IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 43
EMPC 313/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Plaintiff
AND	SMITHS CITY GROUP LIMITED Defendant
AND	NEW ZEALAND COUNCIL OF TRADE UNIONS Intervenor

Hearing:	11, 12 and 13 December 2017 (Heard at Christchurch)
Court:	Chief Judge Christina Inglis Judge K G Smith Judge M E Perkins
Appearances:	C Milnes and A Dumbleton, counsel for the plaintiff K Dunn and M Mau, counsel for the defendant P Cranney, counsel for the intervenor
Judgment:	8 May 2018

JUDGMENT OF THE FULL COURT

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[1] Every morning before Smiths City Group Ltd opens its stores to customers it conducts a short meeting with sales staff. Attendance at these meetings is expected, but no wage and time records are kept. The sales staff who attend are not paid for their time.

[2] The Labour Inspector considers Smiths City's sales staff who attend these meetings are working, so the company must keep records of the time its employees attend and pay them for doing so.

[3] Smiths City says its sales staff are not working during these meetings and, therefore, it is not required to keep records or to pay staff who attend. As an alternative it says that, if those employees attending are working, it can satisfy the Minimum Wage Act by taking into account commission and incentive payments earned in the relevant pay period.

[4] The Inspector considered Smiths City had breached the Minimum Wage Act 1983 and issued an improvement notice to the company pursuant to s 223D of the Employment Relations Act 2000 (the Act). The company objected and the Employment Relations Authority issued a determination rescinding the notice.[1] The Inspector challenged that determination.

The meetings

[5] For at least the last 15 years every Smiths City store has held a meeting of sales staff each morning before opening for business. Sales staff who are on duty in the morning are expected to attend. During the week the meetings start at approximately 8:45 am and stores open at 9:00 am. On weekends they start at 9:45 am and stores open at 10:00 am. Sales staff are not paid for their time attending these meetings. They are paid from when the stores open.

[6] Smiths City's National Sales Manager, Bryce Jenkins, described the purpose of these meetings as being to give information to sales staff to allow them to be more effective in making sales. The meetings are usually conducted by store managers and discuss store-related business. It is normal to discuss sales targets, monthly promotions, upcoming late nights, customer feedback, company announcements and staff achievements. As well as being an opportunity to impart information to sales

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1 *Smiths City Group Limited v A Labour Inspector of the Ministry of Business Innovation and Employment* [2016] NZERA Christchurch 200.

staff, and to communicate with them in the absence of customers, the meetings set the tone for the day and help build team work.

[7] What is discussed at the meetings is planned because each store manager has a standard template, produced by the company, for them to follow that includes for consideration:

(a) presentation of the sales figures for the store broken down to individual employees measured against targets;

(b) sales promotions;

(c) sales comparisons with the previous day, including the margin earned; and

(d) highlights of good news and recognition of high achievers.

[8] One item in the template is labelled "spinning plates". That colourful description reminds managers to address recurring issues for each store.

[9] While the template can be tailored by each store manager, it is more than a guide. It allows records to be kept of what was discussed and, where a presentation was made by a staff member, who presented it. An example of a presentation was given by one witness who addressed a meeting about two new cameras. She researched them in her own time, for about an hour. At the meeting she described their relative benefits, features and specifications. She was not paid for the time it took to make her presentation, her preparatory work, or for the remainder of the time spent at the meeting that day.

[10] Smiths City considers these meetings to be an integral part of a store manager's job as is illustrated by the retention of completed templates for later use. Smiths City goes so far as to have a regional manager undertake a monthly or bi-monthly check of each store to ensure the meetings are being held.

[11] Despite what is discussed, the meetings tend to be relaxed to the point of being informal. As an example, a meeting was described where one staff member was eating

breakfast, two were reading newspapers and one was texting on a phone. During the meeting a staff member left the room to take a phone call, another got up to make a cup of coffee, and a couple of late-comers arrived after the meeting had finished.

[12] In response to the Inspector's assertions about these meetings, Smiths City drew attention to its flexible attitude to working hours. When a store is quiet employees can take longer breaks or finish early. That flexibility extends to allowing staff time to go to an appointment, such as to the bank, without any record being kept of the absence or any deduction being made from that person's pay.

Expectation to attend

[13] Some sales staff who gave evidence believed attendance at morning meetings was compulsory. One employee said she was admonished between 7 and 10 times for being late to meetings. Another employee said he received a warning for non-attendance. That account was disputed by his manager at the time, who said the warning was not for lateness to the meeting but for arriving at work after the store opened at 9.00 am.

[14] Issuing warnings or admonishing staff for non-attendance would suggest the meetings were and are compulsory. However, Mr Jenkins, and two managers, maintained they were not compulsory and no formal disciplinary action was taken for not attending them. One of the managers said he never attended a meeting when he was a salesman and was not reprimanded or disciplined.

[15] What is clear, however, is Smiths City expected sales staff to attend and made sure they knew that. One manager said he would speak to a sales person who was late to a meeting to ask what had happened to prevent punctual attendance. The fact that this manager would inquire about lateness was well known, because staff who anticipated being late usually sent him a text message beforehand to let him know. He monitored the explanations provided so he could be satisfied about them.

[16] When Mr Jenkins was a store manager he spoke to staff who did not attend meetings. He would not speak to an employee who missed an occasional meeting but this leniency did not extend very far. Missing three meetings led to questions to find out why they were being missed and he would remind the salesperson concerned of

the company's expectation about attendance. Mr Jenkins said he took this action because the meetings provided employees with essential information and it was not fair to other sales staff if the absentee was not "up to speed" with the latest promotions and product information.

[17] A telling observation was made by the managers who gave evidence about this expectation. They regarded those who did not regularly attend the meetings as tending to be poorer performers, and that attitude was undoubtedly conveyed to sales staff. In combination, the company's expectation to attend, and the managers attitude about those who did not, created pressure that brought results. By and large sales staff attended the meetings.

Improvement Notice

[18] On 28 January 2016, the Inspector issued an improvement notice to Smiths City pursuant to s 223D of the Employment Relations Act 2000 (the Act).[2]

[19] Section 223D(1) reads:

> **223D Labour Inspector may issue improvement notice**
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> (1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.

[20] The relevant Acts referred to in that section are listed in s 223(1), and include the Employment Relations Act and the Minimum Wage Act.

[21] An improvement notice is required to state:[3]

> (a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and
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> (b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and
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> (c) the nature and extent of the employer's failure to comply with the provision; and
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> (d) the steps that the employer could take to comply with the provision; and

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2 Nothing turns on the erroneous date of 17 November 2015 on its front page.
3 Section 223D(2).

(e) the date before which the employer must comply with the provision.

[22] The Inspector's notice said Smiths City was failing, or had failed, to comply with ss 6 and 8A of the Minimum Wage Act. Section 6 requires payment of wages at not less than the prescribed minimum rate.[4] Section 8A required an employer to maintain wages and time records but was repealed from 1 April 2016.[5]

[23] The nature and extent of Smiths City's failings were stated in the following three paragraphs of the notice:

> 4.1.1 Any employee who is paid at the minimum wage has actually been paid below the minimum prescribed wage once the extra 15 minutes of unpaid work is taken into account.
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> 4.1.2 The record of hours worked misrepresents the reality of the actual working day and results in an underpayment.
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> 4.1.3 All stores in the Smiths City Group nationwide operate on the same model. This means that all sales staff are disadvantaged by this practice. This is therefore a nationwide issue affecting approximately 450 employees. For the majority of sales staff this issue represents a contractual breach beyond the jurisdiction of the [L]abour [I]nspectorate, but those paid on or near the minimum wage are consistently in danger of falling below this minimum standard. The numbers of individuals who are actually paid below the minimum wage as a result of this practice will vary in each pay period.

[24] Those paragraphs confined the notice to a limited class or group of employees described as being those "…paid on or near the minimum wage". The Inspector was unable to describe the loss he said was sustained by them but, for indicative purposes, the underpayment for a person who consistently earned no more than the minimum wage was stated as more than $800 per year.

[25] The notice required Smiths City to comply with its statutory obligations by starting to record the actual hours worked by employees on each day including before and after store opening hours. The comment about activities after store hours referred to two situations that may have involved sales staff being engaged in other work for which they were not paid. The first situation arose because of tasks employees were occasionally required to perform after a store closed. For example, the normal closing

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4 As fixed by a Minimum Wage Order from time to time; at this time Minimum Wage Order 2015 (LI 2015/40).

5 By the Minimum Wage Amendment Act 2016, s 5; now see the Employment Relations Act 2000, s 130.

time on a week day was 6.00 pm, but sales staff were not allowed to begin activities to conclude business for the day, like closing tills or securing the store, while customers were still present. Those tasks were to be performed after customers had left. Staff were not paid beyond 6.00 pm even if they had to stay late to complete them. The second situation was where staff attended product knowledge sessions, sometimes conducted as a social event in the evening, run by manufacturers or suppliers. Staff were not paid for attending them.[6]

[26] Smiths City was required to comply with the notice by conducting an audit and remedying any established deficiencies in the following way:

> 6.1.2 Conduct an audit to identify where wages have been paid below the statutory minimum. This audit must cover all current and previous employees for the last six years. Calculate arrears of pay below the minimum wage and reimburse those arrears accordingly.[7]

[27] Two further steps were to be taken. First, Smiths City was to provide evidence to the Inspector that it had complied by beginning to record the actual hours worked by each employee; it was to make the record of hours available for inspection. Part of demonstrating compliance was to explain the audit's method. The calculation used to determine arrears was to be provided including demonstrating they had been paid. The final step was to comply before 5.00 pm on 29 April 2016.

[28] In summary, the notice generally described Smiths City's shortcomings in not meeting its obligations under the Minimum Wage Act. It compelled remedial steps to be taken to comply, but did not name the affected employees, instead identifying an imprecise class or group, the membership of which might change from time to time.

Issues

[29] The plaintiff and defendant identified the following issues:

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6 Smiths City objected to the Court considering anything other than the morning meetings because the other situations mentioned were not raised by the pleadings, the ambit of the proceeding had been agreed between counsel and the case prepared on the basis it did not extend beyond morning meetings. We have confined our consideration to the morning meetings.

7 Holiday pay was to be calculated and paid as well.

(a) whether the daily morning meetings constitute "work" for the purposes of s 6 of the Minimum Wage Act; and

(b) if so, whether commission and incentive payments should be taken into account in assessing compliance with the Minimum Wage Act 1983, including:

(i) is there a distinction between commission and incentive payments for this purpose?

(ii) how should commission and incentive payments be applying to a pay period?

Issue (a): Work?

[30] Section 6 of the Minimum Wage Act requires payment for work at not less than the minimum rate but does not define what "work" means. That section reads:

> **6 Payment of minimum wages**
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> 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.

[31] No other statute defines "work" for the purposes of the Minimum Wage Act, but s 6 was considered in *Idea Services Ltd v Dickson.*[8] In *Idea Services* the full Court reviewed extensive evidence about Mr Dickson's work as a community service worker, after his normal duties ended and he began what was colloquially referred to as a "sleepover".

[32] In undertaking its assessment the Court held that deciding if the activity was work turned on a factual inquiry saying:[9]

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8 *Idea Services Ltd v Dickson* [2009] ERNZ 116 (sleepover case); the full Court relied on *New Zealand Fire Service Commission v NZ Professional Fire Fighters Union* [2006] ERNZ 1109, where the Court of Appeal held, in the context of a holiday pay assessment, that determining a working day was an intensely practical exercise.

9 At [63].

> We think the same may be said of s 6 of the Minimum Wage Act which also reflects practical considerations. Each case will therefore turn on a factual inquiry as to what is required by an employer of an employee and whether that constitutes "work" for the purposes of s 6.

[33] In rejecting a contention that no part of the time spent by Mr Dickson while asleep, or while permitted to sleep, was work for the purposes of s 6 the Court said:[10]

> The issue requires a broader consideration of all the facts and we do that under three headings:
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> (a) Constraints on the employee.
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> (b) Responsibilities of the employee.
>
> (c) Benefit to the employer.

[34] In considering the first of those factors, the Court said that the greater the degree of constraint the more likely it would be that the period of it ought to be regarded as work.[11] Mr Dickson was significantly constrained during a sleepover because he could not leave without permission, had to be available to be woken if he was needed by a resident in the home, could not consume alcohol, could not have visitors without prior permission and was not to disturb residents during the night. He could only engage in a very limited range of other activities. His privacy was limited and he did not have access to the comforts and resources of his home.

[35] The remaining two factors also indicated sleepover was work. The Court held that the greater and more extensive the responsibilities placed on the employee the more likely the period was work.[12] Mr Dickson's responsibilities were significant and continuous and he was not relieved of them until another staff member took over in the morning. The benefit to Idea Services was that, without Mr Dickson being on duty, it would have breached obligations to operate the home potentially jeopardising its funding.[13]

[36] The Court's factual inquiry was informed by its evaluation of those three factors leading to the conclusion that the sleepover was work for the purposes of s 6.

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10 At [64].
11 At [65].
12 At [66].
13 At [69].

[37] The Court of Appeal agreed and said:[14]

> The [full] 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 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.

[38] An interpretation of "work" that would have confined its application to "… physical and mental exertion in the performance of one's duties" was rejected by the Court of Appeal.[15] That was because limiting the factual inquiry in that way would unintentionally exclude from the definition of work many types of employment. Few workers are required to exert themselves physically and mentally at every moment of the day. The Court of Appeal concluded it was unlikely Parliament intended the legislation not to apply to, for example, 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.[16]

[39] While recognising jurisdictional differences, the Court of Appeal acknowledged that the full Court's decision was consistent with overseas authorities illustrating what the concept of work entails in the minimum wage area. The Court of Appeal referred with approval to cases where:

(a) the European Court of Justice held that doctors on call overnight were in working time;[17]

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14 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] ERNZ 192, [2011] 2 NZLR 522 at [9] (footnotes omitted).

15 At [11]-[12].

16 At [13].

17 At [18]; citing *SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] IRLR 845 (ECJ).

(b) a doctor on call at a hospital who was permitted to sleep when not attending to patients was engaged in working time;[18]

(c) operators of a telephone booking service performed at night were at work because they had to be available to deal with telephone calls even though, between calls, they could spend time reading or watching television;[19] and

(d) a night watchman required to be on site all night, but permitted to rest or to sleep when not carrying out particular tasks, was working.[20]

[40] Those comparisons led to a conclusion that the full Court's decision was not radical or unworkable.[21]

[41] *Idea Services* has been applied in several cases including *Law v Board of Trustees of Woodford House*[22] and *South Canterbury District Health Board v Sanderson*,[23] both of which were referred to in this case.

[42] *Law* was a sleepover case but *South Canterbury District Health Board v Sanderson* was slightly different because it concerned six on-call anaesthetic technicians who were required to report for duty within 10 minutes of receiving a call. Practically that meant they had to be on site while on call. By analysing the facts of that case, using the three factors that had assisted in *Idea Services*, this Court held the technicians were at work when on call.

[43] Both Smiths City and the Inspector relied on *Idea Services* in determining whether the morning meetings are work but from different perspectives. Smiths City accepted each case would turn on a factual inquiry, but focussed on satisfying that inquiry by applying the three factors identified as helpful in that case. It sought to

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18 At [19]; citing *Landeshauptstadt Kiel v Jaeger* [2003] 3 CMLR 16 (ECJ).
19 At [21]; citing *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494, [2002] IRLR 480.
20 At [23]; *Scottbridge Construction Ltd v Wright* [2003] IRLR 21.
21 At [17].
22 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.
23 *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127.

distinguish the morning meetings from the circumstances that led to sleepovers being considered work in *Idea Services* and *Law*. Central to attempting to distinguish this case was the proposition that Smiths City's sales staff were not constrained or compelled to attend as the employees in the sleepover cases were. If the employees could choose not to attend they were not under any constraint in the way Mr Dickson was in *Idea Services*. There was a refinement to this submission to say that the meetings did not place a "significant degree" of constraint on employees. That refinement was probably an attempt to explain adequately the behaviour expected at the meetings where employees had to sit and listen while in attendance.

[44] The second factor from *Idea Services* (responsibilities of the employee), was also said to support the contention that the meetings were not work. Sales staff did not have any responsibilities placed on them relating to the meetings. That situation was contrasted with Mr Dickson, who had responsibilities for the health, safety and welfare of residents in the home.[24]

[45] As to the third factor (benefit to the employer), Smiths City acknowledged it benefited from being able to address sales staff at these meetings. However, Ms Dunn counsel for the defendant, submitted there was a fundamental point of distinction between this case and the examples presented by *Idea Services*, *Law* and *Sanderson*. In each of those cases staff had to be present to satisfy statutory or regulatory requirements for the operation of the workplace and an obvious benefit flowed to the employer as a result. None of those requirements exist in operating a Smiths City store and attendance at meetings was said not to be critical to the company's continued business. To emphasize this point, a distinction was drawn between morning meetings and other meetings which the company conducted and accepted were compulsory. Attendance at compulsory meetings was, and is, paid for. An example was a compulsory meeting on 1 May 2016 to address health and safety issues.

[46] For the Inspector, Ms Milnes also sought to apply *Idea Services* to establish what constitutes work in this case. While also referring to constraints, responsibilities

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[24] *Idea Services* (EmpC), above n 8, at [16].

and benefits, her submissions were that these criteria are indicative and are to be applied by considering the extent and degree of each of them to the facts of the case.

[47] To address the first factor from *Idea Services* (constraint on the employees), Ms Milnes concentrated on Smiths City's expectation that sales staff would attend. She argued that an overt expectation may be regarded as an instruction and amounts to a constraint on the employee's time. This submission relied on the object stated in s 3(a)(ii) of the Act, of acknowledging and addressing the inherent inequality of power in employment relationships.

[48] To deal with the second factor (responsibility of the employees) Ms Milne submitted that sales staff who attended had to be attentive, remain quiet, and could from time to time be asked to make a presentation. All of that was said to amount to the employees having responsibilities.

[49] The third factor (benefit to the employer) was said to be evident from the meetings being designed to ensure staff were on time when the stores opened, were motivated to sell, were aware of promotions, and were generally able to function as an effective sales force.

[50] Mr Cranney, for the New Zealand Council of Trade Unions, accepted *Idea Services* must be applied and that doing so required a factual inquiry. In this case, he said, that inquiry would be better informed by asking if the activity in question was an integral part of each employee's principal activities. If the answer to that question was yes, the activity was work and must be paid for.

[51] Mr Cranney acknowledged limitations in the usefulness of this method of inquiring into the facts, because all or most work includes preparatory or concluding activities that are not work and should not be inadvertently captured by expressing the inquiry too widely. However, he submitted any difficulties could be addressed in the following way:

(a) preparatory and/or concluding activities are work if they are an integral part of the principal activity;

(b) meetings, including training meetings, are work in any event if they are for the employer and directly related to an employee's job;

(c) it does not matter if work is given the label "voluntary" or "compulsory"; and

(d) an employer who organises, allows, or acquiesces in an arrangement where work is undertaken by its workers is required to pay them.[25]

[52] Support for this method was derived from two cases of the Supreme Court of the United States of America that were used as examples of how it could be applied: *Steiner v Mitchell*[26] and *Mitchell v King Packaging Co*[27].

[53] In *Steiner*, workers in a factory making batteries had to change into work-provided clothes at the beginning of a shift and to shower at the end of it because of the noxious work environment that was a danger to their health. The employer was required by law to provide showers. It also supplied separate lockers for work and street clothes. However, it did not record, or pay for, the time taken to change clothes or shower. There was no dispute that changing and showering were indispensable to production work in the factory. What was disputed was whether those activities were part of the principal activity because they happened "off the production line" and before and after regular shift hours.

[54] The US Supreme Court concluded that the time involved had to be paid for because the activities were an integral and indispensable part of the principal activity of working in the factory. The noxious work environment, and associated health risks, drove that conclusion.

[55] *Mitchell v King Packaging* was decided shortly after *Steiner*. The employer was a meat packer and employed knifemen who supplied their own knives. The knives had to be extremely sharp to ensure the work was properly and safely undertaken. Sharpening happened daily but was performed outside of the scheduled shift and the

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25 Ms Milnes' submissions also supported this approach.
26 *Steiner v Mitchell* 350 US 247 (1956).
27 *Mitchell v King Packaging Co* 350 US 260 (1956).

knifemen were not paid for that time. The Court held knife-sharpening was an integral part of, and indispensable to, the principal activity of butchering, and the employees were working when performing that activity.

[56] Mr Cranney submitted that undertaking the factual inquiry in the way he proposed favoured a conclusion that the meetings are work.[28] Ms Dunn rejected reliance on the method proposed by Mr Cranney, or by drawing an analogy with those United States cases. Both were seen as departing from the precedent set by the Court of Appeal in *Idea Services* which is binding.

[57] We agree that *Idea Services* must be applied and that doing so requires undertaking a factual inquiry. However, Smiths City focussed too narrowly on the three factors used to inform the inquiry in *Idea Services*, to the detriment of the fuller consideration of the facts that is the touchstone of that decision. As the Court of Appeal made clear, determining whether or not an activity amounts to "work" is case specific. The factors considered helpful in undertaking the assessment in that decision need not be, and ought not to be, slavishly applied.[29] There will be cases where confining the factual inquiry to the three factors used in *Idea Services* would produce an anomalous outcome. In those cases a more nuanced analysis is required. In the present case we consider it is helpful to undertake this factual inquiry by assessing if the morning meetings were an integral part of the employee's principal activities as sales staff.

[58] It is self-evident that sales staff were employed by Smiths City to sell its products to customers visiting its stores. The meetings were organised by Smiths City. The sales staff only attended them because they were employed by Smiths City. They discussed matters pertinent to selling Smiths City's merchandise: evidenced by the subjects identified in the meeting templates. The meetings were solely for Smiths City's purposes to enable sales staff to earn revenue for the company, and be more

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[28] He also supported this submission by relying on European cases: *Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security* C-266/14 10 September 2015, *SIMAP v Conselleria de Sanidad y Consumo de la Generalidad,* above n 19, *Landeshaupstadt Keil v Jaeger*, above n 20, *Arbeiterwohlfahrt Der Stadt Berlin v Bötel* [1992] IRLR 423 (ECJ), *Davies v Neath Port Talbot County Borough Council* [1999] IRLR 769 (EAT) and *Edwards v Encirc Ltd* [2015] All ER (D) 344 (Feb) (EAT).

[29] *Idea Services* (CA), above n 15, at [9].

effective in doing so. Being informed about the business, sales figures, promotions, sales comparators and other information provided in those meetings equipped sales staff to undertake their jobs: to sell Smiths City's merchandise. The reason sales staff attended them was because the subject matter was sales.

[59] The meetings were entirely about Smiths City's business. Without them the company would have had to relay necessary business information it wanted to pass on to staff during the shift, at the possible cost of disrupting business.

[60] The informality of the meetings is not material. Any possible benefit to staff by enabling them to earn commission or incentive payments is not material. The potential to earn extra income is an incidental part of the meetings and does not change the character or purpose of them.

[61] We conclude the meetings were, and are, an integral part of each attending sales person's principal work. In reaching this conclusion, we have taken into account *Steiner* and *King Packaging* as examples only of how a factual inquiry may be undertaken. Care is required in considering them and subsequent American decisions, because they interpret and apply the Fair Labor Standards Act 1938 as amended by the Portal to Portal Act 1947.[30]

Applying the three factors from *Idea Services*

[62] If our preceding inquiry uses an incorrect approach to assessing the facts of this case, we are satisfied that robustly applying the three factors from *Idea Services* would produce the same result.

Constraint

[63] We reject Smiths City's contention that its employees were not under a constraint to attend morning meetings or while attending them.

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[30] In particular, the US legislation requires an assessment of whether the integral activity is an indispensable part of the principal activity. We consider the inquiry need not go that far. It has not been necessary for us to reach any conclusions on Mr Cranney's submissions about training meetings, voluntary or compulsory labels, or organising, allowing or acquiescing in activities by employees.

[64] Ms Dunn sought to develop the concept of a constraint in this case by equating it with compulsion. One was said to flow from the other. If staff could choose not to attend, because they were not required to do so by their employment agreements, or otherwise, they could not be said to be constrained in the same way as the employee in *Idea Services* was constrained.

[65] Viewed in that way, sales staff could be said to have attended for their own reasons. We disagree. The expectation to attend, and pressure placed on staff to do so, was direct and forceful. That expectation involved the exercise of power in a relationship with an imbalance of power. The practical reality for sales staff was that to satisfy this expectation, and so as not to be seen as poor performers, they had to attend. That is enough to be a constraint on the time of an employee, in the sense used in *Idea Services*. For those employees making a presentation, the constraint was more direct because they had to attend to talk about the products being promoted.

[66] A constraint was also imposed on staff while attending. Staff had some limited freedom but were not entitled to be disruptive and had to listen.

Responsibilities

[67] Most of the time the employees attending the meetings had no "active" responsibilities to discharge. They were, however, obliged to sit and listen to the work-related information that was being imparted and to absorb it. If it were otherwise it is doubtful Smiths City would have seen any benefit in convening the meetings. Those employees making presentations actively discharged work-related responsibilities by imparting prepared information to their colleagues. While not of the same nature and extent of the responsibilities identified by the Court in *Idea Services*, we consider that the responsibilities disclosed by the evidence in this case point towards the meetings being work.

Benefits to the employer

[68] Finally, the third factor from *Idea Services* is benefit to the employer. This factor points to these meetings being work for all sales staff who attended. The benefit

of the meetings was exclusively enjoyed by Smiths City because it had a cost-free opportunity to prepare its staff for the working day. That was not offset by any potentially enhanced opportunity staff may have had to improve their ability to earn commissions or incentive payments. It was not offset by the occasional opportunity provided to them to have longer breaks when the store was quiet or to leave work during business hours to attend to personal tasks.

[69] Using these three factors we conclude that the morning meetings were and are work.

Conclusion on issue (a): Work

[70] The morning meetings conducted by Smiths City before it opens its stores constitute work within the meaning of s 6 of the Minimum Wage Act.

Issue (b): Commission and Incentive Payments

[71] The improvement notice required payment for qualifying employees. Smiths City said it had complied with the Minimum Wage Act because of the way in which it calculated and paid commission and/or discretionary incentives. Because there is no definition of "wages" in s 6 in the Minimum Wage Act, reliance was placed on the extended definition in the Wages Protection Act 1983 to encompass payments such as bonuses and special payments agreed to be paid for the performance of work.

[72] The company characterised its commissions, and incentive payments, as bonuses and submitted that, as a result, they qualified as wages for the purposes of s 6.[31] Relying on *Gunning v Bankrupt Vehicle Sales and Finance Ltd*[32] as well *Idea Services* and *Sanderson*[33] Ms Dunn submitted those payments should be taken into account when considering Smiths City's compliance with s 6.

[73] While we accept that commissions and incentives qualify as wages that does not provide an answer to the Inspector's notice or satisfy s 6. In *Idea* the full Court,

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31 *Law*, above n 22.
32 *Gunning v Bankrupt Vehicle Sales and Finance Ltd* [2013] NZEmpC 212, (2013) 11 NZELR 240.
33 Above n 23.

and the Court of Appeal, held that the key expression in s 6 is the phrase "rate of wages" meaning each unit of time. The only units of time in that legislation are by the hour, day, and week.[34] Which of those units of time is to be used depends on whether the employee is paid by the hour, by piece-work, by the day or otherwise.

[74] Smiths City's standard employment agreements vary, depending on whether staff are paid by salary, or are permanent employees paid wages calculated by the hour, or are casual staff.[35] The improvement notice was only concerned with permanent employees paid by the hour. Those employees signed employment agreements providing for their normal hours of work being allocated in rostered hours per fortnight. A schedule to the employment agreement provided for an ability to earn commission on sales.

[75] Prior to 2015, the hourly pay rate did not always meet at least the minimum hourly rate as determined by the relevant Minimum Wage Order. From then on the rate was increased to be at least the current minimum hourly rate. A top-up payment was made if it transpired that, in combination, the hourly rate of pay, and commissions, did not bring a sales person's income up to the minimum wage for each fortnightly pay period as calculated by the company. That method of payment was justified by the company because wages, and commission, were earned over the whole pay period which it considered to be the correct interval for this calculation.

[76] Smiths City's practice is indistinguishable from the method of payment, described as averaging, that was rejected in *Idea Services*.[36] In that case the Court rejected a submission that, because wages were paid fortnightly, it was sufficient to assess compliance on the same fortnightly basis. That conflated two separate things: the amount payable and when it was to be paid.[37]

[77] Smiths City's employees to whom the improvement notice was directed were, and are, paid by the hour. Their entitlements under the Minimum Wage Act and

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34 At [38]. From 2014 Minimum Wage Orders have added fortnightly pay intervals but that is not relevant here.

35 The standard form agreements produced in evidence name Smiths City (Southern) Ltd as the employer but no point was taken about that.

36 *Idea Services v Dickson* [2009] ERNZ 372 (wages) and above n 14.

37 At [57]-[58].

Minimum Wage Orders must be calculated using the same unit of time. Commissions and incentive payments were additional income earned over and above the contractual hourly rate not in substitution for it.

[78] Ms Dunn attempted to draw an analogy between the commissions paid by Smiths City and the sleepover allowance payable to the employee in *Idea Services*. That allowance was taken into account but only after the Court first established the appropriate unit of time for payment. Ms Dunn also submitted that *Sanderson* supported this submission in its treatment of an on call allowance, but in that case the same methodology was used as had been applied in *Idea Services*. In this case the commission and incentive payments were not earned for attendance at the meetings, and were not connected to hourly rates of pay generally. They were achieved against targets specified by the company. Ms Dunn accepted that commissions and incentives did not attach to a specified period of hours in the pay period. They were, therefore, supplementary payments different in character from the allowances taken into account in *Idea Services* and *Sanderson*.

[79] *Gunning* does not assist Smiths City's case. It relied on *Idea Services* to reject averaging and included comments suggesting commission would be taken into account in some situations, but did not appear to do so in calculating and ordering remedies payable to the employee.[38]

[80] Smiths City's method of calculation is also flawed because it must have excluded from the pay period the time taken for the meetings that it did not consider to be work. In each meeting the employees made a 15-minute commitment to it, during which they had no opportunity to earn commission or incentive payments. At best they had a future opportunity to earn them but that is insufficient to comply.

[81] We conclude that Smiths City has not satisfied the Minimum Wage Act by paying commissions and incentives.

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[38] At [43] and [44].

Final comments on the notice

[82] Before concluding this judgment, we need to make some brief comments about the improvement notice. In its wording the notice was limited to those employees who were paid "at or near" the minimum wage. Nothing more was said about how to identify employees earning only enough to be "near" to that minimum wage. Submissions about the ambit of the notice concentrated on ensuring its requirements did not go beyond that class or group. We have not been asked to determine the validity of the notice by considering if s 223D required more specificity. Our preliminary view is that the Inspector's powers extend to writing a notice referring to a class or group but, in doing so, it should be as clear as is possible to fully inform the employer concerned of the alleged breach to be remedied. In this case the parties clearly understood what was in issue and we would have been disinclined to find the notice was invalid merely because it referred to a class or group. Specifically, we do not share the Authority's concern that the Inspector was required to identify more precisely the adversely affected employees.

[83] The next point relates to s 223D(2)(d) and (e). Those subsections require the notice to state the steps to comply and by when. Smiths City did not object to being required to undertake an audit and to report the results. Effectively, it has to work out the magnitude of its non-compliance, report its breaches and remedy them. In this case s 223D was satisfied by the notice. Obviously a notice must be as clear and precise as possible but we consider there is no impediment to the Inspector electing to write a notice in the way chosen here.

Variation

[84] Finally, there are two respects in which the Inspector's notice needs to be varied, because it refers to the now repealed s 8A of the Minimum Wage Act and required compliance by 29 April 2016. Section 130 of the Act now provides for time and wage records to be maintained. A variation is required to reflect that statutory amendment and to preserve the purpose of the notice. An amendment to the date for compliance is needed to provide time for Smiths City to undertake the required steps. The notice allowed Smiths City approximately three months to comply. A variation

to the notice to preserve the time previously allowed is needed to ensure what is confirmed is consistent with the original notice.

Disposition

[85] The Inspector's challenge to the determination is successful. The determination is set aside and replaced by this judgment.

[86] The Inspector sought declarations and orders. We declare and order:

(a) employees who attended morning meetings, during their employment with the defendant, were working for the purposes of the Minimum Wage Act;

(b) those employees who attended morning meetings did not receive the minimum wage rate for each hour that they worked;

(c) the defendant has failed to comply with s 6 of the Minimum Wage Act;

(d) the improvement notice is varied to replace references to s 8A of the Minimum Wage Act with s 130 of the Act and to require steps to comply to be completed no later than 9 August 2018; and

(e) the improvement notice, as varied, is confirmed.

[87] The costs of and incidental to this proceeding are reserved. If the Inspector intends to apply for costs he must file a memorandum within 15 working days. Smiths City has a further 15 working days to reply. No order of costs will be made in favour of the intervenor.

K G Smith
Judge
for the Full Court

Judgment signed at 3:15 pm on 8 May 2018