Case Note
What are reasonable additional hours?

AMIEU v Dick Stone

On 6 May Justice Katzmann of the Federal Court of Australia handed down her decision in *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* (***Dick Stone***).[1]

The case is of interest for the insights it provides into the operation of an important, but rarely-litigated, aspect of the National Employment Standards in the form of the maximum weekly hours provisions in sections 62 to 64 of the *Fair Work Act 2009* (Cth) (**FW Act**).

The regulatory framework

Section 62(1)(a) stipulates that an employer must not request or require a full-time employee to work for more than 38 hours per week, 'unless the additional hours are reasonable'.[2] This is complemented by section 62(2) which provides that an employee is entitled to refuse to work additional hours if they are unreasonable.

'Reasonableness' in this context is to be determined by taking into account the ten factors set out in section 62(3):

a) any risk to employee health and safety from working the additional hours;
b) the employee's personal circumstances, including family responsibilities;
c) the needs of the workplace or enterprise in which the employee is employed;
d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;
e) any notice given by the employer of any request or requirement to work the additional hours;
f) any notice given by the employee of his or her intention to refuse to work the additional hours;
g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;
h) the nature of the employee's role, and the employee's level of responsibility;
i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;
j) any other relevant matter.

Section 63(1), meanwhile, enables modern awards and enterprise agreements to include terms providing for the averaging of weekly hours over a period, so long as the average over the specified period does not exceed 38 hours,

1 [2022] FCA 512.
2 Section 62(1)(b) makes equivalent provision for part-time employees.

whilst section 63(2) permits average weekly hours that are in excess of 38, so long as they are reasonable. Averaging is also permissible for award/agreement-free employees in accordance with the terms of section 64.

The facts

Dick Stone is a long-established NSW butcher and meat processer.

In March 2016 it offered employment at its Regents Park (Western Sydney) plant to Mr Samuel Boateng (**Boateng**), who was at that time a recent immigrant from Ghana.

Boateng was alerted to the possibility of employment at Dick Stone by a member of the Ghanaian community. He presented at the Regents Park premises on 21 March 2016, was introduced to a member of management, and commenced work straightaway. As Justice Katzmann observed 'there was no discussion about terms, conditions, hours of work, or pay'.[3]

On the following day, Boateng was given an 'employment form' and an 'Employment Commencement Pack' which, among other things, contained a letter of offer of employment.

This letter recorded that Boateng's employment had commenced on the previous day, and set out a number of 'general conditions of employment', including the following provision concerning hours of work:

> **Hours:** The ordinary work hours for a full-time week are 50 hours per week. Your ordinary work hours will initially be within the range 2:00 am to 11:30 am Monday to Friday, 2:00 am to 7:00 am Saturday. This may at some stage in the future need to be varied from this range due to business requirements.
>
> **Additional Hours:** There is the expectation that when requested by the Company employees shall work a reasonable amount of additional hours.

Curiously, the letter of offer was silent as to the rate at which Boateng was to be paid, and the first indication that he had as to his rate of pay was when he received his first pay slip. The amount that he was paid was greater than the ordinary time rate for the hours he worked, but less than what he would have been entitled to be paid if the hours in excess of 38 hours per week had been paid at overtime rates.

Boateng accepted the offer of employment in writing. Relevantly, his employment was also covered by the *Meat Industry Award 2010* (**Award**) and by the FW Act.

In November 2017 the Australasian Meat Industry Employees Union (**Union**) wrote to Dick Stone 'raising concerns about underpayment of several Award entitlements, including with respect to unreasonable working hours and overtime', and suggesting that the matter be resolved through the dispute resolution process (**DRP**) in the Award.

Subsequently the Union initiated proceedings in the Fair Work Commission seeking that it deal with the dispute. These proceedings came to an end, however, when Dick Stone refused to agree to arbitration (as it was entitled to do under the DRP).

In due course, in 2019,[4] the Union initiated the Federal Court proceedings that culminated in the decision of Justice Katzmann of 6 May 2022.

In the meantime, Boateng's employment was terminated by reason of redundancy in May 2019.[5]

The Union alleged that Dick Stone had breached the Award and the FW Act in a number of respects. Most relevantly for present purposes, these included that it had:

- failed to pay overtime rates for hours worked in excess of 38 hours per week as required by cl 36 of the Award;
- failed to pay overtime rates for work performed outside of the ordinary span of hours as required by cl 31.2(d) of the Award; and
- failed to comply with s 62 of the FW Act by requiring or requesting him to work more than 38 hours a week.[6]

The other issues raised by the Union's claims included:

- whether Dick Stone should be regarded as conducting a 'meat processing establishment' or a 'meat retail establishment' for purposes of determining the relevant span of hours during which overtime rates would be payable;
- what award classification applied to Boateng, for purposes of ascertaining his entitlements;
- whether Dick Stone had complied with its obligations under the Award and the NES in relation to the provision of information to employees;[7] and
- whether Dick Stone had underpaid superannuation contributions in breach of the Award.

3 [2022] FCA 512, [50].

4 See 'Meatworker seeks $125K after alleged job trim', *Workplace Express*, 11 October 2019.

5 [2022] FCA 512, [74].

6 [2022] FCA 512, [6].

7 Unusually, this included failure to provide Boateng with a Fair Work Information Statement as required by section 125 of the FW Act. Proceedings for breach of this provision are very rare.

The decision

Essentially, Justice Katzmann found in favour of the Union (and by necessary inference Boateng) on all counts. It should be noted that these proceedings were concerned only with the question of whether Dick Stone had breached the Award and the FW Act. The question of penalties and compensation (if any) is to be dealt with separately.

The overtime issue

As concerns the allegations that Dick Stone had not paid overtime in respect of hours in excess of 38 hours per week and for work performed outside the ordinary span of hours, Justice Katzmann found the Union's allegations to be made out.

That is to say, her Honour accepted that the hours that Boateng worked in excess of 38 hours per week should have been paid at overtime rates – with the overtime comprising the hours from 2.00 AM to 4.00 AM on Monday to Friday, and the time worked on Saturdays. In reaching this conclusion, her Honour rejected Dick Stone's submissions to the effect that the rate at which Boateng was paid was a 'blended rate' which it was entitled to 'set-off' against the award rates. The Union asserted, and Justice Katzmann agreed, that a set-off was not permissible due to the fact that 'there was no agreement or common understanding that the amount he was paid for working any part of a 50 hour week would include an overtime rate, nor was it designated as overtime'.[8]

Her Honour was confirmed in this view by the fact that Boateng's contract 'stipulated that he would be paid overtime for "additional hours" over and above the 50 hours a week "ordinary work hours"'. As Justice Katzmann saw the matter:

> The payments made to Mr Boateng for working 50 hours a week were designated in his pay slips as payment for "ordinary hours". Without communicating its intention to satisfy its obligations to pay overtime rates in accordance with the Award by absorbing them in over-award payments, it was not open to Dick Stone to appropriate part of those payments to discharge its obligation. [9]

The reasonable hours issue

In relation to the section 62 issue, Boateng asserted that 'he was given no choice about his ordinary hours of work', whilst Dick Stone submitted that 'since the 50 ordinary hours of work was a term of Mr Boateng's contract of employment into which he freely entered, it could not possibly be said to have been a requirement of his employer or a 'unilateral' request'.[10]

Justice Katzmann 'inclined to the view' that 'Boateng was required to work 50 hours a week, notwithstanding that he voluntarily entered into the agreement to do so' – especially in light of the fact that 'once the contract was made and he began to work pursuant to its terms he was bound to perform his side of the bargain'. Her Honour did not, however, feel called upon to make a formal finding as to whether 'a condition of a contract of employment that requires an employee to work in excess of 38 hours is a 'requirement' for the purposes of section 62 because it is enough that the employer requests the employee to work the excess hours'[11] – and there clearly had been a 'request' if not a 'requirement' in the present case.

Justice Katzmann noted that the only circumstances in which a requirement or request to work for more than 38 hours is permissible under the FW Act is where the requirement or request is 'reasonable', and that the onus of proving 'reasonableness' rests upon the party asserting it.[12]

Her Honour further noted that:

> What is reasonable in any given case depends on an evaluation of the particular circumstances of both the employee and the employer having regard to all relevant matters including those matters mandated for consideration in s 62(2) (sic).[13]

Justice Katzmann then proceeded to address each of the factors that are set out in section 62(3) by reference to the circumstances of Boateng's employment.

Her Honour's overall conclusion was that she was 'persuaded that it was unreasonable of Dick Stone to require or request Mr Boateng to work 12 hours a week every week over and above the 38 stipulated by the Award and the Act.'[14]

8 [2022] FCA 512, [195].
9 [2022] FCA 512, [209].
10 [2022] FCA 512, [219] and [220] respectively.
11 [2022] FCA 512, [223].
12 [2022] FCA 512, [224].
13 [2022] FCA 512, [225]. This approach is consistent with that set out in the Explanatory Memorandum for the Fair Work Bill 2008 (para [250]), which also makes express reference to the need to undertake a 'balancing exercise' between competing factors in some instances.
14 [2022] FCA 512, [250].

Justice Katzmann's application of the ten section 62(3) factors is summarised below:

- *Section 62(3)(a) – Risk to health and safety* - Accepted that it was common knowledge that fatigue, particularly physical or mental exhaustion, could increase the risk of accidents in the workplace, particularly in a workplace where there are obvious physical hazards, and also, over the long term, contribute to a variety of diseases.[15]
- *Section 62(3)(b) – Personal circumstances* - Little evidence was led about Boateng's personal or family circumstances, other than that he was a recent immigrant to Australia and that this had been disclosed to Dick Stone at the time of his engagement. Her Honour found that this meant that 'in all likelihood he had no knowledge of Australian law'.
- *Section 62(3)(c) – Needs of the workplace* - Although the need to meet customer orders provided a basis for the time that certain hours were worked, the evidence was contested as to whether the business needed Boateng to work 50 hours, or whether the work could have instead been split amongst employees.
- *Section 62(3)(d) – Entitlement to overtime, penalty rates, compensation or remuneration reflecting the additional hours* - In circumstances where Boateng was not paid overtime rates in accordance with the Award, this factor was found not to assist Dick Stone.
- *Section 62(3)(e) – Notice of the request to work additional hours* - Notice was provided in the letter of offer and included as a term of Boateng's contract. The significance of this factor in the circumstances of the case is not clear.
- *Section 62(3)(f) – Notice by employee of intention to refuse additional hours* - Dick Stone gave evidence that on two occasions its managers had invited employees to advise them if they wanted to 'adjust' their hours, but that no employee had taken up the offer. Boateng said that he did not do so because he was concerned that if he did his employment would be terminated. Her Honour suggested that it would be an '*open question*' as to whether Dick Stone would have actually agreed to such a request had it been made.
- *Section 62(3)(g) – Usual patterns of work in the industry* - Although Dick Stone sought to rely on the span of hours in the Award starting at 4 am as demonstrating a wide span of hours in the industry, Her Honour found that this did not assist in circumstances where Boateng started at 2:00 am, which is outside of the standard set by the Award.
- *Section 62(3)(h) – Nature of employee's role and level of responsibility* - It was common ground that nothing in Boateng's role suggested a need to work more than 38 hours per week – he had no managerial, supervisory or other responsibilities.
- *Section 62(3)(i) – Additional hours in accordance with averaging terms* - The additional hours were not worked in accordance with any averaging terms.
- *Section 62(3)(j) – Any other relevant matters* - Her Honour rejected Dick Stone's argument that the unsocial nature of the 2 am starts was irrelevant. Similarly, Her Honour found that the regularity and frequency of the additional hours, which deprived Boateng of his weekends, was also a relevant factor.

In the course of her analysis, Justice Katzmann expressly rejected Dick Stone's argument that the fact that the majority of its employees were comfortable with the 50 hour arrangement was a 'relevant matter' for purposes of the residual category in section 62(3)(j):

> Whether or not the majority of Dick Stone's workers preferred a 50-hour week does not make the hours reasonable in Mr Boateng's case. The fact that he did not question Dick Stone's offer or attempt to negotiate its terms is unsurprising, having regard to the fact that he had only recently arrived in Australia from a third-world country, needed employment, and was likely to be unfamiliar with Australian law. The fact that he made no complaint about working 50 'ordinary hours' before the Union's involvement is also unsurprising in the circumstances.[16]

Of the above factors set out in section 62(3), her Honour appears to have been particularly influenced by:

- the employee health and safety issue;
- the fact that Boateng was not paid overtime rates in accordance with the Award; and
- the absence of credible evidence concerning usual patterns of work in the industry or part of the industry.

Implications for employers

It should be emphasised from the outset that the employment and industrial circumstances in which the above case arose are somewhat unique and are not necessarily representative of the matters that would typically be at issue in other industries, particularly where the relevant cohort of employees are working in a white-collar environment or pursuant to an annualised salary arrangement.

15 For recognition of the potential significance of the decision in this context, see 'Additional hours created WHS risks and breached FW Act', *OHS Alert*, 11 May 2022.

16 [2022] FCA 51`2, [250].

Nevertheless, the decision in *Dick Stone* does highlight a number of important issues that are of relevance in a broader context than the meat industry in Western Sydney. These include:

1. It is important not to assume that the maximum weekly hours issue is of only marginal significance in contexts where employees are on salary, and where contracts of employment contain provision to the effect that the employee will 'work such hours as are reasonably necessary in order to perform their role'.

   Of course the situation in *Dick Stone* was different from such provision in that the 'unreasonable' hours were expressly quantified. A requirement that additional hours may be required from time to time is a very different thing. However there is a risk that if there is a de facto 'requirement' that employees work excessive hours, then the working of those hours could come to be regarded as a 'requirement' to work unreasonable hours.

   Again, it is important to keep the issue in perspective, and as Justice Katzmann was at pains to point out 'what is reasonable in any given case depends on an evaluation of the particular circumstances of both the employee and the employer having regard to all relevant matters', including those set out in section 62(3).
2. For any exposure to arise under section 62, it is necessary that there be a 'request' or 'requirement' to work the unreasonable hours.

   The potential hazard here is that there may be a fine line between an 'expectation' or 'acquiescence' on one hand and a 'request' or 'requirement' on the other.

   Again, however, it is necessary to keep the issue in perspective. Even if there is a de facto 'request' or 'requirement', it will not necessarily run afoul of section 62, so long as the additional hours can objectively be shown to be 'reasonable' – bearing in mind that the onus of proving reasonableness rests upon the party asserting it.
3. It is important to appreciate that the operation of section 62 applies to all employees – irrespective of whether they are covered by an award, enterprise agreement or a contract.
4. It should be noted that requiring or permitting employees (or indeed contractors) to work for excessive hours may give rise to legal exposures far beyond the reach of section 62 of the FW Act. This could include liability for breach of express or implied terms of contract, in tort, under workers compensation legislation, and under work health and safety legislation.

None of this is to suggest that issues associated with working hours beyond the statutory maximum cannot be managed in a manner that effectively protects the interests of both employers and employees. But the decision in *Dick Stone* does serve as a timely reminder that it is an issue that employers ignore at their peril.

Finally and for completeness, we note that section 62 originated in the Howard Government's Work Choices reforms in 2005, and were retained by the Rudd Government in the FW Act in 2009. This suggests that the 'reasonable additional hours' concept is likely to be retained as part of the Federal statute for the foreseeable future.

Furthermore, it seems reasonable to assume that section 62 will give rise to increased litigation in circumstances where unions are increasingly agitating about workloads, particularly in the context of COVID-19 and claims that certain white-collar workers are unable to 'disconnect' from work.

CORRS
CHAMBERS
WESTGARTH

Contacts

PAUL BURNS
Partner

+61 3 9672 3323
+61 417 325 009
paul.burns@corrs.com.au

BREEN CREIGHTON
Consultant

+61 3 9672 3122
+61 419 131 060
breen.creighton@corrs.com.au

SHEA WILDING
Senior Associate

+61 3 9672 3537
+61 437 003 842
shea.wilding@corrs.com.au

Sydney
Melbourne
Brisbane
Perth
Port Moresby

corrs.com.au