IN THE COURT OF APPEAL OF NEW ZEALAND

CA405/2010
[2011] NZCA 14

BETWEEN	IDEA SERVICES LIMITED Appellant	
AND	PHILLIP WILLIAM DICKSON Respondent	

Hearing: 28 October and 13 December 2010

Court: Chambers, Randerson and Stevens JJ

Counsel: C H Toogood QC and N K Dines for Appellant
P Cranney, S Mitchell and A J Connor for Respondent
D B Collins QC, Solicitor-General, J Holden (on 28 October 2010) and E J Child (on 13 December 2010) for the Intervener, the Attorney-General

Judgment: 17 February 2011 14:00:00

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a complex appeal on a band A basis, plus usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Chambers J)

Sleepovers

[1] Idea Services Ltd, the appellant, employs Phillip Dickson, the respondent, as a community service worker. Mr Dickson in this role provides care and support for people with disabilities who live in community homes. He is sometimes required to

do what the parties call “sleepovers”. On sleepovers, Mr Dickson is required to be at the community home overnight so that he can be on hand to deal with any issues that arise during the course of the night.

[2] Under Mr Dickson’s employment contract, he is paid $34 per sleepover, plus his ordinary hourly rate of $17.66 for any time he is required to spend actively tending to the needs of the occupants of the home during the night. If there are no incidents during the sleepover, Mr Dickson simply receives the $34. This works out as between $3.40 and $4.30 an hour, depending on the length of the sleepover.

[3] Mr Dickson filed proceedings in the Employment Relations Authority, claiming he was entitled to be paid the minimum hourly wage prescribed under the Minimum Wage Act 1983 in respect of every hour he was rostered on a sleepover. The Employment Relations Authority upheld his claim.[1] Idea Services filed a challenge in the Employment Court, seeking a de novo hearing of the matter. A Full Court, comprising Chief Judge Colgan and Judges Travis and Couch, heard the case. They agreed with the Authority that these sleepovers constitute “work” for the purposes of the 1983 Act with the consequence that the minimum rate of pay prescribed in the relevant Minimum Wage Orders applied to them.[2] Mr Dickson therefore was entitled to the minimum wage for the entire period of the sleepover. The minimum wage at the time of that hearing was $12.50 an hour. Whether the Employment Court erred in law in its approach to this question is the first issue on this appeal.

[4] Idea Services had a backup argument on which the Employment Court delivered judgment later. Idea Services argued that the 1983 Act was breached only if an employee’s *average* rate of pay over a pay period was less than the prescribed minimum. If one took what Mr Dickson was paid over his fortnightly pay period (a period which included many hours worked at the rate of $17.66 an hour) and divided that by the number of hours worked (including hours spent on sleepovers), the resulting hourly rate exceeded $12.50 an hour. Accordingly, Idea Services had complied with the Act in respect of that fortnight. The Employment Court, by a

1 *Dickson v Idea Services Ltd* ERA Wellington WA117/08, 5 September 2008.
2 *Idea Services Ltd v Dickson* (2009) 6 NZELR 666 [the “work judgment”].

majority, rejected Idea Services' argument and held that the Act required a worker to receive for each hour worked the minimum wage: averaging was not permitted.[3] Whether the Court was right to reject the "averaging" argument is the second issue on this appeal.

Was Mr Dickson working when on his sleepover?

[5] The Employment Court in the work judgment set out the background to this appeal, including the history of Idea Services and its parent organisation, IHC New Zealand Inc.[4] The Court went on to make findings of fact (which cannot be challenged on this appeal[5]) about what exactly was required of Mr Dickson during sleepovers. A somewhat truncated version of those findings follows:

> [12] From 10 pm until a time between 6 and 8 am 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 10 pm. 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.
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> [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.
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> [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.
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> [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:

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3 *Idea Services Ltd v Dickson* (2009) 7 NZELR 121 [the "averaging judgment"]. Judge Travis dissented.

4 See the work judgment at [5]–[10].

5 See the Employment Relations Act 2000, s 214(1).

(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; and

(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.

...

[21] ...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.
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> [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.
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> [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 well-being.

[6] The Employment Court held, on the basis of those factual findings, that sleepovers constitute "work" under s 6 of the 1983 Act. That section provides:

> **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.
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> (Emphasis added)

[7] In deciding whether sleepovers constitute work for the purposes of this section, the Employment Court found it helpful to consider three factors:[6]

(a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;

[6] At [64]–[71].

(b) the nature and extent of responsibilities placed on the employee; and

(c) the benefit to the employer of having the employee perform the role.

[8] The greater the degree or extent to which each factor applied (ie 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*.[7]

[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.[8] 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,[9] 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 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.

[10] We agree with the factors[10] the Employment Court found helpful. We also agree with the Court's application of those factors to the facts as it found them. 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

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7 At [63], citing *NZ Fire Service Commission v NZ Professional Firefighters Union* [2007] 2 NZLR 356 (CA) at [12].

8 At [71].

9 Interpretation Act 1999, s 6.

10 At [7] above.

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 a similar worker being in attendance overnight. Put shortly, Mr Dickson was at the employer's disposal throughout the period of the sleepover.

[11] Mr Toogood QC, for Idea Services, criticised the Employment Court's approach, saying it depended on "nebulous criteria". Mr Toogood questioned whether the Employment Court's approach would allow any employee who is on-call, like a doctor, to claim the minimum wage. The decision, we were told, will have "profound implications for the labour market". The preferable and correct approach is to interpret "work" as meaning the "application of physical or mental exertion in the performance of one's duties". This definition was the "natural and ordinary meaning" of "work" and would be easier to apply in practice.

[12] We think, with respect, that these criticisms of the Employment Court's approach to this issue are wrong. We are not persuaded that its approach (which we endorse) will have "profound" implications for the labour market generally. As we discuss below, it is very similar to the approach taken in other jurisdictions. We note further, in terms of Mr Toogood's specific example, that there are considerable differences between a typical on-call doctor, who is under relatively few constraints, and someone like Mr Dickson while on a sleepover. For instance, Mr Dickson, unlike an on-call doctor, is prevented from leaving his workplace and from seeing friends or family without his employer's permission. He must be constantly available to anyone who might want to see him in his (compulsorily unlocked) room. The Employment Court's approach is certainly more flexible and nuanced than Mr Toogood's proposed interpretation, but, as we explain below, we consider that is to its advantage.

[13] We also reject Mr Toogood's proposed "physical and mental exertion" interpretation of "work". As Mr Cranney, for Mr Dickson, pointed out, Mr Toogood's interpretation would exclude many types of employment from the s 6 definition and so significantly reduce the reach of the minimum wage legislation. Few workers are required to physically or mentally exert themselves at every

moment of their work day. For example, shop assistants, security guards, ambulance officers, fruit pickers in inclement weather, or meat workers during a stock shortage or breakdown will often experience long periods when no mental or physical exertion is required of them. We think it unlikely that Parliament would have intended the minimum wage legislation not to apply to a shop assistant waiting for a customer, a call centre operator waiting for a call, or a fruit picker waiting for the rain to stop.

[14] Mr Toogood next argued that the Employment Court erred by not having regard to the contractual relationship between the parties when assessing whether sleepovers were "work". He submitted that the enquiry as to whether an activity constitutes "work" is determined by, or at least affected by, the particular contractual relationship between the parties. He cited in support *NZ Air Line Pilots Association Inc v Air New Zealand Ltd (No 2)*[11] and *O'Grady v M Saper Ltd.*[12] In the present case, Mr Toogood said, the employment contract could be read as making a distinction between "work", being those periods Mr Dickson is paid $17.66 an hour (for example, whenever he has to actively tend to the needs of the occupants during the course of the sleepover), and other times.

[15] We reject this submission also. The point of the minimum wage legislation is to ensure workers are paid at least the minimum wage and, if necessary, to override private arrangements. Parliament did not intend employers and employees to be able to contract out of the legislation by agreeing between themselves that an employee's functions are not "work". If sleepovers are "work", then Mr Dickson is "entitled to receive from his employer payment ... at not less than [the] minimum rate", "notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service".[13] An employee's employment contract might, of course, be relevant when determining what is actually required of the employee in a particular case. But it cannot be relevant to interpreting and applying the legislation.

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11 *NZ Air Line Pilots Association Inc v Air New Zealand Ltd (No 2)* [2008] ERNZ 68 (EmpC) at [13].

12 *O'Grady v M Saper Ltd* [1940] 2 KB 469 (CA) at 473.

13 Minimum Wage Act, s 6.

[16] We do not consider the two authorities cited by Mr Toogood support his case. The *Air Line Pilots* case was concerned with quite different legislation, namely the Holidays Act 2003. *O'Grady* was concerned with whether an employee was entitled to wages for those periods he was absent from work while ill. It had nothing to do with interpreting what "work" meant in a statute; there was no statute bearing on the question at all. So the issue in that case was naturally resolved by looking to the employment contract. It does not assist us in this case.

[17] The conclusion to which the Employment Court and now we have come is consistent with the approach of overseas courts under similar minimum wage legislation. Mr Toogood submitted that the Employment Court had erred in placing reliance on these overseas cases, which he said "involved different statutory frameworks from that in force in New Zealand". We acknowledge immediately that the statutory frameworks are different, but the cases are nonetheless illustrative of what the concept of "work" entails in the minimum wage area. The fact the Employment Court's and our view is consistent with overseas authority does, at least to an extent, give the lie to the submission that the Employment Court's approach was radical and that it would be unworkable in practice.

[18] We start with the European Court of Justice. In *SIMAP v Consellaria de Sanidad y Consumo de la Generalidad Valenciana*,[14] doctors claimed that the time they spent at the hospital on call overnight was "working time". "Working time" was defined in the relevant Directive as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".[15] This was to be contrasted with a "rest period", which was "any period which is not working time".[16] (We do not consider these concepts to be very different from what is implicit in s 6.) The European Court held that, when doctors were on call and their presence at a hospital was required, they were working.

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14 *SIMAP v Consellaria de Sanidad y Consumo de la Generalidad Valenciana* [2000] IRLR 845 (ECJ).

15 Directive 93/104, art 2 [1993] OJ l307/18

16 Ibid.

[19] In *Landeshauptstadt Kiel v Jaeger*,[17] the Court expressly considered whether time spent on call by a doctor at a hospital, where that doctor was permitted to sleep when he was not required to attend patients, was "working time". The Court, applying *SIMAP*, said it was:

> [63] …the decisive factor in considering that the characteristic features of the concept of working time…are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact…those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties.
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> [64] That conclusion is not altered by the mere fact that the employer makes available to the doctor a rest room in which he can stay for as long as his professional services are not required.
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> [65] …an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on call duty when he is not actually carrying on any professional activity.

[20] The Court distinguished the case of a doctor who is on-call but not required to be present at his or her work place. The distinguishing factor was that a doctor who is required to be at the hospital is "subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required".[18] It will be apparent that the European Court adopted a similar approach to the Employment Court.

[21] The English Court of Appeal had to consider a similar point in *British Nursing Association v Inland Revenue*.[19] The case concerned a telephone booking service. The service was operated during the day by employees at the employer's premises. At night, the service was operated by employees from home. While these employees had to be available to deal with telephone calls, they could otherwise spend their time doing things like reading or watching television. The Court of Appeal held that such workers were "working" throughout their entire shift. Buxton LJ for the Court said:

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[17] *Landeshaupstadt Kiel v Jaeger* [2003] IRLR 102 (ECJ).
[18] At [65].
[19] *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494, [2002] IRLR 480.

> [12] I have to say that not only was it open to the Employment Tribunal and to the Employment Appeal Tribunal to find that the workers were working throughout their shift, but also, *as an issue of the ordinary use of the English language, it seems to me self-evident on these facts that they were indeed so working.* No one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when he or she was actually on the phone. Exactly the same consideration seems to me to apply if the employer chooses to operate the very same service during the night-time, not by bringing the employees into his office (which would no doubt impose substantial overhead costs on the employer and lead to significant difficulties of recruitment), but by diverting calls from the central switchboard to employees sitting waiting at home…
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> [13] …That in the event there may during the middle period of the night be few calls to field is nothing to the point. It is for the employer to decide whether it is economic and necessary to his business to make the facility available on a 24-hour basis. If he does so decide, it is the availability of the facility, not its actual use, that is important to him; and that is what he achieves by the working arrangements described in this case.
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> (Emphasis added).

[22] While this decision was made under different legislation, namely the National Minimum Wage Regulations 1999 (UK), Buxton LJ based his decision on the "ordinary use" of the term "working".[20]

[23] Finally, the Scottish Court of Session in *Scottbridge Construction Ltd v Wright* also came to a similar conclusion on similar facts.[21] This case was also decided under the National Minimum Wage Regulations. The respondent was a night watchman. He was required to be on-site all night, but permitted to rest or sleep when not required to carry out particular tasks, like opening the gate or answering the telephone.[22] The Court held that he was working for the entirety of the shift, noting that:[23]

> …the fact that the respondent had little or nothing to do during certain hours when he was permitted to sleep does not take away from the fact that he was throughout in attendance as a night watchman and required at any time to answer the telephone or to deal with alarms.

[24] Our answer, therefore, to the first issue is that Mr Dickson was working when on his sleepover and his pay for that period must comply with the 1983 Act.

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20 See the italicised passage above.
21 *Scottbridge Construction Ltd v Wright* [2003] IRLR 21.
22 At [2]–[3].
23 At [11].

[25] If the result of this judgment is of concern to the Government, the solution is to have the 1983 Act amended. It must be said that the Act is rather simplistic in its formulation. It is effectively in the same terms as the original 1945 legislation. It is very much premised upon the idea of employees working nine to five, five days a week, a work pattern now enjoyed by, perhaps, only 60 per cent of workers.[24] Employment relationships and the circumstances in which work is undertaken are much more varied these days. The simplicity of our legislation is to be contrasted with the sophistication of the equivalent legislation in the United Kingdom.

Was the Employment Court right to reject averaging?

[26] As we have said, on this issue, the Employment Court was split. The majority rejected Idea Services' submission that compliance with the Minimum Wage Act could be tested by looking at the average rate of pay over an entire "pay period" (in Mr Dickson's case, a fortnight). The majority held that Mr Dickson was entitled to be paid at not less than the minimum wage for each and every hour he worked. It did not matter that his average pay per hour over a fortnight may have exceeded $12.50 (the prescribed minimum then applicable) in particular fortnights.

[27] Where s 6 applies to a worker, that worker is entitled to receive from the employer payment for his or her work at not less than the "minimum rate". Section 4 provides for the minimum rate to be fixed by Order in Council. The relevant order for the purposes of this case is the Minimum Wage Order 2009. Paragraph 4 of the Order provides:

> 4 Minimum adult rates
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> The following rates are the minimum rates of wages payable to an adult worker:
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> (a) for an adult worker paid by the hour or by piecework, $12.50 per hour:
>
> (b) for an adult worker paid by the day, -

24 Statistics New Zealand in its latest survey found 62.7 per cent of employed people usually worked all their hours between 7 am and 7 pm, Monday to Friday: Statistics New Zealand *Survey of Working Life: March 2008 Quarter* <http://www.stats.govt.nz/browse_for_stats/work_income_and_spending/employment_and_unemployment/surveyofworkinglife_hotpmar08qtr/commentary.aspx>

(i) $100 per day; and

(ii) $12.50 per hour for each hour exceeding 8 hours worked by a worker on a day:

(c) in all other cases, -

(i) $500 per week; and

(ii) $12.50 per hour for each hour exceeding 40 hours worked by a worker in a week.

[28] At the hearing before us on 28 October last year, everyone agreed that Mr Dickson fell within category (a). He was a worker "paid by the hour". Following that hearing, it occurred to us that he might in fact be a category (c) man. That was because, while he was undoubtedly paid by the hour for his principal work (as we shall call his non-sleepover work), he was paid by the session for his sleepover work. The suggestion was that this might throw him into the "all other cases" category, in which event it was arguable his entitlements would be tested effectively on a weekly basis. This would not lead to "averaging" as Mr Toogood espouses, but it might nonetheless have led to a "halfway house" whereby Mr Dickson's entitlements would be tested neither by the hour (as Mr Cranney contended) nor by the fortnight (as Mr Toogood contended) but rather effectively by the week.

[29] We invited further submissions on this topic. Mr Cranney submitted we did not have jurisdiction to contemplate this possibility. Mr Toogood and Dr Collins QC, for the Attorney-General as intervener, adopted the suggestion as their fallback positions. In the end, we decided it was necessary to have a further hearing on that point.

[30] Having heard the parties, we are satisfied their original position was correct in testing Mr Dickson's position against para 4(a). In substance, Mr Dickson has always been an hourly worker. The only reason the payment for the sleepover is not expressed on an hourly basis is that Idea Services and Mr Dickson's union, the Service and Food Workers Union, were, at the time the collective agreement was negotiated, operating under a mutual mistake that the sleepover did not constitute

work so that it attracted only an allowance. In these circumstances, it is unnecessary for us to determine Mr Cranney's jurisdictional argument.

[31] In any event, we are not convinced the Executive intended there to be a rigid demarcation between the categories listed in para 4. The essential feature of each of the categories seems to be that workers, no matter how they are paid, must receive $12.50 for each hour worked. The drafter of the order has assumed, for instance, that a worker "paid by the day" will be working at least eight hours a day, for which he or she will receive $12.50 an hour. So too the drafter has assumed that those in category (c) will be working at least a 40 hour week, in respect of which the worker must receive $12.50 an hour.

[32] On this aspect of the appeal, Idea Services' essential argument was that "rate" in both s 6 of the Act and para 4 of the Order means "average rate over a pay period". Thus compliance with the Act must be tested by taking the worker's total pay over the pay period and dividing it by the number of hours worked. Only if the average rate was below the minimum wage rate would there be non-compliance with the Act. Mr Dickson on the other hand said that for every hour of work, he was entitled to the minimum wage, regardless of whether he received more than the minimum wage for other hours worked. "Rate" meant "amount per unit of time".

[33] We agree with Mr Dickson and the majority in the Employment Court on this issue also. We begin with the legislation's words. Section 6 provides that workers to whom the Act applies are entitled to receive payment "at not less than [the prescribed] minimum rate". Paragraph 4 of the Order speaks of "minimum rates of wages". Each "minimum rate" in para 4 is prescribed by reference to a particular time period. The paragraph sets out, as Mr Cranney submitted, an amount [$12.50, $100 or $500] per unit of time [an hour, a day or a week]. Minimum wage orders have always prescribed minimum rates of wages in this way. The 1945 Act, which itself set out minimum rates of pay, adopted the same style.

[34] Mr Cranney's interpretation also sits more comfortably with other provisions in the legislation. Section 8A, for example, requires employers to keep detailed wage and time records for every worker whose minimum wages are prescribed under the

Act. These records include the hours worked each day, the days of the week worked, the wages paid to the worker and the "method of calculation". The purpose of these requirements is to enable workers and labour inspectors to find out what wages are payable and what has been paid. As the Employment Court said:[25]

> If...the sufficiency of payment was only to be calculated over entire pay periods, there would be no reason for s 8A to include a requirement to record the method of calculation or the days on which hours were worked. All that would be required would be the number of hours or days worked during each pay period.

[35] Mr Toogood's interpretation, on the other hand, requires us to infer that, when the Executive says workers should be paid "$12.50 per hour", it really means that workers should be paid $12.50 per hour *on average over their particular pay period*. On this approach, the "pay period" is crucial. If, say, under the collective agreement Idea Services was obliged to pay Mr Dickson $34 at the end of every sleepover, then Mr Toogood accepts the payment would contravene the Act.[26] But if Mr Dickson was to be paid every fortnight, and that fortnight included many hours worked on his normal $17.66 rate, then Idea Services would be in compliance with the Act. Much rides, therefore, on the chosen pay period under the averaging approach. Yet the concept is absent from the legislation. If averaging was intended, the omission of any express reference to it is remarkable.

[36] Finally, the averaging approach would also mean that workers who do exactly the same job are entitled to different amounts of pay depending on how much non-sleepover work they do. Take a worker who does only one or two sleepovers a week and no other work. That worker would be statutorily entitled to considerably more money per hour for his sleepover work than Mr Dickson, despite the fact both workers are doing exactly the same job for exactly the same employer. We consider it unlikely that such an outcome could have been intended by Parliament.

[37] For these reasons, we prefer Mr Cranney's and the Employment Court's approach. Mr Toogood's approach requires something of a mental leap, given its lack of support in the wording of the legislation. We accept that this mental leap

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25 At [62].

26 Assuming a sleepover to be work.

could be achieved if the wider context of the legislation, including its history and purpose, indicated that averaging was in fact intended or that the Employment Court's approach was contrary to the legislation's purpose or purposes.

[38] Mr Toogood made the latter argument, submitting the Employment Court's approach was inconsistent with the legislation's purpose. He pointed to comments made by the Acting Minister of Labour during the second reading of the Minimum Wage Bill in 1945:[27]

> This measure does not leave out anyone; it covers all the people, whether they are covered by an agreement or not...This problem of giving workers a wage to allow them the necessities of life, and nothing more than that, has exercised the minds of all worthwhile statesman in every civilised country...*This Bill provides for an ordinary standard-of-living wage. No wealth is provided for – indeed, one might even call it a bread wage.*
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> (Emphasis added).

[39] Mr Toogood submitted that the legislation's objective was to achieve this "bread wage". It did so by providing for a "minimum wage of general application". The Employment Court's and Mr Dickson's approach did not give effect to this purpose, because it effectively fixed a minimum amount of pay, on an hour by hour basis, rather than prescribing a minimum standard of general application. This meant (we infer) that workers would be statutorily entitled to more than the minimum "standard-of-living wage", if they worked more than the ordinary amount of hours (that is, more than 8 hours in a day or 40 hours in a week, depending on the category the worker falls into).

[40] Mr Cranney supported the Employment Court's assessment that the minimum wage legislation has a number of purposes. One of the purposes of the 1945 Act was to ensure a minimum bread wage for a man working full time with a wife and family. But another important aim was to ensure workers always received a minimum rate of wages for every part of their work; a purpose, therefore, was to counter "exploitation of vulnerable workers, many of whom were employed on a casual or daily basis".[28] The Employment Court noted that both the 1945 Act and

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27 (7 December 1945) 272 NZPD 458, 461.
28 Averaging judgment at [73].

the 1983 Act plainly apply to casual or part-time workers: that is, workers who may not be able to earn a basic “bread wage”.

[41] Again, we find the Employment Court’s and Mr Cranney’s analysis the more persuasive. In particular, the Employment Court must be right in concluding that the legislation was not simply concerned with ensuring a minimum bread wage. The legislation explicitly provides for those situations when an employee works more than the “ordinary” amount: see, for instance, para 4(c), which requires that workers within that category be paid $12.50 for every hour *above* 40 hours in a week they work. If the legislation was solely concerned with ensuring a minimum “bread wage” of general application, there would be no need to make such provision, given that a worker who works over 40 hours will have already (presumably) earned his or her “bread wage”.

[42] Moreover, even if Mr Toogood were right about the purpose of the 1945 Act, it is not obvious why that purpose should automatically be ascribed to the Parliament that passed the current, 1983 Act. (We were not referred, in the comprehensive submissions on this point by the parties and the Attorney-General, to any helpful material on the 1983 Act. Nor have we, in our own researches, found anything helpful.) We therefore do not accept Mr Toogood’s submission that the Employment Court’s approach is inconsistent with the purpose of the legislation.

[43] We now turn to consider Dr Collins’s submissions on this point. The Attorney-General made no submissions on “the work” issue, but did make submissions on “the averaging” issue. The Attorney-General’s essential position was that the words and purpose of the legislation are not “necessarily inconsistent” with averaging and that the “broader implications” of the Employment Court’s decision “may be a factor that favours averaging”.

[44] We have already addressed the first point. We consider here the second. Dr Collins asserted that averaging was “widely assumed to be permissible” prior to the Employment Court’s decision, and that labour inspectors have “traditionally used averaging to test compliance with the Act”. He proceeded to identify various hypothetical employment scenarios in which, he said, the Employment Court’s

approach might entitle people who are not the intended beneficiaries of the legislation – i.e. those who are not lowly-paid – to receive minimum wage payments.

[45] Mr Cranney, an experienced employment lawyer, responded that "no-one had ever heard of the [averaging] theory until it was created for this case, and most unions, workers and employers consider it to be bizarre". While he engaged with and dismissed the Attorney-General's hypothetical scenarios on their merits (persuasively, in our view), he also urged that any issues in relation to other types of workers should be addressed by the courts when and if they arise.

[46] We cannot resolve here the factual question of whether averaging was the norm prior to the Employment Court's decision. If averaging has indeed just been "created for this case", then presumably confirming that the law is what it was always considered to be will not have large implications. If averaging was the norm, however, then the way payment is calculated in some employment relationships may have to change. We cannot, however, address every hypothetical employment scenario suggested to us on this appeal as we would be doing so in the absence of any actual evidence and on the potentially flawed assumption that averaging has previously been considered acceptable. As Mr Cranney submitted, other cases will have to be addressed by the courts when and if they arise.

[47] The Attorney-General also referred us to a number of United States cases on a similar minimum wage provision found in the Fair Labor Standards Act 1938. That Act contains the following provision:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce...wages at the following rates:
>
> (1) except as otherwise provided in this section, not less than $[X] an hour...

[48] The case we were principally referred to, and which we were told reflects federal law,[29] is *Dove v Coupe*, a decision of the United States Court of Appeals for the District of Columbia Circuit.[30] The appeal concerned "whether the workweek as a whole, or each individual hour within the workweek, is the relevant unit for

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[29] See the discussion in *Armenta v Osmose* 135 Cal App 4th 314 (2005) at 322–323.

[30] *Dove v Coupe* 759 F 2d 167 (DC Cir 1985).

determining compliance with the minimum wage prescriptions of federal and local law".[31] The respondents, a pair of limousine drivers, relying on the provision referred to above, claimed they were entitled to the minimum wage for every hour they worked, and that their employer could not simply average out their pay over an entire work week in order to meets its obligations.

[49] The Court held that the "workweek" was the correct "measuring rod" against which to test compliance with the Fair Labor Standards Act.[32] The limousine drivers were therefore not entitled to the minimum wage for each and every hour they worked.

[50] We do not, however, find this case helpful in interpreting our legislation. First, the case is merely authority for the view that the "workweek averaging" interpretation is a "reasonable reading"[33] of that statute, not necessarily that it is the right one. The Department of Labor, the agency responsible for administering the Fair Labor Standards Act, had construed the legislation as allowing them to test compliance by looking to a worker's average pay over a work week.[34] At least at the time *Dove* was decided, courts were required to defer to reasonable agency interpretations of administrative statutes, whether or not the interpretations had been issued with the force of law.[35] This finding of reasonableness in relation to the Department's interpretation of the federal minimum wage legislation was therefore enough to dispose of the case. We note further that the Court in *Dove* repeatedly emphasised that the limousine drivers' interpretation was "open" and "logical" and was consistent with Congress's purpose in passing the law.[36]

[51] Secondly, there are differences between the Federal Labor Standards Act provision and our own legislation. The most important is that the former explicitly refers to a "workweek" as a relevant unit of time: the Act applies to any worker who in a particular "workweek" works for his or her employer. There is therefore some

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31 At 168.
32 At 171–172.
33 At 172.
34 At 171–172.
35 See *Chevron USA v Natural Resources Defence Council* 467 US 837 (1984) and the discussion in *Wool Board Disestablishment Company v Saxmere* [2010] NZCA 513 at [114]–[115].
36 At 171.

greater basis for averaging over that particular unit of time (the "workweek") under the American statute than there is under our legislation. Idea Services' proposed approach, of course, allows any pay period to be chosen, no matter how short, extended or disadvantageous to an employee. As explained above, this concept is absent from our legislation.

[52] While we are grateful, therefore, to Dr Collins for his assistance on this appeal, we are unable to accept either of his arguments. We are satisfied that the majority of the Employment Court was correct in its rejection of the averaging argument.

Result

[53] We dismiss Idea Services' appeal. We consider the Employment Court was correct on both issues. The Employment Court left open the question of remedy. The majority said in the averaging judgment:

> [102] The consequence of our decision is that Mr Dickson is very likely entitled to additional payment for his work. We expect the parties will attempt to resolve issues of quantum by agreement but, in the event that any differences remain, leave is reserved to put them before the Court for resolution by a single Judge.

[54] That is the course the parties will have to follow if they are unable to resolve the outstanding issues.

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