IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 95
EMPC 296/2016

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	MATTHEW FRASER Plaintiff
AND	MCDONALD'S RESTAURANTS (NEW ZEALAND) LIMITED Defendant

EMPC 297/2016

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND BETWEEN	OLIVIA DORAN Plaintiff
AND	CARRICK HOLDINGS LIMITED Defendant

Hearing:	3-5 April 2017 (Heard at Auckland)
Court:	Judge ME Perkins Judge BA Corkill Judge KG Smith
Appearances:	P Cranney and S Meikle, counsel for plaintiffs K Beck and T Oldfield, counsel for defendants
Judgment:	4 August 2017

JUDGMENT OF THE FULL COURT

Introduction

[1] These proceedings have been removed to the Employment Court by way of determinations of the Employment Relations Authority (the Authority) dated 11 November 2016.[1] The determinations effecting the removal were made pursuant to s 178 of the Employment Relations Act 2000 (the Act). In each case, the proceedings centre on s 67D of the Act as to whether the individual employment agreements between the plaintiffs and defendants contain an availability provision pursuant to that section of the Act. If the agreements contain such a provision, the plaintiffs allege that the Act has been breached by the defendants and compensation is sought.

[2] The plaintiffs' claims are couched as disadvantage grievances. These are stated in the statements of claim as being pursuant to s 67D(1)(i) of the Act. Such a provision does not exist. The claims are in fact made pursuant to s 103(1)(h) of the Act. That section in turn refers to s 67D.

[3] The matter has been presented to the Court at this stage for a decision on a preliminary basis as to whether the individual employment agreements contain an availability clause. Wider issues and consequences may arise from the Court's decision, since this is the first case in which there has been an opportunity to consider recently enacted provisions which were intended to prohibit zero-hour contracts. Accordingly, it has been referred to a full Court for hearing.

Introductory factual background

[4] For the purposes of the full Court hearing, the parties have filed an agreed statement of facts. These agreed facts are as follows:

> 1. McDonald's Restaurants New Zealand Ltd is a fast food restaurant company.
>
> 2. It operates fast food restaurants throughout New Zealand, including the McDonald's restaurant on Lincoln Rd, Auckland.

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[1] *Fraser v McDonald's Restaurants (NZ) Ltd* [2016] NZERA Auckland 370; *Doran v Carrick Holdings Ltd* [2016] NZERA Auckland 371.

3. Carrick Holdings Ltd is a franchisee of McDonald's Restaurants New Zealand Ltd and operates the McDonald's restaurant in Pt Chevalier, Auckland.

4. McDonald's Restaurants New Zealand Ltd and Carrick Holdings Ltd are both parties to a collective agreement with Unite Union Inc, which is a registered trade union.

5. The collective agreement was in force at all material times and is expressed to expire on 31 March 2017.

6. The work the plaintiffs did fell within the coverage clause of the collective agreement.

7. Matthew Fraser started working for McDonald's Restaurants New Zealand Ltd at its Lincoln Rd restaurant on 31 August 2016.

8. He was employed as a crew person.

9. He was initially employed on an individual employment agreement, the terms of which included an offer of employment signed by both parties and the standard McDonald's employment agreement.

10. He joined Unite Union Inc. on 16 September 2016 and from that date on he was employed under the terms of the collective agreement.

11. Olivia Doran started working for Carrick Holdings Ltd at its Lincoln Rd store on 30 August 2016.

12. She was employed as a crew person.

13. She was initially employed on an individual employment agreement, the terms of which included an offer of employment signed by both parties and the standard McDonald's employment agreement.

14. She joined Unite Union Inc. on 1 November 2016 and from that date on she was employed under the terms of the collective agreement.

[5] Throughout this judgment, we shall refer to McDonald's Restaurants (New Zealand) Limited as McDonald's and Carrick Holdings Limited as Carrick.

[6] The argument to which this case relates concerns the short periods the plaintiffs were employed on individual employment agreements, and the interpretation of those agreements. Once the plaintiffs became employed under the collective agreement, no further issues as to an availability clause arise. Therefore, the period upon which this dispute bears is a narrow period in time. In the case of Mr Fraser, it relates to the period when his employment commenced on 31 August 2016 and the date he became employed under the collective agreement, which was

16 September 2016. In the case of Ms Doran, the period was from 30 August 2016 until 1 November 2016. No issue has arisen as to whether the grievances by each plaintiff were raised within the period specified in s 114(1) of the Act, and we presume therefore they were raised within time.

The statutory provisions

[7] New sections were added to the Act on 1 April 2016 by s 9 of the Employment Relations Amendment Act 2016. As mentioned, these provisions were inserted into the Act to deal with what were colloquially known as 'zero-hour contracts' – that is, where the employee was required to be available for work, but the employer was not obliged to offer guaranteed hours of work. The new sections relevant to this particular dispute are ss 67C and 67D. These sections read as follows:

> **67C Agreed hours of work**
>
> (1) Hours of work agreed by an employer and employee must be specified as follows:
>
> (a) in the case of an employee covered by a collective agreement,—
>
> (i) in the collective agreement; and
>
> (ii) if section 61 applies, in the employee's additional terms and conditions of employment included under that section; or
>
> (b) in the case of an employee covered by an individual employment agreement, in the employee's individual employment agreement.
>
> (2) In subsection (1), **hours of work** includes any or all of the following:
>
> (a) the number of guaranteed hours of work:
>
> (b) the days of the week on which work is to be performed:
>
> (c) the start and finish times of work:
>
> (d) any flexibility in the matters referred to in paragraph (b) or (c).
>
> **67D Availability provision**
>
> (1) In this section and section 67E, an **availability provision** means a provision in an employment agreement under which—
>
> (a) the employee's performance of work is conditional on the employer making work available to the employee; and

(b) the employee is required to be available to accept any work that the employer makes available.

(2) An availability provision may only—

(a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and

(b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

(3) An availability provision must not be included in an employment agreement unless—

(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.

(4) An availability provision that is not included in an employment agreement in accordance with subsection (3) is not enforceable against the employee.

(5) In considering whether there are genuine reasons based on reasonable grounds for including an availability provision, an employer must have regard to all relevant matters, including the following:

(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.

(6) Compensation payable under an availability provision must be determined having regard to all relevant matters, including the following:

(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.

(7) For the purposes of subsection (3)(b), an employer and an employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

[8] The elements of an availability provision are accordingly as follows:

(a) First, an availability provision is a provision in an employment agreement under which an employee's performance of work is conditional on an employer making work available to that employee, and under which the employee is required to be available to accept any such work: (s 67D(1)).

(b) Then follows several qualifications:

(i) Such a provision may only be included in an employment agreement that specifies "agreed hours of work" within which there are "guaranteed hours of work": s 67D(2)(a).

(ii) "Hours of work", as agreed between an employer and an employee, must be specified in any employment agreement: (s 67C(1)). These include any or all of the following:

- the number of guaranteed hours of work;
- the days of the week on which work is to be performed;
- the start and finish times of work; and
- any flexibility in the matters referred to in the previous two definitions: (s 67C(2)).

(iii) The provision may only relate to a period for which an employee is required to be available which is in addition to that employee's guaranteed hours of work: (s 67D(2)).

(iv) An availability provision may not be included in an employment agreement unless the employer has genuine reasons based on reasonable grounds for including it, and for including the number of hours specified in that provision. An employer must have regard to all relevant matters when considering genuine reasons, including three which are specified: s 67D(3)(a) and (5).

(v) Such a provision must provide for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision. The compensation payable must be determined having regard to all relevant matters, including five specified matters: (s 67D(3)(b) and (6)).

(vi) An availability provision that is not included in an employment agreement, specifying the last two factors, is not enforceable: s 67D(4).[2]

[9] For the sake of completeness, where there has been a breach of ss 67C or 67D, personal grievances arise pursuant to s 103(1)(h) of the Act which reads as follows:

> **103 Personal grievance**
>
> (1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim—
>
> …
>
> (h) that the employee has been disadvantaged by the employee's employment agreement not being in accordance with section 67C, 67D, 67G, or 67H; or
>
> …

[2] Although not relevant for present purposes, s 67E permits an employee to refuse to perform work in addition to guaranteed hours if there is no availability clause which provides for payment of reasonable compensation; s 67F provides that an employee may not be treated adversely because of such a refusal. A contravention of s 67F may give rise to a personal grievance: s 103(1)(i).

[10] As we shall elaborate later, the explanatory note of the Employment Standards Legislation Bill stated that it was to prohibit "zero-hour contracts".[3] This was one of several practices that were identified as lacking sufficient reciprocity, providing an employer with more flexibility and less risk than an employee.[4] The other practices were cancelling a shift without reasonable notice or compensation,[5] putting unreasonable restrictions on secondary employment[6] and making unreasonable deductions from employee's wages.[7]

Preliminary pleadings issue

[11] Understandably, the parties have concentrated on the legal issues arising from the new legislation. However, in doing so it has been overlooked that in pursuing personal grievance claims on behalf of the plaintiffs, the remedies claimed in the statements of claim are not appropriately specified as is required so that all issues are placed before the Court. Mr Cranney sought, and Ms Beck did not oppose, an amendment to the statements of claim. Paragraph 11 of the statement of claim states:

> 11. The plaintiff has been disadvantaged within the meaning of s 67D(1)(i) by his employment agreement not being in accordance with s 67D. The claim governs only the period prior to the plaintiff becoming bound by the collective agreement currently in place between the defendant and the Unite Union Inc.

[12] The remedies presently claimed are:

(a) reimbursement of the sum equal to an availability allowance of $5 per hour which should have been paid but was not;

(b) costs

[13] A personal grievance claim for disadvantage under s 67D would first require the Court to make a finding that the individual employment agreements contain an availability clause. Secondly, the remedies sought would have to be those remedies

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3 Employment Standards Legislation Bill (53-1) (explanatory note) at 2.

4 Michael Woodhouse "Addressing zero hour contracts and other practices in employment relationships" (2015) Ministry of Business, Innovation & Employment http://www.mbie.govt.nz/publications-research/publications/employment-and-skills/cabinet-paper-2015-addressing-zero-hours-contracts.pdf at p[4].

5 Resulting in s 67G.

6 Resulting in s 67H.

7 Resulting in Wages Protection Act 1983, s 5.

in relation to personal grievances specified in s 123 of the Act. The remedy presently claimed of reimbursement appears to be an attempt by the plaintiffs to have the Court fix compensation by way of reimbursement discretely within the confines of s 67D itself. Presumably the Court is being asked to apply s 67D(6) in that respect. For the Court to do that would be to fix terms and conditions of employment outside its jurisdiction. That difficulty, however, also restricts the Court's ability to calculate and provide remedies of reimbursement under s 123 where the agreement does not presently provide for compensation. Any monetary remedies may have to be confined to some form of compensation under s 123(1)(c), which, without further argument or consideration, we consider on a preliminary basis cannot be compensation or remuneration as specified in s 67D(6) of the Act. We emphasise there are substantial issues affecting the Court's ability to set compensation under s 67D even if via remedies sought under s 123 of the Act.

[14] Section 67D itself provides some recourse in that an availability provision that is not included in an employment agreement in compliance with the requirements in s 67D(3) will not be enforceable against an employee. Section 67E also provides that an employee may refuse to work hours additional to any guaranteed hours specified in the employment agreement if compensation is not payable for such additional hours under an availability provision. These remedies are in addition to the entitlement to raise a personal grievance.

[15] In view of the fact that there is no opposition from the defendants, Mr Cranney's application to amend the statements of claim is granted. Paragraphs [1] and [11] in the respective statements of claim are amended to read:

> 1. The plaintiff by filing this statement of claim on removal from the Employment Relations Authority seeks:
>
> (i) Declarations-
>
> (a) that the individual employment agreement of the plaintiff contained an availability clause;

(b) that the individual employment agreement is not in accordance with the requirements of s 67D of the Employment Relations Act (ERA);

(ii) That the Court determines such remedies payable to the plaintiff in accordance with s 123 of the ERA as are within its jurisdiction to provide.

(iii) Costs.

…

11. The plaintiff has been disadvantaged within the meaning of s 103(1)(h) of the ERA by their employment agreement not being in accordance with s 67D. The claim governs only the period prior to the plaintiff becoming bound by the collective agreement currently in place between the defendant and the Unite Union Inc.

[16] This amendment is slightly varied from the amendment sought by Mr Cranney but more appropriately puts the issues the plaintiffs seek to have resolved before the Court. As Mr Cranney submitted, and Ms Beck agreed, at this stage all the Court is being asked to determine is the declaration sought under paragraph 1(i)(a) of the now amended statement of claim. If the declaration is granted, the proceedings can be adjourned to enable the parties to attempt to resolve the issue of whether the plaintiffs have been disadvantaged and if so the issues of remedies and costs. If no resolution is reached, the matter may need to be referred back to the Court for a further hearing.

[17] Regardless of the fact that it has been stated that this case involves an important issue for the purposes of bargaining (whether collective bargaining or negotiating the terms of an individual employment agreement), this particular claim involves personal grievances, and our judgment must be confined to such a possibility. To achieve the parties' objectives, the proceedings might have been more appropriately brought as an application to the Authority pursuant to s 161(1)(a) of the Act and thence by removal to the Court, for a determination of a dispute about the interpretation, application or operation of an employment agreement.

The relevant provisions of the individual employment agreements

[18] The individual employment agreement for each of the plaintiffs consists of an offer of employment together with a brochure/pamphlet containing standard conditions. We now set out the relevant provisions from both the offer of employment and the brochure/pamphlet.

[19] The offer of employment contains provisions as to work scheduling as follows:

> **2. WORK SCHEDULING**
>
> From 1 October 2015, all McDonald's employees will be offered 80% security of hours, up to a 32 hour weekly cap, based on the average of the previous fixed quarterly worked hours.
>
> Unless otherwise agreed, new employees will have their quarterly 80% hours average calculated, based on the minimum hours agreed at time of hiring, until they have worked a full fixed quarter (1 Jan – 31 Mar / 1 Apr – 30 Jun / 1 Jul – 30 Sep / 1 Oct – 31 Dec).
>
> Permanent availability change requests need to be approved in writing by the Restaurant Manager or Franchisee. If approved, the 80% hours average will be applied based on the new minimum hours agreed, until they have worked a full fixed quarter (1 Jan – 31 Mar / 1 Apr – 30 Jun / 1 Jul – 30 Sep / 1 Oct – 31 Dec).
>
> A permanent change of availability would be greater than 2 weeks.
>
> This clause will not apply where a reduction in hours exists that are outside of the control of restaurant manager, and when hours have been reduced equitably. This includes, but is not limited to:
>
> - new restaurants where a pattern of trade has not been established;
> - an extraordinary marked & sustained downturn in sales;
> - natural disasters or other such extraordinary circumstances.
>
> Your initial minimum hours (security of hours) will be: ___ per week
>
> Your initial minimum hours (security of hours) is based on the following agreed availability:

	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
Start time							
Finish time							

> You will be rostered according to your availability.
>
> *Following the posting of your schedule by Tuesday, if your schedule includes hours over and above your security of hours number, you have 24 hours from the posting of your schedule to advise if you are not able to work these additional hours. If you are unable to work these additional hours we may either reduce these additional hours, or reissue your schedule at our discretion. We will continue to ensure that your security of hour's conditions are met, and that all shifts offered meet with your pre-agreed availability.*
>
> (Emphasis added)

[20] Insofar as Mr Fraser and Ms Doran are concerned, they were both employed as crew. Mr Fraser agreed to minimum hours of 16 hours per week, and Ms Doran agreed to minimum hours of 20 per week. In the chart setting out their agreed availability to be rostered, they each inserted the times for each day of the week when they could start and finish. In Mr Fraser's case, he indicated 24-hour availability to accept rostered duties Monday to Saturday and 7 am Sunday to 1 am Monday. Ms Doran indicated narrower time-frames of availability to accept rostered shifts. It is significant in the context of this case that the availability times inserted in the charts are referred to as "agreed availability". This confirms that the employees are nominating availability for themselves rather than being asked to meet the employer's unilaterally stated expectations as to when the employees must be available. The offer also contains the agreement that the employee will be rostered according to the employee's availability. Ms Doran signed the offer, although Mr Fraser did not. There is no suggestion he did not agree that the hours inserted were other than those to which he agreed.

[21] Insofar as the brochure containing the standard conditions is concerned, the following provisions relating to work scheduling and security of hours are relevant.

> **Work scheduling**
>
> **As a fast service restaurant we experience periods of varying customer demand. Therefore our work schedules need to be flexible. However, as**

far as possible, our objective is to recognise the desire of staff to have more certainty over the number of hours they are scheduled each week.

Your work availability is declared on your employment application form or as subsequently amended in your personal letter. Your availability is fixed and may not be changed without your Restaurant Manager's/Franchisee's agreement, except where you want to extend your availability.

Your work scheduling arrangements are as written in your personal letter. Unless otherwise agreed, you will not be scheduled to work:

- A shift of less than 3 hours,
- More than 2 shifts per day,
- More than 8 hours per day,
- More than 40 hours per week,
- After 12 consecutive hours from the time work is started on any day,
- On a sixth or seventh day in any week,
- Without a break of 9 hours between the end of work started on one day and the start of work the following day

Employees will be rostered according to their availability. No employee will be compelled to work overnight shifts, where their availability does not specify overnight as available.

From time to time you may be requested to work hours in addition to [your] work schedule. The Employer recognises that rostering hours is a difficult and contentious issue and will endeavour to ensure restaurant managers are aware of the importance of rostering employees fairly and reasonably. (Emphasis added)

Where additional hours become available in a restaurant, current employees will be offered additional shifts before new employees are employed. Where practicable, additional shifts will be notified to employees on the crew notice board.

Where more than one employee offers to take up any additional regular shifts then based on ability, qualifications and availability and all things being equal, the employee with the longest service and those working normal hours of less than 45 hours per week shall be considered first.

Where there is a need to reduce hours in a store, for reasons outside the control of the Employer, any such reduction will as far as practicable be uniformly applied. This includes for example: new restaurants where a pattern of trade has not been established, down turn in sales, where an employee receives more hours to cover peak periods. Such as special events and school holidays and other similar situations.

Escalation Process:

If you have a concern about your scheduling you should raise this in the first instance with your Restaurant Manager/Franchisee.

You can also request your own wage and time records. If the matter is not resolved in that discussion you should use the PAL programme (refer page 11) in which case the matter will be reviewed by Human Resources who will investigate and share relevant information.

At any time you may seek advice from a representative: a parent/guardian, delegate, union official or other representative.

Security of Hours

From 1 October 2015, all McDonald's employees will be offered 80% security of hours, up to a 32 hour weekly cap, based on the average of the previous fixed quarterly worked hours.

Unless otherwise agreed, new employees will have their quarterly 80% hours average calculated, based on the minimum hours agreed at time of hiring, until they have worked a full fixed quarter *(1 Jan – 31 Mar / 1 Apr – 30 June / 1 Jul – 30 Sep / 1 Oct – 31 Dec).*

Permanent availability change requests need to be approved in writing by the Restaurant Manager or Franchisee. If approved, the 80% hours average will be applied based on the new minimum hours agreed, until they have worked a full fixed quarter *(1 Jan – 31 Mar / 1 Apr – 30 Jun / 1 Jul – 30 Sep / 1 Oct – 31 Dec).*

…

[22] The attendance provision in the standard terms is also relevant to the present matter:

1. Attendance

One of your greatest benefits at McDonald's is flexibility in weekly work schedules. At the time you are hired you will have set up an availability time that fits in with your school, family, other job, or outside activity demands. When this schedule needs to be changed, let your scheduling manager know well in advance so this request can be considered in accordance with your restaurant's policy.

You are required to be in uniform, "clocked in" and ready for work at the scheduled time, to observe the times set for breaks and to work until the scheduled time to cease work at the end of the shift.

"On time" attendance is extremely important. Being late not only adversely affects restaurant operations but it places unnecessary and unfair pressures on fellow crew members whose work depends on your presence. If you are unable to attend work for any reason you must advise your Restaurant Manager/Franchisee as soon as possible, preferably not less than two hours prior to your scheduled start time, so we have time to arrange a replacement.

> Your time card/staff number is required to be entered when you start and finish each shift. Similarly you must clock in and out for your breaks.
>
> You must not enter another person's time card/number.
>
> If you need time off, you must contact your scheduling manager two weeks before that week's schedule is prepared, for your request to be considered. Remember, even in an emergency you must contact your restaurant management team for approval for time off.
>
> Before leaving your work place during working hours, you must have the approval of your manager.

The parties' evidence

[23] The plaintiffs called a number of witnesses who gave evidence as to the practice adopted by their employers who were either McDonald's or franchise holders. Ms Doran gave evidence. Mr Fraser was unavailable through illness.

[24] Mr Michael Treen, the National Director for Unite Union, gave evidence in support of the plaintiffs. His evidence was primarily directed at documents relating to numerous employees whose circumstances are not before the Court. He expressed the opinion that the individual employment agreements contained an availability clause that offended the statutory provisions. The Court did not find his evidence particularly helpful.

[25] Ms Doran gave evidence that within periods of availability which she had nominated, she was rostered to work for a minimum of 20 hours per week. While she confirmed she has never received compensation for the hours she had nominated as available, she stated that she has been offered extra work but had to turn it down on the basis that she is a student and cannot work more hours as she would suffer a tax penalty. She was not ever penalised by Carrick for refusing to accept extra work offered. This is not surprising, as the attendance provision in the standard terms shows the need to fit in with other demands of the employees, including study and alternative employment.

[26] Three McDonald's employees gave evidence. The first is also a student and can only work reduced hours for the same reasons as Ms Doran. Again, she was not penalised for this, and gave evidence which suggested she received extra hours

beyond her guaranteed hours within her nominated availability, which she referred to as open availability and which meant she would accept rostered duties up to her limit as a student at any time, day or night. There was some evidence about her ability to turn down rostered shifts. She has now had this clarified and is able to turn down shifts without being penalised in any way. Her position is really no different from that of Ms Doran.

[27] The second works for McDonald's at its Panmure restaurant. She has guaranteed hours of 24 per week but is offered more to a total of 32.5 hours, which she welcomes. She agreed that she could turn down the extra hours if she wanted. She stated that if she could not work her rostered hours, she had to find her own cover. However, under cross-examination she equivocated on this.

[28] The final witness for the plaintiffs works for a franchisee in Christchurch which is not a party to the proceedings. She gave evidence that she has in the past requested to be excused from rostered duties. On the first occasion, this was refused by her shift manager. On the second occasion, she was asked to find her own cover. On the third occasion, she was asked by the union to request a day off. This was close to the date of hearing and was apparently an attempt by the union to test the employer. Leave was granted on this occasion. We do not regard this evidence relating to an employer not a party to the proceedings as helpful in the hearing of the personal grievances of Ms Doran and Mr Fraser.

[29] The defendants called three witnesses. The first was Matthew Elmes, who is an operations consultant for McDonald's. The second witness was Shalini Kumar, who is the Assistant Manager of the Lincoln Road McDonald's where Mr Fraser works. The third witness was Mark Jenkins, who is a director of the defendant Carrick (a McDonald's franchisee), which runs the Point Chevalier Restaurant in Auckland where Ms Doran is employed. These witnesses were helpful in corroborating a lot of what the employees had stated in evidence concerning the working of the rosters.

[30] Mr Elmes confirmed that when someone applies for a job at McDonald's, they are asked to indicate what times they would be available to be rostered to work.

The following passage from his evidence, while lengthy, is particularly helpful in interpreting the material provisions of the offer of employment and standard conditions which are in issue in this case:

> …
> 9. For example, about 60% of the workforce I help manage are students. They mainly want to work on the weekends and in the evenings when they are not studying, so they might indicate they only have availability at those times; weekends and evenings.
>
> 10. When employment is agreed upon with an employee, we record agreed availability in an offer of employment letter that is signed by both McDonald's and the employee ...
>
> 11. Before an offer of employment is made, we agree what the employee's minimum hours (security of hours) are. These are also recorded in the offer of employment letter.
>
> 12. These are the hours of work that McDonald's is required to provide to the employee each week. These are the guaranteed hours.
>
> 13. We then provide these minimum hours (security of hours) within the agreed availability. So, we do not roster employees to work outside the times they have indicated they are available.
>
> 14. We first entered into this security of hours system in 2015 and we agreed on it during collective bargaining with the Unite Union. It was first set out in the collective agreement that came into force from 1 April 2015 ...
>
> 15. The way it works is that we agree on minimum hours (security of hours) when an employee starts working for us. This is the minimum amount of work McDonald's is required to give the employee.
>
> 16. The minimum hours (security of hours) are reviewed each quarter so that the employee is guaranteed 80% of the previous quarter's hours worked up to a maximum of 32 hours. So, if an employee does extra shifts their security of hours figure will go up.
>
> 17. Employees may be offered hours of work that are over and above their minimum hours (security of hours). However, they do not have to and are not required to work these additional hours. They are free to turn them down and this does not affect their existing minimum hours (security of hours).
>
> 18. We post our rosters on a Tuesday. Employees have to let us know within 24 hours if they are unable to work any hours of work that are over and above their minimum hours (security of hours).
>
> 19. Employees can do this in person, by phone or text to their shift manager or they can use an online system called MeTime to say they can't work.

20. So, an employee will know on Tuesday what their roster is for the following Monday onwards. They will know when they need to be at work and when they don't and they are not required to be available to accept work outside of those rostered hours.

21. Sometimes we do offer employees extra work over and above what is in the roster, either to cover someone else's shift or if we have an unexpected busy period. However, employees are not obliged to accept this extra work. This work will be offered within the times they have said they are available, but may be over and above their minimum hours (security of hours). Employees don't have to work more than their minimum hours (security of hours) figure.

22. In all honesty, I can't think of an occasion when we've required employees to come in and work if they say they can't, even if the work is part of their minimum hours (security of hours). We usually just get other people to cover. If someone says they can't make it for whatever reason, they're probably not going to come in and you're better off just covering the shift rather than trying to require them to work.

23. It is correct that employees don't have fixed shifts, in the sense that they don't work the same times and days every week. However, we will often try to fit crew into similar patterns of work each week.

…

[31] We did not perceive that the extensive cross-examination of Mr Elmes in any way undermined what he had said in his evidence-in-chief.

[32] Ms Kumar's evidence was also particularly helpful. Ms Kumar has extensive experience as an employee at McDonald's, which employs Mr Fraser. The following paragraphs from her evidence are material:

…

3. When people apply for jobs at McDonald's, we ask them to fill out an application form showing what hours they are available to be rostered to work.

4. If they have things like school on, their availability might be limited and they can only work after school. We discuss this during the interview and see what work we have available that fits around a person's availability.

5. Many of the people we interview are young or going for their first job, so you need to discuss how the rostering system works.

…

8. You get a minimum number of hours guaranteed to you. You don't need to accept work over and above those minimum hours of work, although you may be offered it.

9. You don't need to be sitting at home waiting when you're not rostered on to work. You are not on-call during the time you are not rostered to work.

10. Matthew Fraser has minimum hours (security of hours) of 16 and his agreed availability is set out in his offer letter …

11. Matthew is a hard worker and he tries his best. To my knowledge, he has not declined any work that was offered over and above his minimum hours and he told me he was really happy he had more than 16 hours of work per week.

[33] Mr Jenkins' evidence related to the employment of Ms Doran at the Carrick franchisee restaurant at Point Chevalier. His evidence corroborated both that of Mr Elmes and Ms Kumar. The following passages from his evidence are relevant:

…

11. Sometimes people can't work more than 20 hours per week because this might affect their student allowance or visa.

12. The rosters are set on a Tuesday for the week starting the following Monday. If there are any issues with rostered hours, our employees will raise these with the restaurant or roster manager and we can usually sort these out, either by arranging shift swaps or getting someone else to cover the shift.

13. We will discuss and review availability with an employee if they persistently say they are unable to work during a period where they previously agreed they were available.

14. In our restaurant, we roster employees according to our projected demand for labour. Each hour of each day has a projected labour need based on trends and historical sales averages. For example, Saturday nights will be busier historically so our system will tell us we need more employees on a Saturday night. Particular times of year might also require more employees to work.

15. Our system also tells us the availability of each employee according to their agreed availability. So, if we see we need a number of employees on a particular day or shift we can see which employees have said they are available to be rostered to work at that time.

16. It is not strictly correct that Olivia cannot choose the hours she works, because we agree on availability and any rostered hours must fall within that availability. It is correct that start and finish times and days of work may vary from week to week, but generally we try to get employees working similar patterns. Olivia is guaranteed at least 20 hours per week and those hours will be rostered during her agreed availability.

[34] The following exchange between Ms Beck and Mr Jenkins in continuation of his evidence-in-chief is also relevant:

> **Q.** Some of the rosters that we see out – different types of rosters might have something that always starts at 7 o'clock – so a series of 8-hour shifts. Is that how it works in McDonalds restaurants?
>
> **A.** No because every hour of the day is quite different in terms of its sales pattern and as a result we need more or less people to work. So we are seeing a whole series of different starting times and different finishing times to match the needs of the business. Labour in our business is typically 26 per cent of our sales so it is very important that we work through that as best we can.

[35] One final comment we make about all of the evidence is that where it dealt with adopted work practices, we assume it covered not only the brief period when the individual employment agreements applied but also the period following the plaintiffs' employment under the collective agreement.

Counsel's submissions and our comments

[36] The critical clause which must be considered against the statutory requirements is the paragraph contained in the offer of employment letter dealing with rostering and in particular, use of the words "reissue your schedule at our discretion".[8] This clause must be considered within the context of the standard terms of the individual employment agreement, the relevant provisions of which have been set out above.[9] The words "[f]rom time to time you may be requested to work hours in addition to [your] work schedule" came in for particular attention. Counsel submissions centred on these provisions and in particular whether the critical clause in question meant the employee was required to be available to accept any work the employer made available.

[37] Mr Cranney maintained that the wording in the offer, in combination with the standard terms, means that the employee is required to work the hours rostered in addition to the initial minimum hours referred to as "security of hours" in the agreement, or "guaranteed hours of work" as specified in s 67D. He submitted that "requested" in the standard terms means contractually required. He also submitted that "re-issue your schedule at our discretion" in the letter means that any variation requested by the employee, because he or she is unable to work the required hours, is

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8 Set out in [19] above.
9 Set out in [21] and [22] above.

being declined and the previous schedule is being reissued without amendment both as to hours and the nominated employee so rostered. Mr Cranney submitted these interpretations are consistent with the overall tenor of the rostering scheme adopted by McDonald's and the franchisees to force workers to take on employment beyond guaranteed hours. This, he submitted, was to suit the employers' requirements of availability without making payment to the employees for their requirements.

[38] Mr Cranney presented interesting submissions covering the issues of interpretation of these provisions and the history and philosophy behind the amendment to the Act. His clients' overall position (and this must include the Union representing the employees) is encapsulated in his following exchange with the Court during the course of his oral submissions in reply:

> My friend in the very first submission said that when people are employed at McDonalds they're asked to tell us when you want to be rostered. That's not the position at all. The position is to identify as much availability as you can so we can use it and there's no equality in that. You don't say Well I would prefer to be Sunday afternoons and Tuesdays or anything like that. That's not part of the system. You're encouraged to put as much availability as possible into the system and the classic example of it is Ms Doran who has quite a large number of hours of availability in two or three days' work week and it's used, that's the other point. Start and finish times are varied and the days are varied between Tuesday and Sunday.

[39] Mr Cranney also submitted that a proper interpretation of the clause means that the only way an employee is free to have the roster altered is if the employee is unable to work, implying, for example, physical inability, as opposed to unwilling, which would imply a free choice.

[40] Ms Beck submitted this is too fine a distinction. If given the interpretation submitted for by Mr Cranney, "unable" would only ever mean inability due to incapacity. An employee, she submitted, could hardly be required to give several days' notice of physical incapacity in such circumstances. The parties, Ms Beck submitted, must have intended a more flexible attribution of meaning to the word "unable".

[41] Mr Cranney also raised two further arguments in support of his submission that the plaintiffs were compelled to work the guaranteed hours or security of hours

and the additional hours. The first of these related to the rostering system itself which McDonald's and the franchisees operate. The system involves a quarterly review of each employee's roster. The rostering of both the guaranteed and additional hours in the following quarter is then determined by the total number of rostered hours worked in the previous quarter, which may result in either a decrease or increase in rostered hours for the next period.

[42] In a situation where the types of employee McDonald's and the franchisees hire are seeking to maintain their hours of work or even increase them, Mr Cranney submitted that the system imposes a pressure or compulsion to work both the guaranteed and extra hours rostered. Failure to do so will result in lower hours rostered in the following quarter. Mr Cranney's submissions on this point were as follows:

> 12. For the purposes of the contractual scheme, the year is divided into four identified quarters as follows:
>
> 12.1 1 January – 31 March.
>
> 12.2 1 April – 30 June.
>
> 12.3 1 July – 30 September.
>
> 12.4 1 October – 31 December.
>
> 13. If an employee is hired *during* one of these quarters, his or her minimum number of hours is protected both *until* the next quarter commences, and *until the end* of that quarter. Thus an employee engaged on say 10 December in a year enjoys the protection of his or her minimum number of hours until 31 March the following year.
>
> 14. The minimum number of hours for the following quarter (1 April – 30 June) depends what number of hours were *actually* worked in the 1 January – 31 March quarter.
>
> 15. If a worker with a 20 hour minimum number worked on average 30 hours per week in January – March quarter, he or she is entitled to a new minimum of 24 hours per week in the April - June quarter (that is, 80% of 30 hours).
>
> 16. If the same worker worked the 20 hours per week in the January – March quarter, he or she will have a reduction from the "initial minimum", down to a new security of hours figure of 16.
>
> 17. As will be seen, the way in which to preserve a security of hours figure of 20 hours per week as a contractual entitlement in a subsequent quarter is to work at least 24 hours per week in a

preceding quarter. This was confirmed by McDonald's principal witness Mr Elmes.

18. The highest achievable security of hours figure is 32. To preserve that for a subsequent quarter, a worker must work 40 in a preceding quarter.

19. As will be apparent, the system requires that workers who want to retain their current guaranteed hours number over time must work at least 20% in excess of that number to do so.

[43] Mr Cranney in his oral submissions referred to this appearance of employees running on the spot to keep the same number of hours as an example of the Zeno's Paradox in which Achilles could never pass the tortoise. He submitted that the purpose of the employer was to increase the extra hours worked, as otherwise the workers' security of hours would incrementally reduce and thereby an element of compulsion is introduced.[10]

[44] We do not consider that this method of reviewing rosters means that the provision in the offer of employment in the circumstances of this case falls foul of s 67D. Whether or not workers choose to work the additional hours, the evidence shows they were not required to do so in order to maintain their original 'security of hours' number. It was a choice as to whether they did so. The additional hours would fall into the "over and above" hours described in the clause in the letter, which we have concluded did not require them to work those further hours as a matter of contract.

[45] Ms Beck in her submissions covered the evidence from Ms Doran, the other employees and evidence given on behalf of Mr Fraser that in practice, this method of allocating future rostered hours was not necessarily adopted. For instance, Ms Doran and other employees who can only work restricted hours as students without losing other financial benefits, were consistently rostered the same number of hours across succeeding quarters. As Ms Beck submitted, this was part of the agreement involving mutuality of obligations, which confirmed that the employment agreements do not contain availability provisions as prescribed in the Act, where the

[10] While not the subject of evidence or argument in this case, in other factual circumstances and where the criteria contained in s67E exist, this method of reducing rostered hours could amount to adverse treatment under s 67F. In turn, this could give rise to a personal grievance under s 103(1)(i) of the Act.

making of the work available and requirements to work those hours must be by unilateral decisions made by the employer.

[46] The second of the further arguments raised by Mr Cranney related to the flexibility that was available to McDonald's and the franchisees through the rostering regime. This submission relates to what we have set out earlier,[11] relating to the explanatory note of the Employment Standards Legislation Bill which was to prohibit "zero-hour contracts". The rationale for the submission was that this was one of several practices lacking sufficient reciprocity, or mutuality of obligations as Ms Beck referred to it, and which provided an employer with disproportionate flexibility and less risk than the employee.

[47] Mr Cranney submitted that such flexibility was an asset as far as the company was concerned. Flexibility is a concept preserved in the definition of "Hours of Work" contained in s 67C. However, we consider that the method of employees nominating in advance hours when they will be available to be rostered does not provide flexibility only for the benefit of the company but for the employees as well. Flexibility in this instance was a two-way street. We do not accept Mr Cranney's submission that the flexibility arising from the quite extended hours that the employees were nominating provides an imbalance in favour of the employers and therefore gives rise to a compulsion which would provide the need for an availability provision to be included into the agreements for there to be compliance with the statutory requirements.

[48] Putting "over and above" hours to one side, there is no evidence that either Ms Doran or Mr Fraser was required to work any particular rostered hours which fell within the range of hours for which they had stipulated availability. The provisions of both the letter of offer of employment ("you will be rostered according to your availability") and the Work Scheduling Clause ("employees will be rostered according to their availability"), emphasised that employees could indicate they would not be available; and as the evidence which has been presented makes clear, this is in fact what happened.

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[11] Set out at [10].

[49] Mr Cranney elaborated on this concept of the hours of availability providing a disproportionate asset to the employers in his oral submissions when he stated:

> … And I say what these sections are trying to do is to say that there has to be consideration paid for the availability in certain circumstances. And it can't in a case like this be said that it is paid for by the wage because the wages are only payment for the work. And if you look at the way this is operated in this large bundle - of random workers – in the large bundle of yesterday, these are random workers in the sense that they all joined the Union subsequently but when they first joined the company they were just random workers. And you can see the extent of the availability which is bargained for by the employer. Very extensive availability. And the reason for that is because it is cheap. In fact it is not only cheap it is free. Now if there was a cost associated with it then the employer would not be able to bargain for that type of availability or at least would have to pay for it. And one of the effects of an availability payment is to reduce the use of these massive availability figures. And reduce it to something manageable. And that is what the sections are trying to do, first of all put a price on it, and if the price is put on it, it causes the employer to reorganise themselves but within the law.

[50] We would be inclined to agree with that submission of Mr Cranney as thus giving rise to an availability provision under the Act, if this were a case where the employees were simply unilaterally provided with the required hours of availability and required to work them beyond the agreed guaranteed hours. As we have found, that is not the case both from the evidence we have heard and our analysis of the correct interpretation of the contractual provisions.

[51] Ms Beck submitted that the clause in question, and in context with the overall conditions of the agreement, is not an availability provision. She centred her submissions on the mutuality of obligations covered by the provision contained in the offer and the additional contractual terms showing mutuality between the parties rather than these provisions and terms providing employers with the unilateral right to impose obligations of availability. In support of this submission, she relied upon normal interpretation principles and statements from the legislators as contained in Parliamentary materials.

[52] On the question of the term in the offer of employment, which is in dispute, Ms Beck submitted that it is not an availability provision. She submitted that in terms of s 67D(1)(a) of the Act, while the availability of work beyond the guaranteed hours is conditional upon the employer offering that work, there is no obligation on

the employee to accept it, which is the second criterion contained in s 67D(1)(b). Ms Beck disagreed with Mr Cranney's approach that the terms of the provision in the offer mean that the employee is compelled to accept. This, she submitted, was confirmed by the conduct of the parties and applying usual principles of construction to the terms of the agreement. In particular, the scheme of the rostering system adopted by McDonald's and the franchisees involves mutuality of obligations agreed to and not unilateral imposition, as an availability provision in the way the Act defines it would require. The material parts of her submissions in this respect, and in particular the motivation of the legislature in introducing the amendments now contained in ss 67C and 67D of the Act, are set out as follows:

> 41. Sections 67C and 67D were enacted as part of the Employment Standards Legislation Bill. One of its aims was to prohibit "*zero hours*" contracts. Its explanatory note said the Bill "*prohibits certain practices in employment relationships that lack sufficient mutuality between the parties (particularly in relation to "zero hours" contracts)*". It went on to say, "*The Bill also prohibits specific practices that undermine the mutuality of obligations in the employment relationship. These issues were recently highlighted in relation to "zero hours" contracts (in which employees are required to be available for work, but the employer is not required to offer guaranteed hours)*".[12]
>
> 42. There are a number of other relevant references referring to mutuality of obligations:
>
> > "The central policy intent underlying the parts of the bill that seek to prohibit certain unfair employment practices is to uphold the principle of mutual obligation in employment relationships. The provisions seek to prohibit employment practices that lead to employees bearing disproportionate obligations compared to those of their employer. The bill aims to rebalance these relationships, while preserving the mutually beneficial flexibility that they can offer"[13]

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12 Employment Standards Legislation Bill 2015 (53-1) (explanatory note).

13 Employment Standards Legislation Bill (53-2) (select committee report) at 8.

> "But it is the lack of mutuality of obligation that is the most punitive aspect of zero-hour agreements. It is the quid pro quo that if I do not commit, why should the other party?[14]
>
> "Finally, the changes in these bills get rid of zero-hour contracts and other unfair practices in employment relationships. I have always been confident that the original bill was in very good shape in this respect and that it struck the right balance of mutual and reciprocal obligations for employers and employees."[15]

43. The Defendants submit the relevant amendments to the ERA were designed to prohibit an employer from being able to require employees to turn up to work, if it wasn't prepared to guarantee them work in return (unless an availability provision was included in the employment agreement). The focus of the amendments is on creating a mutuality of obligations, not on prescribing rigidity in hours of work.

[53] While Mr Cranney urged us simply to consider the meaning of the provisions on their face, failure to consider the parties' conduct would in this case lead to an artificially restrictive approach to interpretation. The effect of the clause cannot be considered in a vacuum without regard to how the parties applied it. As Ms Beck also submitted in her submissions and with which we agree:

23. This case also requires the interpretation of an identical clause in two individual employment agreements.

24. The Defendants submit it is important to bear in mind that the parties are arguing about individual employment agreements between two specific Plaintiffs and two specific Defendants. While the parties' subsequent conduct may be admissible and relevant to the interpretation of contracts including employment agreements, it is the actual parties to the employment agreements' conduct that is relevant, and then only for the limited time the individual employment agreements were actually in place. For example if the Court accepts evidence that other employees who were not Plaintiffs and who were not party to their employment agreements were required to accept conditional work, this does not take matters further in terms of the interpretation of the particular Plaintiffs' individual employment agreement and whether they have personal grievances. The "big picture" is of much less relevance than it

[14] (8 March 2016) 711 NZPD at 9472.
[15] (10 March 2016) 711 NZPD at 9608.

> would be if the parties were arguing about a collective agreement. (footnote omitted)

Analysis

[54] Mr Cranney maintained that the basis upon which these proceedings were allocated a hearing before a full Court was for the initial and sole purpose of deciding whether the individual employment agreements contained an availability provision. However, we do not consider that the matter can be resolved by a black-letter-law approach to the wording without considering the parties' approach to their employment relationship. We are not prepared to determine the matter in a vacuum in that way. Substantial evidence was led on both sides. A great deal of that evidence had a material bearing on what is, in reality, the nature of the employment agreements between the plaintiffs and the defendants. But in the end, this case simply deals with the individual employment agreements between Ms Doran and Mr Fraser and their respective employers, McDonald's and the franchisee, Carrick. While the plaintiffs' employment is now governed by their collective employment agreement, it is the individual employment agreements which applied for a relatively short period in each case which are the subject of this dispute and now their interpretation.

[55] The correct approach to the interpretation of the relevant clause is to follow standard principles of contractual interpretation. We must decide what the natural and ordinary meaning of the words is in their context at the time the agreements were reached. As decided in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[16] a cross-check can be undertaken, particularly where there is ambiguity. But evidence of post-contract conduct can be of assistance if, when assessed on an objective basis, it reflects the parties' joint intentions.[17]

[56] The decision to be made in this case is that which counsel primarily focussed upon in their submissions. It is whether Ms Doran and Mr Fraser were compelled to

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16 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [24].

17 At [30]-[31] per Tipping J. This statement of principle is unaffected by the dicta of the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432; or *New Zealand Airline Pilots' Association Inc v Air New Zealand* [2017] NZSC 111.

be available for the hours included in the periodic rosters beyond the guaranteed hours. As a matter of detail, the focus was on the words "reissue your schedule at our discretion" contained in the clause of the letter of offer.[18]

[57] We do not agree with Mr Cranney's submissions as to how this phrase should be construed. Where the employees, as they were entitled to do, advised that they were unable to work the additional hours, the employer's agreement to "reduce these additional hours" meant a reduction of the hours over and above the "security of hours". The agreement to "reissue your schedule at our discretion" meant reissuing the schedule of hours to another employee, reducing the hours in whole or in part depending upon the extent of inability, or possibly reissuing it to the same employee to be performed on another occasion. If, as Mr Cranney submitted, these words meant that the employer was refusing the employees' indication that they were unable to work the additional hours, then this would be a very curious and obscure way of expressing the employer's notification that the work must be performed regardless, particularly in the overall context of all the provisions. "Reissue" could not have meant "reconfirm", so that the employee had to work the hours originally asked, thereby introducing an element of compulsion or "requirement" in accordance with s 67D.

[58] The oral evidence of the various witnesses becomes relevant to this point because it shows that in fact shifts referred to in Ms Doran and Mr Fraser's individual employment agreements were to be negotiated under a genuine consensus process. There was no single example of compulsion. The word "requested" in the work scheduling provisions meant what it said: employees could be asked, but not compelled to be available for the hours rostered beyond the guaranteed or "security of hours". Otherwise, the word used would be "required".

[59] Mr Cranney also referred in his submissions to the "mischief" of low hours and high availability. He said that the high availability indicated by the employees was a valuable commodity to McDonald's and the franchisees for which they were not paying so that there was a breach of the provisions of the Act. He argued that the ultimate goal of the statutory provisions was to force employers to pay for all

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[18] Set out at [19].

availability hours beyond guaranteed hours; and that this would result in such a high cost to employers that they would then be more likely to require workers to work according to a fixed-hours schedule rather than the flexible-hours schedule, which, for the purposes of increased profitability, this rostering scheme was designed to achieve. These factors would then, in turn, be relevant to an assessment of the quantum of compensation under s 67D(6) if indeed we had decided there was an availability provision contained in the agreements. We do not accept that such a "mischief" exists in this case. Here, the prospect of wide availability with the possibility of employees being able to arrange substitutes to work their shifts introduced flexibility for them. The evidence establishes that many of the employees are students or transitory workers who may also be working in alternative employment. These arrangements were as much to their advantage as they were to the employers. Accordingly, there was no disproportionate advantage to the employers as Mr Cranney has submitted was the case. Nor, as we stated earlier, do we consider there was an element of compulsion arising from the method of quarterly rostering of hours adopted by the defendants.

[60] The arrangements which applied to Ms Doran and Mr Fraser may be summarised as follows. McDonald's and its franchisees operate restaurants where peaks and troughs in demand occur, as is well known. They employ a large number of workers in the restaurants, the majority of whom are likely to be young and transitory. In order to maintain flexibility in the way it rosters employees for the purposes of maximising profit by reducing wage overheads, it introduced a system which it insists is in compliance with the statutory regime. This is not a case where the employer laid down mandatory hours of availability unilaterally, but rather where it requested potential employees to indicate in advance when they would be available to accept rostered hours. Within those periods of availability indicated by the employees rather than mandated by the employer, McDonald's and the franchisees then establish a roster for the employees which includes periods of guaranteed hours as required, but also nominates additional hours within the periods of pre-indicated availability with the employees having the right to reject the additional hours if they wish. A reasonably lengthy notice period is required if the additional hours are to be rejected. That is not unreasonable in view of the fact that the employer (if the extra hours are rejected) needs to arrange employees in substitution to perform the work.

[61] We make a further point as to the operation of s 67C. If the agreements do not contain an availability provision as defined in the Act, there would be no need to provide guaranteed hours. Section s 67C(2) defining hours of work does not make the inclusion of guaranteed hours of work in an employment agreement mandatory. If the parties chose not to agree to an availability provision, they could nonetheless set out mutually agreed rostered hours. We do not infer from the fact that guaranteed hours are included in the agreements in this case that McDonald's and Carrick believed an availability provision was being included.

[62] For these reasons, we are not prepared to make the declaration which the plaintiffs are seeking. According to the interpretation we favour, the individual employment agreements do not contain an availability provision. While, if an alternative decision had been reached, further issues of remedies would have needed to be considered, there is now no need to go on and consider such remedies, which may have involved a further hearing. Nevertheless, in the course of reaching this judgment, we have expressed some views as to the difficulties the Court would have faced if the circumstances had been different and remedies needed to be considered.

Costs

[63] In view of the fact that these proceedings were commenced to test the effect of new legislation, the parties may be in agreement that costs should lie where they fall. If costs are an issue and cannot be resolved, then the parties have 14 days in which to file submissions in respect of costs. To that extent, costs are reserved.

M E Perkins
For the Full Court

Judgment signed at 11.30 am on 4 August 2017