Risks inherent in part-timers working cumulative hours 3/16/22

Senior Associate, PwC Legal
Edgars Rinkis

The Labour Act does not prohibit employers from hiring part-time workers under the cumulative scheme. This issue has been settled by case law, yet we can still see some part-timers employed on a cumulative basis. This article explores the potential consequences of such action.

Section 140 of the Labour Act permits the employer to adopt the cumulative scheme if the nature of work makes it impossible to use normal hours. This means that the cumulative scheme is acceptable in exceptional circumstances. The question of part-timers working cumulative hours has been dealt with in case law, with the court having ruled that only full-time workers qualify for the cumulative scheme.[1] While many public sources have described this ruling and its central thesis, the legal implications remain undiscussed.

Having found that the employer has a part-timer working on a cumulative basis in breach of the case law, the court might declare this clause of the employment contract to be void. The worker is employed part-time and the working hours must be calculated on a normal, not a cumulative basis. If this clause were to be declared void from the date the contract was concluded, the worker might theoretically exercise the right to ask a recalculation of pay. This could be broken down as follows.

The employer has a part-timer working 30 cumulative hours per week with a monthly review. The worker is to do 120 cumulative hours per month.

Week	Hours worked	Hours worked (normal scheme)	Difference	Outcome	Grounds
1	25	30	–5	The employer must pay the average earnings for 5 idle hours.	Labour Act, sec. 74(2)
2	35	30	+5	The employer must pay for 5 hours exceeding the worker's part-time hours.	The employer's obligation to pay for the work done
3	45	30	+15	The employer must pay for 10 hours exceeding the worker's part-time hours and potentially pay for 5 hours overtime (exceeding the normal 40-hour week).	The employer's obligation to pay for the work done Labour Act, sec. 68(1)
4	15	30	–15	The employer must pay the average earnings for 15 idle hours.	Labour Act, sec. 74(2)

In this example the employer may become liable to pay for 20 idle hours, 15 hours worked, and 5 hours overtime, in addition to the amount already paid. This simple calculation shows that the consequences[2] could be financially significant if the worker asked the court to declare the cumulative scheme void and do a recalculation.

According to the case law, where the court finds a part-timer working on a cumulative basis, the court will confine itself to adjudication of the remedy being sought and will not initiate a recalculation of the pay the worker has received. For example, if the worker has sued the employer to declare termination of employment void and asks to be paid the average earnings for forced absence from work, the court will find the cumulative scheme has been misused but will not undertake a recalculation according to the

normal scheme.

The courts have yet to issue a ruling capable of making this procedure a part of the case law. In the meantime, it is possible that this situation, should the worker go to court, will be resolved in the manner described above. So employers have to tread carefully in using cumulative working hours for their part-time workers even though neither the statute law nor the case law prescribes specific consequences.

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[1] Supreme Court ruling SKC-2735/2015 (C28490012) of 4 December 2015

[2] The case law strictly requires the employer to state weekly or daily working hours in employment contracts based on cumulative as well as normal working hours – Supreme Court ruling SKA-82/2021 of 29 October 2021, paragraph 8 https://www.at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/2021/Apkopojums_darba%20lietas_2022_aktualizets.docx