

Sleepovers and the Minimum Wage obligations

What are the implications of the "sleepover" case for employers in other industries?

When is a sleeping person working?

Whether the person is working all night depends on three relevant factors:

- What are the responsibilities of the person during the night (and how often will they be disturbed)?
- What are the constraints on the person to do as they please at night?
- What is the benefit to the employer?

The Court of Appeal considered these three factors in *Idea Services Limited v Dickson* [2011] NZCA 14. Mr Dickson was a community service worker who supported people with disabilities who live in community houses. At times he was required to stay in the community house overnight. After 10pm Mr Dickson was permitted to rest and sleep, however he could not leave the home without permission and cover, he had to be readily available to respond to any matter requiring his attention, he could not drink or take drugs, he could not have visitors without permission, and he must not disturb residents of the home. He continued to be responsible for property security and emergency evacuation if required. He had to be available at all times to residents who were feeling unwell or who just wanted to talk.

In these circumstances the Court of Appeal was satisfied that Mr Dickson was working at night. He had significant restraints placed on him, and important responsibilities, and there was substantial benefit to the employer from Mr Dickson's role because it was essential to proper functioning of the home. "Put shortly, Mr Dickson was at the employer's disposal throughout the period of the sleepover". His time was not his own.

A related question arises under the Holidays Act 2003, whether an employee has or has not worked on a public holiday. The meaning of "work" in this context was considered by the Employment Court in *New Zealand Airline Pilots Association Inc v Air New Zealand (No 2)* [2008] ERNZ 62. International pilots have layovers in overseas locations during a tour of duty. During a layover a pilot has no duties to the employer, except the usual obligations that would apply even at home: to turn up fit for work at the start of a duty period, and not to bring the employer into disrepute. The Court found that a pilot does not work during a layover. Being away from home did not make the off duty hours "work".

In the *Air New Zealand* case the union and employer had already agreed that a pilot who is "on call" is not working unless and until actually called upon to perform work duties. Whether that is the case for other "on call" staff will depend upon the degree of constraint on their activities, for example their freedom of movement, ability to consume alcohol, and the required response time.

A sleepover is likely to be of significant benefit to the employer, to meet a contractual or legislative obligation to provide a 24 hour service. But the extent of each employee's duties and the degree of constraints on each employee will vary considerably not just from one industry to another but also potentially as between different employers and between different employees.

What to pay them?

All employees must be paid not less than the minimum wage. Waged staff who are paid by the hour, like Mr Dickson, are entitled to be paid not less than the minimum wage for every hour worked. That is currently \$13.00. But the minimum wage for salaried staff is \$520 for the first 40 hours of work and \$13.00 per hour thereafter. An employee who each week works 30 hours during the day and two 8 hour sleepovers, could lawfully be paid a salary equating to \$540 per week plus an allowance of \$30 each sleepover.

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