making no offer to Mr Lye to address the terms of this employment agreement. The imposition of a substantial liability on ISO is argued to be a result of its own deliberate actions. It

¹⁶ The Act, s 67D(3).

¹⁷ *Postal Workers Union of Aotearoa Inc v NZ Post Limited* [2019] NZEmpC 47 at [29].

has known for many years of MUNZ and Mr Lye's objections to the agreement's availability provision.

[79] ISO is said to have sought and obtained a commercial advantage from the availability, which has come at a very significant cost to Mr Lye. This is made explicit by the company in its guidelines.

ISO's response

[80] The company argues that any compensation under this head would effectively amount to the Authority fixing Mr Lye's terms and conditions as to what 'reasonable compensation' for availability would be. Under s 161(2)(b) of the Act, the Authority does not have the jurisdiction to fix new terms and conditions except as specifically provided for in situations which do not relate to this personal grievance claim.

[81] This difficulty was referred to in *Fraser v McDonalds Restaurants (New Zealand) Limited* where the Full Court observed that the jurisdiction limitation meant that "[a]ny monetary remedies may have to be confirmed to some form of compensation under s 123(1)(c)".¹⁸

[82] ISO did not provide any alternative calculation, in the event that I considered I was able to award a remedy under this head.

Conclusion on loss of a benefit

[83] I accept Mr Lye has suffered a very real intrusion into his private life.

[84] Specific provision was made for a grievance regarding the lack of a valid availability provision by the introduction of s 103(1)(h) of the Act. There was no attempt to change the application of the usual remedies available to this type of grievance.

[85] I see it as open to make an award without imposing a term on the employment agreement between Mr Lye and ISO. Rather, it is compensation for a benefit which he has lost or foregone. The award will not require ISO to make a payment on-going after the grievance is determined.

¹⁸ *Fraser v McDonalds Restaurants (New Zealand) Limited* [2017] NZEmpC 95 at [13].

[86] I consider this matter is better looked at as loss of a chance of obtaining an availability benefit, rather than an award of what would have been ‘reasonable compensation’ for the availability provision had a compliant provision been incorporated. The Court of Appeal approved the use of loss of a chance in relation to grievance remedies in *Waitakere City Council v Ioane*.¹⁹

[87] It is still of assistance to examine the s 67D(6) factors:

- (a) *The number of hours for which the employee is required to be available* - Mr Lye is contractually required to be totally available; any time and on any day. However, I accept that the reality is that ISO only calls on him for days shifts. Even the length of those shifts are variable, although he must plan for the standard 12 hour shift and may get a later start for a shorter shift;
- (a) *The proportion of the hours referred to in paragraph (a) to the agreed hours of work* - there are no agreed hours as in particular days, times or shift lengths specified in the agreement;
- (b) *The nature of any restrictions resulting from the availability provision* - there is substantial evidence set out above regarding the major impact on Mr Lye’s life of having to make himself available every day of the week;
- (c) *The rate of payment under the employment agreement for the work for which the employee is available* - there was no evidence suggesting Mr Lye is highly paid compared to others with less restrictive employment agreements. Any such evidence would presumably need to take into account other factors such as the nature of the work itself; and
- (d) *If the employee is remunerated by way of salary, the amount of the salary* – Mr Lye is not on a salary.

[88] In response to my questions, neither party were aware of any other rates of availability within the industry. No evidence of on-call rates or availability compensation in other industries was offered.

¹⁹ *Waitakere City Council v Ioane* [2004] ERNZ 194.

[89] Mr Lye is paid \$30.50 gross per hour. It was not submitted that anything other than an hourly rate should be used to assess the benefit he lost. I accept any award should take into account the fact that Mr Lye is only expected to make himself available for 12 hours a day rather than 24. Although ISO seeks high levels of flexibility in its operation it seems to have been content, for an extended period, to operate on the basis of day shift and night shift worker groupings.

[90] At the rate of \$15.25 per hour for 12 hours a day, seven days a week, this gives a weekly total of \$1,281.00. Submissions for Mr Lye assert that \$1,000 a week would be appropriate.

[91] The chance element is that it seems likely that at the rate of around \$15 an hour on top of the money paid to Mr Lye for hours worked, that ISO would have seriously considered attempting to make another arrangement which reduced availability time and/or tried to negotiate a lesser rate for availability. A substantial reduction should be made given that chance.

[92] For Mr Lye it is accepted that compensation should start from 24 September 2020, seemingly as being 90 days before his grievance was raised, on the basis that ISO was on notice that the grievance was running from that point. Coincidentally there is a period of around 90 weeks between that date and when the Authority's determination will issue. The loss of a chance grievance compensation is to be calculated at a rate of \$250 a week for that period.

[93] There is no reduction for contribution as Mr Lye has not acted in any blameworthy way which has contributed to the situation giving rise to the grievance.

[94] ISO is ordered to pay Mr Lye compensation of \$22,500 for his lost benefit chance of an availability provision which complied with the Act

What about compensation for distress?

[95] Mr Lye also seeks compensation for humiliation, loss of dignity and injury to feelings for the disadvantage of having an availability provision which does not comply with the Act's requirements. A compliant availability provision would have provided some certainty about hours, for example by way of a roster and would have had an appropriate level of compensation to effectively make up for the remaining uncertainty. Mr Lye did not have that.

[96] To some extent the awarding of compensation for the lost benefit does make up for a valid availability arrangement which should have been in place. I take that into account. However, Mr Lye has still suffered substantially in a way which compensation for the lost benefit does not recompense.

[97] Mr Lye is burdened by a sense of feeling lost, waiting until 11.15 to find out whether working. He finds it embarrassing being unable to commit to events when his family and friends ask him to. At times Mr Lye feels extremely upset and frustrated. Recently he was invited to attend a holiday. Having got there Mr Lye received a text saying had to work the following day, so had to leave after a few hours. It was embarrassing to have to ditch his mates.

[98] Mr Lye understandably describes the impact the lack of certainty on this life as enormous. He finds it embarrassing not being able to commit when friends and family ask him to do things. At times he finds the work arrangement extremely upsetting and frustrating. He feels deflated and sad if having decided not to buy a ticket to an event due to uncertainty about work, he finds that he could have attended but it was too late.

[99] Mr Lye frequently feels he is letting his son down because he cannot commit to arrangements with him. There is a frustrating sense of not having control over his own life.

[100] These impacts on Mr Lye have extended for a lengthy period. ISO was aware of concerns about its availability provision for an long time and Mr Lye's grievance claim since 2020 and is still not complying in 2022. There is serious ongoing humiliation and distress for Mr Lye.

[101] For ISO it is argued that the work is fundamentally uncertain which is why it is necessary to require availability over a wide span of time. Further, Mr Lye's uncertainty would likely have been suffered in any event even if reasonable availability compensation was provided.

[102] However, Mr Lye has suffered from both the lack of agreed hours which could give him some more certainty as well as the lack of reasonable compensation for his availability.

[103] Had I not awarded compensation for loss of the benefit I anticipate that the award here would have been rather larger. Given the other award, I order ISO to pay Mr Lye \$15,000 as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[104] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Lye may lodge and serve, a memorandum on costs within 14 days of the date of issue of the determination in this matter. From the date of service of that memorandum ISO would then have 14 days to lodge a reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so has been sought and granted.

[105] 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.

Nicola Craig

Member of the Employment Relations Authority