Protecting the Modern Precariat:

An Analysis of the 2016 Employment Law Amendments in New Zealand

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CONTENTS

INTRODUCTION

"Zero-hour contracts" are a relatively new phenomenon in New Zealand. The term became well-known in New Zealand during the Unite Union's campaign to ban these contracts.[1] The major concern Unite had with "zero-hour contracts" was their lack of secure hours.[2] Unite aimed to help workers who did not know how much work and income they would receive each week and who were often required to be on-call to work for their employer when requested. Unite attracted significant public attention and raised awareness of the use of these, often legal, but grossly unfair and unbalanced employment contracts.[3] The discontent with "zero-hour contracts" escalated to a point where the New Zealand Parliament could no longer ignore it. Instead, they tackled the issue head on.

On 1 April 2016, amendments to the Employment Relations Act 2000 (ERA) came into force. One of the main purposes of the amendments was to address "zero-hour contracts" by "prohibiting certain practices in employment relationships that lack sufficient mutuality between the parties".[4] A particular focus was the lack of mutuality of obligations in some on-call employment arrangements where employees are offered no guaranteed hours of work, yet are required to work for their employers at a moment's notice without receiving any compensation for their time spent available to perform work. Parliament's response has been the regulation of these employment arrangements, limiting their use to when they are legitimately needed and requiring employers to pay their employees reasonable compensation for time spent available to perform work.

This dissertation is divided into two Parts. Part 1 is intended to provide the setting for discussion in Part 2. It begins by introducing "zero-hour contracts" in the context of flexible employment arrangements. The use flexible employment arrangements has continued to grow internationally due to the value of flexibility for both employers and employees. However, issues arise when the desire for flexibility is not mutually shared between employer and employee, and

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[1] Unite Union is a private sector community union representing workers is a range of sectors, including restaurants, fast-food chains and casinos.

[2] Mike Treen "The real heroes of the end to zero hours" (11 March 2016) <http://www.unite.org.nz/the_real_heroes_of_the_end_to_zero_hours>.

[3] Another major contributor to the widespread public discourse on "zero-hour contracts" was the number of occasions the topic featured on the popular news show, "Campbell Live".

[4] Employment Standards Legislation Bill 2015 (53-1), explanatory note.

flexibility is instead used as a tool to legitimise the exploitative and unfair treatment of employees. This is why State action is required to prohibit the use of unfair flexible employment arrangements.

Part 2 provides an in-depth analysis of particular amendments to the ERA that resulted from the controversy over the use of "zero-hour contracts" in New Zealand. The focus is on how the new amendments attempt to address the negative effects of flexible employment arrangements on employees identified in Part 1 through the regulation of on-call employment arrangements. The discussion in this Part provide clarity and guidance as to what the law requires, identify substantive and interpretive issues in the law, and propose changes that could be made.

PART 1: FLEXIBLE EMPLOYMENT ARRANGEMENTS

I. Introduction

Prospective employers and employees look to engage in employment arrangements that facilitate and provide for a unique set of desires. The arrangement entered into should reflect what the employer and/or employee value most in their specific employment arrangement. However, what an employer and an employee wants may differ. More often than not, what the employer desires will ultimately prevail due to the inherent power imbalance in employment relationships.

New Zealand's relatively permissive labour laws allow employers and employers to agree on an employment arrangement that meets their specific needs, as long as it complies with minimum standards.[5] This has resulted in a wide range of employment arrangements each with their own set of characteristics that promote different values. One category of employment arrangements is flexible employment arrangements.

This Part describes what flexible employment arrangements are and explores what makes an employment arrangement flexible. It goes on to explain the global trend towards the increased use of flexible employment arrangements and identify why flexibility can be valued by employers and employees. Next, this Part identifies the trade-off that occurs with increased flexibility and how it can negatively impact employees. Finally, this Part addresses "zero-hour contracts"[6] and explains how they have played a significant part in the lead up to legislative change in New Zealand.

II. What are flexible employment arrangements?

The term flexible employment arrangement captures working arrangements that depart from what is considered to be the typical or standard model of work; permanent, full-time, regular, and indefinite employment. Flexible employment arrangements include what has been termed atypical

[5] Ministry of Business, Innovation and Employment, *Information requested by the Transport and Industrial Relations Committee (the Committee) at its meeting on 15 October 2015* (20 October 2015), at [11].

[6] The term "zero-hour contract" has become a term of art. It has no precise meaning and has been used to describe a range of different employment contracts. Further discussion of what "zero-hour contracts" are can be found at VI.

contracts[7] or non-standard forms of employment.[8] These are arrangements that pertain to a more irregular and/or contingent nature of work. What defines many flexible employment arrangements is their precariousness; often the arrangements offer no, or very few, guaranteed hours of work and a high level of unpredictability as to when and if work will be available.[9]

Casual employment is an example of a flexible employment arrangement. Due to the absence of a definition of casual employment in legislation, extensive case law on the topic has been developed by the courts. Whereas permanent employment connotes an ongoing employment relationship, regular hours and an expectation of continuing work, truly casual employment lack these characteristics.[10] A recent Employment Relations Authority decision stated that "[t]he essence of casual work lies in a series of engagements which are complete in themselves, whilst ongoing employment contemplates a continuing pattern of regular and continuous work."[11]

The result of each employment engagement being complete in itself is that during periods between work a casual worker is usually not an employee for the purposes of the ERA. Under the ERA, an "employee" is anyone employed under a contract of service.[12] A contract of service necessarily requires continuing mutual obligations between the employer and employee. Under a casual employment arrangement, the lack of an obligation on the employer to offer work and the corresponding right of the employee to refuse work will usually indicate that the requisite mutuality

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[7] Atypical work is work "which departs from the standard model of full-time, regular, open-ended employment with a single employer over a long period": Stewart Gee, Ksenia Zheltoukhova and Sarah Veale "What part will atypical contracts play in the future of working life?" in *Workplace Trends of 2015: What they mean to you* (2015) <http://www.acas.org.uk/media/pdf/t/e/Workplace-trends-of-20151.pdf> 16 per Stewart Gee.

[8] "Typically, [non-standard forms of employment] covers work that falls outside the scope of a standard employment relationship, which itself is understood as being work that is full-time, indefinite employment in a subordinate employment relationship." *Non-standard forms of employment* (Meeting of Experts on Non-Standard Forms of Employment, International Labour Office, Geneva, 16–19 February 2015) at 1.

[9] *Working time in the twenty-first century* (Tripartite Meeting of Experts on Working-time Arrangements 2011, International Labour Office, Geneva, 17–21 October 2011) at 53.

[10] *Jinkinson v Oceania Gold (NZ)* CC/09, 13 August 2009, at [40] and [52]. *Jinkinson* is a leading New Zealand case on the distinction between casual and permanent/ongoing employment.

[11] *Rahiri v Bay of Plenty District Health Board* [2016] NZERA Auckland 16, [64].

[12] Employment Relations Act (ERA), s 6(1)(a).

of obligations does not exist.[13] Therefore, generally, casual workers are not employees during periods in-between work.[14] The consequences of this distinction are addressed at *V.*

Not all flexible employment arrangements are casual; depending on the nature of the flexible employment relationship it could either be described as casual or permanent. Examples of permanent flexible employment arrangements are on-call work, part-time work and seasonal work.[15]

The particular type of flexibility this dissertation is focusing on is flexibility as to when work will be offered and performed. This will primarily include a discussion of on-call work and casual work as these are flexible employment arrangements that can offer few or no guaranteed hours of work and result in erratic and unpredictable working hours. It is the precariousness of these flexible employment arrangements and the related unfair restrictions and exploitative employer practices that are of interest.

III. The prevalence of flexible employment arrangements

For some industries and workplaces, having a full-time, permanent workforce is the simplest and most effective way to run their business. However, employers have become increasingly aware of the benefits of engaging in flexible employment arrangements. This has led to a global trend, at least amongst more developed countries, towards the increased use of temporary and casual labour in favour of hiring permanent employees.[16] This trend has disproportionate negative effects on employees and benefits for employers. Guy Standing has suggested we are seeing the emergence of

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[13] *Jinkinson v Oceania Gold (NZ)*, at [41].

[14] The exception to this general rule is that once a casual worker has been offered and accepted work, they become a "person intending to work" and satisfy the definition of employee, as per s 6 (1)(b)(ii). In *Jinkinson v Oceania Gold (NZ)*, at [36], the Court stated that "[the definition of "employee"] recognises that the offer of work and its acceptance creates mutual obligations between the parties sufficient to create a contract of service."

[15] Although seasonal work has traditionally been seen as a laying off at the end of a season and re-engagement at the beginning of a new season, the Court in *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204 found that the meat workers remained "employees" during the off-season. The Court, at [179], described the off-season as "a period during which it is agreed that the employees will not perform work and will not be paid but will have, nevertheless, an expectation that they will be re-engaged (although termed "re-employed")…"

[16] Valerio De Stefano *The Rise of the "Just-in-time Workforce" : on-demand work, crowdwork and labour protection in the "gig-economy"* (Conditions of Work and Employment Series No 71, International Labour Office, Geneva, 2016) at 7.

a new class in society, the "modern precariat".[17] This class is characterised by their precarious employment, lack of labour security and relatively low earnings.[18] Standing attributes the growth of the precariat class to global capitalism and the "neo-liberal" market model based on maximising competitiveness.[19]

Despite the general acceptance that flexible and precarious forms of employment are becoming more prevalent, there is inadequate statistical information to draw accurate conclusions in regards to their growth, especially in New Zealand.[20] This is due somewhat to the difficulties in defining and distinguishing flexible employment arrangements and a lack of effort by governments and international bodies to effectively monitor these forms of employment. However, some attempts have been made. The UK Office for National Statistics estimated that 903,000, or 2.9%, of employees in the UK were working under a contract which guarantees no minimum amount of hours between April and June 2016.[21]

IV. Why is flexibility valued in employment arrangements?

Flexibility is valued by employers and employees alike. Where flexible employment arrangements are mutually beneficial to both employer and employee and managed effectively, the levels of employee engagement and commitment to the organisation are likely to be similar to those in standard forms of employment.[22] For employers, having flexibility in employment arrangements can result in an adaptable, mobile and efficient workforce, enabling employers to respond to fluctuations in demand. The ability to call upon workers as and when needed from a pool of flexible employees can result in significant cost efficiencies.[23]

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[17] Guy Standing "The Precariat: From Denizens to Citizens?" (2012) 44 Polity 588, at 590.

[18] Ibid.

[19] Ibid., 591.

[20] Statistics New Zealand *New Zealand Flexibility and security in employment: Findings from the 2012 Survey of Working* (19 March 2014) at 9. This point was also mentioned by in New Zealand Council of Trade Unions *Under Pressure: A Detailed Report into Insecure Work in New Zealand* (October 2013) <http://union.org.nz/sites/union.org.nz/files/Under-Pressure-Detailed-Report-Final.pdf> at 10.

[21] Office for National Statistics "Contracts that do not guarantee a minimum number of hours" (8 September 2016) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/september2016>.

[22] Stewart Gee and others, 21 per Stewart Gee.

[23] Stewart Gee and others, 22 per Sarah Veale.

Flexibility can also be favourable for employees. For those that have significant commitments outside of work (such as care-giving, study, secondary employment etc), having flexible hours and the right to refuse work when it is offered can be desirable. Being able to mould work around their other commitments allows people to work when it suits them and not be constrained by a set amount of shifts or hours of work each week. Some workers engage in flexible employment arrangements to supplement other sources of income or in the hope that it will lead to permanent employment in the future.[24]

The governments of New Zealand and the United Kingdom have acknowledged the positive effects of flexible employment arrangements for employees and accept that these forms of employment are being used responsibly in some sectors.[25] Employees in New Zealand have a legal right to request flexible working from their employers.[26] A set of requirements are put on employers in regards to their response to, and consideration of, requests.[27] Although employers are given generous grounds for refusal of a request,[28] this legislation signifies an acknowledgement by Parliament that a request for flexible working can be legitimate and that under the right circumstances employees should be entitled to it.

V. The negative impact of flexible employment arrangements on employees

However, issues can arise when the degrees of flexibility sought by the respective parties do not converge, or when one party embraces the flexible arrangement while the other desires more security and certainty.[29] The discontent with "zero-hour contracts" around the world is highlighting

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[24] *Non-standard forms of employment,* at 3.

[25] Government of New Zealand: Ministry of Business, Innovation and Employment "Addressing zero-hour contracts" (17 March 2016) <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/addressing-zero-hour-contracts>. Government of the United Kingdom: Department for Business, Innovation and Skills *Consultation: Zero Hours Employment Contracts* (London, December 2013) 4.

[26] ERA, s 69AA. The equivalent U.K. law can be found is Employment Rights Act 1996 (UK), Part 8A.

[27] ERA, s 69AAC and s 69AAE

[28] s 69AAF.

[29] Janneke Plantenga and Chantal Remery *Flexible working time arrangements and gender equality: A comparative review of 30 European countries* (Publications Office of the European Union, Luxembourg, 2010), 19.

the fact that flexible arrangements can be used by employers to exploit employees.[30] In overly one-sided flexible employment arrangements a "demutualisation of risks" occurs[31], where employers reap the benefits of flexibility while employees bear the associated risks and insecurity.[32] The rise in new types of working arrangements has led to the "blurring of the employment relationship".[33] This poses an issue, as the existence of an employment relationship is a prerequisite for many of the rights and duties employers and employees owe to each other. Workers who do not satisfy the definition of "employee" under the ERA do not have the right to claim unjustified dismissal or to mount other personal grievances, have no automatic entitlement to the accumulation of sick and bereavement leave and do not share other benefits and rights that permanent employees enjoy.

Employment arrangements that have no, or few, guaranteed hours inevitably lead to financial insecurity and instability for employees. The lack of sufficient guaranteed hours in an employment contract is an extreme form of precariousness that many consider to be the real problem with flexible employment arrangements.[34] These types of contracts deny workers the financial security that comes with knowing how much they will earn each week.[35] For some, this insecurity is not a problem - they may have other sources of income, a student loan, be receiving a benefit, or have money saved up.

However for those who rely on a flexible employment arrangement as their main source of income, flexibility can have detrimental effects. These people do not know if they will get enough work (and income) to get by each week, to support their family, to pay their bills. This can leave them continually anxious and stressed.[36] Workers' lives become dominated by work as they are

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[30] "Zero-hour contracts have become one of the most high-profile employment law issues in the United Kingdom, with frequent media reports about the use and abuse of such work arrangements.": Abi Adams, Mark Feedland and Jeremias Prassi *The "Zero-Hours Contract": Regulating Casual Work or Legitimising Precarity?* (Working Paper Series No 5, European Labour Law Network, University of Oxford, 2015), 4.

[31] Valerio De Stefano, at 7.

[32] Stewart Gee and others, 23 per Sarah Veale.

[33] International Labour Organisation "Non-standard forms of employment" (2015) <http://www.ilo.org/global/topics/employment-security/non-standard-employment/lang--en/index.htm>.

[34] Abi Adams et al., 23.

[35] Ruth Hardy "It's not zero-hours contracts that are the problem, it's the bosses who abuse them" (19 December 2013) The Guardian <https://www.theguardian.com/commentisfree/2013/dec/19/zero-hours-contracts-vince-cable-crack-down-exploitation>.

[36] Stewart Gee and others, 24 per Sarah Veale; Nick Garbutt "If New Zealand can ban zero-hour contracts why can't we" (11 March 2016) ScopeNI <http://scopeni.nicva.org/article/if-new-zealand-can-ban-zero-hour-contracts-why-cant-we>

constantly waiting and hoping for more hours to be offered.[37] Having a lack of certainty of hours affects workers' ability to get mortgages, loans and enter into hire-purchase arrangements.[38] This was a complaint made by McDonald's workers in the United Kingdom which was one consideration taken into account when deciding to offer all staff the opportunity to move to an employment contract offering fixed hours.[39]

It could be argued that the people who want fixed hours should search for employment with fixed hours rather than agreeing to flexible employment arrangements. However, the reality is that for some people flexible work is all they can find.[40] It is not uncommon for people working under part-time or temporary working arrangements to be doing so involuntarily.[41] Due to the increasing prevalence of casual and flexible arrangements in low-skilled work, low-skilled workers often have no choice other than entering into these types of arrangements. Often people working under flexible employment arrangements would prefer to be permanently employment with fixed hours of work. In a survey carried out by the Tertiary Education Union, seven out of every eight of their members who were on casual, fixed-term or insecure employment agreements would like permanent work.[42]

The following discussion introduces the concept of "zero-hour contracts", a type of flexible employment arrangement that notoriously imposes unfair and inadequate employment conditions on employees.

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[37] NZCTU *Under Pressure*, at 1.

[38] Under the Consumer Credit Contracts and Consumer Finance Act 2003, s 9C(3)(a), a lender must be satisfied that it is likely that "the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and the borrower will make the payments under the agreement without suffering substantial hardship". Consequently, if an employee does not have predictable earnings, it is unlikely that this requirement will be met.

[39] Graham Ruddick "McDonald's offer staff the chance to get off zero-hours contracts" (15 April 2016) The Guardian <https://www.theguardian.com/business/2016/apr/15/mcdonalds-offer-staff-the-chance-to-get-off-zero-hours-contracts>.

[40] Statistics New Zealand *New Zealand Flexibility and security in employment,* 96: "[S]ome workers take on non-standard jobs, not out of preference, but because of a lack of opportunities for permanent full-time employment."

[41] United States Department of Labor "Contingent workers" (2001) <https://www.dol.gov/_sec/media/reports/dunlop/section5.htm>.

[42] Tertiary Education Union "Casual Employees Want Security Not Flexibility (18 July 2013) <http://teu.ac.nz/2013/07/casual-employees-want-security-not-flexibility/http://teu.ac.nz/2013/07/casual-employees-want-security-not-flexibility/>.

VI. What are "zero-hour contracts"?

There is no universally accepted definition of "zero-hour contract". By some, the term is used interchangeably with casual employment contracts; contracts guaranteeing no minimum hours of work.[43] In New Zealand, "zero-hour contracts" are generally distinguished from casual contracts - although neither form of contract offers guaranteed hours of work, "zero-hour contracts" differ in that the worker is required to be constantly available for work and must accept any work that is offered.[44]

Despite this imprecision, the term is increasingly used world-wide. Generally, "zero-hour contracts" have been painted in a very negative light, often accompanied by a plea for their prohibition. Stories of abusive bosses, unfair treatment and exploitation of employees are common.[45] For example, Sports Direct, a British retailing group, attracted consideration attention earlier this year. The company was accused of unfair treatment of its employees who were subject to very strict work conditions, such as punishment for taking sick days, a requirement for employees to accept all offers of work, no guaranteed hours of work, deductions in pay for clocking in slightly late, and unpaid security checks when entering and leaving the workplace.[46]

In New Zealand, the fight against "zero-hour contracts" was led by the Unite Union and its National Director, Mike Treen. Employers who used "zero-hour contracts" were criticised by Treen for participating in a "culture of bullying and exploitation".[47] Unite has been fighting for "secure hours" in the fast food industry since 2003 when they launched the "SupersizeMyPay.com"

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[43] Gov.UK "Contract types and employer responsibilities" (2014) <www.gov.uk/contract-types-and-employer-responsibilities/zero-hour-contracts>; The Advisory, Conciliation and Arbitration Service "Zero hours contracts" (2013) http://www.acas.org.uk/index.aspx?articleid=4468>.

[44] MBIE *Information requested by the Transport and Industrial Relations Committee (the Committee) at its meeting on 15 October 2015.* This definition of "zero-hour contracts" is the one most frequently used by members of Parliament and governmental officials in New Zealand. However, the public perception of what a zero-hour contract is varies.

[45] Sean Farrell "McDonald's UK boss defends company's use of zero-hours contracts for staff" (26 August 2015) The Guardian <https://www.theguardian.com/business/2015/aug/26/mcdonalds-uk-paul-pomroy-defends-zero-hours-contracts>; Oscar Williams-Grut "Here is the terrible contract staff at Sports Direct's 'Victorian workhouse' had to sign up to" (22 July 2016) Business Insider Australia <http://www.businessinsider.com.au/sports-direct-inquiry-why-zero-hour-contracts-are-bad-for-workers-2016-7?r=UK&IR=T>.

[46] Simon Goodley "Sports Direct minimum wage investigation to cover shop workers" (20 July 2016) The Guardian <https://www.theguardian.com/business/2016/jul/20/sports-direct-minimum-wage-probe-set-to-be-extended-to-shop-staff>.

[47] The Richie Allen Show "Mike Treen, On How He Outlawed Zero Hours Contracts In New Zealand!" (March 17 2016) <https://www.youtube.com/watch?v=jWAifBvyKTU>.

campaign.[48] Protests, brand-shaming and significant public attention ensued, forcing fast-food companies to negotiate with Unite Union on "secure hours". For example, McDonalds agreed that all their employees would be offered guaranteed hours equal to 80 percent of hours they worked over a three-month period.[49] It was the work of Unite that created the widespread discontent with "zero-hour contracts" and led to action by the Government and legislative response.[50]

The inconsistent use of the term "zero-hour contract" renders it a problematic term to use. Furthermore, Adams et al. suggest that there is "no such thing as the zero-hours contract as a singular category; the label serves as no more than a convenient shorthand for masking the explosive growth of precarious work".[51] Accordingly, in this dissertation, the wording "zero-hours contract" will be avoided wherever possible. The term "availability-only contracts" will be used to refer to employment contracts that require employers to be available for work but that do not guarantee any minimum hours of work (i.e what the New Zealand Parliament defines as "zero-hour contracts").

VII. Conclusion

This Part has explored the concept of "zero-hour contracts" within the broader category of flexible employment arrangements in which they belong. The value for employers in having flexible employment arrangements means the use of these forms of work will continue to grow. Although many flexible employment arrangements are mutually beneficial, there is a growing concern that employers are exploiting the flexibility these arrangements offer to disproportionately benefit themselves at the expense of employees. The campaigns to end "zero-hour contracts" in New Zealand and the United Kingdom have resulted in pleas for State action in stamping out illegitimate and unfair forms of flexible employment arrangements.

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[48] Mike Treen "The real heroes of the end to zero hours".

[49] "McDonald's and Unite Union reach agreement on zero hours" (1 May 2015) Stuff <http://www.stuff.co.nz/business/68184848/McDonalds-and-Unite-Union-reach-agreement-on-zero-hours>.

[50] Mike Treen "The real heroes of the end to zero hours". The work of the Unite Union was acknowledged in Parliament frequently during their debates over the Employment Standards Legislation Bill: Iain Lees-Galloway (10 March 2016) 711 NZPD 9612; Denise Roche (10 March 2016) 711 NZPD 9615.

[51] Abi Adams et al., abstract.

The following Part is based on an acceptance that flexible employment arrangements do have a legitimate place in New Zealand's labour market. New Zealand should not attempt to extinguish the use of flexible employment arrangements altogether. Equally, however, these arrangements should not be left untouched. Without adequate regulation, employers would continue to use flexible employment arrangements to engage in unfair and exploitative practices.

PART 2: NEW ZEALAND'S LEGISLATIVE RESPONSE

I. Introduction

After amendments to its law earlier this year, New Zealand was heralded internationally for its progress in the fight against "zero-hour contracts". News' headlines such as "Zero-hour contracts banned in New Zealand"[52] and "If New Zealand can ban zero-hour contracts why can't we?"[53] flooded media forums. It is true that New Zealand has outlawed what Parliament has described as "zero-hour contracts" with the recent amendments to the ERA. In this respect, New Zealand is a world leader,[54] and it deserves the international recognition it is receiving. However, the 2016 amendments have been erroneously interpreted as banning the broadest definition of "zero-hour contracts" (i.e casual contracts).[55]

This Part seeks to explain the effect of particular 2016 amendments to the ERA enacted in response to the campaign against "zero-hour contract".[56] The amendments focussed on are those that regulate on-call employment. This Part intends to address and resolve potential ambiguities and interpretive challenges in the new legislation, providing proposals for legislative change where appropriate.

A. The focus of the 2016 amendments

The 2016 amendments aim to address many of the negative consequences flexible employment arrangements have for employees identified in Part 1. However, the amendments do not outlaw flexible employment arrangements that do not provide certainty of hours. Casual

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[52] Eleanor Ainge Roy "Zero-hour contracts banned in New Zealand" (11 March 2016) The Guardian <http://www.theguardian.com/world/2016/mar/11/zero-hour-contracts-banned-in-new-zealand>.

[53] Nick Garbutt "If New Zealand can ban zero-hour contracts why can't we".

[54] Sue Moroney (10 March 2016) 711 NZPD 9623.

[55] Eleanor Ainge Roy "Zero-hour contracts banned in New Zealand". Within New Zealand there is also considerable confusion as to what the new law requires. Incorrect statements of the law can be found in the media, as well as Unite Union's website and a government run website (http://www.unite.org.nz/the_real_heroes_of_the_end_to_zero_hours; http://www.business.govt.nz/staff-and-hr/hiring-an-employee/hiring-fixed-term-and-casual-employees).

[56] The amendments this dissertation is focussing on came into force on 1 April 2016 alongside a multitude of other amendments to the ERA and other labour legislation. These other amendments made changes to parental leave entitlements, and dealt with unfair employer behaviour such as unreasonable shift cancellation and deductions from employees' pay. Although significant, these related changes to New Zealand's labour laws are not the focus of this dissertation.

employment (offering no guaranteed hours of work) remain legal and largely unregulated under our legislation. The New Zealand Parliament did not fail to ban employment agreements that guarantee no minimum hours of work; rather it made a conscious decision not to. The alternative would effectively ban all forms of casual employment. This would be undesirable because casual employment does have an important place in our labour market and, under the right circumstances, can be beneficial to both the employer and the employee.[57]

The decision not to address the issue of certainty of hours highlights Parliament's view that it is not a lack of guaranteed hours that is the issue in flexible employment arrangements but the unfair restrictions and exploitative employer behaviour that is often coupled with it. The amendments address availability-only agreements - agreements that do not guarantee any hours of work but require employees to be available to accept work. A lack of guaranteed hours of work in itself does not amount to an unfair or exploitative employment agreement.

In a report published by the Ministry of Business, Innovation and Employment ("the Ministry") it is expressly stated that "it is not the policy of the [Employment Standards Legislation] Bill to address the issue of certainty of hours for workers."[58] Similarly, in a Regulatory Impact Statement, the Ministry stated that "Stakeholders have raised a number of further issues about the use of various working arrangements and the impacts that such arrangements may have on certainty of income, certainty of hours of work and access to state support. These issues, however, are outside the scope of the current policy work on the imbalance of obligations in certain employment practices".[59] The amendments to the ERA this dissertation is focussing on were aimed to address the use of on-call employment without intruding on the law surrounding casual employment (which is largely dealt with in New Zealand's common law).

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[57] *Non-standard forms of employment*, at 3.

[58] MBIE *Information requested by the Transport and Industrial Relations Committee (the Committee) at its meeting on 15 October 2015* at [21]. The Employment Standards Legislation Bill led to amendments of the 2016 amendments to the ERA as well as four other employment-related pieces of legislation.

[59] Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Addressing zero hour contracts and other practices in employment relationships* <http://www.mbie.govt.nz/publications-research/publications/employment-and-skills/ris-2015-addressing-zero-hours-contracts.pdf/view> at 1.

B. Summary of law to be discussed

This Part is focussed on ERA sections 67C, 67D, 67E, 67F and 67H, all of which were introduced to the ERA as a result of the 2016 amendments.

Under s 67C, if an employer and employee agree on "hours of work", the agreed hours of work must be specified in the employee's employment agreement.[60] Section 67D regulates the use of availability provisions in employment agreements. An availability provision may only be included in an employment agreement that specifies guaranteed hours of work.[61] Additionally, an employer must have genuine reasons based on reasonable grounds for the inclusion of an availability provision and pay the employee reasonable compensation for their availability.[62] Section 67E provides employees with the right to refuse to perform work that is in addition to their guaranteed hours, unless their employment agreement includes an availability provision that provides for the payment of reasonable compensation to the employee. Section 67F prohibits employers from treating an employee adversely because of a refusal to perform work in accordance with s 67E. Finally, section 67H bans the use of provisions in an employment agreement that restrict an employee's ability to engage in secondary employment, unless the employer has genuine reasons based on reasonable grounds to include the provision.

What follows is a discussion of the practices that prompted these legislative changes and of the effects of the 2016 amendments.

II. Availability provisions and on-call employment

On-call employment requires employees to be available to work at the request of their employer. The terms of availability are usually found in an availability provision[63] in an employment agreement for on-call employment. These provisions can vary from requiring

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[60] This section does not affect the already existing requirement for employers to include "an indication of the arrangements relating to the times the employee is to work" in an employee's employment agreement (s 64(2)(a)(iv)).

[61] ERA, s 67D(2).

[62] ERA, s 67D(3).

[63] An "availability provision" is a generic term that incorporates call-out provisions and standby clauses as well as clauses requiring employees to work reasonable overtime: *Availability Provisions: Quick Guide*" (Canterbury Employers' Chamber of Commerce, March 2016).

employees to stay on work premises, through to allowing employees relative freedom to do as they please, until they are called for work. Alternatively, the employer may simply have an "expectation" that the employee be available to work when requested, but then subject the employees to negative consequences if they refuse offers of work.

Under an on-call employment arrangement where the employee is required to accept all work that is made available, the mutuality of obligations is significantly swayed in the employer's favour. Nonetheless, this form of employment has become common place. In some industries, such as meat works, IT services, medical services and online law-firms, work demand may be so variable and unpredictable that it is not practical for employers to offer set hours to employees. Employers in these industries have a legitimate interest in requiring employees to be available to perform work at their request. The attractiveness of on-call arrangements to employers has catalysed the spread of the practice into other industries that do not necessarily need to restrict employees' ability to refuse work in order to function effectively. In some cases, this has led to unjustified and unfair restrictions being placed on employees.

The 2016 amendments have put a total ban on availability provisions in employment agreements that offer no guaranteed hours of work. However, s 67D allows the use of availability clauses if the employer has genuine reasons based on reasonable grounds for including the availability provision and the employment agreement stipulates reasonable compensation to be paid to an employee for time spent available:[64]

(1) […] an **availability provision** means a provision in an employment agreement under which—
  (a) the employee's performance of work is conditional on the employer making work available to the employee; and
  (b) the employee is required to be available to accept any work that the employer makes available.
(2) An availability provision may only—
  (a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
  (b) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
(3) An availability provision must not be included in an employment agreement unless—

[64] ERA, s 67D.

(a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and
(b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

The intention of this section is to put an end to availability-only contracts in New Zealand. However, in its initial form, this section was heavily criticised for "legitimising" availability-only contracts rather than banning them.[65] The problem with the initial draft was that it did not prohibit or restrict the use of availability provisions beyond requiring "compensation" to be paid in order for availability provisions to be enforceable.[66] There was no requirement for employers to offer guaranteed hours of work or for compensation to be reasonable if they wished to include an availability clause. These were major points of contention in Parliament, with Labour and other parties, such as the Green Party and New Zealand First, refusing to support the Employment Standards Legislation Bill ("the Bill") until changes were made. Labour nonetheless voted in favour of the Bill at its first and second reading on the basis that National would work with Labour and other parties to amend the legislation to effectively ban availability-only contracts and further restrict the use of availability provisions.[67] It was a Supplementary Order Paper put forward by Iain Lees-Galloway of Labour[68] and amendments resulting from the Select Committee stage of the Bill which addressed Labour's concerns, and were subsequently adopted into s 67D.

A. No more "zero-hour contracts"?

Although what Parliament describes as "zero-hour contacts" is now technically banned, the legislation permits the use of availability provisions in employment agreements that only offer a

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[65] The relevant Bill is the Employment Standards Legislation Bill 2015 (53-1). Denise Roche (8 September 2015) 708 NZPD 6360; Phil Twyford (8 September 2015) 708 NZPD 6366 stated that "The Government is not abolishing [zero-hour contracts]… it is simply regularising, or legalising them." "It actually makes matters worse. At the moment, the legal position of zero-hour contracts is highly dubious. The courts do not look kindly on them. This bill will institutionalise them, and that is the big concern that we have"; Similarly, Mitchell Clayton (8 September 2015) 708 NZPD 6362 stated that "…in actual fact, they have not banned zero-hour contracts."; Also, Iain Lees-Galloway (8 September 2015) 708 NZPD 6354 said "This legislation gets rid of that dubious legal status and enshrines zero-hour contracts in law." Also, the Law society in their submission on the Bill: New Zealand Law Society "Submission On The Employment Standards Legislation Bill" (6 October 2015) <https://www.lawsociety.org.nz/__data/assets/pdf_file/0011/95933/Employment-Standards-Legislation-Bill-6-10-15.pdf>.

[66] Employment Standards Legislation Bill 2015 (53-1), s 87.

[67] Andrew Little (8 September 2015) 708 NZPD 6367.

[68] Supplementary Order Paper 2016 (155) Employment Standards Legislation Bill 2015 (53-1).

minimal amount of guaranteed hours.[69] Effectively, the new law can be circumvented by an employer who offers a minimal number of guaranteed hours, possibly even less than one hour.[70] This significantly downplays the 'success' of this provision in banning availability-only contracts as it fails to provide adequate certainty of hours for those who are required to be available. Although certainty of hours was not an issue the Bill proposed to address, the requirement to include guaranteed hours shows a concern for certainty of hours in the context of contracts that require availability. This parallels the major concern with "zero-hour contracts"; low-paid workers who were expected to be available for work all week yet had no assurance that they would receive any work. However, one or two guaranteed hours of work a week will not come anywhere close to the reassurance these workers may need.

One option proposed for dealing with this issue was to cap availability as a proportion of guaranteed hours.[71] This would incentivise employers to offer more guaranteed hours in order for to be able to require more hours of availability. This cap, for example, could be 200%, meaning that a worker who is guaranteed 10 hours of work a week can only be required to be available for 20 hours a week on top of their guaranteed 10 hours. This change would give employees increased income certainty and avoid unduly restricting their right to refuse work above their guaranteed hours. However, this option would severely impact employers who legitimately need longer periods of availability and cannot practicably offer a set amount of guaranteed hours. Employers would be required to guarantee a certain amount of hours of work which neither they nor the employee may desire.

The ideal way of looking at the issue of employment arrangements that offer no, or few, guaranteed hours while requiring availability is to identify the underlying concerns. For those in low-paying jobs, a lack of guaranteed hours of work means a lack of income security. This underlying concern may be better addressed by means other than guaranteeing work. As long as

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[69] Andy Bell "Have we really abolished zero-hour contracts?" (20 June 2016) <http://bellandco.co/have-we-really-abolished-zero-hour-contracts/>. [T]here is still no minimum limit on set hours offered, meaning that zero-hour contracts are still very much alive."

[70] Albeit, the use of an availability provision will trigger the obligations to have genuine reasons based on reasonable grounds for including the availability provision and to pay reasonable compensation to the employee for their availability. Whether these requirements are satisfied will be influenced by the amount of guaranteed hours under the employment agreement.

[71] This was a proposal made by the NZCTU: New Zealand Council of Trade Unions "Submission of the New Zealand Council of Trade Unions Te Kauae Kaimahi on the Employment Standards Legislation Bill" (October 2015) <http://union.org.nz/sites/union.org.nz/files/151006%20Employment%20Standards%20Legislation%20Bill%20CTU%20submission.pdf> at [7.21].

these workers are receiving adequate incomes that they can live off, the number of hours they physically work each week is not at issue. Although the new law does not require more than minimal guaranteed hours in employment agreements requiring availability, it does address the underlying concern of this issue by means of the reasonable compensation requirement. Depending on the efficacy of the reasonable compensation requirement, this may be a better way of dealing with income insecurity than requiring employers to offer more guaranteed hours.

B. What are "guaranteed hours of work"?

A major weakness in s 67D, and a factor significantly hindering the strength of the requirement to include guaranteed hours in an employment agreement that requires availability, is the absence of a definition of guaranteed hours. This raises the question as to whether guaranteed hours must refer to specific hours on specific days of the week that the employee is to work (e.g. 10am-12pm on Monday and Wednesday) or whether guaranteed hours can simply be a number of hours that will be worked at any time during a period of time (e.g. 2 hours of work a week)?

If the legislators believed that reasonable compensation could fully address the underlying issue of a lack in guaranteed hours, the requirement for guaranteed hours would not have been included in the legislation. What reasonable compensation does not achieve, which guaranteed hours can, is certainty as to when work is to be performed. The only way for the current law to do this is if it is interpreted as requiring specificity as to exactly when the guaranteed hours are to be performed. This narrow interpretation incentivises employers to seriously consider if work demand is of sufficient predictability to enable them to offer employees definite times for when work will be performed.

On the other hand, a wider interpretation may also have positive effects for employees. If employers do not have to be specific in regards to guaranteed hours, employers who cannot reasonably predict exactly when work will be needed, but have an idea of the minimum amount of work that will be required weekly, would be able to offer more guaranteed hours to employees. On balance, however, since there is no guarantee that employers would offer more guaranteed hours as a result of adopting this interpretation, the former interpretation would likely provide more protection for employees and give more meaning and purpose to the requirement for guaranteed hours to be included in an on-call employment agreement.

Limited guidance as to what "guaranteed hours of work" are can be found in the wording of s 67C. This section requires "hours of work" agreed to by an employer and employer (if agreed to at all) to be included in the employee's employment agreement. Section 67(2) states that:

> 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).

It could be implied from the wording of section 67C(2) that guaranteed hours of work do not have to stipulate exactly when the hours will be worked. Since days of the week and start and finish times are distinct from the number of guaranteed hours of work, it could be implied that guaranteed hours of work do not necessarily include specific days or hours that work is to be performed. Further supporting this interpretation is that hours of work may include "the *number* of guaranteed hours of work". If guaranteed hours of work can be expressed simply by reference to a number it follows that there is no requirement for these guaranteed hours to state when the work is to be performed. This interpretation essentially limits the meaning of "guaranteed hours of work" to a guaranteed number of hours that must be offered to the employee.

Adopting this interpretation becomes problematic in the context of the definition of an availability provision. An availability provision "may only… relate to a period for which an employee is required to be available *that is in addition to those guaranteed hours of work*".[72] This means that an employer cannot require an employee to be available to perform for work within their guaranteed hours if the performance of the guaranteed hours of work is conditional on the employer specifying when the work is to be performed. Therefore, under this interpretation of guaranteed hours, employees would be free to refuse to perform work that falls within their guaranteed hours of work, rendering these hours not guaranteed at all.

The only way for guaranteed hours of work to be truly guaranteed is if the employer and employee are clear as to when the work is to be performed. A reasonable employee would assume

[72] ERA, s 67D(2)(b).

that guaranteed hours of work means specific hours of work they will perform at specific times, not simply a number of hours that they are guaranteed to be offered. An alternative interpretation is required. The reference to the requirement for guaranteed hours of work to be included in an on-call employment agreement in s 67D does not include "number of". Therefore, it is possible that a number of unspecified hours is not what the section is contemplating, unlike s 67C which specifically uses the words "number of". The only way for agreed hours of work to include guaranteed hours of work (rather than a number of guaranteed hours) is if both the days of the week on which work is to be performed and the start and finish times of work (points (b) and (c) under s 67C) are stated. It is likely employers who offer something short of this will not satisfy the requirement to include guaranteed hours in an on-call employment agreement.

This interpretation is in line with what s 67D should be trying to promote which is some level of certainty of work and income for employees who are required to be available. Although a number of guaranteed of hours of work provides employees with a minimum amount of work they will be offered and income they could potentially receive, depending on the length of the notice period before work is to be performed it does not provide employees with sufficient certainty to be able to plan other aspects of their life around work. Interpreting guaranteed hours that are required to be in an employment agreement to enable the use of an availability provision as specific hours on specific days will provide employees with more certainty and assist in balancing the mutuality of obligations, therefore furthering the purposes of the Bill. Requiring guaranteed hours to be specific also makes distinguishing between guaranteed hours and available hours a lot easier, which will assist in calculating reasonable compensation.

Additionally, and perplexingly, nowhere is it stated that guaranteed hours of work must be on a daily or weekly or monthly basis. This seems to leave open the option that an employer could satisfy the requirement for guaranteed hours to be included in an employment agreement, and thus include an availability provision, if they guarantee one hour of work to be performed over the course of the entire employment engagement. Due to this absurdity, it is unlikely that this interpretation would be accepted and a court would likely decide that guaranteed hours refers to hours of work that must be guaranteed weekly, or monthly. Any other interpretation would be nonsensical and render the ban on availability-only contracts futile. If this is not the case, offering one unspecified guaranteed hour of work in an employment agreement would nonetheless be a relevant factor a court would take into account when assessing the reasonableness of compensation

and would likely result in the payment of a higher compensation being imposed. This should act as a disincentive for employers to offer one guaranteed hour of work even if it is permitted by the legislation.

C. Genuine reasons based on reasonable grounds

Availability provisions can only be included in an employment agreement if the employer has "genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision".[73] The addition of "and the number of hours of work specified in that provision" is to ensure employers have reasonable grounds for including the specific provision in question and the number of specified hours in the employment agreement.[74] Employers must be able to justify the specific period/s of availability imposed. This subsection received much less political attention than ss (2)(a) that bans availability-only contracts. However, it has the potential to be far more effective at reducing the use of exploitative availability provisions. The purpose of this requirement is to ban employers from unjustifiably requiring availability from employees. Therefore, the efficacy on this section will be determined by whether it can satisfactorily meet this goal.

In considering whether there are "genuine reasons based on reasonable grounds", an employer must have regard to all relevant matters, including:[75]

(a) whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision:
(b) the number of hours for which the employee would be required to be available:
(c) the proportion of the hours referred to in paragraph (b) to the agreed hours of work.

Although the legislation offers three mandatory considerations, employers are given little guidance as to what will be a genuine reason based on reasonable grounds. Exactly what this section requires will be decided by the courts. However, the Ministry, in a Departmental Report

[73] ERA, s 67D(3)(a).

[74] Supplementary Order Paper 2016 (155)

[75] ERA, s 67D(5).

prepared for the Select Committee, gives us additional guidance.[76] The Ministry agreed with submitters that availability provisions should be used only where they are necessary. This is because the imposition of an availability provision necessarily sways the allocation of risk significantly in favour of the employer. Although many industries experience fluctuations in work demand, in many instances this can be addressed by good planning rather than requiring employee availability.[77] This is why the requirement for genuine reasons based on reasonable grounds was proposed by the Ministry. Unpredictability in work demand should only be a justification for the use of an availability provision where it cannot be adequately addressed by other means. This idea was echoed by Jonathan Young in Parliament, who stated that the reason for the genuine reason requirement is to ensure employers are very careful about actually genuinely needing availability and that requiring availability was not due to laziness in rostering or managing workflow.[78]

The Ministry proposed factors to be included in legislation to guide the courts and assist employers in understanding the requirements of this section.[79] Although worded differently, the factors listed in the legislation generally reflect those recommended by the Ministry. However, considerations regarding the restraints put on employees due to availability, the notice period for undertaking work and the rate of compensation paid to employees for being available were not expressly included, despite being recommended. This may have been a conscious decision by the legislators to keep the focus of this section on the employer and what a reasonable employer would do in the circumstances.[80]

1. Consideration (a): Practicability

The first mandatory consideration is "whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision".[81] Practicable means able to be done; feasible. Therefore, if the employer can achieve the

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[76] Ministry of Business, Innovation and Employment *Employment Standards Legislation Bill: Departmental Report to the Select Committee* (3 December 2015).

[77] MBIE *Departmental Report*, 23.

[78] Jonathan Young (10 March 2016) 711 NZPD 9611.

[79] MBIE *Departmental Report*, 24.

[80] Compare s 67D(6) that requires more employee focussed considerations when determining compensation to be paid.

[81] ERA, s 67D(5)(a).

same desired outcome by a means other than the use of an availability clause, that will be a factor suggesting the employer does not have genuine reasons based on reasonable grounds to use the availability provision. The reasonableness of the practicability will likely come into play. For instance, if the employer can practicably meet business demands for the work to be performed by the employee without including an availability provision, but the alternative options are considerably more expensive or unreasonably risky, then the employer may have a genuine reason based on reasonable grounds to include the availability provision.

A relevant consideration that would help determine the 'practicability' question is what comparable employers in the same business or industry, or acting under similar circumstances, as the employer are doing. If the use of availability provisions is scarce within the industry in which the employer is engaged, it might be more likely that the employer does not have genuine reasons based on reasonable grounds to include the availability provision. That said, business demands may vary within the same industry and may be very specific to an employer. Some businesses may have a higher demand for flexibility than others simply because flexibility is a value that they want to exhibit and offer to customers/clients in order to gain a competitive edge. Although some employers may essentially create a higher business demand for flexibility than is necessary, this will likely be a legitimate way for an employer to prove the necessity of requiring availability and the lack of other practicable means of achieving the flexibility.

An alternative to requiring availability is the employment of an employee on a contract offering fixed hours. This will likely not be reasonably practicable only if the work concerned is of a volatile nature with unpredictable fluctuations in work demand, meaning that times when employees would be needed to work could not be accurately foreseen.

Peter Kiely et al. suggest that in the situation where someone is required to cover a shift on short notice, such as a waitress who has phoned in sick, "it may be impracticable for the employer to employ someone on a casual basis because the employee would not have an obligation to come to work when requested".[82] They go on to suggest that "[t]his type of arrangement would be likely to constitute a genuine reason."[83] If this was to be the case, the purpose for including the

[82] Peter Kiely, Elise Robinson and Kiely Thompson Caisley "Zero Hour Contracts "Banned" – the Employment Relations Amendment Act 2016" (2016) 2 CLEW'D IN 11 at 11.

[83] Ibid.

requirement for genuine reasons based on reasonable grounds would be significantly undermined. First, Kiely et al. treats impracticability as a decisive factor in determining whether an employer has genuine reasons based on reasonable grounds. However, it is crystal clear from the legislation that all relevant factors need to be taken into account and the practicability is only one of them (albeit, a mandatory consideration). Secondly, in a situation akin to the one described by Kiely et al., calling in a casual worker to cover the shift most definitely could be practicable. In fact, it has been suggested that the "true use of [casual] agreements is genuinely intermittent work for the purpose of matters such as covering sick employees".[84] The inability for an employee to work at short notice is a risk all employers face. It is common practice that, in the situation described, the employer would call upon casual workers to cover the shift. In the case of low-skilled work (e.g. waitressing) the risk of people declining the offer of work is a reasonable risk for employers to bear. Employers can limit this risk by creating a large enough pool of casual workers to call upon. In the case of highly-skilled or specialist work where replacements cannot easily be found, or where the employer is running an essential service (e.g. emergency medical assistance), the employer will have a better case for arguing that he/she has genuine reasons based on reasonable grounds for the inclusion of the availability provision.

If this section could be satisfied simply by pointing to the convenience or security gained by an employer for including an availability provision (a characteristic shared by all availability provisions) it renders this section completely redundant. Parliament would not have included the genuine reasons requirement unless it wanted to meaningfully restrict the use of availability provisions. The inclusion of the 'practicability' consideration and the implicit requirement to look at alternatives to requiring availability signifies that convenience or security for the employer should not be enough to justify the use of an availability clause.

2. Consideration (b): Available hours

The second mandatory consideration is "the number of hours for which the employee would be required to be available".[85] The inclusion of this requirement is to incentivise employers to require availability only where it is necessary.[86] It essentially requires there to be a nexus between

[84] Andy Bell "Have we really abolished zero-hour contracts?".

[85] ERA, s 67D(5)(b).

[86] MBIE *Departmental Report*, 23.

the genuine reasons and the hours the employee is required to be available. For instance, if business demand significantly and unpredictably fluctuates during weekends, but is stable and predictable on working days, an employer may only have genuine reasons based on reasonable grounds to require availably during the weekend.

The number of hours of required availability can also act as evidence as to whether an employer has genuine reasons. An employer requiring availability for a minimal number of hours and at specific times indicates that there is likely a specific need for availability during a particular time period, rather than a general desire by an employer to restrict an employee's right to refuse work beyond their guaranteed hours.

3. Consideration (c): Proportion of available hours to agreed hours of work

The Ministry stated, after listing the factors it proposed to be included when determining genuine reasons based on reasonable grounds, that:

> The intended effect of these factors is that where the size of the availability-window is greater in proportion to agreed hours, or greater overall, an availability provision is less likely to be justified (ie found to be based on reasonable grounds). For example, to offer an availability-only agreement for 40 hours a week (such as current zero hours agreements) the employer would need to have a very good reason, based on reasonable grounds. Whereas, to offer an employee who is working 35 guaranteed hours a week an agreement to be available for another 20 hours would be likely to be easier to justify.[87]

A genuine need for employees to work overtime will likely be a genuine reason for including an availability provision. Indicators of a need for overtime include where the required hours of availability are tagged on to the end of guaranteed working hours. Where there is an effort to guarantee as many hours of work to the employee as is practicable (which may be evident from a large number of guaranteed hours in an employment agreement) it is more likely that the employer has a genuine reason to require availability.

[87] Ibid., 24. The Ministry states that with a very good reason an availability-only agreement could be offered. This is no longer the case, as there is now a blanket ban on availability-only agreements. The Ministry was reporting on the Bill in its initial form before availability-only agreements were banned.

4. Other relevant considerations

The list of considerations under s 67D(5) are non-exhaustive; all relevant considerations must be taken into account. Another relevant consideration will likely be the amount of compensation payable to an employee for making himself or herself available to perform work. An employer who includes a generous amount of compensation (i.e an amount above what would be considered reasonable, or higher than the minimum wage, or close to the usual hourly rate of work) is more likely to be presumed to have genuine reasons for requiring availability. This consideration was proposed by the Ministry to be expressly included in the legislation.[88] The decision not to include it may signify that it should not hold as much weight as the other considerations listed. Nonetheless, it can still be a helpful tool to provide evidence that an employer does have genuine reasons for requiring availability. However, a generous rate of compensation should not allow the use of an availability provision that would otherwise fail to meet the genuine reasons based on reasonable grounds standard. If this was to happen, the purpose of the genuine reasons requirement to limit the use of availability provisions to situations where they are necessary would be undermined. However, in practice, employees who are offered generous compensation for time spent available are far less likely to challenge the use of an availability provision.

5. Legislative context

The phrase "genuine reasons based on reasonable grounds" is found in two other sections of the Employment Relations Act.[89] Under s 66(2)(a), an employer must have "genuine reasons based on reasonable grounds" to justify the use of a fixed-term contract. Under s 67H, a secondary employment provision requires "genuine reasons based on reasonable grounds" for it to be included in an employment agreement.

All three sections necessarily require section-specific genuine reasons. This means they offer little help in deciphering what the legislators envisaged "genuine reasons" to mean in s 67D. For instance, the possible suggestions for what a genuine reason could relate to, as expressed in s 67H(3), include protecting an employer's commercially sensitive information, intellectual property rights, commercial reputation, or preventing a real conflict of interest. These would be irrelevant

[88] Ibid.

[89] However, it is not found in any other New Zealand legislation.

considerations when deciding whether an employer has genuine reasons to impose an availability provision. Section 66(3) stipulates examples of what are not genuine reasons specifically for the purposes of fixed-term contracts.

The case law on s 66 suggests that "genuine reasons are necessarily tied to legitimate operational concerns".[90] This is similar to Italy's approach that "on-call work must be justified by reference to production peaks and organisational needs [and] not be relied on to supply the enterprise's general needs".[91] Mazengarb Employment Law suggests that "[b]y analogy, it might be asked under s 67D whether, given the nature of the work, could a reasonable and fair employer organise that work so that an availability provision was not required?". This is consistent with the 'practicability' consideration aforementioned. A reasonable and fair employer would not impose availability requirements on an employee unless it is necessary due to other options being impracticable or unreasonably practicable. Some leeway should be given to employers as any unreasonableness or unfairness in requiring availability may also be dealt with through the amount of payable compensation to the employee.

A question that arises is when must the genuine reasons based on reasonable grounds be held. For the purposes of s 66 on fixed-term contracts, it seems that the genuine reasons must be held at time the contract was entered into but the reasons are not required to still be valid at the termination of the employment agreement.[92] Similarly, because an availability provision is tied to an employment agreement, the time to assess genuine reasons must be at the point which the availability provision is included in the employment agreement. Arguably, for the purposes of s 67D, if the genuine reasons for having an availability provision disappear, the availability provision would no longer be allowed to be "included" in the employment agreement.[93] At this point it would have to be removed, or another genuine reason identified with an adjustment to the hours of availability to match the new genuine reason. This interpretation would provide more protection for

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[90] Gordon Anderson and others (eds) *Mazengarb's Employment law* (looseleaf ed, LexisNexis) at [ERA67D.5.2].

[91] Zoe Adams and Simon Deakin, *Re-regulating Zero Hours Contracts* (Institute of Employment Rights, Liverpool, 2014) at 28-29.

[92] Gordon Anderson and others (eds) *Mazengarb's Employment law* (looseleaf ed, LexisNexis) at [ERA103.19]. This is in contrast with the original Bill regarding s 66 that included a required that the reasons remain valid until termination.

[93] This is because the existence of genuine reasons based on reasonable grounds is a requirement for "including" an availability provision in an employment agreement: s 67D(3)(a).

employees and mitigate against the continued use of availability provisions by employers who no longer have genuine reasons based on reasonable grounds to do so.

6. No requirement for genuine reasons to be made known

In s 66(2), the genuine reasons requirement is accompanied by an obligation on the employer to advise the employee as to the reasons why they are on a fixed-term contract.[94] In s 67H, the genuine reasons must be stated in the employee's employment agreement. Section 67D includes no corresponding obligation to inform the employee of the reasons why an availability provision is used, or for these reasons to be stated in their employment agreement.

An obligation for employers to state the reasons for the inclusion of the availability provision in the employment agreement would be highly valuable for employees wishing to challenge the use of an availability provision or for courts who are determining an availability provision's appropriateness. Equally, it would be expedient for employers to specify genuine reasons in an employment agreement for easy reference in the event the use of an availability provision is challenged. Without this requirement, employees are unable to ascertain the reasons why their employer has included an availability provision if the employer refuses to disclose the information. Additionally, given the inherent power imbalance between employers and employees, it is hard to expect employees to insist on being told the genuine reasons by their employer. It is suggested that s 67D(3) be amended to include a requirement that "the [genuine] reasons [based on reasonable grounds] are stated in the employee's employment agreement". This is akin to the requirement found in s 67H.

7. Conclusion

The genuine reasons requirement is a much needed addition to the regulation of availability provisions. How effective it will be is yet to be determined, as we require the development of case law to see how the section will apply in practice. The genuine reasons requirement has the potential to be the most effective section in furthering the purposes of the amendments. This requirement should act as a meaningful hurdle to be overcome by employers who want to use availability

[94] ERA, s 66(2)(b).

provisions. To curtail the exploitative and unfair use of on-call employment arrangements, employers should only be able to include an availability provision where it is justified, having regard to all relevant factors. The requirement to pay reasonable compensation works in tandem with this section to further restrict the legitimate use of availability provisions.

D. Reasonable compensation

Employers who include an availability provision in an employee's employment agreement must provide the employee with "reasonable compensation" for the time the employee is available to perform work.[95] Compensation must be determined with regards to all relevant factors, including:[96]

(a) the number of hours for which the employee is required to be available:
(b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work:
(c) the nature of any restrictions resulting from the availability provision:
(d) the rate of payment under the employment agreement for the work for which the employee is available:
(e) if the employee is remunerated by way of salary, the amount of the salary.

The presence of the requirement for reasonable compensation to be paid to employees who are subject to availability provisions makes an important statement in itself. Even employment arrangements that offer guaranteed hours to employees and where the employer has a genuine reason based on genuine grounds for including the availability provision still require reasonable compensation to be paid. This acknowledges of how one-sided availability requirements are. On-call agreements lack the mutuality of obligations in fixed-hour employment agreements where employers are required to have work available to be performed and employees are required to perform the work. Similarly, they lack the mutuality of obligations found in casual employment agreements where, although employers are not obliged to offer work, employees are not obliged to accept work offered to them. Under on-call arrangements, employees are left at the mercy of their employers as to how much work they will receive each week. Employers enjoy this flexibility at the expense of employees. The reasonable compensation requirement is designed to bring back balance to the mutuality of obligations.

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[95] ERA, s 67D(3)(b).

[96] ERA, s 67(6).

The Bill in its initial form had a requirement for compensation to be paid but with no reasonableness standard attached to it.[97] The New Zealand Council of Trade Unions (NZCTU) denounced this requirement as offering nugatory protection for employees given the lack of a reasonableness standard.[98] The initial proposal was also bombarded with criticisms in Parliament by Parliamentarians who believed it was creating no enforceable standard at all due to its lack of specificity and guidance.[99] Compensation could have been a minuscule or symbolic amount, and possibly even non-monetary.[100] After hearing the criticisms, proposals from the Ministry, and suggestions by submitters, the Select Committee recommended amending the Bill to resemble the enacted law.

The new law, albeit requiring reasonable compensation, offers no indication of a minimum amount of compensation that must be paid. This option was considered and strongly supported by submitters during the passing of the Bill. The Law Society was one such submitter. It stated that a minimum level of compensation is needed to further the purpose of the Bill in prohibiting practices that lack sufficient mutuality of obligations.[101] Furthermore, the Society said that "compensation should not be token or illusory, and it should be able to be determined with some certainty so as to avoid disputes".[102] As is discussed shortly, token or illusory compensation will unlikely be reasonable (albeit, not out of the question), however there remains a lack of certainty as to what amounts to reasonable compensation.

The reasoning behind a minimum amount of compensation not being included is the range of scenarios and potential variation in availability provisions. A broad test with mandatory considerations was the most appropriate way to "provide clarity without one-size-fits-all rigidity".[103] Despite asserting that these factors provide clarity, the Ministry accepted that further

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[97] Employment Standards Legislation Bill 53-1, s 67E(3).

[98] NZCTU "Submission of the New Zealand Council of Trade Unions" at [5.12].

[99] Andrew Little (08 September 2015) 708 NZPD 6367.

[100] Phil Twyford (08 September 2015) 708 NZPD 6366; Iain-Lees Galloway (08 September 2015) 708 NZPD 6354. Whether compensation must be in the form of remuneration is still not explicitly stated in legislation, but it is assumed.

[101] New Zealand Law Society "Submission On The Employment Standards Legislation Bill" at 17.

[102] Ibid.

[103] MBIE *Departmental Report*, 25.

guidance may be needed and could be provided by the Ministry and/or through a code of employment practice.[104] Until this law is tested by the courts, those wishing to understand the reasonable compensation requirement further will have to rely on academic writing, background Parliamentary materials and future governmental guidance.

1. Consideration (a): Available hours

The first consideration when determining compensation is the number of hours for which the employee is required to be available. Generally, the more hours an employee is required to be available the more compensation they should be paid. It is likely an hourly rate of compensation will be decided on, and paid in accordance with the number of hours for which the employee is required to be available. A high number of hours required to be available would also likely result in a higher hourly compensation rate to be paid, due to consideration (b).

The requirement to pay reasonable compensation is to compensate the employee for making himself or herself available to *perform* work.[105] This likely relates to the hours that the employee could potentially be called into work by their employer. It follows, then, that if in one week an employee works for the full amount of time that they were required to be available to perform work, and they only receive pay for the work performed, they would not be receiving any compensation for the fact that this work was not guaranteed. In this situation, the on-call employee would be paid no more than a full-time employee who worked the same amount of hours that week, despite the on-call worker not having the same security of hours that the full-time employee enjoys. Arguably, on-call employees should also be entitled to compensation for their availability to *accept* work. This could be in the form of a set level of compensation payable (regardless of the amount of hours the employer is required to be available to perform work) to recognise the inherent restriction and lack of certainty imposed on employees who are subject to availability provisions that workers with fixed-hours of work do not suffer.

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[104] Ibid. Under ERA s 100A, the Minister has the power to formally approve codes of employment practice.

[105] ERA, s 67D(3)(b).

2. Consideration (b): Proportion of available hours to agreed hours of work

The proportion of agreed hours of work (which necessarily includes guaranteed hours of work) to the number of hours for which the employee is required to be available is a consideration that must be taken into account when determining compensation.[106] This will mean that the smaller the ratio of available hours to guaranteed hours in a contract, the greater the compensation, all else being equal.[107] This should provide more income security for those who were previously on availability-only contracts. Employers who fail to provide more than minimal guaranteed hours (whether this is to avoid the ban on availability-only contracts or because offering guaranteed hours is not reasonably practicable) will have to pay more compensation as a result. Therefore, this makes up for the ease employers have in circumventing the requirement to guarantee hours of work in s 67(2)(a), as already discussed.

Rather than the proportion of time available to the guaranteed hours of work simply being a consideration when determining reasonable compensation (as is currently the case), it could be used to calculate the minimum level of compensation required. This would further incentivise employers to guarantee hours of work wherever possible. For example, a requirement of availability at 100% or less of the minimum guaranteed hours (i.e hours available are equal to or less than the guaranteed hours of work) could receive a minimum compensation of 25% of the employee's usual hourly pay for each hour spent available. Availability at 101%-200% could receive minimum compensation of 33% of the employee's usual hourly pay. And availability at more than 200% could receive a minimum compensation of 50% of the employee's usual hourly pay. This would mean that employees would have a starting point to bargain from and a standard they could enforce. However the downside of this is the loss of flexibility which is so fundamental to why these forms of employment arrangements are being used.

3. Consideration (c): Restrictions on the employee

A requirement to be available for work will result in restrictions on the employee. The greater the extent of these restrictions on the employee, the more compensation they should receive.

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[106] ERA, s 67D(6)(b).

[107] This point was alluded to by Alistair Scott (10 March 2016) 711 NZPD 9615. Scott's wording also suggests that guaranteed hours could be half an hour.

Examples of restrictions include having to stay at the workplace, stay in cellular reception, or remain alcohol-free.[108] The length of a notice period for undertaking work permitted under an availability provision will be a major factor indicating the restrictiveness of the provision. If the employee is in a situation where they are expected to drop whatever they are doing when called upon and head into work as soon as possible, they should be compensated at a higher rate. The notice period for undertaking work was proposed to be a mandatory consideration of its own by the Ministry and the NZCTU.[109] However, these proposals were not included in the legislation, likely because notice periods fall within this broader consideration.

The nature of restrictions will vary considerably between availability provisions. In some cases, extreme forms of restriction on employees may justify a set minimum amount of hourly compensation to be paid for time spent available. One way of achieving this is treating time spent available as working time. The Ministry stated that it was not the intent of the Bill, or the Ministry's expectation, that all availability will be considered "work" for the purposes of the Minimum Wage Act.[110] However, there may still be scope to argue that some forms of availability constitute "work" and therefore should be subject to the minimum wage. In *Idea Services Ltd v Dickson* the Court of Appeal upheld the decision of the Employment Court that time spent sleeping-over, in this case, constituted "work" for the purposes of the Minimum Wage Act.[111] Dickson was employed by ISL to care for disabled people in community homes and was paid $34 per sleepover, well below the minimum wage. The restraints on Dickson's freedom, his considerable responsibilities in caring for the residents and the security and benefit to ISL for his presence overnight led to a finding that Dickson was working during sleepovers. Before the case reached the Supreme Court, the Crown, the employers and the union involved reached a settlement. Under the resulting law, employees working in the health and disability sector who are required to be at their workplace overnight, be ready to work if necessary, and are allowed to sleep, must be paid at, or above, the minimum wage per hour for time spent sleeping-over.[112]

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[108] NZCTU "Submission of the New Zealand Council of Trade Unions" at [7.12]

[109] Ibid.; MBIE *Departmental Report*, 25.

[110] MBIE *Departmental Report*, 25.

[111] *Idea Services v Dickson* [2011] 2 NZLR 522.

[112] Sleepover Wages (Settlement) Act 2011, s 22(2).

In determining whether time spent available was "work", the Employment Court in *Dickson*[113] engaged in a factual inquiry focussing on three points:

(a) Constraints on the employee
(b) Responsibility of the employee
(c) Benefit to the employer.

It is possible a court would apply the same factual enquiry to other availability provisions that exhibit similar qualities to those in *Dickson*. The Employment Court in *Law v Board of Trustees of Woodford House* found that sleepover shifts performed by house matrons at a schools' boarding houses were comparable to those performed by Dickson.[114] Future cases may extend this further to non-sleepover, but similarly restrictive, availability arrangements. For instance, an availability provision that requires an employee to remain at their workplace and be ready to work if required. The United Kingdom has legislated to achieve this with Regulation 3(1) of the National Minimum Wage Act 1998 (UK), which stipulates that onsite availability should be counted as working hours. As New Zealand has no equivalent law, whether onsite availability is required will simply be one relevant consideration in determining what reasonable compensation is in the circumstances. However, the possibility remains that a court may consider an arrangement of this type to be "work".

All employees subject to availability provisions that require the performance of work at short notice are restricted from engaging in other employment opportunities. Work that requires an employee to be at a particular place at a particular time would be risky to contract for if the employee could potentially be called into work by another employer. However, other forms of work that have looser timeframes and more flexibility may work well for people subject to an availability provision. People who are self-employed often have the freedom to work when it pleases them. Content creators on YouTube and bloggers are examples of people who will be able to put their work on hold when they are called in by an employer to work. Writers, for instance, may have a deadline that a piece of writing must be completed by, but no strict schedule for when the actual writing must take place. However, although people may have other means of generating income, a requirement for availability does significantly restrict employees from performing many different

[113] *Idea Services Ltd v Dickson* (2009) 6 NZELR 666, at [64]-[71]. There factors were approved by the Court of Appeal at [10] of their judgment.

[114] *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, at [188].

types of work and income opportunities. This will be a relevant consideration when determining reasonable compensation.

4. Consideration (d): Rate of payment

The rate of payment for the work for which the employee is available is another mandatory consideration.[115] This consideration may have been included so that employers pay more compensation to highly skilled and sought after workers that they are restricting from working else where as a result of requiring availability. However, since the focus of compensation should be to provide a level of income security for workers, this factor may have the opposite effect. Well-paid workers are more likely to have sufficient income and work security when compared to low-paid workers. Therefore, it could be argued low-paid workers should generally receive more compensation to ensure an adequate income.

5. Consideration (e): Amount of salary

If an employee is remunerated by way of salary, the amount of the salary will be another consideration when determining compensation. An employer and employee may agree that the employee's salary includes compensation for time spent available.[116] Denise Roche was firmly opposed to this addition to the ERA believing that it "makes the reasonableness of compensation opaque and difficult to test, and acts as a perverse incentive to place more and more workers onto salary as a way to reduce their entitlement".[117] Roche's proposal to disallow reasonable compensation from being a part of an employee's salary was rejected 58 votes to 63.[118]

Including compensation as part of a salary will be a practical way for employers and employees to meet the requirement to pay compensation. This will likely address the common scenario where employers require their employees to be available for extra work outside of their normal hours, on the basis that their salary covers this extra work. Although in practice employees under these arrangements may only be required to work overtime infrequently, the reality is the

[115] ERA, s 67D(6)(d).

[116] ERA, s 67D(7).

[117] Supplementary Order Paper 2016 (151) Employment Standards Legislation Bill 2015 (53-1), explanatory note.

[118] Vote (08 March 2016) 711 NZPD 9498.

employer has the power to require overtime to be worked at anytime. This is a significant imbalance in power, and one which requires an adequate compensation to be paid. Allowing employers to hide the absence of compensation, or lack of reasonable compensation, by remunerating an employee by way of a salary may result in inadequate compensation being paid. The courts will likely spend as much time and effort ascertaining what amount of an employee's salary represents the compensation for availability as they do on determining whether the compensation is actually reasonable. To avoid this, s 67D(7) should be amended to require employers who include compensation for availability in an employee's salary to stipulate what proportion of the salary is compensation. This proposal would meet the concerns of people like Denise Roche, while also facilitating the practicality in bundling compensation with an employee's salary.

However, as the law stands, if the employee is paid by way of a salary, the amount of the salary will be another consideration when determining compensation. A relatively low salary would raise the question as to whether the employee is being reasonably compensated for their availability. Another relevant consideration would be a comparison with the salaries of those performing similar jobs who are not subject to an availability provision.

In some employment arrangements, the inability to meaningfully distinguish between normal working hours and overtime hours will be a problem when calculating compensation. Often salaried workers do not have a clear set of hours they are required to work, but rather tasks or assignments they must complete within a broad time period. Although employment agreements that include an availability provision must include agreed hours of work, this may be put in very broad terms offering no clear guidance as when "normal" working hours are.[119] The likely outcome in these types of broad arrangements is that as long as work is done within the agreed hours of work it will not be considered overtime and therefore not compensable. However, without an availability provision, employees who are asked by their employers to perform a task at a specific time may, at their own risk, refuse the employer's request.[120] If an employee believes they are being required to work overtime because they have been forced to work more hours than they usually would, they would first need to challenge the incorrect articulation of the agreed hours of work in their

[119] Section 67C(2) allows for flexibility in agreed hours of work as to days of the week on which work is to be performed and start and finish times of work. This allows for very broad and ambiguous agreed hours of work.

[120] The employee would not have recourse to s 67F to claim adverse treatment because the right to refuse work in addition to guaranteed hours only applies to contracts that include an availability clause, as discussed in *E. Right to refuse certain work and to not be teated adversely for refusal to accept certain work*.

employment agreement. Once the correct agreed hours of work are identified, and the employment agreement accordingly amended, the number of overtime hours would be able to be calculated.

6. Problems with the reasonable compensation requirement

The problem with the reasonable compensation requirement is that is relies on the ability of employees to bargain with their employers. This is an issue because often people who are offered minimal guaranteed hours of work and are required to be available for work tend to be the most vulnerable and unqualified workers in our society. These people cannot be expected to effectively bargain for reasonable compensation[121] - more often than not they do not have the capacity to negotiate.[122] Although communication and negotiation should be encouraged between employees and employers, the lack of a clear minimum standard means those who are incapable of negotiating, or who are subject to employers who are using their power to enforce unreasonable compensation, are not adequately protected.

Nonetheless, it is understandable why this general test for reasonableness is in the legislation. The wide range of potential scenarios means that what is reasonable in any particular case will be fundamentally decided by the unique facts of the case. The open textured nature of this section allows it to apply to multiple cases. Also, the uncertainty of what is reasonable compensation in any given situation will be reduced as challenges to compensation are mounted and resolved by the courts. However, the fact that the legislation requires it to be tested before it can be fully understood is a problem. Denise Roche shares this concern: "I have a difficulty with making laws that need to be tested after a problem with the exploitation of a worker, when we should be making laws that prevent exploitation in the first place."[123]

The reasonable compensation requirement, and included mandatory considerations, are the result of political compromise and a balancing between protecting employees and not unduly restricting employers. However, considering the purpose of this legislation is to prohibit certain exploitative employment practices it should not be establishing a broad and ambiguous tests for reasonableness akin to those found in the common law. Statutes require an amount of certainty if

[121] The support of a union can mitigate this factor.

[122] Iain Lees-Galloway (8 September 2015) 708 NZPD 6354. Marama Fox (03 March 2016) 712 NZPD 9406.

[123] Denise Roche (03 March 2016) 712 NZPD 9401.

they truely expect to adequately protect the interests of those concerned, especially where those concerned are the most vulnerable workers in society. As the law currently stands, the burden is put on unions and labour inspectors[124] to discover and challenge unreasonableness of compensation. Unfortunately, with relatively low union membership and a limited number of labour inspectors,[125] most employees will be not have the support needed to effectively bargain for reasonable compensation.

7. A minimum amount of compensation

Further guidance is needed for employees. This could be in the form of a minimum amount of compensation that must be paid. New Zealand does not require employers to pay their employees a reasonable amount for time worked - we have a set minimum wage that must be paid. This is an acknowledgement that no matter how easy or unskilled work may be, employees deserve a certain level of pay. Why then has Parliament not set a minimum amount of compensation that must be paid per hour for time spent available under an availability provision? Without a set minimum standard for compensation the question as to whether no compensation will be reasonable is left open.

Whether zero compensation may be reasonable compensation in some circumstances may be influenced by the law of other jurisdictions. In the United States of America, although it is not required for reasonable compensation to be paid to on-call workers, it is common for workers who are on-call to not be eligible for an hourly rate of compensation. Whether a worker is to be compensated on an hourly basis for time spent on-call is dependent on whether they are "waiting to be engaged" or "engaged to wait".[126] Fundamental to this distinction is the extent to which employees are free to engage in personal activities, and any other conditions on their on-call time.[127] U.S. case law may provide guidance for when reasonable compensation might be next to

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[124] However, compensation levels are unlikely to receive proactive attention from New Zealand's under-resourced labour inspectorate because these provisions do not attract a penalty for employers.

[125] NZCTU "Submission of the New Zealand Council of Trade Unions" at [32.4]. "There are approximately 49 labour inspectors employed in New Zealand for a working population of 2,360,000: a ratio of 1/47,200."

[126] U.S Department of Labour Wage and Hour Division "Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)" (July 2008) <https://www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Documents/whdfs22.pdf> at 1.

[127] Arthur Silbergeld "Know the Rules for On-call workers" (14 March 2012) <http://hrdailyadvisor.blr.com/2012/03/14/know-the-rules-for-on-call-workers/>.

nothing. In one case, an employee who was required to stay sober and be able to return to work in 20 minutes of being paged was not entitled to hourly compensation for time on-call.[128] In another case, a funeral director who received an average of 15-20 calls each night and was required to respond to additional calls was not entitled to hourly compensation because he was free to watch television, spend time with family, go out to dinner, and make personal calls.[129]

Whether New Zealand will take the hardline that the United States does is unclear. If we were to, the power of these new amendments will be significantly reduced. The easier it is to satisfy reasonable compensation the more prevalent contracts akin to availability-only contracts, but offering minimal hours of guaranteed work, will be. The work of Unite Union and Parliamentarians who fought for these new laws would be in vain. For these reasons, New Zealand should develop its own rules and guidelines to determine what is reasonable compensation, without reliance on U.S. precedent. Although no compensation being reasonable is not out of the realms of possibility,[130] the inclusion of a requirement for reasonable compensation to be paid to employees signifies that no compensation is unlikely to be held to be reasonable. The reasons expressed by the Ministry as to why a minimum amount of compensation was omitted from the legislation focus on the difficulty in establishing a minimum compensation due to the wide variety of availability provisions.[131] Hence, the lack of a minimum amount should not lead to a conclusion the legislators believed no compensation may be reasonable compensation.

Despite the appeal of a minimum compensation for employees, it may actually be in their best interests not to have a minimum amount of compensation prescribed in legislation. A minimum sum could encourage employers to only offer the minimum without fully engaging in an analysis of all the relevant considerations. To avoid this issue, minimum compensation could be determined with reference to time required to be available and the usual hourly rate paid to the employee for

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[128] *Bright v. Houston Northwest Medical Center Survivor, Inc* (5th Cir 1991).

[129] *Rutlin v. Prime Succession, Inc*. (6th Cir 2000).

[130] For example: A waiter works full-time at a cafe, 8am-5pm Monday-Friday, gets paid above the minimum wage and is required to be available for 1 hour between 5pm-6pm on Friday afternoons (often the busiest afternoon). The employer can on require the waiter to work if he/she gives him 1 weeks' notice. It may be reasonable for the waiter not to be paid compensation for his availability. Not only is it for a minimal amount of time, the waiter has a large amount of guaranteed hours/pay, the requirement for availability is not very restrictive (as the waiter is already at the workplace) and has a generous notice period.

[131] The Ministry stated that "We do not agree a floor for minimum compensation should be set in legislation given that the length, restrictions and notice periods for work within an availability provision will vary considerably across different industries given the diverse nature of work" (MBIE *Departmental Report, 25*).

work performed. For example, in Ireland, employees are entitled to 25% of the normal wage for any hours that they are required to be available, up to a maximum of 15 hours per week.[132]

Having a minimum compensation would help mitigate against the uncertainty of the reasonable compensation test, however it would be accompanied by its own negative consequences. The lack of flexibility a minimum compensation enforces goes against the flexibility on-call arrangements seek to bring to employment. A better option than a minimum amount of compensation would be an expectation of compensation payable under a availability provision. This could be the minimum wage. Employers and employees would be entitled to agree on an amount less or more depending on all relevant considerations, including how restrictive the availability provision is. This option allows for flexibility and good faith bargaining but also gives employees support in requesting the minimum wage if they believe their availability provision is restrictive enough to warrant it.

8. Conclusion: Reasonable compensation

The requirement to pay reasonable compensation is designed to act as a counterbalance against the obligation on a employee to remain available to perform work under an availability provision. The purpose is to prohibit on-call employment arrangements that lack sufficient mutuality of obligations. The reasonableness of compensation will depend on all relevant considerations and necessarily depend on the mandatory considerations explained above. The open textured nature of the reasonable compensation requirement allows it to apply to all possible availability provisions and does not unduly impinge the flexibility that on-call employment arrangements provide. However, the reality is that vulnerable employees without sufficient bargaining capability are likely to suffer due to the lack of certainty in this requirement.

Thus, the enacted reasonable compensation requirement currently does not adequately ensure that employees will receive reasonable compensation for time spent available. Further guidance and support is needed to help vulnerable employees from being exploited by employers who use their bargaining advantage to impose compensation that is not reasonable. This guidance

[132] Zoe Adams and Simon Deakin *Re-regulating Zero Hours Contracts*, at 28-29.

will undoubtedly present itself with the development of case law, however employees should not have to wait till cases make it to court to be offered more certainty.

A minimum amount of compensation would provide more certainty to the compensation requirement. However, it would curtail the flexibility that is so valued in these arrangements and potentially result in negative effects for employees. A safer and more desirable option would be the imposition of an expectation of compensation payable under an availability provision. This would promote good faith bargaining and better protection for employees whilst retaining flexibility. Guidance could be developed for when the minimum wage will be reasonable compensation, such as in sleepover cases and availability provisions that require on-site availability. Increased certainty can also be achieved without legislative amendment, as guidance could come in the form of codes of employment practice or publications by the Ministry.

E. Right to refuse to perform certain work and to not be teated adversely due to refusal to perform certain work

Before concluding this discussion of availability provisions and on-call employment, the two related sections following s 67D will be analysed. Section s 67E states:

> "An employee is entitled to refuse to perform work in addition to any guaranteed hours specified in the employee's employment agreement if the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the availability provision."

Although it is not clear from the wording of s 67E, this section only applies to employment agreements that include an availability provision. This section, which was originally part of the now s 67D, was considered significantly important to warrant its own section.[133] The original draft of the section gave employees subject to an availability provision the right to refuse work if they were not being compensated for their availability.[134] The section was amended to "avoid the possible misinterpretation that an employee was entitled to refuse any work under an availability

[133] Transport and Industrial Relations Committee *Employment Standards Legislation Bill: Commentary* (2016) at 10.

[134] Employment Standards Legislation Bill 53-1, s 67E(4).

provision".[135] Now it is clear that employees may only have the right to refuse to perform work in addition to their guaranteed hours.

If an employment agreement includes an availability provision that provides for the payment of reasonable compensation to the employee, the employee does not have the right to refuse to perform work under s 67E. Perplexingly, there is no express reference to the requirement for the employer to have genuine reasons based on reasonable grounds for the inclusion of the availability provision. This essentially means that an availability provision that is not allowed to be included in an employment agreement (due to not satisfying the requirement under s 67D(3)(b)) would nonetheless restrict an employee from exercising their right to refuse to perform certain work.

This issue is exacerbated when assessing the relationship between s 67E and the following section. Section 67F provides protection for employees from being treated adversely by their employer due to an exercise of their right under s 67E. It seems that employees subject to an availability provision that provides for reasonable compensation would not be afforded the protection under s 67F. However, this is regardless of whether the employer has genuine reasons based on reasonable grounds for its inclusion in the employment agreement. Although the employee could challenge the inclusion of the availability provision in their employment agreement, they could not make a claim for adverse treatment, even if they had been subject to it.

This literal interpretation leads to an absurdity that is likely a legislative mistake rather than a desired outcome. The purpose of these sections seems to be that employees subject to availability provisions should be allowed to refuse to perform certain work, and be protected from adverse treatment because of a refusal, unless the availability provision accords with the requirements of the legislation. A more sensible interpretation of s 67E would be to require availability provisions to not only provide for reasonable compensation but also for employers to have genuine reasons based on reasonable grounds for the inclusion of the availably provision in the employee's employment agreement in order to restrict the employee's right to refuse work outside of their guaranteed hours work.

[135] TIRC *Employment Standards Legislation Bill: Commentary* (2016) at 10

Employees should nonetheless be aware of the possible ambiguity in the interpretation of s 67E and act accordingly. In the situation where an employee is claiming adverse treatment due to a refusal to accept work, and in response their employer tries to challenge the employee's right to refuse work under s 67E, the employee should bring a personal grievance against their employer over the inclusion of the availability provision in the employment agreement rather than claim they had the right to refuse work.[136] Although it is debatable under s 67E whether an employer could restrict an employee's right to refuse work simply by paying reasonable compensation, it is clear that a personal grievance claim would put the onus on the employer to prove both genuine reasons based on reasonable grounds for the inclusion of the availability provision and that reasonable compensation is being paid.[137]

F. Conclusion

The 2016 amendments discussed in this Part were enacted to bring an end to "zero-hour contracts", rebalance the mutuality of obligations in on-call employment arrangements and stop continued exploitative behaviour by employers in regards to requiring availability. However, an inherent weakness in the amendments is that they lack sufficient certainty and clarity to enable employees entering into on-call employment arrangements to effectively bargain with employers. Reasonable employers and employees will differ as to what genuine reasons and reasonable compensation are in the circumstances. The inherent imbalance in power in employment relationships will likely result in what employers consider reasonable prevailing in practice. The Courts will no doubt resolve the uncertainty in the law as case law develops, but the interests of employees should be addressed now with better guidance as to what the new amendments require. Although imposing a minimum amount of compensation would achieve certainty and an enforceable standard, it would limit the flexibility of on-call employment agreements and may in fact not benefit employees if the minimum was low. The legislation requires changes including the defining of "guaranteed hours of work", requiring genuine reasons based on reasonable grounds to be stated in the employment agreement, a better means of assessing what reasonable compensation will be (such as an expected amount of compensation for negotiations between employer and

[136] ERA, s 103(1)(h), states that a personal grievance includes a claim that "the employee has been disadvantaged by the employee's employment agreement not being in accordance with section 67C, 67D, 67G, or 67H".

[137] ERA, s 67D(3).

employee to begin from), and amendments to s 67E and s 67F to make the intentions of the sections clearer.

CONCLUSIONS

The campaign to end "zero-hour contracts" in New Zealand emphasised the inherent unfairness of some forms of flexible employment arrangements and the detrimental effects they can have on employees. The two concerns with flexible employment arrangements are their inability to provide certainty of hours and the demanded, but often uncompensated, requirement for employee availability. Amongst the criticisms and attention on the negative effects for some employees, it is easy to lose focus of the positives of flexible employment arrangements. Flexible employment arrangements do have a legitimate place in New Zealand's labour market and when entered into mutually can be beneficial to both employers and employees.

Recognising this tension, the New Zealand Parliament took on the task of restricting unfair and exploitative forms of flexible employment arrangements while not curtailing the appropriate and mutually beneficial use of these flexible employment arrangements. The subsequent amendments to the ERA focussed on regulating employers' ability to require employees' availability. The lack of certainty in hours was only considered an issue where it was coupled with a requirement to be available, and accordingly, the law regarding casual employment has largely been unaffected by the new amendments.

The main concern with on-call employment is the inherent imbalance in obligations they impose. The amendments aimed to achieve more fairness and reciprocity in on-call arrangements by balancing the requirement for employees to be available with new obligations on the employer. Those new obligations require guaranteed hours of work to be included in on-call employment arrangements and for reasonable compensation to be paid for requiring employee availability. The amendments also aim to restrict the use of availability provisions by requiring employers to have genuine reasons, based on reasonable grounds, to justify the inclusion of an availability provision in an employment agreement.

The effectiveness of the broad requirements imposed by the amendments depends on how strictly they are interpreted. In this regards, this dissertation has presented three propositions. First, an employer's obligation to offer guaranteed hours in order to use an availability provision should not be satisfied unless specific days and specific start and finish times of work are included in the employment agreement. Secondly, the requirement for genuine reasons based on reasonable

grounds should limit the use of availability provisions, and the specific hours of availability, to where they are necessary and no other reasonably practicable options are available. Thirdly, reasonable compensation should not ever be zero and, in some situations, should be equivalent to the minimum wage, if not more. Strong, employee-focussed interpretations of the 2016 amendments are not simply desired or sensible, they are fundamentally necessary if the objects of these amendments are to be given any meaningful effect.

This dissertation has criticised some of the aspects of the 2016 amendments. The intention has not been to condemn the regulation of flexible employment arrangements nor to suggest that this legislation is inherently flawed. Rather it was to explore places for potential interpretive ambiguity and provisions that may allow unscrupulous employers to continue to exploit employees' flexible work arrangements.

It is evident from governmental and parliamentary materials that, throughout the legislative process, there was an appreciation of the negative effects of some flexible employment arrangements and a genuine attempt to amend New Zealand's legislation to prohibit flexible employment arrangements that lack sufficient mutuality of obligations. The 2016 amendments to the ERA constitute a positive step in the right direction. However, it remains to be seen if the amendments with live up to the expectations of some Members of Parliament:[138]

> "Today is the day where we actually stand united in the House to introduce real change that will make a difference in the lives of hundreds of thousands of workers across New Zealand" - Denise Roche (MP).
>
> "This is very good legislation. It is fantastic legislation for the employee, in all respects" - Alistair Scott (MP).
>
> "[W]e have ended up with something that is pragmatic, is fair, and, actually, is very useful in terms of achieving an outcome that will help both businesses and employees" - Andrew Bayly (MP).
>
> "I think zero-hour contracts continue to hamper workers internationally, and no one has yet found a solution… I think that here, in little old Aotearoa New Zealand, we have found a solution" - Sue Moroney (MP).

[138] Denise Roche and Alistair Scott (10 March 2016) 711 NZPD 9615; Andrew Bayly (10 March 2016) 711 NZPD 9622; Sue Moroney (10 March 2016) 711 NZPD 9623.

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