

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 190  
5616832

BETWEEN            BARBARA SHEEHAN  
                                 Applicant

A N D                BOARD OF TRUSTEES OF  
                                 NELSON COLLEGE  
                                 Respondent

Member of Authority:     Peter van Keulen

Representatives:         Andrew McKenzie, Counsel for Applicant  
                                 Kay Chapman, Advocate for Respondent

Investigation Meeting:    On the papers

Submissions Received:    13 October 2017 for Applicant  
                                 13 October 2017 for Respondent

Date of Determination:    8 November 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.     The parties are to calculate compliance with the applicable Minimum Wage Orders by:**
- a.     Establishing how many hours Ms Sheehan worked for each week worked. Based on the number of hours the parties can then calculate the minimum weekly entitlement under the applicable Minimum Wage Order.**
  - b.     Establishing how much Ms Sheehan was paid for the week in question, including any wages paid for that week, any overtime and any of the applicable allowances whether paid weekly or hourly.**

- B. If there is a shortfall in any week between the minimum weekly entitlement under the applicable Minimum Wage Order and the actual amount paid to Ms Sheehan then this must be paid to Ms Sheehan together with interest at the prevailing rate.**
- C. I reserve costs with a timetable set for submissions if required.**

### **Employment relationship problem**

[1] This employment relationship problem arises out of the payment of wages to Ms Sheehan over a period of six years. Ms Sheehan says that during this time, when she worked as a full time domestic employee at Nelson College, the Board of Trustees of Nelson College (the College) paid her wages below the applicable minimum wage rate.

[2] The College says that whilst the hourly rate that makes up the weekly wage Ms Sheehan receives is below the applicable minimum wage rate Ms Sheehan also receives a number of allowances for the work she undertakes and once these payments are added to her wages the rate exceeds the applicable minimum wage rate.

[3] Ms Sheehan says that compliance with minimum wage cannot be calculated by adding these allowances and averaging out her wage payments.

[4] In order to resolve this employment relationship problem I must determine how the parties should calculate whether the applicable minimum wage rate has been met for each of the payments made to Ms Sheehan.

### **Discussion**

[5] The College employs Ms Sheehan on terms and conditions of an individual employment agreement (IEA). The IEA is based on the expired 2007 – 2009 National Union of Public Employees Collective Employment Agreement (The Collective).

[6] Under the IEA, Ms Sheehan is paid fortnightly but her pay is based on a weekly wage rate of \$505.40. If she works more than 40 hours per week or 8 hours per day, Ms Sheehan receives an overtime payment of time and one-half the ordinary hourly rate.

[7] Ms Sheehan also receives various allowances including<sup>1</sup>:

- a. A food hygiene certificate allowance per week;
- b. A shift allowance per week;
- c. A hostel cleaning and catering allowance per week; and
- d. A catering weekend allowance paid per hour for each hour worked in the weekend.

[8] For the purposes of calculating Ms Sheehan's fortnightly wage payment the College has taken the weekly wage under the IEA and divided that by 40 (hours) to get an hourly rate. The College then pays Ms Sheehan for ordinary hours worked each week up to 40 hours at this hourly rate plus any overtime at the overtime rate and the applicable allowances.

[9] The College says that when any overtime payment, catering weekend allowance and other allowances are added to the weekly wage, on average, Ms Sheehan's weekly payment exceeds the minimum weekly pay requirement under the Minimum Wage Act 1983 and the applicable Minimum Wage Order<sup>2</sup>.

[10] This averaging using the allowances is where the parties disagree on how Ms Sheehan's wages should be calculated to ascertain compliance, or otherwise, with the applicable minimum wage rate.

[11] My role in resolving this employment relationship problem is to identify, for the parties, how the parties should calculate whether the payments made to Ms Sheehan comply with the minimum wage requirements. I will do this by considering two principles that are in issue between the parties – the use of averaging and whether allowances should be included in wages.

[12] The first principle should not be controversial – compliance with a Minimum Wage Order is not calculated by averaging wage payments. The Court of Appeal and

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<sup>1</sup> Not all allowances are listed as some, such a laundry allowance, are treated as reimbursement and are not included in the calculation of wages. KiwiSaver contributions are also excluded from any calculations.

<sup>2</sup> Except for a period in 2016 where payments were below the required rate, which the College has identified and paid.

the Employment Court have made this clear in *Idea Services Ltd v Dickson*<sup>3</sup>. The principle has subsequently been applied in *Law v Board of Trustees of Woodford House*<sup>4</sup> and *Gunning v Bankrupt Vehicle Sales and Finance Ltd*<sup>5</sup>.

[13] However, this does not mean that compliance can only be established by reference to an hourly wage rate as Ms Sheehan's counsel suggests.

[14] What is clear from the case law is that compliance must be established based upon the way in which the worker's pay is calculated.

[15] In this case, Ms Sheehan's wages under the IEA are calculated on a weekly basis. Clause 35.1 of the Collective, (therefore the relevant wage clause of the IEA) states:

The following are the minimum weekly wages:

	Per week as at 1/1/2008	Per week as at 1/1/2009
First Cook	\$550.85	2008 rate + CPI
...		
Waitresses and Domestic	\$475.75	2008 rate + CPI

[16] The 2008 rate plus CPI for Domestic for 2009 is \$504.40, which is the weekly rate Ms Sheehan has been paid since 2009.

[17] The Minimum Wage Orders, which set the minimum wage rates to be paid in any given year, are specified in hourly, daily, weekly or fortnightly amounts. As an example the Minimum Wage Order 2015 states:

**Minimum adult rates**

The following rates are the minimum rates of wages payable to an adult worker:

- (a) for an adult worker paid by the hour or by piecework, \$14.75 per hour:
- (b) for an adult worker paid by the day,—
  - (i) \$118 per day; and
  - (ii) \$14.75 per hour for each hour exceeding 8 hours worked by a worker on a day:
- (c) for an adult worker paid by the week,—
  - (i) \$590 per week; and

<sup>3</sup> [2011] NZCZ 14 and [2009] ERNZ 116 (EmpC)

<sup>4</sup> [2014] NZEmpC 25

<sup>5</sup> [2013] NZEmpC 212

- (ii) \$14.75 per hour for each hour exceeding 40 hours worked by a worker in a week;
- (d) in all other cases,—
  - (i) \$1,180 per fortnight; and
  - (ii) \$14.75 per hour for each hour exceeding 80 hours worked by a worker in a fortnight.

[18] Ms Sheehan is an adult worker paid by the week as the IEA specifies her wages by reference to a weekly amount. It does not matter that Ms Sheehan is actually paid fortnightly, a week is the period over which compliance with the Minimum Wage Orders must be considered.

[19] Ms Sheehan's pay per week must meet the minimum payment specified for a worker paid by the week in the relevant Minimum Wage Order. Continuing with the example, from April 2015 the minimum payment would be \$590.00 plus \$14.75 for every hour worked exceeding 40 hours.

[20] The second principle from the cases is that wages paid to a worker includes allowances and additional payments such as commission and overtime. This is also consistent with the definition of wages in the Wages Protection Act 1983 and the Income Tax Act 2007.

[21] I do not accept Ms Sheehan's counsel's point that using allowances to calculate wages becomes problematic if a worker's pay is calculated on an hourly basis and an allowance is paid weekly or even daily, as this might require some averaging. In *Gunning*, the Court stated:

[43] The second issue is how remuneration in the form of commission is to be taken into account. In the second full Court decision in *Dickson*, the majority concluded that an allowance paid in respect of a number of hours should be credited by averaging it over the hours concerned. A similar approach was suggested in respect of piecework payments. Where a supplementary payment is earned by work done over a period of time which exceeds the basis for the rate of pay, that is appropriate. Where the payment is earned by a single action, the approach may be more direct. In this case, Mr Gunning was entitled to commission on two sales. They were made on different days. They may be taken into account under the minimum Wage Act by giving the Company credit for paying him an additional \$50 on each of those days.

[22] So there are two ways of dealing with allowances. First, where the allowance is paid for a period greater than the basis for the rate of pay, averaging is permitted. I take this to mean, for example, if a worker is paid by the hour but earns a weekly

allowance that allowance can be averaged out over the hours worked in that week when calculating whether the hourly payment meets the applicable minimum wage rate. Second, where the allowance is paid over a shorter period than the basis for the rate of pay then the allowance is applied in total to the period of the payment. So, in *Gunning* a one off payment (i.e. less than a day) was applied to calculate the daily payment for the day the payment was attributed to.

[23] For Ms Sheehan as a worker who is paid by the week, any allowance paid on a weekly basis is simply applied directly to that week. Any allowance paid on an hourly basis within that week is applied as a total amount, for all the hours the allowance is paid in that week, to the weekly pay amount.

[24] By applying these two principles I have determined the way in which the parties can establish if the College has met the applicable minimum wage rate for the wages it has paid to Ms Sheehan<sup>6</sup>.

[25] First, for each week worked the parties must establish how many hours Ms Sheehan worked. Based on the number of hours worked the parties can calculate the minimum entitlement that Ms Sheehan should have been paid.

[26] Any hours worked up to 40 hours are paid at the applicable weekly rate<sup>7</sup> and then anything worked over 40 hours per week should be paid at the specified hourly rate. By way of example, taking a week in June 2015, the applicable minimum weekly rate is \$590.00 per week and the applicable minimum hourly rate is \$14.75. If Ms Sheehan only worked 36 hours then she should have been be paid at least \$590.00: if Ms Sheehan worked 42 hours she should have been paid at least \$619.50 (\$590.00 + (2 x \$14.75)).

[27] Then the parties should establish how much Ms Sheehan was paid for the week in question including, as I have indicated, any wages paid for that week, any

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<sup>6</sup> My analysis has also been informed by the steps set out by Chief Judge Colgan in *Law* at [233] – [241]

<sup>7</sup> See *Gunning* at [42] where the Employment Court makes it clear that it does not matter if the full day (or week) is not worked, the minimum amount specified in the applicable Minimum Wage Order, for a worker paid by the day (or week) must be paid. The exception to this will of course be where leave is taken for part of the pay period, particularly if it is leave without pay. In such cases it seems to me that the worker would be paid for the part period at the corresponding part payment of the applicable minimum wage rate with the leave component of that period being covered by any leave payment if there is an entitlement.

overtime for that week and any of the applicable allowances for that week, whether paid weekly or hourly.

[28] If there is a shortfall in any week between the minimum weekly entitlement under the applicable Minimum Wage Order and the actual amount paid to Ms Sheehan then this must be paid to Ms Sheehan together with interest at the prevailing rate.

[29] If the parties are unable to agree the application of my determination or cannot agree if there is any amount payable to Ms Sheehan or the amount of such payment, if something is due to her, then they can apply to me for further assistance.

### **Costs**

[30] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[31] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority