IN THE COURT OF APPEAL OF NEW ZEALAND

CA465/2009
CA41/2010
[2010] NZCA 241

	BETWEEN	IDEA SERVICES LIMITED Applicant
	AND	PHILLIP WILLIAM DICKSON Respondent

Hearing: 18 May 2010

Court: Arnold, Ellen France and Baragwanath JJ

Counsel: C H Toogood QC for Applicant
P Cranney and A J Connor for Respondent

Judgment: 9 June 2010 at 4 pm

JUDGMENT OF THE COURT

A Leave to appeal is granted on the following questions:

Does "work" in s 6 of the Minimum Wage Act 1983 cover the entire duration of "sleepovers" performed by the respondent given their nature, and, in particular, are the terms of the applicable collective agreement relevant to that question?

Is the applicant entitled to average the hourly rates payable to the respondent during the course of a pay period in order to achieve compliance with s 6 of the Minimum Wage Act 1983?

B Costs are reserved.

REASONS OF THE COURT

(Given by Arnold J)

[1] The applicant seeks leave to appeal from two decisions of the Full Court of the Employment Court concerning the application of the Minimum Wage Act 1983 (the Act) to what are described as "sleepovers" performed by the respondent, one of its employees.[1] The point at issue in the first of these decisions was whether "sleepovers" constituted "work" for the purposes of s 6, so that the minimum rate of pay prescribed under the Minimum Wage Orders (the latest being the Minimum Wage Order 2009 (the Order)) applied to them. The second concerned how wages were to be calculated consistently with the Act and the Order, in particular, whether an averaging approach could be adopted whereby payment at less than the minimum rate for part of a period could be balanced against payment at a greater rate for another part. We will refer to these decisions respectively as the work decision and the averaging decision.

Background

[2] The applicant employs the respondent and others as community services workers under a collective agreement. They provide care and support for people with disabilities who live in community homes. The respondent is paid an hourly rate which is significantly above the minimum wage ($17.66 as opposed to $12.50). He receives his pay fortnightly.

[3] Several times a month, the respondent performs "sleepovers", that is, he sleeps at the home so that he can deal with any issues that arise in the course of the night. During a sleepover, the respondent's time is his own unless and until he is required to deal with something arising in the home. When he performs a sleepover, the respondent is paid an allowance of $34, plus his hourly rate of $17.66 for any time that he is required to spend tending to the needs of the occupants. If there are no incidents during the course of the night, the respondent receives simply the

allowance, which works out at between $3.40 and $4.30 per hour depending on the length of the sleepover.

[4] The respondent claimed that sleepovers were "work" for the purposes of s 6 of the Act, so that he was entitled to be paid the minimum wage for the entire period of any sleepover, even if there were no incidents during the course of the night and he was able to sleep through. Both the Employment Relations Authority and the Employment Court accepted his claim.

[5] On the assumption that that was the position, the applicant argued that it was entitled to calculate the respondent's pay by averaging his pay rates over the fortnightly pay period. In other words, the applicant could set off the above minimum wage rate ($17.66) against the below minimum wage rate and if the average hourly rate for the pay period was $12.50 or above, it had met its obligations to the respondent under the Act. By a majority, the Employment Court rejected this contention.

[6] The applicant seeks leave to appeal on both points.

Approach to be adopted

[7] Under s 214(1) of the Employment Relations Act 2000, an appeal is available from the Employment Court to this Court, by leave, on a question of law. The question must be one which ought to be submitted to the Court "by reason of its general or public importance, or for any other reason".[2] In *Bryson v Three Foot Six Ltd* the Supreme Court held that the section limits appeals to "significant" questions of law.[3]

Are sleepovers "work"?

[8] At the outset of the work decision, the Employment Court noted that the principles involved in the present case were potentially of wide application, and for

---

1 *Idea Services v Dickson* EmpC Wellington WC 17/09, 8 July 2009 and 11 December 2009.
2 Employment Relations Act, s 214(3).
3 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [19].

that reason a Full Court was convened.[4] The Court then set the nature of the respondent's work, including noting a number of constraints that he (and other) community service workers faced while performing sleepovers and finding that he was paid by the hour.[5] Following that, the Court addressed a number of arguments that the applicant had raised about the approach to be taken to the meaning of "work" in s 6, rejecting them all. The applicant had raised arguments based on the provisions of the collective agreement. Of those the Court said:[6]

> [Counsel for the applicant] made a series of submissions based on the provisions of the applicable collective agreement. We have considered those submissions fully but they cannot assist [the applicant]. As [counsel] properly acknowledged, s 6 requires payment at the minimum rate, not withstanding anything to the contrary in a collective agreement.

[9] The Court then identified the approach that it proposed to adopt. It said that s 6 reflected practical considerations. "Each case will therefore turn on a factual enquiry as to what is required by an employer of an employee and whether that constitutes "*work*" for the purposes of s 6."[7] The Court then considered sleepovers against three factors: the constraints on the employee, the responsibilities of the employee and the benefit to the employer. The Court concluded on the basis of this analysis that all the time that the respondent spent on sleepovers formed part of his work for the purposes of s 6 of the Act.[8]

[10] The essence of Mr Toogood QC's submissions for the applicant were that:

(a) The ordinary and natural meaning of the word "work" in s 6 of the Act required purposive action involving physical or mental effort or exertion, which excluded sleepovers (other than the periods when some incident was being dealt with for which the respondent was paid). That argument was made to the Employment Court, but was rejected.

---

4 At [2].
5 At [15] and [29].
6 At [57].
7 At [63].
8 At [71].

(b) The terms and conditions of the collective agreement were relevant to the question whether an employee has performed "work" on a particular occasion. As we note at [8] above, the Employment Court also rejected that argument.

(c) Although the Employment Court had said that whether something done by an employee on a particular occasion was "work" was a factual matter, it had expressed a conclusion of general application to all employees of the applicant performing sleepovers, whatever their individual circumstances.

[11] Mr Cranney for the respondent said that there was no tenable argument that "work" properly interpreted required physical or mental exertion. The applicant, he submitted, was essentially attempting to challenge a finding of fact.

[12] On the face of it, the first two points raised by Mr Toogood do raise legal questions which are, as the Employment Court said, of much wider significance than simply this case. While we have some doubt about whether the first question is seriously arguable, we accept that the second is. That being so, we think we should grant leave on a basis which enables both questions to be argued. Accordingly we grant leave to appeal in respect of the following question:

> Does "work" in s 6 of the Minimum Wage Act 1983 cover the entire duration of "sleepovers" performed by the respondent given their nature, and, in particular, are the terms of the applicable collective agreement relevant to that question?

Averaging

[13] On the basis that sleepovers did constitute work, the applicant argued before the Employment Court that it was entitled under the Act and the Order to average the hourly rates that the respondent receives during each pay period, balancing out payment calculated on the above minimum rate against that calculated at the below minimum rate. In making this submission, the applicant was supported by Business

New Zealand, the National Residential Intellectual Disability Providers Inc and a Labour Inspector. The New Zealand Council of Trade Unions adopted the competing submissions of the respondent. By a majority, the Employment Court rejected the applicant's argument.

[14] The majority (Chief Judge Colgan and Judge Couch) said that the language of the Act and the Order were straightforward. That language meant that the respondent, who was paid by the hour, was entitled to receive at least $12.50 for each and every hour that he worked. In doing so they declined to follow *Mickell v Whakatane Board Mills Ltd*, a decision which involved similar wording in the Minimum Wage Act 1945.[9] The minority (Judge Travis) took a different view of the legislative language, one which he considered was consistent with previous authority and the purpose of the Act.

[15] The applicant wishes to raise a number of arguments under this head, including that the Employment Court's approach is inconsistent with previous authority. Mr Cranney for the respondent submitted that the statutory language was clear and unequivocal.

[16] The averaging approach seems to require a significant gloss to be placed upon the statutory language. We find it difficult on the basis of the limited argument that we have heard to see any justification for that. However, the averaging approach does have support in previous authority, was adopted by Judge Travis in the present case and has been applied by the Employment Relations Authority on at least one previous occasion.[10] In light of this, and because of its obvious importance, we consider that we should grant leave to appeal in respect of this issue as well.

[17] Accordingly, we grant leave to appeal in respect of the following question:

> Is the applicant entitled to average the hourly rates payable to the respondent during the course of a pay period in order to achieve compliance with s 6 of the Minimum Wage Act 1983?

---

9 *Mickell v Whakatane Board Mills Ltd* [1950] NZLR 481 (SC), at 487–488.

10 *Harding v Spectrum Care Trust Board* ERA Auckland AA314/08, 1 September 2008 at [94].

Decision

[18] We grant leave to appeal on the questions identified in [12] and [17] above. Costs are reserved, to be dealt with in conjunction with the appeal.

[19] Both parties advised us that they would seek to have the appeal dealt with urgently if leave was granted. We invite counsel to make a joint approach to the Registrar about that.

Solicitors:
Quigg Partners, Wellington for Applicant
Oakley Moran, Wellington for Respondent