



**13 July 2011**

**Union sleepover case backgrounder – 4 pages**

On 15 June 2011 the government made an offer to settle the claim of members of the Service and Food Workers Union Ngā Ringa Tota (SFWU) and the Public Service Association (PSA) in what is known as the "sleepover case".

The offer followed decisions by both the Employment Court and the Court of Appeal (*IDEA Services Limited vs Dickson*) that sleepover shifts should be paid at least the minimum wage. IHC, which owns Philip Dickson's employer Idea Services Ltd, has appealed the decision. The appeal is due to be heard by the Supreme Court on 13 September.

The unions are claiming the legal minimum wage for each hour disability support workers and community mental health workers are on a sleepover shift and back pay for underpayments in the past six years.

The disability sector and community mental health sector have been chronically underfunded by the government for many years. As a consequence, wage rates for disability and mental health support work are totally inadequate and do not recognise the complexity, skill or responsibility of the work. There is now a significant gap between support work and comparably sized jobs.

The PSA and SFWU are prepared to negotiate a settlement that would provide a solution for now and for the future. We believe the unions' proposal is a reasonable compromise and the government proposal is unrealistic and well short of what is owed. The two positions are:

The unions' proposal	The government's offer
<p><b>Payment of minimum wage</b> Immediate payment of half the adult minimum wage (\$6.50 an hour) for sleepover shifts.</p> <p>Full minimum wage (\$13 an hour) paid within six months.</p> <p><b>Backpay</b> Half the backpay owing to all those who have filed plus interest.</p> <p>Paid to current and former members who have filed a claim.</p> <p><b>Working Party</b> A working party be set up to address pay rates for disability support workers across the sector.</p> <p><b>Funding for support services</b> The settlement must not affect future funding increases for the sector.</p> <p><b>Supreme Court appeal</b> That this be withdrawn.</p>	<p><b>Payment of minimum wage</b> A staggered implementation of the minimum wage over 4 years.</p> <p><b>Backpay</b> 25% of back pay owing or up to a combined total of \$45m, whichever is the lesser.</p> <p>The government would pay half of this; providers would have to pay the rest.</p> <p>Would apply only to current staff in services funded by Vote Health.</p> <p><b>Working Party</b> To be set up to consider future workforce requirements and models for delivery of services.</p> <p><b>Supreme Court appeal</b> Withdrawn if settlement reached</p>

While the government offer clearly acknowledges that the workers should receive the minimum wage, it offers a four-year phase in and caps the amount available for back-pay.

SFWU and PSA members have been meeting over the past month to consider and vote on whether to accept the government offer. The meetings concluded on 13 July. The outcome of the meetings was overwhelmingly to reject the government's offer.

### **Is the government offer fair in this fiscal climate?**

The offer is very unfair given this fiscal climate, in which over \$4 billion have been given away in tax cuts to the wealthy, \$1.2 billion paid out to those who made risky investments in South Canterbury Finance, \$43million for loans to Mediaworks to save their radio network *\$36 million payment to Americas Cup, and Hobbit tax credits to Warner Bros of an extra \$50-\$60 million. The list goes on.*

Three courts have said that those working sleepovers are entitled to the minimum wage but the Government is not offering to fund the minimum wage payment now, but over a four year period, saving them close to \$75 million.

## **The facts**

### **What is the sleepover case?**

The sleepover case is a legal action involving disability support workers who are being paid less than the minimum wage of \$13 an hour. The minimum wage applies to all employees aged 16 and over who are not in training.

### **What do disability support workers do?**

The disability support workers involved in the sleepover case work with men and women who require 24-hour support because of their intellectual disabilities or because of mental health issues. Many also have physical disabilities. They live in residential houses staffed round-the-clock by disability support workers. The houses are operated by agencies such as Idea Services, the service arm of IHC. These agencies get the bulk of their funding from the government.

### **What does their job involve?**

Disability support workers are responsible for the health and safety of the house residents and enabling them to live as full a life as possible.

Their work includes dispensing medication, and dependent on the person's level or type of disability either providing meals or supporting people to cook meals, bath, dress, do laundry, manage personal finances, shop, do housework and manage personal development programmes. Organising doctors' appointments and community participation, as well as managing house finances, keeping diaries for each resident, a house diary and writing a monthly report.

### **Are they paid the minimum wage for providing 24 hour support?**

No. The disability support workers are required to staff the residential houses 24 hours a day. But when they work overnight sleepover shifts they're paid less than the minimum wage. Idea Services pays its disability support workers \$34 for working a 9-hour sleepover shift from 10pm to 7am. That's \$3.77 an hour, less than a third of the minimum wage of \$13 an hour.

### **Why are they called sleepover shifts?**

Because the workers are allowed to sleep during the shift. But they remain responsible for the health and safety of the house residents who cannot be left on their own. They must be readily available to assist residents and if there is an incident they have to deal with it. Because of residents' behavioural issues and disabilities there is often a lot of disturbance in the night even without incident.

### **Do other workers get full pay when allowed to sleep at work?**

Yes. Firefighters, ambulance officers and resident doctors are allowed to sleep at work while doing overnight shifts and continue to get paid their full rate.

Firefighters are allowed to sleep at their stations between 11.30pm and 6.45am. Ambulance officers can sleep at work between 10pm and 6am. Resident doctors are allowed to sleep on 10pm to 8am shifts. They all continue to receive their full pay while sleeping during these overnight shifts. That is because they are at work and available if their services are required and cannot attend to out of work responsibilities or activities, just like disability support workers doing sleepover shifts.

### **What are disability support workers doing about this underpayment?**

Through their respective unions, the SFWU and PSA, disability support workers launched the "sleepover" case in 2007.

### **What is the unions' case?**

The unions' case involves disability support worker and SFWU member Phil Dickson. He runs a residential house that is home to four men with intellectual disabilities. Phil is paid \$34 for a 9 hour sleepover shift from 10pm to 7am. That is \$3.77 an hour. The unions argued that a sleepover shift is "work" as defined in the Minimum Wage Act. So Phil Dickson should be paid the current minimum wage of \$13 an hour for the shift.

### **What did the Employment Court and Court of Appeal say about sleepover shifts?**

The Employment Court agreed with the unions' case. The court ruled that being required to stay on the employer's premises throughout the night to support people with intellectual disabilities was "work" and should attract the minimum wage.

The court described Phil Dickson's responsibilities on a sleepover shift as "weighty" and "critical to the business of the employer." The Employment Court also ruled that "Mr Dickson was entitled to be paid not less than \$12.50 (the minimum wage when the Employment Court heard the case in 2009 – since increased to \$13.00) for every hour he worked for Idea Services Ltd including the work done during sleepovers."

The Court of Appeal subsequently reaffirmed the Employment Court decision.

### **Why is the legal action continuing?**

IHC, which owns Idea Services Ltd, has appealed the Court of Appeal decision to the Supreme Court. This will be heard on the 13 September 2011.

### **Why has IHC gone to the Supreme Court?**

Because the government fails to provide IHC and other disability support providers with enough money to pay their disability support workers the minimum wage for sleepover shifts.

### **Is the government involved in the appeal?**

Yes. The Attorney-General, represented by Solicitor General David Collins, joined IHC in the Court of Appeal, seeking to avoid providing the funding needed to enable disability support workers to be paid at the level the Employment Court ruled they should be paid – at least the minimum wage - for a sleepover shift instead of \$3.77 an hour. The Attorney-General will also be represented in the Supreme Court case.

### **Is the government trying to get around the Court of Appeal ruling?**

Yes. Despite both the Employment Court and the Court of Appeal ruling against them, the government is still supporting the IHC argument that it can “average” out Phil Dickson’s fortnightly pay. This would allow the employer to divide the hours worked per fortnight (including sleepover hours) into the gross pay and if it came to less than an average of \$13.00 an hour the employer would be required to make a monetary top-up to comply with the minimum wage. In effect, averaging would reduce Phil’s ordinary hourly rate of \$18.16 an hour and, as the Court of Appeal noted, would lead to intricate calculations every pay period to see if the Minimum Wage Act was being complied with or not. The Court of Appeal agreed with the unions’ position that this argument was “bizarre”.

### **What will the unions tell the Supreme Court?**

The SFWU and PSA will continue to submit that Phil Dickson be paid no less than the minimum rate (now \$13.00) for each hour of a sleepover shift as ruled by the Employment Relations Authority, the Employment Court and the Court of Appeal.

### **What’s the cost of paying the disability workers \$13 an hour for sleepovers?**

Ministry of Health has estimated the cost of paying disability support workers the minimum wage for sleepover shifts at \$360 million. But the union settlement proposal, when it was made recently, was only around \$60 million plus the on-going cost of paying disability support workers the minimum wage.

### **Should the government provide the money?**

Yes. Disability support workers enhance the quality of life for thousands of New Zealanders with intellectual disabilities and mental disorders. The sleepover case shows they have been underpaid for years. It’s time the government acknowledged this and began providing the funding the disability sector needs to start paying its workers what they are worth.

### **Are unions putting the services at risk?**

No. The risk comes from the government’s failure to adequately fund mental health and disability support services. The PSA and SFWU are seeking services to be put on a firm footing through adequate funding based on decent pay and quality services. This is what disabled people and their families are also calling for.

### **What is the legal case?**

The Government is responsible for funding the sector to implement the minimum wage and we believe has a legal obligation to fund the sector to comply with minimum legal requirements.

### **For more information, please contact:**

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