WHAT ARE REASONABLE HOURS?

Employment Law Group

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Now that it has been accepted by the Full Bench of the Australian Industrial Relations Commission (AIRC) that working hours have changed significantly over recent decades, one might ask the question, 'What are reasonable hours?' and what do they mean for workplace relations.

In a landmark decision the AIRC inserted into a number of federal Awards a provision conferring employees a right to decline to work unreasonable overtime having regard to their personal circumstances including amongst other things—family responsibilities. It is expected that unions will now seek to vary other Federal and State Awards so as to incorporate the test standards.

The Full Bench of the AIRC accepted there has been a significant reduction in the number of employees who work 'standard hours'. Increasingly, employees are working extended hours across a range of occupations, industries and income levels, of which a significant proportion remains unpaid.

The ACTU maintains that at least 2.4 million Australians now work in excess of 45 hours per week and at least 1.6 million Australians work in excess of 50 hours per week. According to the ACTU, Australia has the fastest growing overtime rate globally and is now ranked only behind Korea in the developed world with respect to the average numbers of hours worked per week.

In referring to these statistics —including one that points out that Australia has a higher rate of unpaid overtime that that of Korea—the ACTU sought to insert a more extensive clause into awards applicable to, amongst others, public servants, construction workers, miners, teachers, finance employees, flight attendants, hospitality workers and shop assistants.

The Full Bench accepted that the trend towards working longer hours is likely to give rise to an increased risk of fatigue and occupational health and safety risks. The Commission also recognised that the relationship between working hours and family and community life is an important issue for both employees and employers.

The Full Bench declined to award the test case provision in the terms sought by the ACTU which would have prevented employers from requiring employees to work unreasonable hours having regard to a number of factors. In particular, it recognised that most Awards define 'ordinary hours of work' as 38 hours per week and noted that employers and employees are able to plan on that basis. The insertion of a clause prohibiting employers from requiring an employee to work unreasonable hours would not only make it difficult for both groups to plan in advance, but such a clause would be likely to create disharmony at an enterprise level.

In addition, the ACTU sought the insertion of a clause which would have entitled an employee who had worked particular hours to a two day paid break, and where that break was not provided within seven days, to penalty rates until such break was provided. The Commission declined to insert such a clause rejecting the basic tenet of the ACTU's case that extreme hours are bad for employees. It recognised that in certain circumstances extreme hours provide financial benefits for employees and their families. The Commission also noted that the insertion of such a clause would be inappropriate in certain awards where unique work arrangements were applicable, for example in the air travel industry.

The Full Bench awarded a test case provision of a more limited nature than that sought by the ACTU but

which the ACTU has subsequently described as 'a win for workers which would also provide more jobs for the nation's unemployed'. The Provision reads:

1.1 Subject to clause 1.2, an employer may require an employee to work reasonable overtime at overtime rates.

1.2 An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

1.2.1 Any risk to employee health and safety.

1.2.2 The employee's personal circumstances, including any family responsibilities.

1.2.3 The needs of the workplace or enterprise.

1.2.4 The notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and

1.2.5 Any other relevant matter.

The New South Wales Industrial Relations Commission has recently announced that it will consider, on its own motion, the hours worked by employees within New South Wales. It is required to give consideration to decisions of the full bench of the Federal Commission where the decision is likely to affect employment conditions within New South Wales.

Employers should be aware that many employees covered by federal awards and Australian Workplace Agreements will now be entitled to refuse to work excessive overtime in certain circumstances. In particular, employers must consider the impact that overtime may have on the personal circumstances of employees and provide reasonable notice to employees of any requirement to work overtime. It is probable that clauses relating to excessive overtime will be inserted more widely in other federal and state based awards in the future.

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