

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 117/08  
5105496

BETWEEN PHILLIP WILLIAM DICKSON  
Applicant

AND IDEA SERVICES LIMITED  
Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for the Applicant  
Michael Quigg and Tim Sissons for the Respondent

Investigation Meeting: 2 July and 4 August 2008 at Wellington

Determination: 5 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is a test case about community support workers conducting sleepovers in accordance with the parties' collective employment agreement. Mr Dickson and the Service & Food Workers' Union claim that community support workers like him are entitled to be paid the minimum wage provided under the Minimum Wage Order for sleepover duties, rather than the lesser sum they are paid by way of allowance. Sleepovers are where workers sleep over in domestic homes lived in by Idea Services Limited's (Idea Services) clients, so as to be on hand should their services be required. While Mr Dickson was the only applicant, his circumstances apply to a huge number of other community service workers (CSWs) conducting sleepovers. The potential liability for Idea Services and consequently its owner, the IHC could possibly afford to pay. As agreed by the parties the Authority's investigation at this stage is to determine liability, not quantum.

[2] This issue has been alive for many years. It is of concern to the Authority, although not relevant to this determination, that while the union has been raising this matter with IHC since at least 2001, it has taken until now to support a claim in the Authority. The Authority is designed as a low level investigatory body ideally suited to dealing with such claims speedily, so as to help provide much needed certainty to the parties. This matter could therefore have been cleared up years ago, to the benefit of all parties, as well as the end funder of the services. In any event, at the time of the negotiation of the latest collective agreement the parties were aware that whatever agreement they reached over the sleepover allowance, it would be challenged by the union as being in breach of the Minimum Wage Act.

### **The Facts**

[3] The IHC is the largest provider of community based services to people with intellectual disabilities. Idea Services is a one hundred percent subsidiary of IHC and provides such services on IHC's behalf. The basic premise behind this is to separate the service provisions to intellectually disabled clients run by Idea Services Limited from the IHC's advocacy on behalf of the needs of intellectually disabled people and their families.

[4] The Government provides the majority of funding (being over 98%), although users of the services also pay some fees.

[5] The IHC has developed group homes in the laudable aim of trying to integrate intellectually disabled people into normal life and society as much as is possible. The provision of support workers at these homes allows the clients to live in a manner very similar to a flatting situation, but with appropriate safeguards provided - in essence by the community support workers, whether on duty or on a sleepover.

[6] Residential services provided by Idea Services cover about 3,300 people who live in group homes and/or supported living. Mr Dickson is a community support worker engaged under a collective employment agreement with Idea Services. He works in Otaki and Levin.

[7] The role of a community support worker is described in the collective contract under clause 3.1.1 in the following terms:

*The primary function of a CSW is to support, care, educate and encourage individuals and groups of people with an intellectual disability in their daily living situation; whether it be at home, at work, school, day programme or in social, leisure and educational time.*

*CSW staff are expected to undertake their full CSW role for the service employed in, consistent with the CSW Level attained.*

[8] The current provision for sleepovers is provided in the collective agreement as follows:

#### *4.4.2 Sleepover Allowance*

*4.4.2.1 All residential staff are required as a condition of employment to be available to sleepover for the purposes of being on call during the night. In recognition of this requirement an allowance of \$34.00 per sleepover will be paid.*

*4.4.2.2 The sleepover allowance does not take away the employee's entitlement to additional payment at the appropriate rate where work is required during a sleepover.*

*A minimum payment of one hour is to occur where work is required during the period of the sleepover where justified by an incident report.*

*4.4.2.3 A sleepover shall not exceed ten hours in duration.*

*4.4.2.4 Where sleepovers are required a separate furnished bedroom shall be provided by the employer for this purpose including a lockable cupboard/drawer for personal effects and a bed in good repair.*

*4.4.2.5 No employee shall be required to sleepover on a regular basis on more than six nights per fortnight or be required to sleepover on the night preceding days off, without consent.*

[9] Ordinary hours of work are not to exceed 80 hours in any 10 days in any pay fortnight without the payment of overtime. Workers should be rostered for community support work at least four weeks in advance.

[10] The minimum rates for community support workers are set in the collective agreement on both a fortnightly and hourly basis, with the fortnightly rate equating to 80 hours per fortnight. Under clause 6, full time employees are those employed to

work for 80 hours per fortnight. Such employees will be paid the fortnightly wages specified elsewhere.

[11] It is clear that in order to ensure the safety of people living in group homes such as the one supported by Mr Dickson, that the sleepover arrangements are required. Only in about 4% of sleepovers, however, is there a claim made for work actually done. While employees may be loathe to claim for small amounts of work required, the fact is that they are entitled to do so and it is therefore inappropriate to consider those occasions.

[12] Mr Dickson is similar in many respects to many community support workers, but he is contracted for 77 rather than 80 hours per fortnight. In addition, he currently does seven sleepovers per fortnight. Mr Dickson works in the clients' domestic home until 10pm. Sometimes Mr Dickson is unable to complete his duties before 10pm, when the sleepover starts. He is able to claim additional working time for that time and if he has concerns about the amount of work he is required to do then he is entitled to claim for overtime. His claim of regularly having to finish off his working duties at the commencement of the sleepover period is therefore not relevant to the issue before the Authority.

[13] Mr Dickson is able to attend to whatever activities he wishes during the course of the sleepover provided he does not leave the premises, drink alcohol or have unapproved visitors. For instance, he may read, watch television or sleep. Mr Dickson's sleepover is generally uninterrupted until its conclusion at 7am, unless he is working in one particular house (which he tries to avoid), in which case he is regularly woken.

[14] There is some dispute between the parties about the availability of the home's telephone for Mr Dickson's private use. I accept that if toll calls are made, then the employee is expected to pay for them, but in other circumstances, an employee is entitled to reasonable use of the phone.

[15] While I accept that Idea Services provides as comfortable a bed and sleeping environment as possible, the fact is that the employees are sleeping in the employer's bed on the employer's premises and not their own beds.

[16] In the normal course of events, however, Mr Dickson is not required to do any physical work on most occasions and when he does so, he can and does claim for it, and

is paid, provided he files an incident report. I accept that the incident reports are important in order for Idea Services to know what client issues there are in the house.

[17] I also accept, however, that it is possible for community support workers, particularly those who are light sleepers, to be woken during the course of the night by clients moving around the house. In this sense, given their role to support clients, it would be appropriate for community support workers to take account of unusual noises during the night. After all, they are there to care for intellectually disabled clients. They retain responsibility for those people in their care, whether asleep or not.

[18] Because this is a test case, it has been impossible to resolve in mediation or by discussion between the parties. It therefore falls to the Authority to make a determination. In making my determination, I take account of and accept (but do not repeat) the reasoning in the recently issued determination of my colleague, Mr Alastair Dumbleton, in *Harding v. Spectrum Care Trust* AA314/08, 5107611, 1 September 2008.

### **The Law**

[19] The only question at issue is whether or not attendance at a sleepover constitutes work for purposes of section 6 of the Minimum Wage Act 1983, which provides:

*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.*

[20] As explained below, I note that the term *work* in s.6 does not appear to have been closely analysed. This is not so in relation to the law over payment for public holidays. The Holidays Act 1991 provided that additional payments were required if an employee works (in accordance with his or her employment agreement) on any part of such day. While work was not defined (similar to the Minimum Wage Act), unlike in the Minimum Wage Act there is reference to the phrase, in accordance with his or her employment agreement. The Holidays Act 2003 has added, under s.12 (3), various factors, which are not present in the Minimum Wage Act, to take into account.

[21] The Full Court in *NZALPA v. Air NZ Ltd* unreported, Travis and Shaw JJ, AC4/08, 19 March 2008, held that the approach to the question of whether a day would

otherwise be a working day is an intensely practical one. The Court referred to various dictionary definitions of *work* as set out below in paras.[29] to [32]:

[29] ... *Black's Law Dictionary, 8th Ed defines work as:*

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

...

[30] *Amongst the many meanings given in the 48 pages defining "work" in the Oxford English Dictionary online, one finds the following:*

... to bestow labour or effort upon; to operate on: various connections and shades of meaning "to do one's ordinary business; to pursue a regular occupation; to be regularly engaged or employed in some labour trade or profession etc".

[31] *In the more simple version, the Concise Oxford Dictionary defines "work" as:*

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

[32] *From the dictionary definitions it would appear that "work" carries the connotation of actually being involved in physical or mental exertion in the performance of one's duties. That is likely to be the meaning to be ascribed to "works" in s50(1).*

[22] It was also held at paras.[36] to [38] that

[36] *We are not persuaded by Mr Harrison's argument that the definition of a ToD ensures that everything done by a pilot following the pilot's departure from home base and the pilot's return, whether or not actual duties have been performed, amounts to "works" for the whole period of the ToD. Layovers which do not involve the performance of any duties on behalf of the company after a "series of flights and/or a series of duty periods" – to use the definition in the 2002 CA, are not periods when the pilot "works" for the purpose of s50(1). Were significant restrictions imposed on the pilot during the layover, analogous perhaps to standby duties, the position may well have been different.*

[37] *Although the company is required to provide a minimum rest period there is no corresponding obligation imposed on the pilot, other than the general obligation to be fit for return to flying duties as rostered.*

[38] *The position would also be different if the pilot was directed to perform duties during the layover ...*

[23] Standby duties involve personal attendance by the pilot at an airport. Such duties are comparable to a sleepover in that attendance is required without there necessarily being any physical duties to complete.

[24] *O'Brien (Labour Inspector) v. Guardian Alarms (Auckland) Ltd* [1995] 2 ERNZ 170 was another holiday pay case. The Court held that an employee may be said to be required for work when he or she is needed to do some work, even if (in terms of the contract), turning up to perform such work may be optional. The Court held at 175:

*There is no doubt merit in the argument that the employee could not call the day his own because he was at risk of being called out. He was in a quite stressful situation. Looking at the day of the public holiday in advance, it can be seen that he could not commit himself to any time-consuming activity with any confidence that the activity would not be interrupted by the pager and need to be curtailed as a result of the succeeding telephone call made in obedience to the pager. The concern of the labour inspectorate for the employee is understandable. Looking at the day in arrears, however, it can be seen that if the employee had taken a gamble and had undertaken a leisure activity, taking his pager with him, he would have been able to complete his activity on every occasion except two in that 3 year period. On those two occasions the respondent complied with its obligation to give him a day off in lieu later on. Equally understandably, the respondent points to the fact that the employee did not do any work for it on the days in question, and objects to paying him an additional day's pay, having already paid him for the day as a paid holiday.*

*As a Court of equity and good conscience, this Court always endeavours to look at questions of fact and degree and leans towards hindsight in preference to using the gift of foresight to speculate about the future. It is all a matter of hindsight and...work commitments did not interrupt Mr McQuinlan's enjoyment of a public holiday. The only restriction was that he had to remain within about an hour's drive of the central business district – being the approximate reception area of the respondent's telepager. There is no evidence of any activity that Mr McQuinlan felt that he had to forgo on any specific day, but I accept that he most likely suffered from apprehension. There was also the potential of the kind mentioned by Mr Wilkin, such as the possible restriction on taking advantage of a cheap fare to Australia for a long weekend. However, as Mr Mitchell pointed out, the respondent's obligation was, at most, to provide the day free of work cares and not the whole weekend.*

*It is possible to envisage situations in which the restriction on the employee's freedom of action will be so great that it can be said, for all practical purposes, that the employee has not had a whole holiday because of a requirement to be ready, willing, and able to return to work at short notice. There could be situations in which an employer would be obliged to provide the employee so required to be on call with another free day from that responsibility. However, that cannot be said in a case like the present where the employee was provided with a car, help with payment of the telephone rental, and a portable pager capable of receiving communications over a reasonably extensive area.*

*In addition, the expectation was not that the employee, on receiving a message, should turn out at once but only that he should do so within 2 hours. In fact, he was called upon only rarely and it must have been apparent to him that the statistical probability of being called out was relatively low, although the possibility was quite real.*

*In essence, the applicant's case is that the holidays that Mr McQuinlan enjoyed were not qualitatively whole. I am not prepared to hold that it was the intention of Parliament to do any more than secure to workers the enjoyment of public holidays that could be described as quantitatively whole. All that the Act guarantees them is a holiday on pay. Did Mr McQuinlan have a holiday on pay each of the days called into question by the inspector? I believe so. It had to be a whole holiday and not a partial holiday. It had to be a whole day taken as a holiday, and in this context a holiday must be taken to be a vacation day, a break from work, a day when no work is done. I find as a fact that on the days which are concerning the labour inspectorate, no work was done by Mr McQuinlan. On the two public holidays on which work was done by him, he was paid at the contractual rate for such work and was, in addition, provided with a whole holiday in lieu and on pay.*

[25] Both parties relied on *O'Grady v. M Saker Ltd* [1940] 2 KB 469 where McKinnon LJ held the following:

*The issue as to payment for illness must be dependent on the terms of the contract. The right to wages depends upon whether the consideration therefore has been performed. It must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work, or whether the mere readiness and willingness, if of ability to do so, is the consideration.*

[26] In *O'Grady* it was held that it was an implied term of the contract that the employee would not be paid when ill, especially in light of the fact that he did not expect to be paid. Mr Quigg relied on the case to demonstrate that the parties had contemplated and agreed that sleepovers were not work. Mr Cranney relied on it to show that an employee such as Mr Dickson was providing consideration (for which should have been paid) by his readiness, willingness and ability to work if required.

[27] Turning to cases involving the Minimum Wage Act, *Mills v. Patrick t/a Cedar Park Motor Lodge* (unreported, Finnigan J, A68/93, 20 September 1994) was a case involving a motel manager who was bound to *be in attendance 24 hours per day seven days per week*. Mrs Mills claimed, however, only for those hours that she said that she had worked, namely 14 or 15 hours a day seven days per week. Of relevance is that Finnigan J noted that:

*...the contract itself and the performance of it by the parties clearly raise the question whether in that relationship Mrs Mills was an*

*employee at all. There are many features in the contract itself and in the evidence which would lend support to an argument that her contractual status was outside the definition of worker in the Labour Relations Act 1987, and for that matter outside the terms of the Minimum Wage Act 1983.*

[28] Finnigan J felt constrained, however, to deal with the appeal on the same footing as that argued in the Tribunal, i.e. hours worked. He held:

*In the present instance the parties agree that Mrs Mills would live on the premises and be in attendance every day of the year. They were silent about what hours they would consider as hours when she was not considered to be working. The evidence makes it clear that the silence is deliberate. Mrs Mills was required to be present on weekends and at any hour of the day, and to get out of bed at any hour of the night if guests or other motel business required that. In this she was not different in principle from the firefighter in the case cited above who was required to remain on the station premises, but for more than half of the 84 hours per week that he was so required, was in the eyes of the Court free to go about his own business until required to attend one of his contractual duties. That being so, he was found not to be earning wages when not actually working. This basic principle was the foundation of Mrs Mills' case in the Tribunal.*

*The principle requiring payment of wages when the employee is 'ready, willing and able' to perform this contractual obligation, illustrated by the cases referred to me and named above, does not in any event apply to help Mrs Mills in the present case. It was her contractual obligation, freely assumed by her, to be 'ready, willing and able' 24 hours per day 365 days per year. Not even she is claiming entitlement to wages for all these hours. Having said that, I note that the evidence does not disclose any instances of her being 'ready, willing and able' to perform any of her prescribed duties at a time when the employer was not able to make those duties available to her. Had that occurred, she would have been entitled to remuneration whether she had performed the duties or not.*

[29] I conclude that *Sealord v. NZ Fishing Industry Guild* [2005] 1 ERNZ 535 can be distinguished, as the finding over when moneys become payable for wages under an employment agreement does not address the issue of what constitutes work under the Minimum Wage Act.

[30] The High Court dealt with the case of Russian seafarers in dispute with their employer when their wages were not paid for many months in *Udoenko & Ors v. Karelrybflot* (unreported, Young J, 24 April 1999, AD90/98). One of the seafarers, Mr Udoenko, who was master on a ship run by Karelrybflot, made a claim under the Minimum Wage Act. Young J recited relevant portions of the Minimum Wage Act 1983 and the applicable minimum wage order. He compared that with the contractual obligations of the parties. Mr Udoenko claimed that the wages book did not

accurately reflect the hours worked, as demonstrated by the ship's logs. Karelrybflot considered that in terms of the hours actually worked by the men (that is while they are actually physically engaged in the operation of the vessel), the contractual stipulations were generous. It painted a picture of the men on the whole spending most of their time drinking coffee. The Judge also noted some difference, at least in the eye of the Karelrybflot witnesses, between the maritime concept of being on duty and the concept of hours of work in terms of both the contract and the minimum wage legislation. The Judge held at p.32:

*The debate as to the actual hours worked seems to me to be a little artificial. The men were required to be available for duty while the vessels were at sea on a 24 hour basis. Although the practical exigencies of the situation are no doubt different when the vessels were in port, the men were still subject to the control and direction of the masters and at least in a very general sense (in that they could be directed to assist or work) were on duty.*

[31] The Judge went on to hold at p.34 that:

*The Minimum Wage Order... must be applied in terms of how it was contemplated under the relevant contracts of employment that the particular men would be paid.*

[32] He concluded that in terms of the contract the men were to be paid by the day pursuant to one or more of the formula provided in the contract and therefore applied the Minimum Wage Order accordingly.

[33] In assessing quantum awards, the Judge dealt with Mr Udovenko's claim during the period he was in port in the following way (at p.45-46):

*The general duties of Mr Udovenko involved, in theory being on duty for a 24 hour period and then being off for two days. Until 26 October there were only two officers available for watch duty, so during the period 1 October 1997 until 26 October 1997 Mr Udovenko was working on a two day and not a three day cycle.*

*For the period 11 to 31 October, a bridge log is available and this supports Mr Udovenko's claim.*

*On the evidence, therefore, Mr Udovenko worked an average of 12 hours a day (in the sense that he was on duty) between 1 and 26 October (312 hours) and further 40 hours between 27-31 October. The total hours for this period are therefore 352 hours.*

*Under the Minimum Wages legislation, he is entitled to a minimum payment of \$7 per hour for 352 hours if he is entitled to be paid on the basis of when he was on duty, or alternatively for 31 days at \$56 a day if a daily rate is appropriate. The daily rate calculation under the*

*Minimum Wage legislation is \$1,736 (31 x \$56). If he is entitled to be paid at \$7 an hour for each of the hours that he was on duty he is entitled to \$2,464 (352 x \$7).*

*I rather think that the actual work Mr Udovenko was required to perform while on watch was comparatively limited (generally preferring, on this point, the evidence of the Karelrybflot witnesses). In those circumstances, I do not think that Mr Udovenko can fairly say that he worked for all the hours on which he was on duty, most of which he undoubtedly would have spent in his cabin. On that basis, I think that his entitlement under the Minimum Wages legislation is \$1,736 ...*

*It will be noted that I have not applied Mr Udovenko's contractual hourly rate to the actual hours worked (in the sense of being on duty). I have not done that because I think that it is clear in terms of the contract that the entitlement is for 4 hours a day while in port, with an allowance for any relevant crew deficiency, and \$9.40 per notional hour. This is irrespective of the actual duties or actual hours worked.*

[34] While there was no analysis of the meaning of the word *work* in s.6, Young J was not prepared to accept that Mr Udovenko's hours on duty all constituted work for the purposes of the Minimum Wage Act. In terms of his analysis that a daily rate was applicable, he limited Mr Udovenko's entitlement to the equivalent of 8 hours per day work rather than the 12 hours Mr Udovenko claimed.

[35] The judgment was appealed to the Court of Appeal by Karelrybflot. The Court of Appeal (*Karelrybflot v. Udovenko & Ors* [2002] NZLR 24) did not directly address the meaning of s.6 either. It focused instead on the applicable minimum wage order and the difference between hourly and daily rates. It concluded that the workers were hourly workers rather than daily workers for the purposes of the minimum wage order. In so doing, the Court of Appeal referred to the workers' entitlements under the minimum wage order to *be paid the minimum rate only for time actually worked in reliance on Hopper v. Rex Amusement Ltd [1949] NZLR 359, 368-9.*

[36] Of interest is that the Minimum Wage Act 1945 then applicable deals with work in exactly the same way as now. Both parties relied on *Hopper*. In *Hopper* the Court of Appeal merely had to deal with the issue of whether an employee was an hourly or weekly worker.

[37] From these two cases I conclude that the words *actually worked* relate to whether a worker is entitled for whole or part-payment of an hour or a day or a week under the minimum wage order. What *Karelrybflot* and *Hopper* make clear is that workers relying on a minimum wage order only get paid for part of an hour, part of a

day or part of a week if they actually worked only part of that hour, day or week. The Court of Appeal did not, therefore, appear to specifically address the issue of whether in s.6 of the Act the word *work* means hours actually worked.

[38] I therefore conclude that neither of the *Karelrybflot* cases gives particular guidance as to the meaning of the term *work* which may be applied to Mr Dickson's circumstances. By contrast, although the Employment Court's Judgment in *Air New Zealand* related to the Holidays Act rather than the Minimum Wage Act it is a Full Court decision which post dates *Karelrybflot*. It is explicitly recognised in *Air New Zealand* that the application of significant restrictions on a worker affects the issue of whether any particular situation may be regarded as work or not.

[39] The overseas cases relied on by Mr Cranney are all premised on different legislation, which generally provide for meal and rest breaks, which is quite different from the New Zealand legal position at the time of the investigation meeting. I therefore decline to take any account of them in my analysis.

### **Determination**

[40] Whether an employer's requirements of an employee are sufficient as to constitute work under the Minimum Wage Act in any case depends on the facts and it is a truism in employment law that each case turns on its particular facts. Such is the case here. The cases make it clear that while there are some situations which are clearly work (such as being ready, willing and able to work while on roster and being required to be in attendance at one extreme), there are others which are not work, (such as being at home on call but having almost total freedom of action at the other extreme). I note here that employees are usually paid for the whole period they are at work, even though they may not be engaged in mental effort or physical exertion for the benefit of their employer. People daydream, discuss current affairs and attend to their ablutions in the course of work, during which times they continue to get paid. Similarly, staff might be expected to attend to business if it comes in, but have little or no physical duties to do otherwise, such as may occur from time to time with shop assistants, although I accept that workers will normally be expected to be alert to the employee's interests, such as ensuring there are no shoplifters, etc.

[41] A line must be drawn somewhere between the above extremes in any particular case. As noted above, consideration may in some cases be provided simply be

provided by a worker being ready, willing and able to work (*O'Grady*), rather than to have to do actual work. It is also clear from the *Air New Zealand* case that the degree of constraints on an employee's freedoms and the level of responsibility required of him or her is important.

[42] In my determination I adopt the fully reasoned, general approach to principle set out in *Air New Zealand* with respect to what constitutes work, in preference to the approach in *Karelrybflot*, to the extent that there is any inconsistency, on the basis of the analysis above and in *Harding*. In determining whether or not any particular activity or requirement of an employee by an employer constitutes work in terms of s.6 of the Minimum Wage Act I therefore rely on the following factors. First, the terms of the employment agreement (*Karelrybflot*). Second, the likelihood of interruption or requirement to attend to work duties (*Guardian Alarms*). Third, the constraints placed on an employee's freedom of activity in relation to being on call, or other expectations by the employer (*Air New Zealand*).

[43] In terms of the constraints or freedoms that an employee has, a key one is whether or not they are required to be at the workplace or whether they can remain at home, on call. Next is the importance of the reason for the employee's presence. For example the need to be available on site in order to protect property against burglary or to take customer calls, is not as important as to look after the welfare of people who cannot properly look after themselves. By contrast, it may be that a person is not required to be at the workplace for any particular reason except that because of the nature of the physical duties expected of them they cannot be anywhere else, such as if they are required to remain on board during fishing expeditions of more than a day.

[44] The next important factor is whether or not an employee is entitled to sleep or not during the period they are alleged to be working under the Act. The next issue is the degree to which they are free to undertake activities that would not normally be allowed at work, such as taking alcohol or sleeping pills. Also relevant is the degree to which social contact is allowed. The final factor is the degree of comfort afforded to workers.

[45] Clearly there are any number of possible scenarios in relation to whether the work test has been met for the purposes of s.6 of the Act. I assess some here on a sliding scale to help determine where Mr Dickson's situation falls.

[46] An employee who is on call does not meet the test for work under s.6. Such employees are not required to be at the workplace but to be available to return if called out. The only other requirement of them is to be in a fit state to meet such callout on assignment, as in the *Air New Zealand* case.

[47] It seems clear from the *Mills* case and *NZ (etc) Fire Brigade Officers' etc and NZ Fire Brigades Employees' (etc) Application for Award* (1965) BA 1496, that there are or were occupations such as moteliers and fire-fighters where workers must be ready to undertake work when required when "off duty", although there are no particular constraints put on their use of time over such extended periods. Here the workplace is where they and their families live. In the absence of specific duties being undertaken such off duty periods have been held not to constitute work.

[48] Another scenario is where workers are on assignment overnight from time to time and even for longer periods. They are away from their family, but are otherwise free to do as they wish when not conducting work engagements, and this does not constitute work.

[49] Another area when it has been held to not constitute work involves seafarers. Seafarers have always been treated as part of a particular specialised industry, because of its own peculiarities, with its own branch of the law (Admiralty) and many industry-specific International Labour Organisation conventions. Such workers are not required to do anything in particular when off duty, but are not able (for obvious reasons) to be with their families, are not able to partake of alcohol and are otherwise restricted in their recreation because of their location, unless in port and able to leave. It is a matter of evidence whether actual work has been required, even when on duty (*Karelybflot*).

[50] The next category is that of Mr Dickson and others in similar circumstances.

[51] I note here that while the union is entitled to bring its claim that the sleepover arrangement is in breach of the Minimum Wage Act, it must do so in the context that it has freely agreed to the sleepover allowance in its collective agreement, whatever implications may flow from that choice. Clearly while the parties' agreement cannot constitute a contracting out of the Minimum Wage Act, it is relevant for determining what may or may not constitute work in a particular employment situation governed by the collective agreement. The agreement could not be clearer that the parties intended that employees only be paid their regular hourly rate when *work is required* and is

justified by an incident report. It therefore can not be said that Idea Services expects Mr Dickson to physically or mental exert himself in its interests without payment for those particular periods. The issue is rather whether the term work under the Minimum Wage Act may in the circumstances be wider than the simple definition suggested by the Employment Court in *ALPA* para.32, as it itself envisages in para.36.

[52] The key for determination of the term work under the Minimum Wage Act in terms of the parties' collective agreement is the substantial restriction on Mr Dickson's freedom to meet the requirement for Idea Services to have 24 hours a day, 7 days a week care for the clients. In essence Idea Services must maintain supervision of its clients in one way or another. While it may be that Mr Dickson is a committed carer of the clients of Idea Services, the requirement of him to sleepover is part of his employment and therefore may be seen as part of his work.

[53] If Idea Services wanted to engage volunteers or contractors to conduct such work and pay them an allowance there would be no problem under the Minimum Wage Act. I note that volunteers would not necessarily be appropriate for sleepovers, however, because of the strong desirability (if not necessity) of continuity of care. It may be quite inappropriate, given the vulnerable position of the clients, for them to wake up and find an unfamiliar face attending to their needs, for example.

[54] Mr Dickson can not be responsible for and attend to his own family's needs if required when on a sleepover, because he is responsible for the needs of what are in essence the IHC's families, namely the residents in the homes Mr Dickson sleeps over in.

[55] Another important issue is the tying of sleepovers to Mr Dickson's employment and therefore his work. Mr Dickson has no choice, if he wants to remain a community support worker with Idea Services, but to conduct the sleepovers.

[56] Clearly the situation of a worker on call at home, with the opportunity to do what they wish (as long as they remain close to a phone and are able to respond to a call out) is quite different from sleeping over in the employer's premises with the constant possibility of a client needing attention, who must be seen to immediately. This is so even though I accept that Idea Services provides a comfortable environment for the CSWs on sleepovers.

[57] Mr Dickson's position is also not analogous to the Air New Zealand pilots on lay-over, who can leave the country, drink alcohol and in fact have no controls on their behaviour except their duty of fidelity and being able to recommence their duties in a fit state. These are factors that apply to all employees.

[58] I now assess the last sentence of *Mills*, being the issue of a worker being ready, able and willing to work. If it means that Mrs Mills would have been entitled to pay for periods where there was evidence of her being ready, willing and able to work but no work was provided to her by the motel's owners, then it could be argued on behalf of Mr Dickson that he had to be ready, willing and able to work during the course of a sleepover if required, but that he was allowed to sleep in the event that he was not, and it was thus work. An alternative analysis of this case relates to the difference between being in attendance and working pursuant to the contract. In this case, however, the parties are in agreement that a sleepover does not constitute work unless an incident takes place.

[59] A distinguishing factor between Mrs Mills' case, the fire-fighters' case and Mr Dickson's is that Mrs Mills and the fire-fighters lived on their work sites. Similarly, seafarers are in a unique position (as highlighted above) and have no choice whatsoever but to live on board when on a voyage.

[60] Mr Dickson is also not able to drink alcohol or (I presume, because he has to be able to respond immediately to incidents) take sleeping pills, nor is he able to have visitors without permission and must sleep on the premises, which greatly limits other activities of a personal nature that he might want to undertake. This contrasts his position to all the other cases except *Karelrybflot*.

[61] Looking at the matter from the position of what Mr Dickson is actually required to do on sleepover, it is relevant to ascertain what Idea Services and IHC actually require in order to properly care for the intellectually disabled people Idea Services provides services to and the IHC represents. These are some of the most vulnerable members of society, who also often exhibit challenging behaviours. By arranging for them to live as independently as possible, the nature of supervision is different than might otherwise be the case. For example, there may equally be vulnerable residents in a rest home, but supervision of them can be maintained by one person covering a much greater number of clients than the four or five that might be in an ordinary Idea Services group home. The fact remains, however, that given the current structure, each

home does need somebody on the premises at all times in case an incident occurs. This is a distinguishing factor to *Karelrybflot*.

[62] The matter is a finely balanced one. On the one hand, it has been freely agreed that if Mr Dickson does any work that is supported by an incident report, he is entitled to be paid his normal hourly rate under the agreement. Also agreed (by implication) is that Mr Dickson, when conducting a sleepover, is not doing paid work. Furthermore, in over 95% of sleepovers, no actual work duties as such are required of employees such as Mr Dickson.

[63] On the other hand, Mr Dickson is required as a condition of his employment to conduct sleepovers. He is not entitled to drink alcohol, nor have visitors, nor leave the premises. In particular, he is required to sleep at the employer's premises and it is not a case, like so many, where the premises in which he sleeps is his own home. Had that been the case, the result would have been different.

[64] Mr Dickson must be available to attend immediately to the needs of his employer's clients and this immediate attention is required for valid health and safety reasons. If Mr Dickson or some other employee of Idea Services was not in attendance, someone else would have to be. I conclude that these restrictions are so pervasive as to constitute work for the purposes of the Minimum Wage Act. As the parties can not contract out of the Minimum Wage Act through their employment agreement then the agreement can not assist Idea Services at this point in the analysis.

[65] I therefore conclude that Mr Dickson's sleepovers constitute work for the purposes of the Minimum Wage Act.

[66] A conference call will be convened shortly with the parties to determine the process for investigating the level of quantum (if any) that Mr Dickson is entitled to.

**G J Wood**  
**Member of the Employment Relations Authority**