IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 195
CRC 34/12

IN THE MATTER OF	an application for special leave to remove Authority proceedings
BETWEEN	THE NEW ZEALAND KING SALMON CO LIMITED Applicant
AND	MARTIN CERNY First Respondent
AND	FRANCIS MORETTI Second Respondent

Hearing: 15 November 2012
(Heard at Wellington)

Appearances: Karen Radich and Amberley James, counsel for the applicant
Graeme Malone, counsel for the respondents

Judgment: 16 November 2012

JUDGMENT OF JUDGE A D FORD

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[1] The applicant has applied, pursuant to s 178(3) of the Employment Relations Act 2000 (the Act), for special leave to have an employment relationship problem removed in its entirety from the Employment Relations Authority (the Authority) to the Court. In a determination[1] dated 31 August 2012 the Authority had declined the applicant's application for removal. However, this is not a challenge to the Authority's determination but an application for special leave which falls to be considered afresh on one or more of the limited grounds prescribed in s 178(2)(a) to (c) of the Act.

[1] [2012] NZERA Christchurch 191.

[2] Counsel for the applicant, Ms Radich, correctly pointed out that the respondents had wrongly brought the claim as a personal grievance under s 103(1)(b) of the Act whereas in fact it is a claim under s 11 of the Minimum Wage Act 1983 for recovery of arrears of wages under s 131 of the Act. Mr Malone, counsel for the respondents, who was instructed subsequent to the filing of the statement of problem, acknowledged the error and undertook to clarify the position, if necessary, following the issuance of this judgment.

[3] The background facts were succinctly summarised by the Authority in its determination in these terms:

> [2] Messrs Cerny and Moretti have worked since 2003 and 2000 respectively as hatchery operators at the Takaka Salmon Hatchery in (Takaka). They claim an unjustified disadvantage in relation to their pay, although their claim may more accurately be characterised as a claim for arrears of pay under s. 11 of the Minimum Wage Act 1983 or s. 131 of the Employment Relations Act 2000 (the Act). Their claim is based upon the principle confirmed by the Court of Appeal in *Idea Services Ltd v Dickson* [2011] NZCA 14; namely, they claim that they are employed to work *on call* from 4:30pm to 8:00am, during which period they do not receive the minimum hourly rate as required by the Minimum Wage Act.
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> [3] The respondent company denies that the applicants are entitled to be remunerated at the minimum wage rate for the periods that they are on call at the salmon hatchery as they say that the applicants are not *working* during those periods.

[4] The sole ground the applicant relies upon in support of its application for special leave is that set out in s 178(2)(a) of the Act, namely, that a matter may be removed if, "an important question of law is likely to arise in the matter other than incidentally". The applicant says that the question of law arising in the present case is:

> ... whether the respondents are "working" or are "on call" according to the tests set out in *Idea Services Ltd v Dickson* [2011] NZCA 14 when they stay overnight in a house at the salmon hatchery at Takaka and may need to respond to issues that arise in the hatchery during the night.

[5] In *McAlister v Air New Zealand Ltd*,[2] Judge Shaw, in reliance on *Hanlon v International Educational Foundation (NZ) Inc*,[3] summarised the principles to be

[2] (unreported) AC 22/05 at [9].
[3] [1995] 1 ERNZ 1.

applied in dealing with an application for special leave noting, in relation to the need to identify an important question of law:

> 5. The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it.

[6] Judge Shaw also referred to the discretionary element involved in any consideration of an application for special leave stating:

> [10] Even if an important question is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority ... and whether this is a case which will inevitably come to the Court by way of a challenge in any event.

[7] In *Lloydd v Diagnostic Medlab Services Ltd*,[4] Judge Travis accepted the defendant's contention that the facts would determine the case, but His Honour granted special leave to remove the proceedings on the ground that the questions of law raised were important in that the issue had "not been before the Courts directly in New Zealand" and there was therefore "no guiding authority."

[8] In the *Idea Services* case the issue was whether Mr Dickson, a community service worker, was engaged in "work" under s 6 of the Minimum Wage Act 1983, when he was sometimes required to remain at the community home overnight on a sleepover so that he could deal with any issues that might arise during the night involving the residents. A full Court of the Employment Court concluded that sleepovers constituted work. In doing so the Court considered the following factors:

> (a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;
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> (b) the nature and extent of responsibilities placed on the employee; and
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> (c) the benefit to the employer of having the employee perform the role.

[4] [2009] ERNZ 42.

[9] The Court of Appeal agreed with the three factors identified by the Employment Court and with the Court's application of those factors to the facts as it found them. It stated:[5]

> ... In our view, Mr Dickson was clearly working when engaged in a sleepover. The findings we quote at [5] above amply demonstrate the significant restraints placed on Mr Dickson when engaged in a sleepover, the important responsibilities placed on him with respect to the home and those in his care, and the substantial benefit the employer derived from Mr Dickson's role as night carer. It is difficult to see how the home could function as it does without Mr Dickson or similar worker being in attendance overnight. Put shortly, Mr Dickson was at the employer's disposal throughout the period of the sleepover.

[10] In the present case, Ms Radich accepted that the question of law identified by the applicant "will be determined by an application of the tests set out in *Idea Services Ltd v Dickson*" and she conceded that the consideration of the first and third factors in the three pronged test, "will not be unusually complex matters to determine in this case." Counsel went on to submit:

> 11. However, it will be far more problematic to determine and assess the 'nature and extent of responsibilities' placed on employees who are present at a site overnight in order to respond to issues that might arise with livestock. The Applicant submits that the assessment of the nature and extent of responsibilities on such an employee is the basis for there being an important question of law in this case. This is particularly the case where there has been no precedent case law as yet regarding a situation where an employee is present on site in order to respond to issues that may arise with livestock, rather than with disabled persons or other persons (such as motel guests). There are no cases from which either party, or the Employment Relations Authority, can draw any guidance on this question.

[11] In response, Mr Malone challenged the applicant's claim that the case involved an important question of law submitting:

> 13. With respect however Counsel submits that the case before the Court does not involve an important question of law (or) one of wider impact than that involving these two respondents. Instead the applicant's submission ignores the very thrust of the decisions in the *Idea Services Ltd v Dickson* case that there is no prescriptive legal test. Rather each case involves a determination of the individual facts applying to the circumstances against the relevant factors identified.
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> ...

[5] *Idea Services Ltd v Dickson* [2011] 2 NZLR 522 at [10].

> 15. The fact that the decision fundamentally involves a determination and assessment of relevant factual background against criteria established by the Employment Court and confirmed by the Court of Appeal is highlighted by the inability of the applicant to identify any specific question of law that will arise and instead rely on generalisation to the effect that the Court in assessing responsibilities in this case and the effect of such responsibilities on the question of work/non work will provide guidance to other employers.

[12] Both counsel covered other issues in their comprehensive submissions but in essence it was the application of the principles recognised by the Court of Appeal and this Court in the *Idea Services* case that occupied most of the argument. Ms Radich referred the Court to a determination of the Authority dated 16 October 2012 in *Victoria Law anors v Board of Trustees of Woodford House*,[6] which is a case relating to the issue of "sleepovers" in school boarding houses which has been removed to this Court. Counsel drew the Court's attention in particular to the following passage from that determination:[7]

> ... While the issues have been dealt with in depth in the *Idea Services* case, I accept the joint submission of the parties that the Courts' findings have not been extended to other sectors and, in particular, the education sector. I also accept that the determination of this matter could potentially affect a number of other employers in the education and other sectors. Therefore the matter, as its predecessor case *Idea Services* showed, does involve an important question of law.

[13] In response, Mr Malone stressed the fact that, unlike the present case, the parties in *Victoria Law* wished to have the matter removed to the Employment Court and so the transfer was made by consent. He also made the point that there is no evidence before this Court "of any other employees, either of the applicant's or anyone else, whose working circumstances are the same (as the respondents)" and, "any decision in this case will have no wider ramifications than to the parties themselves".

[14] Having carefully considered the evidence before me and the detailed submissions of counsel, I find myself in agreement with Mr Malone. I have not been persuaded that the case does involve an important question of law. Unlike *Lloydd* (see [7] above), it cannot be said that there is no guiding authority on the issue in New Zealand. On the contrary, the legal position has been considered and

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[6] [2012] NZERA Wellington 125.
[7] At [5].

determined at one of the highest levels. That much appears to be acknowledged by the applicant in the way it has framed its alleged question of law by reference to the "tests set out" in *Idea Services*.

[15] Although the *Idea Services* case involved a community service worker, the Court of Appeal did not appear to confine its observations to such workers. It noted that the conclusions it and this Court had come to were consistent with the approach of overseas courts under similar minimum wage legislation. The Court of Appeal made specific reference in this regard to certain overseas cases which dealt with situations involving workers in other employment outside the disability services industry. Reference was made, for example, to cases involving hospital doctors on call overnight, telephone booking services operated by employees from their homes and a case involving a night-watchman required to be on-site overnight but permitted to rest or sleep when not carrying out particular tasks like opening the gate or answering the telephone. The Court of Appeal noted that the approach adopted in *Idea Services* was consistent with these overseas authorities.

[16] It seems to me that the principle confirmed in *Idea Services* has wider application than its application to community service workers involved in sleepovers. The Court of Appeal, in reference to the three factors identified by the Employment Court stated:

> [8] The greater the degree or extent to which each factor applied (i.e. the greater the constraints, the greater the responsibilities, the greater the benefit to the employer, the more likely it was that the activity in question ought to be regarded as "work". The Court said that the question has to be approached in an "intensely practical" way, adopting what was said by this Court in *NZ Fire Service Commission v NZ Professional Firefighters Union*.[8]
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> [9] The Court considered that all three factors applied to a significant degree in this case, and so concluded that Mr Dickson's sleepovers constituted "work" for the purposes of s 6 of the Act. The Court did not attempt to be more prescriptive than Parliament had chosen to be, and we, with respect, think that was appropriate. As the Court noted, legislation applies to circumstances as they arise, and so it would be a brave court that attempted to divine or craft an exhaustive definition of what work meant in 1983, or in 1945 (the date of the Act the current legislation is modelled on), or, for that matter, what it means in 2010. What the Court did do was offer some guidance as to what factors will ordinarily be relevant in deciding whether a person is working. The Court's approach appropriately reflects, we think, the wide variety of work that can be undertaken and the

[8] [2007] 2 NZLR 356 (CA) at [12].

> circumstances in which it may take place. It also acknowledges the fact that what people ordinarily consider to be "work" has changed and will change over time. Parliament no doubt enacted the legislation with these points in mind.

[17] With respect, the observations made by the Court of Appeal in this passage from the judgment in *Idea Services* appear to be of general application and not confined to employment in the disability services sector.

[18] It is clear from the lengthy statement of problem and equally lengthy statement in reply filed in the present case that the factual situation is relatively complex. In my view, the Authority is eminently suited to carrying out the exercise of analysing the facts and applying them to the three pronged criteria identified in *Idea Services*.

[19] For the reasons stated, the application for special leave is declined. Costs are reserved.

A D Ford
Judge

Judgment signed at 4.00 pm on 16 November 2012