



Briefing Paper for MPs on the Pending Court of Appeal Decision on the Payment of the Minimum Wage for Sleepovers in State Funded Community Homes

Background of Case

The Court of Appeal will soon be releasing a written decision that could confirm that disability support and mental health community workers have been underpaid for a very long time.

It is now over 20 years since people with disabilities and those with mental illness were moved out of public psychiatric and psychopaedic hospitals to be looked after by publicly-funded organisations in the community.

The model of community support that was implemented was a giant step forward for the rights of people with disabilities to live an ordinary life, but unfortunately it was based on the employment of thousands of support workers on low rates of pay working long hours of work.

Despite discussions between the two unions (the SFWU and PSA) and successive governments over a number of years about the disability workforce underfunding, there has been no dramatic action to quickly address this issue.

One of the aspects of this underfunding is the paltry sum that is paid by residential disability and mental health providers to workers required to stay in community homes overnight to be on-call to provide support to the 4-5 residents.

In 2007 the SFWU and PSA launched cases against two of the largest intellectual disability residential providers (IHC and Spectrum Trust) arguing that the overnight stays (called “sleepovers”) were “work” under the Minimum Wage Act and should be paid at the prevailing minimum hourly rate.

Employment Court Ruling

Following an Employment Relations Authority decision that sleeping over was work, IHC and the SFWU submitted the issue to the Employment Court in May 2009 using IDEA Services (a subsidiary of IHC) residential support worker Phil Dickson as the applicant.

The Employment Court heard that Phil Dickson was required by his employer to stay on IHC premises for up to 150 hours a fortnight, but was only paid for 77 of those hours at an ordinary hourly rate. The other hours (up to 73 a fortnight) were paid at just over \$3.00 an hour.

While all on-call workers are expected to be available for work, the Court said that Phil Dickson was at the disposal of his employer to such an extent that it was actually “work”. The Court noted a number of points about Phil’s situation, including:

- not being able to leave the facility during the sleepover without the prior permission of a supervisor and a relief worker being available and present
- being readily available to be woken to respond to any incident in and around the home and not locking your bedroom door
- not consuming alcohol or other drugs during a sleepover
- not having visitors without the prior permission of the manager and it being acceptable to the home's service users
- not engaging in any activity that might disturb the service users during the night

The Employment Court's finding concurred with the earlier Employment Relations Authority decision and similar court decisions in the UK, Europe, Canada and Australia, which have ruled that such "sleepovers" are work and should be paid at the minimum hourly rate as per the Minimum Wage Act. In New Zealand that rate is currently \$12.75/hour.

The Employment Court agreed to hear a second argument by IHC, the National Intellectual Disability Residential Providers Group, Business NZ and the Department of Labour in October last year. They were arguing that even if sleeping over was work, IHC could average Phil Dickson's earnings over the fortnightly pay period to calculate how much was owed rather than just paying the difference between \$12.75 and \$3.00 an hour for sleepover hours.

As Phil Dickson, a long-serving and experienced support worker, was paid just over \$17.00 an hour, this would dramatically lessen the amount owed.

The Employment Court rejected this argument ruling that Phil was an hourly worker and needed to be paid the minimum hourly rate as set out in the Minimum Wage Act.

Court of Appeal Hearing

IHC recently appealed the Employment Court decision to the Court of Appeal and was joined in the Court by the Attorney-General, who is supporting the IHC argument that the minimum wage can be "averaged" to allow higher contractual pay rates in one part of the pay period to be offset by rates of \$1.00 or \$2.00 an hour in another part. This approach allows very low pay rates to be maintained without an employer breaching the Minimum Wage Act.

The three Court of Appeal judges conducted a very robust discussion around this issue, although the Court, in its earlier decision granting IHC leave to appeal, had set the bar quite high. The Court had commented on the averaging issue:

"The averaging approach seems to require a significant gloss to be put on the statute language. We find it difficult on the basis of the limited argument we have heard, to see any justification for that."

The Minimum Wage Act currently entitles hourly workers to \$12.75 an hour, daily workers to \$102 a day (with \$12.75 an hour after 8 hours) and weekly workers to \$510 a week (with \$12.75 an hour after 40 hours). There is no mention of pay periods in the statute, let alone the fortnightly pay periods that IHC is attempting to argue.

What is the Government's Response?

The Minister of Health told the NZ Herald that the Government won't be providing the extra funding for these services because of the estimated \$500 million bill, which he says the Government cannot afford.

The Union believes the actual bill is just more than half of this, with most of it being contained in a one-off backpayment covering support workers who have worked sleepovers during the last six years. The ongoing cost we believe to be about \$50 million per year.

Rather than fronting up and agreeing to make an important investment in the disability support and mental health sectors, the Government has taken a different tack.

They have refused to stand behind IHC and have allowed IHC subsidiary IDEA Services (which has been clocking up debts of over \$20 million a year in money owed to support workers) to go into statutory management so that it can keep providing services to the thousands of people with intellectual disability that they are supporting.

They have also approved the Department of Labour to work on a proposal to amend the Minimum Wage Act to specifically allow averaging, not just in the health and disability sector, but across the whole New Zealand economy.

What is wrong here?

There is something very wrong with the approach that allows an iconic long-term New Zealand provider of intellectual disability services to be put into statutory management when they are only fronting for long-term government underfunding of these services.

IHC was at the forefront of the movement of disability support services from hospitals into the community.

IHC pioneered the first transparent funding model with the Ministry of Health, is an efficient provider of disability support services and a strong advocate for the rights of people with disabilities.

IHC is only one of about 30 disability support and community mental health providers that have claims against them lodged in the Employment Relations Authority.

If the Government goes ahead with an "averaging" amendment to the Minimum Wage Act they may save themselves about 80% of the money owed, but they will reduce the employment rights of tens of thousands of New Zealand workers who are paid on or close to the statutory minimum wage.




Instead of hourly workers having certainty that their employment agreement must contain a minimum pay rate of \$12.75 an hour, they could be more than this on weekend days or busy days and rates under \$10.00 an hour on other days – all done quite legally.

The thinking behind this approach is that the minimum wage is something to aim for, rather than a minimum floor that employers are encouraged to exceed.

What are we asking you to do?

We are seeking the following:

- We would like you to become better informed about the work that disability support workers actually do. Some MPs took up the opportunity last year to “walk a day in the shoes” of a disability support worker. We are keen to arrange these opportunities for those MPs who missed out.
- We urge you to become familiar with the issues around the Minimum Wage Act and the “averaging issue”. We have a paper prepared by the NZ Council of Trade Unions on this issue for those who wish to read more.
- We ask you to write to the Prime Minister and express your opposition to the move by the Minister of Labour to draw up legislative proposals to overturn any Court of Appeal decision that goes against the Government.



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18 November 2010