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Workers entitled to be paid minimum wage for each hour when on call

March 2018

Community service workers are often required to undertake sleepovers as part of their role. They must remain on site overnight to be on hand to deal with any issues that arise. The law has been clear since the Court of Appeal's decision in *Idea Services Ltd v Dickson* that a sleepover is *"work"* for the purposes of s 6 of the Minimum Wage Act 1983. Accordingly, a community service worker is entitled to the minimum wage for each hour worked.

The law has been unclear however on whether on call workers are also entitled to the minimum wage for each hour worked. This issue has been given some clarification by the Employment Court in the recent decision in *South Canterbury District Health Board v Sanderson*.

The main issue was whether six anaesthetic technicians (**ATs**), who worked for the South Canterbury District Health Board at Timaru Hospital, are, for the purposes of s 6 of the Minimum Wage Act 1983, at *"work"* when on call.

In its decision, the Employment Court said that the sleepover principle from *Idea Services* can be extended to include on call workers, depending on the circumstances. Under the sleepover principle, the circumstances are assessed by considering the following three factors:

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

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.

The Court emphasised that the greater the degree or extent to which each factor applied, the more likely it was that the activity in question ought to be regarded as work. The Court also said that the assessment has to be undertaken in an intensely practical way.

Constraints placed on the freedom

The Court noted that the key feature of the case was that the ATs had to be ready at any time during the on-call period to respond within 10 minutes. This meant they had to reside away from their homes, which each of them reasonably said impacted on the quality of their family life in significant respects. In the Court's view, that requirement impacted on each of them significantly.

The Court was also critical of the nature of the free accommodation provided by the DHB, as it involved sharing basic facilities with other employees at times, both male and female; and the ATs slept in facilities which they considered to be less comfortable than their own homes. This was not the key factor, however.

Nature and extent of responsibilities

the Court found that the nature and extent of the AT's responsibilities was significant, and at times very

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significant. The Court particularly emphasised the fact that each employee when on call had to be ready to respond promptly at any time to assist in the delivery of surgical services, often on an emergency basis, in circumstances which could impact on the life of a patient.

Benefit to the employer

The Court reviewed previous authorities which held there was benefit to the employer in having its employees undertake sleepover work. In *Idea Services* the Court found that without the presence of community service workers performing a sleepover in each group home every night, the company would be in breach of its obligations to operate the group homes in an appropriate manner and potentially jeopardise its funding. In *Law v Board of Trustees of Woodford House*, sleepover was required by rigorous requirements for school boarding hostels, as well as their management and staffing.

In *South Canterbury District Health Board*, the Court emphasised the fact that DHBs are constituted under the New Zealand Public Health and Disability Act and must operate within the context of the objectives described in that Act. The Court noted that DHB's are required to meet detailed performance and financial targets which are regularly monitored by the Ministry of Health. The Court concluded that DHB operates in a highly prescriptive and regulated environment.

The Court stated that, given that environment, it is inherently unlikely that the DHB would operate its theatre services unless those were considered essential. And having determined that such a service would be provided, the effect of the statutory provisions is that the DHB is monitored to ensure the service is provided according to agreed terms. Since there will be consequences for a DHB that does not do so, the Court found that there is significant benefit to the employer of having ATs on call.

Conclusion

The Court concluded that being on call for the ATs ought to be regarded as *"work"* for the purpose of s 6 of the Minimum Wages Act. This meant each employee was entitled to be paid minimum wage for each hour in the on call period, less hours of call back.

This case provides a very useful guide as to how the sleepover principle will be applied. It is important to remember however that a practical assessment of the facts is required to determine whether the on-call work constitutes *"work"* for the purpose of the Minimum Wage Act.

If you would like more information regarding the above, or have any questions, please contact us.

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