The Right to Reasonably Limited Working Hours in the Smartphone Era

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Abstract

Under the International Covenant on Economic, Social and Cultural Rights, everyone in New Zealand has the right to reasonably limited working hours. However, New Zealand law does not expressly recognise this right or generally limit the number of hours a person may work. Also, according to figures from the 2013 Census, just over 215,000 people work between 50–59 hours per week, and some 160,000 people work 60 hours or more per week. These figures indicate that many people in New Zealand do not enjoy the right to reasonably limited working hours. This article argues that New Zealand is not complying with its obligations under the Covenant in respect of working hours, or with related obligations concerning the family and health. It also proposes ways in which New Zealand could better comply with these obligations. In this context, the article considers the impact smartphones have on work, and the challenges they create in placing limits on work.

Key words

Economic, social and cultural rights, working hours, family, health, smartphones.

Introduction

> Figures show Kiwis...work longer hours than many of their OECD counterparts...And experts predict that to increase further as more employees get smartphones and tablet devices, potentially connecting them to their jobs 24 hours a day.[1]

This article is in six parts. Part I summarises the right to reasonably limited working hours as recognised in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[2] as well as the family and health-related rights set out in the ICESCR. It also explains New Zealand's obligations in respect of those rights, some of the ways in which they may be violated, and the extent to which they are enforceable in New Zealand domestic law.

Part II provides statistics on working hours in New Zealand, and discusses some of the impacts long hours can have, including on health and families. Part III refers to how smartphones affect

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[1] Nicola Brennan-Tupara, Louise Risk and Jenna Lynch "No rest for the wicked" *Stuff* (online ed, New Zealand, 20 October 2012).

[2] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1996, entered into force 3 January 1976) [ICESCR]. New Zealand ratified the ICESCR on 28 December 1978.

the ways people work, as well as the times and places in which they work or can be reached by work. Part IV analyses New Zealand statute and case law relevant to hours of work, and highlights some of the current regime's deficiencies.

Part V argues that New Zealand is not meeting its obligations under the ICESCR in respect of the rights referred to above. Part VI provides a framework for a new maximum hours regime.

Part I: Rights to Reasonably Limited Working Hours, Health, and Family

The Right to Reasonably Limited Working Hours

Under the ICESCR, New Zealand recognises "the right of everyone to the enjoyment of just and favourable conditions of work".[3] New Zealand also recognises that such conditions have to ensure, amongst other matters, "rest, leisure and reasonable limitation of working hours".[4]

The inclusion of these rights in the ICESCR may be seen as one of the products of the struggle to reduce long hours of work in early industrialisation.[5] The ability to enjoy these rights is central not only to a dignified and healthy working life, but also to a dignified life in general.

The ICESCR does not define what amounts to reasonably limited working hours. However, three International Labour Organisation (ILO) conventions[6] and state practice suggest:[7]

> …that 'reasonable' hours under Article 7(d) of the ICESCR should normally be no more than 40 hours per week, and certainly no more than 48 hours per week.

Consistent with this, the European Working Time Directive defines "maximum weekly working time" as an average working time of 48 hours or less over each seven day period, including overtime.[8]

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[3] ICESCR, art 7.
[4] ICESCR, art 7(d).
[5] See Ben Saul, David Kinley and Jacqueline Mowbray *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, Oxford, 2014) at 472, who refer "to working hours of up to sixteen hours per day during early industrialization". See also Stephen Blumenfeld, Sue Ryall and Peter Kiely *Employment Agreements: Bargaining Trends & Employment Law Update 2014/2015* (Victoria University of Wellington Centre for Labour, Employment and Work, 2015) at 43, who state that "[r]egulation of working time has been a fundamental issue for unions and collective bargaining around the world since the 19th century. Research indicates that the limitation of working time offers benefits for workers, as well as for employers and society at large".
[6] Hours of Work (Industry) Convention, 1919 (No 1) (adopted 28 November 1919, entered into force 12 June 1921) [Industry Hours of Work Convention]; Hours of Work (Commerce and Offices) Convention, 1930 (No 30) (adopted 28 June 1930, entered into force 28 August 1933) [Commerce and Offices Hours of Work Convention]; and Forty-Hour Week Convention, 1935 (No 47) (adopted 22 June 1935, entered into force 23 June 1957) [Forty-Hour Week Convention].
[7] Saul, Kinley and Mowbray, above n 5, at 476. Additional hours may be worked in the circumstances and subject to the conditions provided for in the Industry Hours of Work Convention and the Commerce and Offices Hours of Work Convention, above n 6.
[8] See art 6 of Directive 2003/88/EC concerning certain aspects of the organisation of working time [2003] OJ L299 [European Working Time Directive]. The Directive does, however, permit a Member State to derogate from art 6 in a range of circumstances. These include the option of not applying art 6 where, amongst other matters, the state ensures that no employer requires a worker to exceed the maximum weekly work time unless the worker has

Quantifying 'reasonable hours' in this way is also consistent with other definitions which have been used to analyse hours of work. For example, the Organisation for Economic Co-operation and Development (OECD) defines working "very long hours" as working on average 50 hours or more per week.[9] Other research referred to below defines long hours as 50 or more per week[10] or 55 or more per week,[11] and very long hours as 50-59 or 60 plus hours per week.[12] Moderately long hours have been defined as between 40-49 hours per week.[13]

Family and Health-Related Rights

New Zealand has also bound itself under the ICESCR to recognise certain family and health-related rights. Article 10 of the ICESCR records States Parties' recognition that "

> the widest possible protection and assistance should be accorded to the family…particularly for its establishment and while it is responsible for the care and education of dependent children.

Under art 12(1), States Parties recognise "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

These work, family and health-related rights are dependent on one another for their realisation, and on the other rights recognised in the ICESCR. As discussed in more detail below, the longer a person's working hours, the less time they will have for rest and leisure. Long working hours may put a person's relationships under pressure and affect their health, sometimes seriously. A person's enjoyment of other rights recognised by the ICESCR, such as to education[14] and to take part in cultural life,[15] may also be affected.[16]

agreed to that, and is not subjected to any detriment by his or her employer if the worker does not agree: see art 22.

[9] OECD "Better Life Index" (2015) <www.oecdbetterlifeindex.org> [Better Life Index]. New Zealand is a member of the OECD.

[10] Lindy Fursman "Parents' Long Work Hours and the Impact on Family Life" (2009) 35 Social Policy Journal of New Zealand 55.

[11] Sarah Johnson and others "Mothers' and Fathers' Work Hours, Child Gender and Behaviour in Middle Childhood" (2013) 75 J Marriage Fam 56 at 68.

[12] Sibyl Kleiner, Reinhard Schunck and Klaus Schömann "Different Contexts, Different Effects? Work Time and Mental Health in the United States and Germany" (2015) 56(1) J Health Soc Behav 98 at 103.

[13] At 103.

[14] ICESCR, art 13.

[15] ICESCR, art 15(1)(a).

[16] Saul, Kinley and Mowbray, above n 5, at 473–474.

Progressive Realisation, Legislative Measures, and Respecting, Protecting and Fulfilling Rights

The ICESCR obliges each State Party to realise progressively the rights referred to above, and other recognised rights,[17] to the "maximum" of its "available resources."[18] Progressive rather than immediate realisation means that a State Party is not in violation of the ICESCR if the rights recognised in it are not fully guaranteed on ratification. Instead, each State Party is obliged to take deliberate, concrete, and targeted steps towards full realisation (meaning full enjoyment of each right by everyone within the State Party's jurisdiction).[19] It is for the State to demonstrate that it is making "measurable progress" towards this objective.[20]

Full realisation is to be achieved by "all appropriate means", particularly by legislative measures.[21] Legislation will be an appropriate means where it is reasonably required to provide adequate protection for an ICESCR right,[22] or otherwise to make that right effective.[23]

In deciding whether to legislate or take other steps, a State Party must consider what measures have been the most effective in ensuring the protection of other human rights in its jurisdiction. There must be compelling justification for employing significantly different measures to give effect to ICESCR rights from those used in relation to other human rights.[24]

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[17] There is a distinction in the ICESCR between "recognized" rights, which are subject to progressive realisation, and rights which must be guaranteed or obligations which must be fulfilled immediately (such as the undertaking of States Parties in art 2(2) of the ICESCR that the rights set out in it will be exercised without discrimination). For a discussion of this, see Joss Opie "Economic, Social and Cultural Rights in New Zealand: Their Current Status and the Need for Change" (LLM Thesis, University of Toronto, 2010), available at University of Toronto Research Repository <https://tspace.library.utoronto.ca> at 9–10 ["ESCR: Current Status and Need for Change"].

[18] See ICESCR, art 2(1), which provides that "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[19] Opie "ESCR: Current Status and Need for Change", above n 17, at 10–12. In certain circumstances, a State Party may take retrogressive measures (meaning measures which reduce the extent to which a recognised right is enjoyed within the State Party's jurisdiction) or otherwise subject rights to limitations: see Joss Opie "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43 VUWLR 471 at 474 ["A Case for ESCR in the NZBORA"]. The ICESCR's principal limitations provision, art 4, reads: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

[20] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* E/C.12/2000/13 (2000) at [8].

[21] See ICESCR, art 2(1), above n 18.

[22] CESCR *General Comment No 3* E/1991/23 (1990) at [3]. The Committee on Economic, Social and Cultural Rights (CESCR) was established to assist the United Nations Economic and Social Council in its monitoring of State Party compliance with ICESCR obligations. As with other United Nations treaty bodies, the CESCR reviews State Party reports under the ICESCR and issues observations on those reports. It also provides authoritative interpretations of the ICESCR, including in "General Comments". Further, the CESCR may consider communications by individuals or groups of individuals who are under the jurisdiction of a State Party to the ICESCR, and who claim to be victims of a violation by that State Party of any of the rights in the ICESCR, provided that State Party is also a Party to the Optional Protocol to the ICESCR. New Zealand is not currently a Party to the Optional Protocol.

[23] As the CESCR stated in *General Comment No 9* E/C.12/1998/24 (1998) at [9], "whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary."

[24] At [7].

More generally, each State Party is obliged to respect, protect and fulfil the rights set out in the ICESCR, to the maximum of its available resources. A State Party respects rights when it does not interfere unjustifiably with their enjoyment. Meeting the obligation to protect requires a State Party to protect individuals against third party violations of their rights (for example, a State Party failure to ensure that employers meet health and safety standards may constitute a violation of the right to work). Fulfilling rights requires, amongst other matters, that each State Party take action to ensure or improve people's access to the resources (whether material, institutional, legal or otherwise) they need to realise their rights.[25]

Violations of the ICESCR and Remedies

A State Party may violate the ICESCR by, for example, not taking appropriate steps to progressively realise rights,[26] not reforming or repealing legislation which is "manifestly inconsistent" with the ICESCR,[27] or by pursuing a policy or practice which "deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result."[28]

Each State Party must ensure that a person whose rights under the ICESCR are violated within its jurisdiction has access to an effective remedy, including compensation.[29]

Enforceability of ICESCR Rights and Obligations in New Zealand, and Good Faith

While New Zealand has recognised the rights referred to above as a matter of international law, a person cannot directly enforce these rights in the New Zealand courts. Unless Parliament legislates to give them domestic legal effect, their influence is limited to being an aid in statutory interpretation and potentially a relevant consideration in administrative decision-making.[30]

Accordingly, Parliament has a critical role. If it decides not to enact legislation which, for example, gives domestic effect to the right to reasonably limited hours of work, people will not be able to rely on that right directly in New Zealand. Put another way, the enforceability of our internationally recognised human rights depends, to a very significant extent, on Parliament's favour. In that regard, it is important to recall that, as with its other obligations under international treaties, New Zealand is required to perform its ICESCR-related obligations in good faith.[31]

[25] Opie "ESCR: Current Status and Need for Change", above n 17, at 25–26.
[26] *Maastricht Guidelines*, above n 20, at [15(a)].
[27] At [15(b)].
[28] At [11].
[29] CESCR *General Comment No 18* E/C.12/GC/18 (2006) at [48].
[30] Opie "A Case for ESCR in the NZBORA", above n 19, at 512–516; Opie "ESCR: Current Status and Need for Change", above n 17, at 41–42.
[31] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 26.

Part II: Working Hours in New Zealand, and Effects of Long Hours

2013 Census Statistics

According to figures from the last Census in 2013,[32] the majority of people in New Zealand usually work between 40-49 hours a week.[33] However, 11.3 per cent (216,366 people) advised that they usually work between 50-59 hours a week, and 8.5 per cent (162,171 people) advised that they usually work 60 hours or more a week.[34] The 2013 Census also recorded 19,194 people as having responded that they normally work 70 hours a week.[35] These figures did not include time worked in secondary or other employment, which some 180,000 people claimed to have.[36] Also, OECD statistics suggest that New Zealand workers work longer than workers in many other OECD countries.[37]

The Effects of Long Hours on Health and Family

Health-related impacts of long hours

As multiple factors influence a person's health, the relationship between long work hours and health is complex. Also, the financial benefits of working longer hours, together with benefits such as social networks, socio-economic status, and the psychological fulfilment that some work can bring, may have positive effects on health.[38] This is particularly so where the worker has a degree of flexibility about when he or she works.[39] Also, and as one would expect, having

[32] Statistics New Zealand *2013 Census QuickStats about work and unpaid activities* (2015) <www.stats.govt.nz> at 28. These statistics include both employed and self-employed people. Note that, as stated at 6, the quarterly Labour Market Statistics are the official source of data about work in New Zealand, not the Census. However, while the Labour Market Statistics are derived from "surveying samples of the population, census data covers the population as a whole" and therefore is "useful for detailed regional and demographic breakdowns." Because of that, and because the customised data referred to above is freely available, I have used it for the purposes of this article (rather than, for example, attempting to use the Labour Market Statistics from the last four quarters). While the figures referred to above represent a snapshot in time and have to be treated with some caution (including because they are based on self-reporting), they still provide a useful indication of working hours for the New Zealand workforce in 2013. Note also that Statistics New Zealand does not recommend making any comparison between Census data and the Labour Market Statistics: at 6.

[33] See also Blumenfeld, Ryall and Kiely, above n 5, at 43, who state that "[a]lthough less common in New Zealand than it was 12 months ago, the typical work week across the OECD as well as in New Zealand is still 40 hours."

[34] The OECD's 2015 edition of the Better Life Index, above n 9, states that in New Zealand "some 14 per cent of employees work very long hours" (that being defined as 50 or more a week on average).

[35] Statistics New Zealand "Census Totals By Topic" ("Hours worked per week in main job") (2013) <www.stats.govt.nz>.

[36] Statistics New Zealand "Census Totals By Topic" ("Hours worked per week in other jobs") (2013) <www.stats.govt.nz>. Despite this, and while "Kiwis work 15 per cent longer than the OECD average", we "produce about 20 per cent less output for every hour worked" (Steve Hart "Six-hour work day gains strength" *The New Zealand Herald* (online ed, Auckland, 26 July 2014)).

[37] Blumenfeld, Ryall and Kiely, above n 5, at 46 (referring to 2013 statistics). The OECD's 2015 edition of the Better Life Index, above n 9, states that the "share of employees working 50 hours or more per week is not very large across OECD countries. However, in New Zealand, some 14 per cent of employees work very long hours, slightly more than the OECD average of 13 per cent". See also Brennan-Tupara, Risk and Lynch, above n 1, who claimed in 2012 that "figures show Kiwis, and their Australia [sic] counterparts, work longer hours than many of their OECD counterparts with 13 and 14 per cent, respectively, working long hours (classed as more than 50 hours a week). That's above the OECD average of 9 per cent and higher than Denmark (3 per cent), Canada (4 per cent), Britain (12 per cent), and the United States (11 per cent)."

[38] Kleiner, Schunck and Schömann, above n 12, at 99.

[39] At 99.

insufficient or no work can negatively affect health.[40] Unemployed people report more symptoms of depression than employed people, and are "particularly vulnerable to stressful life events".[41]

However, as one would also expect, negative associations between long hours and mental or physical health have been identified.[42] According to some research, long work hours are expected to lead to varying levels of stress and stress-related illness.[43] Long work hours have also been associated "with lower satisfaction with work-family balance and chronic feelings of time pressure regarding personal or family time...These challenges, in turn, are associated with distress."[44]

Cases demonstrate the highly negative effects that long hours can have on people's health. In *Johnstone v Bloomsbury Health Authority*, Dr Johnstone claimed that in some weeks he had been required to work over 100 hours a week, that on one weekend he worked a 32 hour shift with only half an hour's sleep, and that on another weekend, he was on call for 49 hours continuously, during which he only slept for seven hours in total.[45] He alleged that working these hours led to him suffering from depression, stress, and a diminished ability to sleep, being lethargic as well as physically sick from time to time due to exhaustion, and feeling suicidal and desperate.[46]

Similarly, in *Carpenter v Mondiale Freight Services Limited* (discussed below), Ms Carpenter suffered from headaches, exhaustion, and depression substantially caused by regularly working between 55-65 hours a week.[47] She resigned, and was unfit to work for four months after her resignation.

[40] At 100.
[41] At 100.
[42] At 99.
[43] At 99.
[44] At 100. This study also found that cultural factors such as legislative frameworks can have an impact. In comparing the effects of long hours on mental health in Germany and the United States, very long hours (referred to at 103 as between 50–59 hours a week or 60 and greater) were identified as having a strong negative association with mental health in Germany, but not in the United States. The differences between the two countries identified as contributing to this outcome included the differing legal regimes, and the expectations which each created (Germany had comparatively extensive regulation of working hours, while there was no legal limit in the United States). However, if in fact a population such as that of the United States has become habituated to not having rights such as the right to reasonably limited working hours respected, that cannot provide a justification for not protecting those rights in jurisdictions such as New Zealand. Further, the lack of an association at a national level in one country between working very long hours and negative mental health outcomes does not mean that individuals in that country have not experienced such negative outcomes due to very long hours.
[45] [1991] 2 All ER 293 at 296. As well as seeking damages from the Health Authority and other remedies, Dr Johnstone sought a declaration that, despite his contract, the Health Authority could not lawfully have required him to work so many hours in excess of his normal working hours as would foreseeably injure his health. His appeal concerned a lower court decision to strike out those aspects of his claim relating to his working hours. Allowing the appeal in part, the majority of the Court of Appeal held, amongst other matters, that the Health Authority's express contractual right to require Dr Johnstone to work such substantial hours had to be exercised consistently with its implied duty to take reasonable care not to injure his health (see, for example, at 299 per Stuart-Smith LJ and at 305–306 per Browne-Wilkinson VC). Whether that implied duty had been breached was to be determined by another trial.
[46] At 296.
[47] [2012] NZERA 20.

Effects on the family

As with health, the impacts on families of long working hours are not uniformly negative. In a New Zealand-based study, the benefits of working long hours were found to include having extra money, being able to develop a business, and acting as a role model for one's children.[48] However, the negative impacts included fatigue, less time spent with children, less energy available for parenting, less time available for exercise, and the difficulty or impossibility of having family holidays or special occasions together. Spouses of people who worked long hours had to take on most or all of the household and parental responsibilities, and long hours created stress in some couples' relationships.[49]

Some of the people involved in the study worked well over 50 hours a week. For example, a road crew supervisor, Doug, married to Abbey with two young children, would begin work at approximately 5:30am. He would regularly work at least 12 hour shifts, six days a week, and averaged at least 80 hours of work per week. This was because his shifts could start at 5am and not finish until 10pm at night.[50] Doug was paid a salary, which worked out as being less than the minimum wage on an hours-worked basis.[51] Abbey, who suffered from stress-related health issues, said "Doug basically works, eats, sleeps, and that's kind of his life."[52]

A caregiver, Lani, was married with four children. She worked 75 hours a week on average at two different hospitals, and her husband worked as a bus driver. Lani had a permanent night shift, but would also often work an afternoon shift. This meant that after returning home from her night shift, doing domestic chores and assisting her children to get to school, she would sleep for between three and four hours before going back to work. Lani said:[53]

> …the only thing I think about is the time I spend at work [and how it] affects my family life. Like, spending more time working and not enough time here with family...I am afraid that I'm not going to know my children.

The negative impacts of long hours could be ameliorated where, for example, a couple had family support and childcare assistance, and/or flexible work arrangements. On the other hand, they could be exacerbated by, for example, the frequency and duration of work-related travel, or if the person working the long hours had no control over them or their timing.[54] One of the study's conclusions was as follows:[55]

> Within the families we spoke with, there were some where a variety of factors converged to exacerbate the impact of long working hours, with the result that the

[48] Fursman, above n 10, at 62.
[49] At 62–63.
[50] At 60.
[51] At 65. Note that in *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, the Employment Court held that salaried employees are covered by the Minimum Wage Act 1983 (MWA). Accordingly, Doug and other salaried employees in his situation would have a claim under the MWA to be paid at least the applicable minimum wage for the hours they work (for example, to be paid the difference between what they actually received as salary for each of those hours and the applicable minimum wage, where the former is less than the latter): see [236]–[241] of the judgment. See also *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95 at [99].
[52] Fursman, above n 10, at 64.
[53] At 62.
[54] At 64.
[55] At 66.

> families were under significant stress. For example, families who were on a very low income and had little or no flexibility in their working hours, and had few or no educational qualifications with a resulting lack of occupational alternatives, were without apparent choices regarding their working hours.

Further, the study's findings included that people with high incomes were most likely to work long hours, but the majority of people working longer hours were in the lower income brackets.[56] Fifty-five per cent of the people working 50 hours or more a week had incomes of less than $50,000 per annum, and over 90,000 low-income earners worked 50 or more weekly hours, against a little over 51,000 workers earning more than $100,000 per annum.[57] Some parents in the low-income group were the least likely to be able to negotiate working arrangements which would promote family wellbeing.[58]

These findings from 2009 appear to be broadly consistent with some of the figures from the 2013 Census. For example, in 2013, the most common occupations for people with no formal qualifications were labourers (33.8 per cent) and machinery operators and drivers (37.1 per cent).[59] Machinery operators and drivers also made up the second highest proportion (32.4 per cent) of occupations in which 50 or more hours a week were worked (with managers having the highest proportion at 36 per cent).[60]

Particular effects on boys of fathers' long working hours

In a 2013 Australian study,[61] an association was identified between fathers in two-parent heterosexual families who worked more than 55 hours, and considerably higher levels of behavioural problems in boys. The comparator group was boys in two-parent heterosexual families where the father worked fewer weekly hours. No association was identified between behavioural problems in children and their mothers' work hours.

The study referred to evidence that long working hours limited the time parents had to interact with their children, including activities important for their development such as playing, talking and teaching. Such hours also limited the time available to assist their children to overcome learning and social difficulties.[62] The study also referred to other research identifying an association between regular and active engagement by fathers, reduced behavioural problems for boys, and less psychological problems for young women, as well as an association between greater work-family conflict and less positive marital relationships when parents worked long hours.[63] In addition, a possible consequence of fathers working long hours was less good parenting by mothers. This was due to the extra pressure which the father's absence put on the mother.[64]

[56] At 55.
[57] At 61.
[58] At 55.
[59] Statistics New Zealand, above n 32, at 21.
[60] At 29.
[61] Johnson and others, above n 11.
[62] At 59.
[63] At 59.
[64] At 69.

As the researchers noted:[65]

> …emotional and behavioural problems in childhood can set a trajectory of psychopathology later in life...and via poorer literacy, numeracy, and school achievement, constrain later employment prospects and life chances in adulthood…

A conclusion of the study was that fathers should be incentivised to work less, and have a greater share in parenting.[66] In that regard, it is noteworthy that one of the findings in the 2013 Census was that men were more likely than women to work longer hours in employment, with men making up 74 per cent (120,039) of those normally working 60 hours or more a week.[67]

Summary

On the basis of the figures from the 2013 Census set out above, while the majority of people in the New Zealand workforce are not working hours inconsistent with their right to reasonably limited working hours, a large number of people are. Working such hours may bring certain benefits, but it can also cause real harm to the people working them and to their families, including the children in those families. Further, these long hours of work may be more prevalent amongst lower income earners, and the families of these people may be worse affected by long hours than more wealthy families.

As with all human rights, the right to reasonably limited working hours is concerned with highly significant interests and values. If the right is not adequately protected, individual and social harm results. Also, and as is often the case, those with fewer resources may well be less able to protect their rights.

The next part explores some of the impacts of smartphone technology on work. While the smartphone brings benefits, it is also a further threat to the extent to which the right to reasonably limited working hours is realised in New Zealand. Instead of assisting to increase the numbers of people who enjoy the right, it may undermine current levels of realisation. It may also worsen the situation of those who do not currently have the benefit of the right.

The ways in which the smartphone operates, combined with its increasing ubiquity (and, therefore, the increasing extent to which a smartphone is required to participate and be seen to participate effectively in work and wider cultural life), promote the erosion or eradication of former work/private life divisions, and a seamlessness between work and private life. In that process, and over time, the intrusion of work into private life may be normalised and ultimately rendered invisible. This would seem to be particularly likely if the work and time-related transformations being wrought by the smartphone remain unrecognised by the law.

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[65] At 57.

[66] At 70. See also in this regard a report by Karen Mangnall, entitled "Fathers' role linked to child behaviour" (2015) Radio New Zealand <www.radionz.co.nz>. The report refers to research which links a "lack of parenting by Pasifika fathers" with a considerably increased risk of their children suffering serious behavioural problems. It states that, according to the lead researcher Dr Tautolo, "the pressure to work long hours as the sole income earner also made it harder for Pasifika fathers to find time for their children. Dr Tautolo is also quoted as saying "[b]ut this is about trying to show him it's really important that you do prioritise some of that time if you can, and perhaps developing strategies or services that allow him to do that more effectively."

[67] Statistics New Zealand, above n 32, at 29.

Part III: Smartphones and Work

Smartphones are a relatively new phenomenon, in the workplace and outside of it. However, their use is already widespread and rising quickly. While not all adults in New Zealand own or have access to a smartphone, 70 per cent do, up from 48 per cent in 2013.[68] It seems likely that over time this figure will increase to close to 100 per cent, particularly given that in the 18-34 year-old age group 91 per cent own or have access to a smartphone.[69]

The use of smartphones and other mobile technology for work has important implications for the right to reasonably limited working hours. As discussed below, the same smartphone features which facilitate work also expose the user to being perpetually on-call, and to increased work.

The advantages of having a smartphone include the ability to access and respond to work calls and correspondence outside of work. This can increase productivity and the speed with which problems can be resolved.[70] The smartphone may also assist in building and maintaining client relationships, including promoting visibility and accessibility. As a Brazilian lawyer put it in a recent study of smartphone use in a corporate law firm in Brazil:[71]

> The device is *on* so that I can get attuned to the client. I work anywhere any time. No one needs to impose it on me. I conceive it as a dire need. The better I respond to a customer, the greater is the chance that I will grow professionally.

The smartphone can also give users a greater ability to work on their terms outside the office.[72] This includes being able to go home and work from there, perhaps after spending time with one's family, doing household chores, or socialising, rather than having to stay in the office or at another place until the day's work is finished.[73]

All of these features, however, allow work to expand, in quantity as well as temporarily, spatially, and mentally. The boundaries between work and non-work space, and work and non-work time, become increasingly blurred,[74] if not broken down altogether. A cultural shift has occurred, according to which working after business hours and expecting others to be available

[68] Research New Zealand *A Report on a Survey of New Zealanders' Use of Smartphones and other Mobile Communication Devices 2015* (Wellington, 2015) at 3.
[69] At 5.
[70] Diannah Lowry and Megan Moskos *Hanging on the Mobile Phone: Experiencing Work and Spatial Flexibility* (National Institute of Labour Studies Working Paper 153, Flinders University, Adelaide, 2005) at 6 and 9–11. See also Flávia Cavazotte, Ana Heloisa Lemos and Kaspar Villadsen "Corporate Smart Phones: professionals' conscious engagement in escalating work connectivity" (2014) 29 New Tech Work Employ 72 at 78.
[71] Cavazotte, Lemos and Villadsen, above n 70, at 83 (emphasis in original).
[72] At 78.
[73] Lowry and Moskos, above n 70, at 13.
[74] Cavazotte, Lemos and Villadsen, above n 70, at 79; Elpida Prasopoulou, Athanasia Pouloudi and Niki Panteli "Enacting new temporal boundaries: the role of mobile phones" (2006) 15 Eur J Inf Syst 277 at 281. See also Brennan-Tupara, Risk and Lynch, above n 1, who state that "experts predict [the number of people working longer hours] to increase further as more employees get smartphones and tablet devices, potentially connecting them to their jobs 24 hours a day…Accountant Greg Harris, a partner at Deloitte Hamilton, said he was finding it ever harder to leave work at the door when he left the office."

after business hours is increasingly acceptable and/or required, whether by one's employer or due to competitive pressure.[75] A further study claims:[76]

> Professionals fear that not answering their mobile phone after normal office hours, and thus maintain[ing] a rigid temporal boundary, would be interpreted as evading or not delivering on work responsibilities. Consequently, they succumb to a blending of their work and private time without experiencing any transition towards more fluid or lax work habits that would justify such a change.

As another lawyer in the study that focussed on the corporate law firm in Brazil said:[77]

> When Friday night comes, I try to turn the Black Berry off, theoretically, not read it any more. But sometimes, when I'm waiting for some client's e-mail, there are many madmen that answer on the weekend. I thought it was just me…Then I turn the Black Berry on, end up reading, answering if I see it's urgent.

Users can experience anxiety, increased pressure, worry about being contacted or not being contacted, and can feel as if they are constantly on-call or needing to be alert:[78]

> On many occasions when I was relaxing, having fun, I would then get a message, something I needed to reply to. My mood changes completely. It's complicated…But you can only become aware that it is going to be like that once you begin to experience the device. It's insane![79]

> We are talking about situations and decisions that involve a lot of money. So, a delay might cost you; it's money you won't make. Nobody cares if you are working 24 hours a day…But sometimes I give myself the right to take some time off. It is just that, then, I see the e-mail. You have to stay alert, otherwise…[worried expression].[80]

There are also impacts on familial and other personal relationships. Conflict can arise with partners and spouses over smartphone use out of the office.[81] Children may also resent the

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[75] Cavazotte, Lemos and Villadsen, above n 70, at 83; Prasopoulou, Pouloudi and Panteli, above n 74, at 281.

[76] Prasopoulou, Pouloudi and Panteli, above n 74, at 283. See also Steve Randall "Morning Briefing: Law firms see greatest increase in out of hours demands" *NZ Lawyer* (online ed, New Zealand, 29 June 2015), which states: "The data from telephone answering company AllDayPA shows that since 2012 the average increase in calls to businesses before 9am and between 6 and 8pm has been 41 per cent; for law firms it's almost double. While IT and maintenance firms have seen out of hours calls increase by around the average, demand for lawyers out of hours has soared by 80 per cent." Note that it is not clear to which jurisdiction these figures relate.

[77] Cavazotte, Lemos and Villadsen, above n 70, at 81.

[78] Cavazotte, Lemos and Villadsen, above n 70, at 81 and 84; Libby Wilson and Narelle Henson "How smartphone creep can ruin work-life balance" *Stuff* (online ed, New Zealand, 29 June 2013); Lowry and Moskos, above n 70, at 8 and 9; Hannah Rippin "The Mobile Phone in Everyday Life" (2005) 1 Fast Capitalism at 8, 9 and 23.

[79] Cavazotte, Lemos and Villadsen, above n 70, at 84.

[80] At 81.

[81] At 80: "So sometimes my husband complains a bit: 'Gosh, give some attention to your family…Today is Saturday, today is Sunday…He feels much more like a slave to me, because he says that I really neglect to be with them, answering messages in moments that would otherwise be theirs." In another study, a respondent stated that "[the phone] drives me nuts. He gets called on the mobile at all hours of the night, sometimes two or three times. He's fine at getting back to sleep, but I just lie there in bed awake for hours. I've just started seething about it all, it's like his workplace has entered our bedroom. And the lack of sleep is affecting my own performance at work": see Lowry and Moskos, above n 70, at 13.

diversion to the smartphone or other mobile technology of attention and time which could otherwise be theirs. According to a recent survey, approximately one third of the child respondents between the ages of 8-13 claimed that their parents spent the same or less time with them as on their smartphones and other mobile devices. Forty per cent of those surveyed referred to their parents being distracted by a smartphone or tablet during conversations with them, and said that this made them feel unimportant.[82]

Therefore, as the use of smartphones and other mobile technology increases, and changes societal norms in the process, the greater the risk there is of people working longer, and not being able to disconnect from work. Rather than promoting the right to reasonably limited working hours, as well as to rest and leisure, the smartphone and the expectations engendered by it mostly pull in the opposite direction.

Given the harm which long hours of work can cause and New Zealand's international obligations, one could expect there to be a strong and clear legal framework in place in New Zealand to regulate hours of work. Given also the risks presented by the smartphone in relation to the right to reasonably limited working hours, one could also expect that this framework be re-evaluated to determine whether it is sufficient to meet the challenges posed by new technology, as well as whether it is otherwise suitable for today's workplace and forms of work. As Parts IV and V of this article discuss, however, that is not the case.

Part IV: Law Affecting Hours of Work in New Zealand

Despite the significance of hours of work for people's lives and New Zealand's international obligations, there is no express right to reasonably limited working hours in New Zealand law. In fact, New Zealand legislation has very little to say about hours of work.

The generally applicable section is s 11B of the Minimum Wage Act 1983 (MWA), which is entitled "40 hour, 5-day week". Despite its heading, however, the section does not establish any requirement for such a working week. Rather, it states that "every employment agreement...must fix at not more than 40 the maximum number of hours (exclusive of overtime) to be worked in any week",[83] unless the parties agree otherwise.[84] Accordingly, s 11B requires that contractual limits on hours of work be negotiated, and it does not limit the number of hours which an employee may agree to work.

A degree of protection against long hours is, however, provided by health and safety legislation (although it does not set any specific limit on hours, and there is no other generally applicable, specific limit in New Zealand law).[85] Under the Health and Safety at Work Act 2015 (HSWA),

[82] See Lydia Anderson "Kiwi kids want parents to put away mobiles – study" (2015) 3 News <www.3news.co.nz>. Of course, parents' use of mobile technology will not all be work-related (and in some cases, the majority or even all use will not be for a work-related purpose).
[83] MWA, s 11B(1).
[84] MWA, s 11B(2). Further, the obligation established by s 11B with respect to the five-day week is only to "endeavour to fix" an employee's daily working hours so that he or she does not work on more than five days a week. Also, s 11B(3) provides that this obligation only applies if the parties to the relevant employment agreement have agreed that the employee's maximum weekly working hours (exclusive of overtime) are not more than 40.
[85] There are some sector-specific limitations on working hours. For example, see pt 4B (Work time and log books) of the Land Transport Act 1998, pt K of pt 135 of the Civil Aviation Rules (Air Operations — Helicopters and

every employer is obliged to ensure, so far as is reasonably practicable, the health and safety of employees and other workers while they are at work in the business or undertaking.[86] An employer will breach its health and safety obligations if it requires an employee to work so many hours that their physical or mental health is put at risk or compromised[87] (and in the author's view this would be the case even if the parties' employment agreement had a clause requiring that such hours be worked).[88] Similarly, an employer may breach its health and safety obligations if it does not do all that is reasonably practicable to prevent an employee from working such long hours.

As the selection of cases summarised below indicate, health and safety law[89] together with contract law may provide a basis for employees to seek redress in respect of excessive hours of work or otherwise to limit their hours of work. However, the cases also illustrate some of the deficiencies of the current domestic legal framework.

Case Law

Carpenter v Mondiale Freight Services Limited[90]

In this case, Briony Carpenter made various claims against her former employer Mondiale, including that she had not been provided with a safe workplace and had suffered harm as a result, and that she had been constructively dismissed.

Ms Carpenter's employment agreement provided that her normal hours of work were 40 a week. It also stated that she may be required to work outside of those hours and at weekends from "time to time", and that she would not be paid overtime for these additional hours. Rather, her salary was said to be "set at a level that recognises" the possibility of additional work. The salary was $60,000 per annum.

Small Aeroplanes), and the Hours of Rest provisions in pt 31A of the Maritime Rules (Crewing and Watchkeeping Unlimited Offshore, and Coastal (Non-Fishing Vessels)), made under the Maritime Transport Act 1994.

[86] HSWA, s 36(1).

[87] See *Gilbert v Attorney-General* [2000] 1 ERNZ 332. This case concerned a probation officer, Mr Gilbert, who left his position with the Department of Corrections on medical grounds and then brought proceedings against the Department. The Employment Court found, amongst other matters, that Mr Gilbert's workload was excessive in both complexity and volume, and that he had to work without the necessary support, resources and supervision. The Employment Court also found that the Department had breached its obligations under the Health and Safety in Employment Act 1992 (HSEA) and express and implied contractual terms by failing to take reasonable precautions against unnecessary stress in Mr Gilbert's working conditions. These breaches caused Mr Gilbert to suffer vital exhaustion and coronary artery disease, and amounted to his constructive dismissal. After some 13 years of litigation, Mr Gilbert secured substantial awards of damages, including general damages of $75,000 for humiliation, anxiety and distress, and compensation for lost income (see *Gilbert v Attorney-General* [2010] NZCA 421). While the finding in *Gilbert v Attorney-General* concerning workload was not that Mr Gilbert's hours of work were excessive, but rather that his workload was excessive in volume and complexity (see [2000] 1 ERNZ 332 at 380), the legal principles set out would also be applicable to excessive hours of work which put an individual's health and safety at risk or resulted in harm to that individual.

[88] See ERA, ss 54(3)(b)(i) and 65(2)(b)(i); and Illegal Contracts Act 1970, ss 3, 5 and 6. See also *Johnstone v Bloomstone Health Authority*, above n 45, at 344 per Stuart-Smith LJ; and JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 35–37.

[89] These cases were decided under the HSEA, which was replaced by the HSWA on 4 April 2016. While the HSWA differs in some respects from the HSEA, the points set out in the main text above remain valid under the HSWA.

[90] *Carpenter*, above n 47.

During the just over two years of her employment, Ms Carpenter regularly worked between 55-65 hours a week. She sought medical advice, suffering from headaches, anxiety, stress, exhaustion and depression. She advised her employer of these matters, but no steps were taken to address them. In March 2010, she resigned and brought proceedings.

The Employment Relations Authority[91] found that, following her resignation, Ms Carpenter was unfit for work for four months. It also found that her long hours were a significant cause of this, and of the health issues she began to suffer one month after starting work at Mondiale. The Authority considered that Mondiale had breached its statutory obligation to maintain a safe workplace for Ms Carpenter.

In the Authority's view, Mondiale should have systematically monitored Ms Carpenter's working hours, but it did not have any mechanisms in place to do this. As a result, Ms Carpenter was "left to work whatever hours were required to meet the business demands."[92] The routinely long hours of work were also in breach of the parties' employment agreement, which, as set out above, only provided for work in excess of 40 hours from time to time. Further, the Authority found that Ms Carpenter had been constructively dismissed.

The remedies the Authority awarded Ms Carpenter included $15,000 for hurt and humiliation, and lost remuneration for the period following her resignation until she obtained alternative employment.

Bao Ho Van Nguyen and Vu Ho Van Nguyen v Hue Kim Thi Ta t/a Little Saigon Restaurant[93]

Little Saigon concerned a series of claims brought by two cooks, Bao Ho Van Nguyen and Vu Ho Van Nguyen, against their former employer. Both had been dismissed from their employment at Little Saigon Restaurant.

Bao's employment agreement required him to work a maximum of 40 hours a week and stipulated that he would not be required to work overtime. Vu's employment agreement was on similar terms.[94] The Authority found, however, that Bao worked an average of 66.5 hours a week,[95] and that Vu also worked 66.5 hours a week for certain periods during his employment.[96] The remedies Bao and Vu were awarded included wage arrears calculated on the basis of the actual number of hours worked.[97]

Sato v Vice-Chancellor of Massey University[98]

Dr Shie Sato was employed by Massey as a lecturer. She was covered by a collective employment agreement (CEA) which applied to "Academic" and "General" (non-academic) employees. Under the CEA, "General" employees had their weekly hours of work fixed at 37.5,

[91] The Employment Relations Authority is New Zealand's first instance tribunal for employment matters.
[92] *Carpenter*, above n 47, at [59].
[93] *Bao Ho Van Nguyen and Vu Ho Van Nguyen v Hue Kim Thi Ta t/a Little Saigon Restaurant* [2014] NZERA 173.
[94] At, for example, [86].
[95] At [43] and [44].
[96] At, for example, [86].
[97] At [49] in relation to Bao and [88] in relation to Vu. Vu was also awarded wage arrears for certain other periods, including a period when he was not working due to the Christchurch earthquake: see, for example, at [79].
[98] ERA Auckland WA 106/07, 30 July 2007.

and were entitled to overtime for additional hours. There was no comparable provision for "Academic" employees. Rather, the CEA stated that "Academic" employees had to devote their full "contracted hours" to their work for Massey, but did not define what "contracted hours" meant.

Dr Sato sought a declaration that the maximum number of weekly hours she could be required to work was 37.5, or in the alternative, 40. Her evidence to the Authority included that sometimes she would work less than 40 hours a week, and other times more.

Massey contended that the CEA did not limit Dr Sato's hours to any specific number, and that she was required to work as long as it took to complete her work. According to its evidence, academics at various universities had resisted fixed hours as they wanted to have the flexibility to work outside normal hours when that suited them. Also, evidence was provided to the effect that academics may work long hours to complete a project, and following that reduce their hours for a time to compensate.[99]

The Authority found that Dr Sato's weekly hours of work were not fixed at either 37.5 or 40 hours, and that "the hours worked will be dictated by the peaks and troughs of the Academic work to be undertaken".[100] It also found that an agreement to work such hours was lawful in terms of s 11B(2) of the MWA.

Cooper v Greenfingers Garden Bags Ltd[101]

This case was decided under the Employment Contracts Act 1991 (ECA), the predecessor to what is now New Zealand's principal labour law statute, the Employment Relations Act 2000 (ERA). It concerned Trevor Cooper, who had been employed by Greenfingers as a truck driver. His job involved picking up organic waste from Greenfingers' clients.

When Mr Cooper was interviewed for the job, he was advised that he would generally need to work over eight hours a day, and often, if not always, for six days a week. Six days would be required when Mr Cooper could not meet the target number of pick-ups Greenfingers had set for him by working five days.

Mr Cooper claimed that meeting his quota of pick-ups required working 10 or 11 hours a day. He also claimed that in his first week of employment he worked 89 hours. Greenfingers did not appear to dispute this. Its position seemed to be more that Mr Cooper was inefficient in comparison with other drivers, as he could not match the number of pick-ups Greenfingers said that other drivers could do.

Mr Cooper took advice about his hours and other issues, including his pay. He then advised Greenfingers that he would not work more than 40 hours a week until his pay had been addressed. Ultimately, Greenfingers dismissed Mr Cooper for refusing to work more than 40 hours a week.

No written employment contract was ever concluded between the parties. The Employment Tribunal found, however, that there was an oral contract in place, under which Mr Cooper had

[99] At [32] and [33].
[100] At [34].
[101] ET Auckland AT165/01, 21 November 2001.

agreed to work for more than 40 hours a week. The Tribunal noted that this was "expressly permitted by" s 11B(2) of the MWA.[102] Accordingly, Mr Cooper's refusal to work such hours was a breach of his contract.

While the Tribunal found on procedural grounds that Mr Cooper's dismissal was unjustifiable, it reduced the remedies awarded to him by 80 per cent. This was essentially on the basis that Mr Cooper's breach of his contract by refusing to work more than 40 hours a week was the cause of his dismissal, and a dismissal in such circumstances was substantially justifiable (meaning that, but for Greenfingers' procedural failings, the dismissal would have been upheld).[103]

Deficiencies Highlighted by the Case Law

The case law summary set out above demonstrates that an employee may be able to achieve some redress under current New Zealand law for having to work in a manner inconsistent with his or her right to reasonably limited working hours. However, for the reasons now discussed, there are significant gaps in the legal framework.

No generally applicable right to compensation for additional hours worked

While the Authority in *Little Saigon* ordered that the employees in that case be paid for hours worked in excess of the contractually agreed hours, the same order was not made in *Carpenter*. In one email to her employer, Ms Carpenter stated that the company needed to review her remuneration as she was covering two jobs, and that "[t]hey are saving a whole person's salary by having someone else cover".[104] However, the awards made by the Authority did not compensate Ms Carpenter for these additional hours.

The reason for the different approaches taken in these two Authority determinations is not clear,[105] and the result in *Carpenter* highlights the need for an express, generally applicable right in New Zealand employment law to recover for hours worked in breach of contract. This is because the approach followed in *Carpenter* meant that Mondiale had the benefit of a large amount of work by Ms Carpenter which it did not have to pay for, despite the fact that having Ms Carpenter work these hours was in breach of her employment agreement and her internationally recognised right to reasonably limited working hours.

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[102] At 11.
[103] At 10 and 12.
[104] *Carpenter*, above n 47, at [29].
[105] The basis for the approach in *Little Saigon* appears to be that, if the employees had not been paid for the additional hours, the pay they received would have amounted to less than the minimum wage (*Little Saigon*, above n 93, at, for example, [49]). Given that, the Authority may have considered that it had statutory jurisdiction to make the award it did: see MWA, s 11. However, the Authority does not refer to s 11 and, if this was the basis for the Authority's decision, there is an issue about whether the quantum of the award made was correct. This is because the Authority calculated the amount owing for the additional hours on the basis of the employees' contractual rates, rather than the lower minimum wage rates. In *Carpenter*, there was no issue of any breach of Ms Carpenter's rights under the minimum wage legislation. As a result, it may have been that, even if the Authority had considered whether to compensate Ms Carpenter for her additional hours, it would have decided that it had no power to make such an award. This could have been on the basis that, as provided in s 161(2)(b) of the ERA, the Authority has no jurisdiction to fix terms and conditions of employment. Ms Carpenter received a salary, and for obvious reasons the parties had not themselves made any express agreement on what rate should be payable for any hours Ms Carpenter was required to work in breach of contract (a point which could also complicate any argument for an implied term that Ms Carpenter should be paid a particular rate for such hours).

It also meant that the return Ms Carpenter got from her work was considerably less than what she had bargained for. Ms Carpenter's salary was $60,000 per annum or approximately $1,150 before tax a week. Accordingly, in the weeks where she worked 65 hours, her pay for those hours would have equated to approximately $17.75 an hour, only $2.50 more than the current minimum wage of $15.25. This contrasts with almost $29 an hour, which is what her pay would have equated to for a 40-hour week.[106] Such an outcome is unjust. It also does not incentivise employers to respect the right to reasonably limited working hours as much as an express right to recover for hours worked in breach of contract would.

No compensation for hurt and humiliation, or penalties

In *Little Saigon*, the Authority awarded one of the applicants $6,000 and the other $8,000 as compensation for the hurt and humiliation they suffered, principally as a result of their dismissal. However, the Authority did not make any such compensatory award in respect of the excessive hours that the men were required to work. In addition, although the Authority imposed a penalty against the employer for failing to keep wages and time records and failing to produce wages and time records,[107] no penalty was imposed for the gross breach of contract both men suffered due to having to work substantially in excess of their contractually required 40 hours a week.[108]

While the Authority considered that "an unequivocal message" needed to be sent that breaches of "minimum employment standards…are totally unacceptable in New Zealand",[109] the extreme breach of not only the employees' contractual rights but also their human rights in respect of their hours of work was not identified as similarly worthy of condemnation. This was no doubt because New Zealand's generally applicable baseline employment standards do not include any express limits on hours of work.

Risk related to the lack of any express limits

In *Sato*, the Authority determined that Dr Sato was contractually obliged to work any and all hours required to do her job. In other words, she had a contractual obligation to work whatever hours were required to meet business demands (subject to health and safety requirements, although this was not identified by the Authority). This was the same situation which was found in *Carpenter* to be in breach of contract and the cause of the considerable harm Ms Carpenter suffered. Mr Cooper was in a similar situation. He also had no set hours, but rather was contractually bound to work as long as it took to meet his pick-up quotas.

From the Authority's determination in *Sato*, it seems clear that Dr Sato did not work as much as Ms Carpenter did. Also, the Authority accepted that academics at Massey were able to take time off if they had been working long hours. This was not, however, the case for Mr Cooper, who had a contractual obligation to work long or very long hours, week out and week in. From

[106] Query whether Ms Carpenter could have made a claim based on quantum meruit in relation to the additional hours she was required to work in breach of contract. In this regard see, for example, *Pretorius v Marra Construction (2004) Limited*, above n 51, at [69] and [77]-[83], the Restitution chapter of *Laws of New Zealand* (online looseleaf ed, LexisNexis) at [47], [67] and [91], and *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [1819]–[1820].
[107] *Little Saigon*, above n 93, at [121]–[132].
[108] Such a penalty could have been awarded pursuant to s 134 of the ERA.
[109] *Little Saigon*, above n 93, at [126].

the hours of work statistics set out above, it seems clear that this will also not be the case in many other New Zealand workplaces.

Making it lawful for parties not to stipulate an express maximum number of hours in their employment agreement creates a clear risk that an employee may be required to work long or very long hours without the possibility of any real remedy unless he or she can show harm (for example, poor health attributable to the long hours).[110] Making any such claim may well be expensive and complex, particularly from an evidentiary perspective.

Summary

The case law shows that, under current New Zealand law, an employee may have some remedy if their right to reasonably limited working hours is violated. However, the absence of an express right to reasonably limited working hours means that a violation of that right will not be recognised (other than indirectly as a contractual or health and safety breach, where that can be shown). This absence also makes it likely that such a violation will either not be reflected at all in remedies or will be inadequately reflected. Further, the degree to which an employee's right to reasonably limited working hours is protected is likely to depend significantly on the hours of work the employee has been able to negotiate with their employer as part of the parties' employment agreement. In other words, the extent to which an employee can protect their human right to reasonably limited working hours is likely to be influenced by their bargaining power.

As argued in the next part, this situation is inconsistent with New Zealand's obligations under the ICESCR.

Part V: Is New Zealand Meeting its ICESCR Obligations?

This Part explains why New Zealand's approach to hours of work does not comply with its obligations under the ICESCR. Many people apparently do not enjoy the right to reasonably limited working hours, legislative steps are not being taken to realise these people's rights, and this has been the case for a long period of time. It also appears that, due to a trend of reducing employees' entitlements to a higher rate of pay for overtime work, long hours of work in some types of employment attract lower rates of pay than they did in the past. Accordingly, the economic reward for working long hours may be decreasing in at least some sectors, as is the economic incentive for employers in those sectors to reduce long hours.

For the right to reasonably limited working hours to be effective, specific legislative protection is required. The current legislative framework (including health and safety law) does not provide such protection, and s 11B of the MWA is manifestly inconsistent with the right.

[110] In this regard, see also the employment contract at issue in *Weir v Denning t/a St George Motel* ET Auckland AT50/02, 19 March 2002. The contract had two provisions relevant to hours of work, one of which stated "[n]o minimum or maximum number of hours of work per week by the Employee are [sic] prescribed by this Agreement." The other stated "[t]he hours of work shall be those normally required to be worked to ensure the effective control of the business to the satisfaction of the Company and the demands of the business clientele".

A Right Not Realised For Many, and a Lack Of Steps Towards Realisation

As set out above, 378,537 people were recorded in the 2013 Census as usually working 50 or more hours a week. 162,171 of those people usually worked 60 hours or more. On the basis that reasonably limited working hours for the purposes of the ICESCR should normally be 40 or less, and not more than 48, it appears that hundreds of thousands of people in New Zealand were not enjoying that right as at 2013.[111] It also seems unlikely that the situation has changed significantly from then until now.

Under the ICESCR, New Zealand must proactively realise the right to reasonably limited working hours, in good faith and by all appropriate means (and in particular through legislative measures). However, New Zealand is not currently taking any legislative measures to advance the realisation of this right.

As discussed in Part II above, the impacts on health and on families of long work hours may be considerable. An appropriate means of further realising everyone's "right to the enjoyment of the highest attainable standard of physical and mental health" would appear to be the taking of focussed, active steps to limit working hours to reasonable levels (in conjunction with steps to realise other ICESCR rights).[112] The same applies in relation to New Zealand's obligation under art 10 of the ICESCR to accord the "widest possible protection and assistance to the family", particularly while it is responsible for children. Conversely, the absence of such steps affects people's enjoyment of these rights, and limits their progressive realisation.

A long-standing problem, and deregulation

According to figures from the 1986 Census, the number of people usually working between 40-49 hours was 732,048 (50.4 per cent). 161,163 people (11.1 per cent) usually worked between 50-59 hours, and 137,739 (9.5 per cent) usually worked 60 hours or more a week.[113] In the 2001 Census, 212,016 people (13.1 per cent) advised that they usually worked between 50-59 hours a week, and 193,116 people (11.9 per cent) usually worked 60 hours or more a week.[114]

There are broad similarities between these figures and those from the 2013 Census. They indicate that there is a significant and long-standing problem in New Zealand in relation to the realisation of the right to reasonably limited working hours.

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[111] Given that the "vast majority" of the New Zealand workforce is made up of employees rather than the self-employed, it may well be that most of these people are employees rather than in business on their own account: see Gordon Anderson and John Hughes *Employment Law in New Zealand* (LexisNexis, Wellington, 2014) at 1.

[112] It is the case that, depending on whether and how much incomes are affected, limiting working hours may have a negative effect on people's health and families. The proposal regarding overtime payments and the guarantee of average earnings for people on wages in Part VI of this article seeks to address this issue. Also, while the right to a fair income is beyond this article's scope, note that the right in art 7 of the ICESCR to "just and favourable conditions of work" includes the right to remuneration which, as a minimum, is fair and provides all workers and their families with "a decent living...in accordance with the provisions of the present Covenant." In art 11(1) of the ICESCR, States Parties recognise everyone's right to an adequate standard of living, "including adequate food, clothing and housing".

[113] According to customised statistics drawn from the 1986 Census which I obtained from Statistics New Zealand. Unfortunately, it was too costly to acquire the same sets of statistics for other periods.

[114] Statistics New Zealand, above n 32, at 28.

The figures also indicate that the legislation in place in 1986, the Industrial Relations Act 1973 (IRA), provided inadequate protection for the right. Section 93 of the IRA required the Arbitration Court to fix weekly hours of work in every award[115] at no more than 40 (exclusive of overtime). The exception to this was if the Court considered that it would be "impracticable to carry on efficiently any industry to which the award relates" if weekly working hours were limited to 40 or less. In this situation, the Arbitration Court had to record in the relevant award the reasons for not limiting normal working hours to a maximum of 40 a week.[116]

It is not clear why the IRA was unable to achieve greater realisation of the right to reasonably limited working hours.[117] However, given the apparent inadequacy of the IRA's regime in that respect, an appropriate step for Parliament to take in relation to its ICESCR obligations may well have been the enactment of a more prescriptive regime. Instead, in the Labour Relations Act 1987, Parliament chose the opposite course. That Act was the precursor to the current position under s 11B of the MWA, as it allowed parties to an award or agreement to agree on a normal working week of more than 40 hours (or to apply to the Arbitration Commission for a greater number of hours if they could not agree).[118]

Section 11B was then enacted in 1991.[119] Since that time, the only change to s 11B has been to replace the previous reference to the ECA with a reference to the current legislation, the ERA.

Accordingly, in almost 30 years, the only generally applicable legislative measures focussed on the limitation of hours of work have been deregulatory.[120] Also, if any other measures have been taken to realise the right more fully in New Zealand (such as policy measures), it would appear that they have been unsuccessful.

Overtime

Prior to the mid-1990s, hours worked in excess of 40 a week were generally defined as overtime and, therefore, paid at a higher rate than ordinary hours of work (such as time and a half or double time).[121] Since then, however, and while overtime is still paid, "the overall trend has

[115] As Anderson and Hughes, above n 111, explain at 32–33 (and referring to the Industrial Conciliation and Arbitration Act 1954), "an award was an instrument of delegated legislation, it was an offence to breach the provisions of an award and awards were enforced by a system of government inspectors. Awards provided minimum, legally enforceable terms and conditions of employment [including that] the standard working week be normally a 40-hour, five-day week".
[116] IRA, s 93(2).
[117] One reason may be that managers and other senior office workers, a category of work in which long hours are common (see Statistics New Zealand, above n 32, at 29), were excluded from the national award system (Anderson and Hughes, above n 111, at 33). The terms and conditions of most other public and private sector employees in New Zealand were determined by awards until at least 1984: see Anderson and Hughes, above n 111, at 33 and 38. Another reason may be that, while the majority of awards would have limited normal working hours to no more than 40, overtime was permitted and no doubt worked by many people.
[118] Labour Relations Act 1987, s 172.
[119] Section 11B was inserted by the Minimum Wage Amendment Act 1991, which began life as pt X of the Employment Contracts Bill 1990 (9-1).
[120] Note that pt 6AA of the ERA provides a statutory framework within which an employee may request a variation to their working arrangements, including to their hours of work. This framework does not, however, set any limits on hours of work. Also, there is a broad range of grounds on which an employer may rely to refuse a request: see ERA, s 69AAF.
[121] Blumenfeld, Ryall and Kiely, above n 5, at 47 and 52. Presumably there were some exceptions to this, such as for managers and other senior employees who were not covered by awards.

been to remove provision [from agreements] for payment of a premium rate for overtime work."[122]

No legislative steps have been taken by Parliament to address this trend, which has affected a considerable number of collectivised employees. Currently, one in every four employees covered by a CEA is not entitled to overtime payments.[123] There do not appear to be any figures available for employees employed under individual employment agreements (IEAs), no doubt because IEAs are not publicly accessible documents. It seems quite unlikely, however, that IEAs would generally provide for greater overtime entitlements than CEAs.

This trend suggests that the compensation employees receive for work in excess of 40 hours a week may be generally less than it was before 1991.[124] In other words, it indicates that overtime is being worked without it being paid for as it once was. If that is correct, it follows that, not only are some groups of employees earning less for long hours, but the economic incentive for employers to organise their operations so as to minimise overtime has diminished.

The Need For Greater Legislative Protection

In its third periodic report under the ICESCR, New Zealand advised that its legislation did not set any maximum weekly hours.[125] In its concluding observations on that report, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that this fell "short of the requirements of article 7 of the Covenant regarding the protection of workers' right to rest and reasonable limitation of working hours".[126] The CESCR went on to recommend that New Zealand "introduce a statutory maximum number of work hours."[127]

New Zealand has reportedly ignored this recommendation, without giving any reasons.[128] This approach is inconsistent with New Zealand's obligations of good faith, as referred to in Part I above.[129] Also, New Zealand's refusal to follow the CESCR's recommendation or otherwise

[122] At 52.
[123] At 53. The authors also record that "84 per cent of food retailing employees and 74 per cent of education employees [are] in this category."
[124] Although in the absence of a comparative analysis of pre-1991 compensation and current wages and salary, no conclusions can be drawn in this regard.
[125] *Third periodic report submitted by States parties under articles 16 and 17 of the Covenant: New Zealand* E/C.12/NZL/3 (2009) at [193].
[126] *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand* E/C.12/NZL/CO/3 (2012) at [16].
[127] At [16].
[128] See APNZ "Govt ignores UN recommendation of work-hour limit" *New Zealand Herald* (online ed, Auckland, 17 January 2013), which reported: "The Government has ignored a recommendation by the United Nations for legislation to dictate a maximum number of work hours to reduce the risk to workplace health and safety. Today, Acting Labour Minister Christopher Finlayson would not comment on introducing the statutory work-hour limit, despite the call from the United Nations more than eight months ago." It is also noteworthy that the article referred to a member of the Labour Party, Darien Fenton, stating that the "'by agreement' clause of the 40-hour week under the MWA made it 'effectively meaningless'", but that Labour only supported statutory limits on working hours for "dangerous industries". The reason for this is unclear, as the right to reasonably limited working hours as recognised by the ICESCR is not restricted to people working in dangerous industries.
[129] New Zealand's approach also appears inconsistent with its obligations under the ILO Forty-Hour Week Convention, above n 6, which New Zealand ratified on 29 March 1938. At art(1)(a) and (b), the Convention provides that, by ratifying it, a State Party "declares its approval of the principle of a 40-hour week applied in such a manner that the standard of living is not reduced in consequence", and of the "taking or facilitating of such measures as may be judged appropriate to secure this end." In this regard, see also the commentary on s 11B of the MWA in *Mazengarb's Employment Law*, above n 106, at [3011B.3], which notes that "[d]uring the passage

amend its working hours legislation disregards the substantial numbers of people in New Zealand who apparently do not enjoy the right to reasonably limited working hours. The hours these people apparently work strongly indicate that the current legal framework is insufficient.

The inconsistency of s 11B of the MWA with New Zealand's ICESCR obligations

In this regard, it is important to recall that the purpose of s 11B was not to protect the right to reasonably limited working hours. Rather, it was to maximise flexibility. In relation to the fixing of working hours, a report by the Department of Labour (DOL) on the Employment Contracts Bill 1991 (9-2) (which introduced the provision which became s 11B) recorded a submission that there should only be a very limited ability for employers and employees to agree on normal working hours in excess of 40. The DOL's comment on that submission was that "[t]he purpose of the Bill is to give employers and employees the maximum freedom to negotiate whatever arrangements best suit their circumstances".[130] Accordingly, s 11B represents a view that the number of hours an individual works is generally a private matter for negotiation, and a matter the state and the law should be little concerned with. It leaves the definition of reasonable hours to the parties.

This approach is manifestly inconsistent with New Zealand's recognition that everyone within its jurisdiction has the right to reasonably limited working hours. Its effect is to give legal authority, and thereby strong legitimacy, to arrangements which are inconsistent with that right. It is tantamount to, for example, legislating that the minimum wage shall be $15.25 an hour unless the parties agree otherwise, that an employee will have four weeks' holidays a year unless they agree otherwise with their employer, or that a woman may not be afforded less favourable terms of employment than a man unless she and the employer agree something different.

Inequality in bargaining power

As the ERA recognises, there is an "inherent inequality of power in employment relationships".[131] This inequality may be ameliorated by collective bargaining, but only about 20 per cent of New Zealand's waged or salaried workforce has its terms and conditions of employment determined by collective bargaining and collective agreements.[132] This leaves some 80 per cent of the workforce to determine their terms and conditions by individual bargaining.

While some may have considerable bargaining power (for example, highly-skilled employees or those working in sectors with skill shortages), many do not. This is particularly the case in the lower-income sector of the market. With those employees, employers have much more scope to adopt tougher bargaining positions, including offering hours and other terms on a take it or leave it basis.[133] And, as set out in Part II above, there is research to indicate that the

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of the [Employment Contracts] Bill, the Statutes Revision Committee questioned whether the permissive nature of the then s 11B was compatible with New Zealand's ratification of ILO Convention 47".

[130] Department of Labour *Employment Contracts Bill: Report of the Department of Labour to the Labour Select Committee* (L/91/811, 1991) at 177.

[131] ERA, s 3(a)(ii).

[132] Blumenfeld, Ryall and Kiely, above n 5, at 16.

[133] See in this regard *Law v Board of Trustees of Woodford House*, above n 51, at [52], where Chief Judge Colgan states that "[l]ow and modestly paid employees seeking new employment are not in a strong position to negotiate

majority of people working long hours are on lower incomes.[134] Such people may well be unable to protect their right to reasonably limited working hours through negotiation with their employer or with a prospective employer.

Other rights recognised in art 7 of the ICESCR, such as periodic holidays with pay and remuneration for public holidays,[135] have not been left to bargaining. Instead, they have received specific legislative protection in the Holidays Act 2003, which provides common standards and minimum entitlements for all employees. This is the approach followed for other human rights. It needs to be applied in the case of working hours.

Uncertainty in health and safety law, and in litigation

While health and safety law provides some protection for the right, it does not set any clear legislative standard or standards to guide conduct or against which an agreement may be judged. Due to this, a job applicant or employee cannot, for example, identify easily if the hours they are being offered or working are in breach of their internationally recognised right. Neither can an employer easily identify how many hours are too many. In the case of employees such as Mr Cooper, hours of work which are inconsistent with the right may be required by the relevant employment agreement.

Similarly, the absence of any national standard(s) makes it difficult for a job applicant or employee to take a stand on hours. The former may jeopardise their chances of being appointed, and the latter may risk their employment relationship. For example, it may be safely assumed that if Mr Cooper had advised Greenfingers that he was not willing to work long hours at his interview, he would not have been offered employment. Also, his refusal to work long hours once he was appointed was in breach of contract and formed the basis for his dismissal.

While an employee may litigate over their hours of work, the lack of any clear legislative standard(s) means that the outcome will be unpredictable (unless a clear standard is set in the employee's employment agreement). And, unless the employee has suffered actual harm from having to work long hours, the cost of litigation would be likely to exceed any potential remedies.

In contrast, if there were a clear legislative standard or standards, employers would be much less likely to offer unreasonable hours or have their employees work such hours. If they did so and a clear legislative standard were in place, enforcement of that standard could be made

terms and conditions". The Chief Judge also refers at [53] to the difficulties individuals may have in attempting to negotiate changes to terms of standard form employment agreements.

[134] This gives rise to a potential issue of indirect discrimination. As the CESCR explains in its *General Comment No 20* E/C.12/GC/20 (2009) at [10(b)], "[i]ndirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination." The CESCR also considers at [35] that a person's "economic and social situation" is a prohibited ground of discrimination under the ICESCR. A further definition states that "[i]ndirect discrimination is said to occur when an apparently neutral practice or policy disproportionately disadvantages one of the groups against whom it is unlawful to discriminate. Although everyone is treated the same, the condition or requirement affects members of a prohibited group differently": see *Human Rights Law* (online looseleaf ed, Thomson Reuters) at [HR65.01]. If the requirement to negotiate hours of work with one's employer disproportionately affects the enjoyment of the right to reasonably limited working hours by lower income people in New Zealand, that may amount to indirect discrimination contrary to art 2(2) of the ICESCR. However, whether a case could be made to that effect is outside the scope of this article.

[135] ICESCR, art 7(d).

relatively straightforward. Such a standard may also assist in preventing people from being harmed due to overwork.

Concerns beyond health and safety

In addition, even if a person's health is not prejudiced by the hours they work, those hours may still be too many for the person to be able to enjoy his or her rights to rest and leisure under the ICESCR (for example, "the freedom to pursue and enjoy life opportunities outside of work"). They may also be too many for the person to have the benefit of his or her right to family as recognised in the ICESCR.[136]

For example, while it is possible that Mr Cooper may not have been harmed by working long or very long hours for Greenfingers (at least in the short term), such hours would directly impact on the amount of free time he had outside of work. Also, reasonably limited working hours are generally likely to be less than the number of hours which may put a person's health at risk.

As Mr Hunter, the MP for Manawatu, said to Parliament during the debate on the Industrial Conciliation and Arbitration Amendment Bill in 1936,[137] "working from daylight to dark" is "no sort of life for a human being to live."[138] In a further passage which reflects the humanistic values and interests underlying the rights to rest, leisure and reasonably limited working hours, and why they encompass but are also greater than health and safety concerns, Mr Hunter said:[139]

> I am looking forward to the time when, with the application of the forty-hours week, with a reasonable retiring age for our people, and following an extension of educational facilities to enable children to attend school for a longer period, we shall be able to give our people more leisure, and leisure which they can enjoy. It seemed to be the aim of the previous Government to ask people to work as much as possible, merely for the sake of working them. On this side of the House we realize that there is something more in life than work from morning till night.

Summary

The analysis above demonstrates that New Zealand is not meeting its obligations under the ICESCR in respect of the right to reasonably limited working hours. Consequently, it is also not meeting its ICESCR obligations in respect of the rights to family and health.

The right to reasonably limited working hours is not recognised in New Zealand law, and there is no statutory guarantee of an effective remedy if the right is violated. Section 11B of the MWA makes arrangements which are inconsistent with the right lawful as a matter of domestic law.

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[136] Saul, Kinley and Mowbray, above n 5, at 473.
[137] This Bill led to the enactment of the Industrial Conciliation and Arbitration Amendment Act 1936, which for the first time in New Zealand's history gave legislative protection to the eight-hour day and 40-hour week: see Blumenfeld, Ryall and Kiely, above n 5, at 45.
[138] (23 April 1936) NZPD 569.
[139] At 568.

Despite there apparently being considerable numbers of people who do not enjoy the right in New Zealand, and legislation being an appropriate means to realise the right further, no legislative steps are being taken. Section 11B has been in place for 25 years. Also, while on the basis of the 2013 Census statistics that the majority of people in New Zealand do not work unreasonably long hours, those that currently enjoy the right have no statutory guarantee in respect of it.

As the status quo is unjustifiable in terms of the ICESCR, legislative and other changes are required.

Part VI: Reform

Alternative Models and Detailed Information

There are various ways in which the right to reasonably limited working hours could be better realised in New Zealand legislation.[140] Alternative models are available, such as the ILO Hours of Work (Industry) Convention and the Hours of Work (Commerce and Offices) Convention,[141] as well as the European Working Time Directive.[142] The ILO Reduction of Hours of Work Recommendation also provides a useful reference point,[143] as may some of the sector-specific limitations on working hours already in place in New Zealand.[144]

As the CESCR has said, "the essential first step towards promoting the realisation of economic and social and cultural rights is diagnosis and knowledge of the existing situation."[145] Therefore, and consistent with its obligation of progressive realisation, the state needs to obtain detailed, up-to-date statistics and other information on the numbers of people in New Zealand who do not currently enjoy the right to reasonably limited working hours. Such information needs to include how many such people are employed and how many are self-employed, what sectors they work in, and how much they earn. It should also include whether such people are required to use a smartphone or other mobile technology during their work, and, if so, what conditions are associated with that use and how such use affects them.

[140] There would be challenges in establishing a more prescriptive regime. As stated by Saul, Kinley and Mowbray, above n 5, at 479, "[i]n many states, work is no longer organized on a regular daily, weekly or annual basis, as a result of various factors: the diversification, decentralization and individualisation of work hours; a multiplicity of different types of work; globalization, competition and productivity considerations; and concerns about family responsibilities, gender equality, and worker choice and control over their working hours." A similar statement could be made about work in New Zealand. That said, much work in New Zealand is carried out at regular times, and more prescriptive regulation is not impossible. This is demonstrated by the fact that there are already more prescriptive regimes in place for some industries: see above n 85. Further, while some types of work may require exceptions, determining which types of work come into that category and what the exceptions should be is not impossible. Indeed, New Zealand's obligations under the ICESCR oblige it to carry out this task.

[141] See above n 6. New Zealand was originally a State Party to these Conventions. It ratified them on 29 March 1938, but denounced both on 9 June 1989.

[142] See above n 8.

[143] Reduction of Hours of Work Recommendation, 1962 (No 116) (adopted 26 June 1962).

[144] See above n 85. Note, however, that the Land Transport regime referred to in n 85 allows up to 70 hours' work in one "cumulative work period". It is difficult to see how this is consistent with the right to reasonably limited work hours.

[145] CESCR *General Comment No 1* 3rd Sess E/1989/22(SUPP) (1989) at [3].

Once a clear understanding of the extent of non-realisation is obtained, the state needs to consider the ILO and European models in detail, as well as other alternatives. In consultation with employers and their associations, unions, employees, the self-employed and the public generally, the state then needs to decide what steps to take to realise the right to reasonably limited working hours further in New Zealand, and to set New Zealand on the path towards full realisation. Such steps should include, but not be limited to, legislative measures.

In the interests of assisting with this process, I set out below a proposal for a new maximum hours regime. This does not purport to be comprehensive in any sense. Rather, the aim is to sketch a broad framework, and thereby provide a starting point for debate.

A Proposal for a Maximum Working Hours Regime[146]

Genuine reasons and maximum working hours: using New Zealand's fixed term model

Section 66 of the ERA provides that an employee may be employed on a fixed term rather than on a permanent basis if certain statutory criteria are met. These include that the employer must have "genuine reasons based on reasonable grounds" for the fixed term, and the employee's employment agreement must state what those reasons are.

If an employer purports to appoint an employee on a fixed term basis without having a genuine reason for the fixed term, or if the employer fails to meet the other requirements of s 66, the employee may treat the fixed term as ineffective (in which case the employer cannot rely on the fixed term to end the employee's employment).

A similar system could be used for working hours. An initial maximum of 40 weekly hours for a full-time employee could be prescribed in law, with the parties having the option to agree on a greater number of hours up to an absolute legal maximum if the employer has a "genuine reason" for needing the employee to work additional hours (whether intermittently or regularly).[147]

Different absolute maxima may be required for different types of work,[148] and, therefore, could be set down in regulations (subject perhaps to an overall, definitive statutory limit).[149] However, any such approach would need to be consistent with the right of everyone to reasonably limited working hours, and the rights under the ICESCR to family and health. It would also need to be consistent with the definitions of long and very long hours set out earlier in this article. Accordingly, there would need to be clear justification for any significant differences in absolute maxima (for example, lower absolute maxima for physically demanding work).

A genuine reason for requiring an employee to work hours in excess of the initial maximum would need to be expressly stated in the employment agreement. Considerations which do not amount to a genuine reason could be expressly and non-exhaustively set out in law (for

[146] I do not attempt here to address the issues of daily and weekly rest periods, or breaks. In relation to those issues, see, for example, arts 3–5 of the European Working Time Directive, above n 8. See also the very loose framework for rest and meal breaks in pt 6D of the ERA.
[147] Different initial and absolute maxima would need to be set for part-time employees.
[148] See, for example, arts 20 (Mobile workers and offshore work) and 21 (Workers on board seagoing fishing vessels) of the European Working Time Directive, above n 8.
[149] See, for example, art 6 of the Industry Hours of Work Convention, above n 6.

example, a general desire to have as much flexibility as possible).[150] As with fixed terms, an employee could elect to treat a requirement to work over 40 weekly hours as ineffective if there were no genuine reason for the requirement. In the event of a dispute, the Authority could determine the issue.

Averaging

To allow for peaks and troughs in work, averaging could be permitted over a set time period for the purposes of calculating whether the applicable maximum had been exceeded, rather than placing an absolute limit on weekly hours.[151]

Record-keeping

To ensure that maxima were not exceeded, employers could be required to keep a record of the actual hours worked by all employees, as part of the wages and time record they are obliged to keep under the ERA.[152]

Overtime

The law could further provide that any employee who works more than 40 hours a week on average, whether waged or salaried, must be compensated for that work by being paid an amount for it which is separate and additional to his or her normal pay, unless that pay is over an amount specified in regulations.[153] A minimum amount for overtime could be set in regulations, with the parties having the ability to agree upon a greater amount.

Such a requirement could assist in ensuring that people on lower salaries are fairly paid for the hours they actually work, while giving greater flexibility to employers paying higher salaries and to those employees who receive them.

The impact on businesses and other organisations of a new requirement to pay overtime for hours in excess of 40 a week would need to be carefully assessed to determine the maximum level of salary a person may receive while still retaining an entitlement to overtime payments,

[150] As is the case in relation to fixed term employment: see s 66(3) of the ERA.

[151] See in this regard, for example, art 2(c) of the Industry Hours of Work Convention, above n 6, and art 6 of the Commerce and Offices Hours of Work Convention, above n 6, as well as art 16 of the European Working Time Directive, above n 8.

[152] Section 130(1)(g) of the ERA requires an employer to record for each employee "the number of hours worked each day in a pay period and the pay for those hours." Section 130(1B) goes on to state that where the number of hours and pay are agreed, and the employee works those hours (referred to as "the usual hours"), s 130(1)(g) will be complied with where those usual hours and pay are stated in, for example, the employer's wages and time record or the parties' employment agreement. Section 130(1C) then states that the usual hours of an employee remunerated by salary rather than wages "include any additional hours worked by the employee in accordance with the employee's employment agreement." Section 130(1D) provides that, despite ss (1C), an employer has to record any additional hours worked that "need to be recorded to enable the employer to comply" with its obligation under s 4B(1) of the ERA. That obligation is to keep sufficiently detailed records so that the employer can demonstrate that it has complied with minimum standards such as the minimum wage. Accordingly, under the current law an employer does not have to record the actual hours worked by an employee remunerated by salary who has agreed to work over and above his or her "usual hours", and whose salary is at such a level that working these additional hours does not mean that the employee receives at or less than the minimum wage.

[153] See, for example, art 6(2) of the Industry Hours of Work Convention, above n 6, and art 7(4) of the Commerce and Offices Hours of Work Convention, above n 6. See also arts 16–19 of the ILO Reduction of Hours of Work Recommendation, above n 143.

the rate at which overtime should be paid, and whether the requirement to pay overtime should be introduced in stages (for example, a percentage increase every year).

Smartphones and other mobile technology

Given the ability of smartphones and other mobile technology to expand the workplace and increase working hours, their use would need to be taken into account in any maximum hours regime.

One option would be to provide that any time during which an employee is expected to be available for and attend work-related calls and emails on their smartphone or other mobile technology must be taken into account in calculating the employee's weekly hours. That may incentivise employers to, for example, instruct employees not to respond to work-related emails or take calls outside of their normal hours of work.[154]

If that were considered too restrictive, another option would be to provide that any time actually spent on such tasks must be included in calculating weekly hours. Added to that time would be an additional nominal period or periods to reflect the employee being on call outside of their normal working hours, the implications of that for the employee, and the benefit to the employer of having the employee available. The difficulty with this alternative would be determining the length of any such nominal period, including ensuring that it was sufficient to incentivise the reduction of such on-call time.

A key aim in bringing the use of mobile technology into a maximum hours regime would be to reflect that, while an employee who is expected to be available via smartphone or other technology outside of normal work hours may not have to carry out many of their normal responsibilities during those periods, neither is the employee's time completely their own. Although those periods may not be work-time in the day-to-day sense, neither are they not-work time.[155] Instead, work remains present: an imminent potentiality, and then an actuality if the phone rings or beeps. While the best way ahead may not be to treat these periods in the same way as normal working hours, not recognising them at all would be inconsistent with the right to reasonably limited working hours.[156]

[154] See in this regard Lucy Mangan "When the French clock off at 6pm, they really mean it" *The Guardian* (online ed, United Kingdom, 9 April 2014), which refers to "employers' federations and unions" having signed a "new, legally binding labour agreement that will require employers to make sure staff 'disconnect' outside of working hours." According to the article, 250,000 workers are directly affected by the agreement. See further Carmen Fishwick "Work-life balance: what changes could help improve yours?" *The Guardian* (online ed, United Kingdom, 9 April 2014), which states: "New labour laws in France now protect some workers in the digital and consultancy sectors – including the French offices of Google, Facebook, Deloitte and PwC – from having to respond to work emails outside of working hours."

[155] See also in this regard Jade Bate "Finding a work-life balance can save your life" *Stuff* (online ed, New Zealand, 7 May 2015). According to this article, a recent survey has warned that the practice of people checking their phone outside of normal work hours and on holiday is "causing widespread burnout, depression and even death". An executive is quoted as saying: "Aggravating the issue can be an expectation that leaders take their technology home with them each night and even on holidays, so they never really get completely away from their work."

[156] For discussions of, and differing views on, some of the issues which arise in this context, including the concept of work, see *O'Brien (Labour Inspector) v Guardian Alarms (Auckland) Ltd* [1995] 2 ERNZ 170 at 175–176; *New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd (No 2)* [2008] ERNZ 62 at 68–69 and 71; *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149 at [33]–[38]; *Idea Services Limited v Dickson* [2009] ERNZ 116 at 125–131 (Employment Court); *Idea Services Limited v Dickson* [2011] ERNZ 192 at 197; and *Law v Board of Trustees of Woodford House*, above n 51, at, for example, [92], [192]–[193] and see the summary of authorities at [178]–[181].

Exceptions

Exceptions to maximum limits would need to be established, such as where additional hours are required, due to events such as accidents, force majeure, or abnormal work pressure. These would need to include stipulations regarding the maximum number of additional hours which can be worked when an exception applies, and the rate payable for such hours.[157]

Consideration would also need to be given to whether exceptions should apply in relation to any category of employee, such as senior managers.[158] Again, however, everyone has the right to reasonably limited working hours and to the other rights referred to in this article; there is, for example, no differentiation between the obligations owed to managers and other employees in terms of health and safety or minimum holiday entitlements, and managerial work commonly involves long or very long hours.[159] Also, under the proposal above, senior managers would be unlikely to have an entitlement to overtime payments and certain averaging would be permitted. On that basis, it is difficult to see how any such exception could be justified (other than perhaps in the case of the most senior executives).

It may also be that a complete exemption should apply for people in business on their own account. While self-employed people can work long hours, ultimately they control the business and, therefore, have the final say on how many hours they work.[160] In other words, they arguably have a greater ability to determine the extent to which their right to reasonably limited working hours is recognised (although this ability is, of course, affected by market forces and the need to ensure the ongoing sustainability of the business). Their exemption would also be consistent with the exclusion in New Zealand of self-employed people from other minimum work-related standards, such as those relating to holidays.

Such an exemption may also assist in ensuring that a maximum hours regime does not unjustifiably limit a person's right to work. While the proposal above would mean that a person could not legally agree to work hours in excess of the maximum limit (or limits) as an employee, they would have the option of self-employment if they wished to work additional hours. Secondary employment may also be an option, unless that type of employment were also brought within a maximum hours regime.[161] If the proposal above applied only to employment relationships, the resulting limitation on a person's right to work would seem justifiable in terms of art 4 of the ICESCR.[162]

If, however, the statistics referred to above demonstrated that there are many self-employed people who do not enjoy the right to reasonably limited working hours, the state would have to

[157] See, for example, art 6 of the Industry Hours of Work Convention, above n 6, and art 7 of the Commerce and Offices Hours of Work Convention, above n 6, as well as art 17 of the European Working Time Directive, above n 8. See also arts 14–15 of the ILO Reduction of Hours of Work Recommendation, above n 143.

[158] For example, States Parties to the Commerce and Offices Hours of Work Convention may exempt managers from its application (above n 6, art 1(3)(c)), and supervisors and managers are excluded from the Industry Hours of Work Convention (above n 6, art 2(a)). Article 17(1)(a) of the European Working Time Directive, above n 8, sets out certain exceptions for the "managing executives or other persons with autonomous decision-taking powers".

[159] See Statistics New Zealand, above n 32, at 29.

[160] In that regard, see, for example, art 17(1) of the European Working Time Directive, above n 8.

[161] Consideration of this issue would need to include an assessment of the effect on the right to reasonably limited working hours if secondary employment were excluded from a maximum hours regime, balanced against the economic impact of limiting hours of secondary employment on employees with more than one job.

[162] See above n 19.

consider what measures could be adopted to assist those people to realise that right, and then progressively take appropriate measures.[163]

Making the transition

Change could be implemented by requiring all existing employment agreements to include provisions consistent with the new regime from a certain date, as well as requiring all new employment agreements to include such provisions.[164] In that regard, it is worthwhile to note that, if a maximum hours regime were introduced, it seems unlikely that it would affect or significantly affect most employment relationships. While it appears that a large number of people do not currently enjoy the right to reasonably limited working hours, in 2013 most people in the New Zealand workforce reported that they worked between 40-49 hours a week.

Consideration would also need to be given to whether employees earning wages should have their average earnings guaranteed for a period. The purpose of this would be to prevent those average earnings falling due to the introduction of a requirement to pay overtime, and a corresponding decision by their employer to reduce their hours to avoid having to pay overtime. To avoid doubt, the regime would also need to make it clear that employees who normally worked in excess of the initial maximum hours at the introduction of the regime, but whose salary was below the salary cap for overtime, could not have their salaries reduced by reason of the new regime.

Enforcement

The Authority's jurisdiction to issue compliance orders could be extended to encompass compliance with maximum limits on hours.[165] An express jurisdiction could be provided to enable the Authority to award an employee who had worked in excess of any maximum limit compensation for the additional hours worked, and the Authority's penalty jurisdiction could be extended to provide for the imposition of a penalty in such circumstances.[166] An employee could recover any wages or salary owing for overtime by way of an arrears claim.[167]

Conclusion

For a long time now, New Zealand has taken a hands-off approach to the regulation of working hours. This has persisted despite hundreds of thousands of people apparently not enjoying the right to reasonably limited working hours in New Zealand, and despite the considerable and negative effects long working hours can have on other rights and institutions protected by the ICESCR: health, family, and the ability to enjoy life outside of work. And, while some of those who work long hours will be well-paid, most may well not be (at a time when premium payments for overtime increasingly appear to be a relic of the past).

[163] As the CESCR states in its *General Comment No 18*, above n 29, at [6], "[t]he right to work [including the right to reasonably limited working hours] is an individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage paid work."
[164] This was the approach followed to implement the right of employees to be paid at time and a half for working on a public holiday: see Holidays Act 2003, ss 52–53.
[165] See ERA, s 137.
[166] See ERA, s 135.
[167] See ERA, s 131.

New Zealand's approach is inconsistent with its obligations under the ICESCR. Protection of the right to reasonably limited working hours can no longer be subject to bargaining, or left to health and safety law. Deliberate, targeted, and concrete action is required.

In accordance with its duties under the ICESCR, New Zealand needs to acquire a clear understanding of the extent to which the right to reasonably limited working hours is not currently enjoyed in New Zealand. It then needs to set legislative standards which effectively protect the right, as well as ensuring that effective remedies are available for breach. It also needs to take all other appropriate steps to realise the right progressively, until full realisation is achieved. All steps taken will have to be reviewed periodically, and revised as appropriate.

Further, the understandings of work, work-time and the workplace in New Zealand law must be reassessed and potentially reconfigured to take into account the transformation of these concepts by smartphones and other mobile technology. Decisions will then need to be made regarding how best to protect people's rights in this age of limitless connectivity, including how to meet the challenges posed by smartphones and other mobile technology to the realisation of the rights discussed in this article. As the duty-holder under the ICESCR, the New Zealand state needs to take a central role in this analysis, and the lead in deciding what to do.