IN THE EMPLOYMENT COURT
WELLINGTON

WC 17/09

WRC 31/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	IDEA SERVICES LIMITED Plaintiff
AND	PHILLIP WILLIAM DICKSON Defendant

WRC 34/08

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	PHILLIP WILLIAM DICKSON Plaintiff
AND	IDEA SERVICES LIMITED Defendant

Hearing:	5 and 6 May 2009 (Heard at Wellington)
Court:	Chief Judge G L Colgan Judge B S Travis Judge A A Couch
Appearances:	MF Quigg and Tim Sissons, Counsel for Idea Services Limited Peter Cranney and Fleur Fitzsimons, Counsel for Phillip Dickson
Judgment:	8 July 2009

JUDGMENT OF THE FULL COURT

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[1] This case raises two important issues about the interpretation and application of the Minimum Wage Act 1983 ("the Act"). The first issue is whether what are known as "sleepovers" constitute "*work*" for the purposes of the Act and require payment of wages at not less than the minimum rate prescribed under the Act. The second issue is whether the requirements of the Act are satisfied by "averaging" the wages for a period of work so that payment at less than the minimum rate for part of the period is balanced by payment at a greater rate for another part.

[2] We deal with these issues in the context of Mr Dickson's employment by Idea Services Limited (Idea Services) but the principles involved are potentially of much wider application. Sleepovers are a widespread practice in the community care arrangements for people with physical and intellectual disabilities. The wage averaging issue does not appear to have ever been determined authoritatively since the original Minimum Wage Act was passed in 1945. This issue may affect many other employers and employees in sectors where low wages are paid. For these reasons, a full Court was convened to decide the case.

[3] Mr Dickson is employed by Idea Services as a community service worker. His work involves supporting and caring for people with disabilities living in community homes. For part of the time, Mr Dickson is involved in constant activity and is paid at a rate well above the minimum wage. Several nights a month, he performs "sleepovers" in the home. During these times, he is responsible for the health and safety of the residents and must be available to attend to any specific issues which arise in the home but may otherwise sleep or quietly do as he wishes. Mr Dickson is paid for the time spent on sleepovers at a rate well below the minimum wage.

[4] The Employment Relations Authority determined that sleepovers performed by Mr Dickson are work and that he is entitled to receive not less than the minimum rate of wages for all of the time he is engaged on sleepovers. Idea Services challenged that determination and that aspect of the case proceeded before us by way of a hearing de novo. The second issue relating to averaging was removed to the Court for us to hear without the Authority investigating it.

Relevant facts

[5] Idea Services Limited is a wholly owned subsidiary of IHC New Zealand Incorporated, a long established non-Governmental organisation that cares for and supports people with intellectual disabilities and their families. Until about a generation ago, those people with disabilities who could not live alone or with their families were gathered in large institutions. During the 1980s a profound shift in the nature of the care and support of these people resulted in many who are able to do so now living in small groups in houses within communities. As far as possible, these group homes provide a conventional community living environment. The closest analogy may be with a flatting situation but a significant feature is that each home and its residents are cared for by an on site employee of the service provider who is responsible for the care and protection of the occupants. Those occupants are known as "service users".

[6] These group homes are owned and/or operated by charitable bodies including IHC. Most of the operating costs are met through Government grants delivered by the Ministry of Health. The balance comes from a variety of sources including public donations, investment income and rental from occupiers.

[7] Labour costs constitute a very substantial part of the costs of having these homes. Idea Services operates about 900 group homes throughout New Zealand. It employs many community service workers to staff these homes.

[8] In this case, Phillip Dickson works as a community service worker in several of Idea Services' homes in the Horowhenua area, although principally at one home in Otaki. The case for Mr Dickson focused on his own circumstances but evidence of witnesses called by Idea Services about its group homes generally, including those elsewhere in New Zealand, illustrates that there are some features common to all homes and other features that are particular to some homes only.

[9] In most cases, the service users are engaged in paid work, training or other activities away from the group homes from about 9am until about 4pm each week

day. As a result, there is little or no need for community service workers to be present during these times.

[10] From about 4pm until 10pm on week days, and on weekends, one or more community service workers employed by Idea Services will be present in each group home to assist the residents with all of the usual domestic events that take place during that period. This will include washing, making and eating a meal, cleaning and tidying, preparation of lunches for the following day, and social activities such as watching television. Some service users go out to evening activities in the community but most retire for the night in the mid to late evening. From 10pm until the following morning, the home and its occupants are the responsibility of a community service worker who stays in the group home overnight. This is known as a "sleepover".

[11] Mr Dickson typically begins work at about 4pm each day he is rostered. Until 10pm he is engaged in assisting service users in their activities described above and also in record keeping and other tasks necessary for the safe and efficient running of the home for which he is responsible. There is no question that during these times Mr Dickson is working as an employee and is paid $17.66 per hour, significantly more than the current minimum wage rate of $12.50 per hour.

[12] From 10pm until a time between 6am and 8am the following morning, Mr Dickson frequently remains in the home on a sleepover. During this time he is not required to be actively and constantly engaged with service users, their visitors and others as he is until 10pm. Rather, with some not insignificant limitations, Mr Dickson's time is his own unless and until he may be required to deal with an incident or other event associated with the home and its service users. He has a room which is used as a staffroom and as an office during the day but which has a bed and other modest furnishings for his use at night.

[13] In Mr Dickson's case, he uses the sleepover for rest and sleep. Other community service workers apparently spend some of their time during a

sleepover studying, watching television or engaged in other activities consistent with a quiet home environment that permits the other residents to sleep.

[14] There is no doubt that community service workers engaged on sleepovers are subject to significant constraints on their activities but there were differences between the witnesses about the extent of those constraints. Overall, we prefer the evidence of Mr Dickson, based on his personal experience, to the evidence of the witnesses for Idea Services whose evidence was generalised, theoretical or based on experience elsewhere in New Zealand.

[15] Having resolved the conflicts of evidence on this issue, we find that the constraints on community service workers, including Mr Dickson, performing sleepovers include:

a) They may not leave the group home during the period of the sleepover without the prior permission of a supervisor and a relief worker being available and present.

b) If they sleep, they must be readily available to be woken to respond to any incident in or around the home requiring their attention. This means they may not sleep behind a locked door.

c) They may not consume or be affected by alcohol or other drugs.

d) They may not have visitors without the prior permission of a manager and it being acceptable to the service users in the home.

e) Any activity they engage in must not disturb the service users during the night.

[16] It was common ground that, throughout the duration of sleepovers, community service workers have certain continuous responsibilities. These include responsibility for the safety and well being of service users. At the start of each sleepover, they must consult a day book in the home which is an essential means of communication between community service workers and between Idea

Services and staff. They must also ensure that routine and emergency evacuation procedures are current and known.

[17] Depending on the nature and needs of particular service users in the home, the community service worker may need to ensure that residents take medication or that they are not left alone. They must also be constantly available to the service users. This means that any lock on the door to the room in which they sleep may not be used except for brief periods required to dress or undress. We accept Mr Dickson's evidence that some service users frequently come in and out of the community service worker's sleeping area if they are feeling unwell or want to talk. Many service users consider immediate access to community service workers during sleepovers to be a matter of course. This was likened in evidence to the innocent access that young children have to their parents' bedrooms.

[18] Property security is also the constant responsibility of the community service worker, no less at night during sleepover times. They must ensure that doors are locked, that windows are closed and heaters turned off at night. In some group homes, service users may go out in the evening and not return until late. Although such residents have their own keys, it remains the responsibility of the community service worker on sleepover to ensure the home is secure after each resident returns. Service users' medication must be locked away and appropriate areas of the home, such as the kitchen, secured. A daily fire check of each home must be completed during a sleepover and signed off.

[19] Community service workers are required to complete what are known as "incident reports" if significant events occur while they are on duty. When and how often incident reports have been made was the subject of a good deal of evidence, some of it conflicting. The case for Idea Services was that community service workers completed incident reports every time they were required to do any active work and that, because relatively few incident reports were made, it could safely be concluded that sleepovers were usually uninterrupted. Mr Dickson's evidence was that incident reports were completed only in respect of significant and unusual events and that the many routine tasks completed by

community service workers during every sleepover were never reported in this way.

[20] In the course of cross-examination of the witnesses for Idea Services, it became apparent that the company had an established policy regarding the circumstances in which incident reports were to be made. We called for the documents evidencing this policy and were provided with them.

[21] Those documents supported the evidence given by Mr Dickson. The incident reporting process requires staff to report undesired events relating to service users or the group home that are more than trivial and may adversely affect persons or property. The principal purpose of incident reports is to provide Idea Services with relevant information about individual service users so that their needs can be analysed and catered for appropriately. As such, the process is a needs assessment tool rather than an employment tool. Its use by Idea Services in relation to payment for sleepovers is incidental to its essential purpose and the threshold for submitting an incident report excludes most of the routine tasks carried out by community service workers in the course of sleepovers. The number of incident reports submitted is therefore far from an accurate reflection of the extent to which community service workers are disturbed or engaged in active tasks during sleepovers. We also find that the numerous minor events which do not warrant the completion of an incident report in terms of Idea Services' detailed guidelines nevertheless disrupt the rest or sleep of community service workers on sleepovers.

[22] The collective agreement applicable to Mr Dickson's employment provides for payment of a minimum of one hour's wages for work done during a sleepover *"where justified by an incident report."* There was also evidence that, rather than complete an incident report in relation to a task carried out during a sleepover, community service workers may record on their time sheets that they have been active for a certain period and that they will then be paid at their normal hourly rate for that time. While we accept that such a scheme is available, we also accept Mr Dickson's evidence that he does not claim in this way for the various tasks he routinely performs in the course of a sleepover. It follows that we do not accept that the combination of incident reports and claims for additional payment

provides a useful measure of the extent to which staff are actively engaged during sleepovers.

[23] We mention four other aspects of the evidence about sleepovers which impressed us as being significant. Mr Dickson gave evidence that in almost every case he began sleepovers after a shift of normal work from 4pm to 10pm. He said that, although the tasks associated with that shift work are meant to be completed by 10pm, meeting the needs of the service users during that period often means this cannot be done. As a result, he often completes that work during the first hour or more of the sleepover. The work involved usually includes the completion of individual service user plans that record the goals and aspirations of each resident.

[24] The dynamics of a group home are similar to that of many other shared living arrangements. Residents wake from time to time. They may move around the home or create noise which may disturb other residents. The duty of care which the community service workers have during sleepovers means that they must be alert to such noises or activity.

[25] Community service workers are known to, and trusted by, the service users in whose homes they work and sleep over. They are aware of the needs and other relevant circumstances of the service users in their homes and play an active part in a continuous process of review of those needs to ensure the best level of support and protection of service users. The very presence of a community service worker in a group home during sleepovers is reassuring to the service users and contributes to their wellbeing.

[26] There are some group homes in which the service users routinely need frequent or prolonged personal attention during the night. In such homes, the community service worker is required to do what is called a "wakeover" at night rather than a sleepover. This requires an employee to remain awake during the period of 8 to 10 hours from 10pm each night. Employees are paid for wakeovers at their normal hourly rate rather than simply receiving an allowance. It appears that there are few group homes in which wakeovers are provided and that there are

numerous homes in which the circumstances fall between those requiring wakeovers and, at the other end of the spectrum, where a community service worker can enjoy a full and uninterrupted night's sleep. As Mr Dickson described it in evidence: *"Although the support workers sleep, it is a sleep which is often disturbed and with the knowledge of being responsible for all the others in the house who are vulnerable people."* Mr Dickson regards the requirement to be at the premises at all times during a sleepover as a matter of *"profound responsibility."*

[27] The collective agreement provides that community service workers such as Mr Dickson may not be required to complete more than six sleepovers per fortnight without their consent. Despite that, the evidence was that Mr Dickson and other staff in similar roles routinely do many more sleepovers than that. In a sense, these additional sleepovers are voluntary but we accept that the modest rates of pay for shift work make it necessary for many community service workers to spend long periods of time at the workplace, including numerous sleepovers, to earn an acceptable income. It is not uncommon for Mr Dickson, when undertaking both shift work and sleepovers, to be at a group home as a community service worker constantly from 4pm on a Friday until 4pm on the Saturday or even 4pm on the following Sunday. This arrangement suits Idea Services also because it guarantees the presence of a well known, well liked and well regarded community service worker in the group home and involves lower cost for travelling allowances.

[28] Using the early months of this year as an example, Mr Dickson spent nearly as much time engaged on sleepovers as he did on shift work. On average, he spent 148 hours per fortnight in group homes. Of this, 77 hours was regular shift work and 71 hours was on sleepovers. For the shift work, he received $17.66 per hour. For each sleepover, he received an allowance of $34.00 which worked out at between $3.40 and $4.30 per hour.

[29] The collective agreement provides both hourly and fortnightly rates of pay for community service workers. It is very clear from Mr Dickson's payroll records, however, that his wages are calculated on every occasion by reference to

an hourly rate and to time factors measured in hours. We find that other community service workers are likewise paid at hourly rates.

Is a sleepover *"work"* for the purposes of the Minimum Wage Act?

[30] This part of the judgment turns on the interpretation of s6 of the Minimum Wage Act 1983 which provides:

> ***6 Payment of minimum wages*** *- Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for* ***his work*** *at not less than that minimum rate.* (Emphasis added)

[31] The Minimum Wage Act does not define the word "*work*". The approach to be adopted in ascertaining its meaning in this context must therefore be that directed by s5 of the Interpretation Act 1999 which provides:

> ***5 Ascertaining meaning of legislation***
>
> *(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
>
> *(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
>
> *(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

[32] Mr Quigg summarised the case for Idea Services as follows:

> *2.1 Determination of what constitutes* [Mr Dickson's] *"work" under the MWA should occur based on a distinction between time when:*
>
> *(a)* [Mr Dickson] *is not required to be awake but is required to be available to attend to residents if and when necessary; and time when*
>
> *(b)* [Mr Dickson] *is required to be awake and attending to residents.*
>
> *2.2 The former only constitutes* [Mr Dickson's] *"work" when he is in fact attending to residents.*
>
> *2.3 The latter constitutes* [Mr Dickson's] *"work" for as long as the requirement is in place.*

[33] In support of this proposition, Mr Quigg made a number of submissions. After referring to s5 of the Interpretation Act set out above, Mr Quigg's first submission was that s11B of the Minimum Wage Act contained an indication of the meaning of the term *"work"*. It provides:

> ***40-hour 5-day week***
> *(1) Subject to subsections (2) and (3), every employment agreement under the Employment Relations Act 2000 must fix at not more than 40 the maximum number of hours (exclusive of overtime) to be worked in any week by any worker bound by that employment agreement.*
> *(2) The maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week may be fixed at a number greater than 40 if the parties to the agreement agree.*
> *(3) Where the maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week is not more than 40, the parties to the agreement must endeavour to fix the daily working hours so that those hours are worked on not more than 5 days of the week.*

[34] Mr Quigg submitted that this section set out a presumption that a working week will not comprise more than 40 hours unless the parties agree otherwise. Consistent with this requirement, the collective agreement covering Mr Dickson's work fixed the normal hours of work at 80 per fortnight. That being so, Mr Quigg submitted that an interpretation of the term *"work"* which led to a conclusion that Mr Dickson "worked" up to 167 hours per fortnight ought to be avoided.

[35] The obvious difficulty with this submission is that s11B expressly excludes overtime from the 40 hours per week benchmark and the collective agreement expressly provides for overtime to be worked. It is therefore consistent with s11B and with the collective agreement to adopt a meaning of the term *"work"* which leads to Mr Dickson "working" more than 80 hours per fortnight provided the additional hours are treated as overtime.

[36] Mr Quigg's second submission focused on the purpose of the legislation, tracing the Act back to its origins in the Minimum Wage Act 1945. He noted that the relevant parts of the 1945 Act were very similar to its 1983 successor and also provided no definition or other clear indication of the meaning of the term "*work*". He quoted from the speech of the Acting Minister of Labour during the second reading of the Bill in 1945 in which he spoke of the *"natural definition of wages"*

as "*A reward for labour*."[1] Mr Quigg submitted that this was an indication of the legislative intention of the 1945 Act that "*work*" should be associated with physical activity.

[37] We obtained little guidance from this and other passages from Hansard in 1945. The speeches made by the members then reflected the views of a society very different from that in which we live today. This is demonstrated by another part of the Minister's second reading speech when he said: "*The worker is the man who produces. One cannot produce by looking at something or by writing figures in a book. To get production one has to work for it.*"[2] Such a narrow view would exclude a large proportion of modern people who, as a matter of common understanding, we regard as "working". It would, for example, exclude all those who work with computers. To adopt such a view would also be to ignore s6 of the Interpretation Act which provides:

> ***6 Enactments apply to circumstances as they arise***
> *An enactment applies to circumstances as they arise.*

[38] Since 1945, a myriad of new circumstances have arisen in which it must be said work is being performed. Thus, although the words used in the 1945 Act were repeated in the 1983 Act and continue in force today, we find that the meaning to be ascribed to those words has changed as society has changed.

[39] Turning to the purpose of minimum wage legislation, Mr Quigg referred us to the description of the Minister in 1945 of the minimum wage as "*a bread wage.*" We accept that the original purpose of the legislation in 1945 was to provide a basic wage at a subsistence level for a 40-hour week and that this remains one of the purposes of the current legislation. But that is not its only purpose. Recognising the inequality of bargaining power in the employment relationship, the minimum wage legislation forms part of what has been described as the "minimum code" aimed at protecting employees from exploitation. It fulfils this role together with other legislation such as the Holidays Act 2003, the Equal Pay Act 1972 and the Wages Protection Act 1983.

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[1] New Zealand Parliamentary Debates Vol 272 November 22 – December 7 1945 p459
[2] p468

[40] Having regard to the broader purpose of the legislation, we do not accept Mr Quigg's submission that the concept of *"work"* for the purposes of the Minimum Wage Act ought to be construed narrowly to prevent an employee claiming payment for hours "*vastly in excess of the standard working week, especially when the employee's duties during many of those hours are minimal.*" The broader purpose of the Minimum Wage Act is apparent from the Minimum Wage Orders through which it is given practical effect. Successive Orders have provided not only for minimum rates of wages per 8-hour day or per 40-hour week but, in every case, for each hour worked in addition to those basic entitlements – see, for example, clause 4 of the Minimum Wage Order 2009.

[41] In his next broad submission, Mr Quigg cited passages from *New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd (No 2)* [2008] ERNZ 62 (the *NZALPA* case), where a full Court considered the term "*works*" in the Holidays Act 2003. The Court had to determine whether airline pilots were working on public holidays while on a rest period during an overseas tour of duty and therefore entitled to payment at penal rates. Mr Quigg relied particularly on the following passage from the judgment:

> *[13] The Holidays Act 2003 does not define the central concept of "works" and, although the terms of the employment agreement are highly material to the inquiry, the central concept must be determined on the facts of the individual case.*

[42] Mr Quigg submitted that this applies equally to the definition of the word "*work*" under the Minimum Wage Act.

[43] Mr Quigg referred to the Court's use of dictionary definitions in *NZALPA*, as follows:

a) Black's Law Dictionary (8th ed) defines "*work*" *as:*

> ***Work**, n.1 Physical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor.*

b) The Oxford English Dictionary online, which in 48 pages defining the word "*work*" includes:

> *…to bestow labour or effort upon; to operate on: various connections and shades of meaning 'to do one's ordinary business;*

to pursue a regular occupation; to be regularly engaged or employed in some labour trade or profession etc'.

c) The simpler definition in the Concise Oxford Dictionary defines "*work*" as including:

The application of mental or physical effort to a purpose….

[44] The Court in *NZALPA* said:

> *[32] From the dictionary definitions it would appear that "work" carries the connotation of actually being involved in physical or mental exertion in the performance of one's duties. That is likely to be the meaning to be ascribed to "works" in s50(1).*
>
> *[33] As Mr Toogood submitted it is difficult to reconcile that concept when a pilot in a rest period during a layover is permitted to carry out personal activities without effective constraint by the employer.*

[45] Adopting to an extent what the full Court said in paragraph [32] of this passage, Mr Quigg submitted that, for the purposes of the Minimum Wage Act, "*work*" should also be interpreted as involving the exchange of physical or mental exertion by an employee for an agreed rate of remuneration paid by an employer, which must be not less than the prescribed minimum rate. He submitted that not every act required of or restriction placed on an employee by an employer will mean that the employee is "*working*".

[46] Mr Quigg properly conceded that the constraints imposed on pilots during rest periods in the *NZALPA* case were less extensive than those imposed by Idea Services on community service workers in the present case and acknowledged what was said in paragraph [36] of the *NZALPA* decision:

> *…Were significant restrictions imposed on the pilot during the layover, analogous perhaps to standby duties, the position may well have been different.*

[47] In concluding his submissions regarding the *NZALPA* case, Mr Quigg submitted that, although it provided useful guidance on the meaning of the word "*work*", the fact that it decided issues under the Holidays Act meant that it was not

determinative in the present circumstances. Instead, he urged us to adopt the approach he said was taken in two other cases.

[48] The first of these cases was *Mills v Ball, Hunt & Patrick (t/a Cedar Park Motor Lodge)* AEC 58/94, 20 September 1994. A motel manager's employment contract required her to "*be in attendance 24 hours per day 7 days per week*". She was required to reside on the premises and was responsible for organising a deputy in her absence. The Court held that the Employment Tribunal was correct in rejecting the employee's claim that she was entitled to be paid the minimum rate for an average of 14 hours per day. It upheld the Tribunal's approach of regarding her as working only when she was physically engaged in carrying out her duties.

[49] The case is of very little precedent value. On appeal to the Court it had been argued for the first time that the employee's hours of work should be based on when she was ready, willing and able to serve the employer. That had not been raised before the Tribunal and s95 of the Employment Contracts Act 1991 prevented the Court from considering it.

[50] There is a passage in the judgment referring to s11B(2) of the Minimum Wage Act which came into effect on 15 May 1991:

> *It was common ground that had the contract been made five weeks later on or after 15 May 1991 then this present claim could not have been made. Section 11B(2), a 1991 amendment to the Minimum Wage Act 1983 effectively abolished claims such as the present one, based on contracts concluded on and after 15 May.*

[51] Mr Quigg invited us to regard this as authority for the proposition that s11B precluded claims for payment of the minimum wage for more than 40 hours per week. That is not expressly spelled out in the judgment and does not appear to have been the subject of argument. In any event, we do not accept the proposition. To do so would mean that any hours worked in excess of 40 per week could lawfully be unpaid or paid below minimum rates. Such a result would be inconsistent with the purpose of the legislation as a whole and, to have this effect,

clear wording in the Act constraining s6 would be required. It is clear, however, that s6 is not made subject to s11B.

[52] This proposition also misconstrues the purpose of s11B. Although included in the Minimum Wage Act, it is clear from its legislative history that s11B was intended to enshrine the philosophy of the 40-hour week by preventing an employee from being required to work more than 40 hours without agreement. Section 11B could have been included in the Employment Relations Act 2000 and we note the current section was substituted by Schedule 5 of the Employment Relations Act 2000 for the 1991 Amendment of the Minimum Wage Act. Section 11B is not a bar to Mr Dickson's claim.

[53] The second line of authority relied on by Mr Quigg was derived from the two High Court and one Court of Appeal decisions concerning the crew of three seized Russian fishing vessels[3]. During a period when one of the vessels was in port, an officer, Mr Udovenko, was on duty for an average of 12 hours per day. When discussing the application of the Minimum Wage Act generally, Young J found that, while performing such duties, officers were paid by the day as opposed to being paid by the hour. In a later discussion of the specific amount of wages to which Mr Udovenko was entitled, Young J observed that Mr Udovenko had little to do while on duty in port and that he spent most of his time in his cabin. He then confirmed that Mr Udovenko was entitled to a minimum rate of wages at the daily rate. It was suggested to us that it was implicit in Young J's observation that he accepted there was a difference between being "*on duty*" and being at "*work*". Given the conclusion that Mr Udovenko was paid by the day, that is not necessarily so. The Court of Appeal did not deal with this issue on appeal. Again we do not find this series of cases particularly helpful. They contain no clear statement of principle which would assist us and the facts were significantly different to those in this case.

[54] Mr Quigg also relied on *NZ Fire Brigades Officers and NZ Fire Brigades Employees Application For Award* (1965) BA 1496 which dealt with s149(1) of

the Industrial Conciliation and Arbitration Act 1954. This section was the forerunner of what is now s11B of the Minimum Wage Act and prevented the Court of Arbitration, in settling an award, fixing the "*maximum number of hours (exclusive of overtime) to be worked in any week by any worker bound by the award*" at more than 40, unless it was of the opinion that "*it would be impracticable to carry on efficiently any industry to which the award relates if the working hours were so limited*". The Court held that the aim of the section was to put a restriction on working hours and did not apply to the whole of the period when firemen, as they were then called, were required to be at fire stations. The Court said:

> *Though firemen are "on duty" for 84 hours in a week it would, we think, be a distortion and exaggeration of the word "work" to hold that they were working for 84 hours per week. In point of fact during a great deal of their time on duty firemen are going about their own affairs with the sole restriction that they may not leave the environs of the station and must be available for fire calls.* **(p1498)**

[55] The case reflects an analysis of the reality of the on-duty period to ascertain whether it constituted work during its entirety. The approach of the Arbitration Court was very similar to that of the Employment Court in the *NZALPA* case. Firemen were provided with their own quarters at fire stations where their families were permitted to live with them. The only constraint on firemen when on duty was the requirement not to leave the environs of the station. This was regarded as a limited restriction applying only every second day, and balanced by extended leave provisions. When on duty, the firemen had no tasks to perform or responsibilities to discharge unless and until they were required to attend a fire. Those facts are quite different from the present case.

[56] Mr Quigg relied on these cases for the proposition that the Court should be reluctant to conclude that an employee will be "*working*" where the claim is for what he described as "*excessively long periods of time*", even when there are some duties involved throughout such periods. That may be so, but it does not assist in determining, on the facts, whether the particular responsibilities and

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[3] *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA); *Udovenko v AO Karelrybflot* High Court Christchurch AD 90/98, 27 April 1999; *Udovenko v AO Karelrybflot* High Court, Christchurch, AD 90/98 24 May 1999

constraints placed on Mr Dickson by his employer make sleepovers part of "*his work*" for the purposes of s6.

[57] Mr Quigg made a series of submissions based on the provisions of the applicable collective agreement. We have considered those submissions fully but they cannot assist Idea Services. As Mr Quigg properly acknowledged, s6 requires payment at the minimum rate, notwithstanding anything to the contrary in a collective agreement.

[58] Finally Mr Quigg relied on Part 6D of the Employment Relations Act 2000 which was inserted by the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008. Part 6D provides employees with an entitlement to rest breaks and meal breaks in the course of their work. Mr Quigg submitted that, if Mr Dickson is right, applying these provisions to the present circumstances produces an absurdity. He contended employees cannot take rest or meal breaks if they are asleep during a sleepover and there is little by way of duties during a sleepover from which to have a break.

[59] In support of this submission, Mr Quigg referred us to the decision of the Employment Appeal Tribunal in the United Kingdom in *Hughes v G & L Jones t/a Graylyns Residential Home* UKEAT/0159/08/MAA, 3 October 2008. In that decision, the Appeal Tribunal suggested there may be an absurdity in the suggestion that a person who is on call but asleep must be woken to take a rest break. Mr Quigg suggested that a similar absurdity would arise under Part 6D if time spent asleep was regarded as *"work"*.

[60] To the extent that such a situation may arise under English legislation, we do not see it arising under the provisions of Part 6D of the Employment Relations Act 2000. A "break" for the purposes of this legislation can only mean freedom from an obligation to work. An employee having a "break" is not required by the Act to do anything in particular. Indeed, the very purpose of the employee having a "break" is to allow the employee a measure of choice about what he or she does during that time. It follows that an employee who is asleep need not be woken up to have a rest break or a meal break. It is sufficient that employees know they do

not have to work during those periods of time. This part of the Employment Relations Act does not assist in the interpretation of s6 of the Minimum Wage Act.

[61] For Mr Dickson, Mr Cranney cited extensively from cases in Canada, the United States, the United Kingdom and the European Community. As Mr Quigg properly observed and Mr Cranney acknowledged, however, these cases involved different statutory frameworks to that in force in New Zealand. Some of the statutory provisions, for example in the United Kingdom, have tried to deal expressly with the situation where an employee is required to live on the employer's premises. It is also clear that in the European Union there is a divide at the highest level as to whether a distinction should be drawn between "*active*" on-call time, and "*inactive*" on-call time. One proposed amendment to the current legislation was that only "*active*" on-call time would represent "*work*". We were told that that amendment has not been carried into law. We note, however, that the perceived need by some in those jurisdictions for such an amendment reflects what we have discerned in the cases, namely that inactive on-call duty can still amount to work. We accept Mr Cranney's submission that the overseas cases generally support this approach.

[62] We do not separately record the other submissions made by Mr Cranney on the first issue. For the most part, we accepted those submissions and they are reflected in our decision.

[63] In reaching our decision on the first issue, we adopt the view taken by William Young P and Chambers J in *NZ Fire Service Commission v NZ Professional Firefighters Union* [2007] 2 NZLR 356 at 359 (CA). Construing the Holidays Act, they held that the question of whether a day would be otherwise a working day is an intensely practical one. We think the same may be said of s6 of the Minimum Wage Act which also reflects 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 s6.

[64] We do not accept Idea Services's analysis that no part of the time when Mr Dickson is asleep or permitted to sleep can form part of *"his work"* for the purposes of s6 of the Minimum Wage Act. The issue requires a broader consideration of all the facts and we do that under three headings:

a) Constraints on the employee.

b) Responsibilities of the employee.

c) Benefit to the employer.

[65] The first important factor is the extent to which the employer imposes constraints on the freedom the employee would otherwise have to do as he or she pleases. The greater the degree of constraint, the more likely it is that the period of constraint ought to be regarded as *"work"*. At paragraph [15] above, we set out a summary of the constraints on Mr Dickson in this case. Their combined effect is that, while engaged on sleepovers, Mr Dickson can only engage in a very limited range of activities. He cannot carry on normal family life or socialise with friends. His privacy is limited. He does not have access to the comforts and resources of his home. He must be sober and quiet. We regard those constraints as substantial and significant.

[66] The second factor is the nature and extent of responsibility on the employee. The greater and more extensive the responsibilities, the more likely it is that the period in question ought to be regarded as *"work"*. Throughout the period of sleepovers, Mr Dickson has important responsibilities. He must care for and support the service users. He must also ensure the security and safety of the group house premises. These responsibilities are continuous throughout the duration of each sleepover, whether Mr Dickson is asleep or awake. He is not relieved of those responsibilities until another staff member arrives in the morning.

[67] In discharging his responsibilities, Mr Dickson inevitably performs numerous tasks during the period of each sleepover. He is also liable to be disturbed by service users at any time and must respond quickly and appropriately on every occasion. Such disturbances are unpredictable in their frequency and timing.

[68] Overall, we regard the responsibilities of community service workers such as Mr Dickson during sleepovers as relatively weighty. The fact that those responsibilities are continuous is of particular importance. In this regard, Mr Dickson's situation is readily distinguishable from a person who is at home or in the community on call. Such a person will usually have no tasks to perform or responsibilities to discharge unless and until he or she is called.

[69] The third broad factor is the benefit to the employer of having the employee assume the role in question. The greater the importance to the employer and the more critical the role is to the employer, the more likely it is that the period in question ought to be regarded as "*work*". It is critical to the business of Idea Services that there is a community service worker performing a sleepover in each group home every night. Without their presence, the company would be in breach of its obligations to operate the group homes in an appropriate manner and potentially jeopardise its funding.

[70] In addition to these practical components of Mr Dickson's role during sleepovers, there are other more intangible aspects to it. While he is asleep, it may fairly be said that Mr Dickson is not engaged in physical or mental effort but his mere presence in the group home is productive. While he is there, he is the service users' protector, fulfilling a role comparable to a parent. This is so whether he is awake or asleep. Simply by being there, he helps to maintain the physical and emotional wellbeing of the service users in the home.

[71] Taking all aspects of the matter into account, we conclude that the time spent by Mr Dickson engaged on sleepovers forms part of "*his work*" for the purposes of s6 of the Minimum Wage Act. It follows that Mr Dickson is entitled to payment at not less than the prescribed minimum rate for all of that time.

The "wage averaging" issue

[72] Arising out of our decision that the time spent by Mr Dickson engaged on sleepovers properly forms part of "*his work*" for the purposes of s6 of the

Minimum Wage Act, the second issue is how the right to payment conferred on Mr Dickson by s6 can be satisfied.

[73] We have found as a fact that Mr Dickson is paid by the hour. Clause 4 of the Minimum Wage Order 2009 prescribes the minimum rate of wages for adult workers employed by the hour as $12.50 per hour.

[74] For Idea Services, Mr Quigg submitted that the requirements of the Minimum Wage Act are met if, at the end of each pay period, Mr Dickson receives not less than $12.50 per hour for the total number of hours he has worked during that period. The applicable collective agreement provides for fortnightly pay periods.

[75] The effect of this submission is that, for the purposes of the Minimum Wage Act, Idea Services may set off the $17.66 per hour Mr Dickson has received for shift work against the $3.40 per hour or so he has received for sleepovers. If the result is that Mr Dickson has received an average of not less than $12.50 for each hour worked during the fortnight, Idea Services says it owes Mr Dickson no more under s6.

[76] In making this submission, Mr Quigg acknowledged that it involves a different calculation of payment for the purposes of the Minimum Wage Act to that employed for the purposes of the collective agreement. He submitted, however, that this is permissible because the statutory obligations are separate from the contractual obligations and unconnected with them.

[77] For Mr Dickson, Mr Cranney submitted that the combined effect of the Minimum Wage Act and the Minimum Wage Order is that sufficiency of payment must be assessed on an hour by hour basis and that Mr Dickson is entitled to be paid not less than $12.50 for each and every hour worked.

[78] The effect of Mr Cranney's submission is that Mr Dickson is entitled to retain the $17.66 per hour he has been paid for shift work and that Idea Services must make up the $34 Mr Dickson has received per sleepover to not less than $12.50 for each hour he was so engaged.

[79] This is a difficult and very important issue. The decision we make is likely to be based on relatively broad principles. It will therefore affect not only the parties to this proceeding and others in the same sector, but also potentially large numbers of other low paid employees and their employers.

[80] We believe we would benefit from further considered argument and submissions in relation to those principles. The potential impact of our decision is also such that we should offer Business New Zealand and the New Zealand Council of Trade Unions the opportunity to appear and be heard as we encourage and allow from time to time on such important questions.

[81] Without wishing to constrain the scope of further submissions which counsel may wish to make, we note the following points which may be worthy of consideration:

a) The opening words of s6 of the Minimum Wage Act might be thought to isolate obligations under the Act from contractual obligations.

b) The phrase *"shall be entitled to receive from his employer"* might imply that sufficiency of payment under the Act is to be determined on the basis of how the employee's wages are actually calculated.

c) If *"averaging"* is permitted for the purposes of the Act, this may affect compliance with other statutory obligations, such as s50 of the Holidays Act 2003.

d) Are there any aspects of the purpose of the Minimum Wage Act which may assist us in deciding the second issue?

e) The extent to which we may be assisted by the following decisions:

    i) *Sealord Group Ltd v New Zealand Fishing Industry Guild Inc* [2005] ERNZ 535

    ii) *Hopper v Rex Amusements Limited* [1949] NZLR 359 (CA)

iii) *Brown (Inspector of Factories) v Manawatu Knitting Mills, Limited* [1937] NZLR 762

iv) *Mickell v Whakatane Board Mills, Limited* [1950] NZLR 481

[82] We acknowledge that Mr Quigg and Mr Cranney have addressed some of these points in the submissions they have already made but we note them here in order to invite counsel for any interveners to address them. Counsel for the parties should also feel free to supplement the submissions they have already made.

Conclusion

[83] On the first issue, we find in favour of Mr Dickson. Sleepovers performed by him are "*work*" for the purposes of the Minimum Wage Act 1983. Idea Services Limited's challenge in this regard is dismissed. Pursuant to s183(2) of the Employment Relations Act, however, the Authority's determination of the first issue is set aside and this decision stands in its place.

[84] On the second issue, this is an interim judgment only in which we do not decide the point. The Registrar should invite the two central organisations to consider whether they wish to apply to be interveners in the case in relation to this issue. A single Judge may determine how further submissions are to be made and heard. Once we have received those submissions, we will issue a final judgment on the remaining issue.

[85] Costs are reserved.

A A Couch
Judge
for the full Court

Judgment signed at noon on 8 July 2009