IN THE EMPLOYMENT COURT
WELLINGTON

WC 17A/09
WRC 31/08
WRC 34/08

WRC 31/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	IDEA SERVICES LIMITED Plaintiff
AND	PHILLIP WILLIAM DICKSON Defendant

WRC 34/08

IN THE MATTER OF	a matter removed to the Court by the Employment Relations Authority
BETWEEN	PHILLIP WILLIAM DICKSON Plaintiff
AND	IDEA SERVICES LIMITED Defendant

Hearing:	3 September 2009 (Heard at Wellington)
Court:	Chief Judge G L Colgan Judge B S Travis Judge A A Couch
Appearances:	C H Toogood QC and N Dines, Counsel for Idea Services Ltd Peter Cranney and Fleur Fitzsimons, Counsel for Phillip William Dickson T P Cleary, Counsel for Business New Zealand as intervener P N White, Counsel for National Residential Intellectual Disability Providers Inc as intervener A H Gane and A A Leulu, Counsel for Robin Arthur Semmens, Labour Inspector, as intervener
Judgment:	11 December 2009

JUDGMENTS OF THE FULL COURT

JUDGMENT OF CHIEF JUDGE GL COLGAN AND JUDGE AA COUCH

(Given by Judge AA Couch)

[1] In our judgment of 8 July 2009 (WC 17/09), we decided that "sleepovers" constitute work for the purposes of the Minimum Wage Act 1983 ("the Act"). We now need to determine the second issue which is how the requirements of the Act regarding the calculation of wages payable to Mr Dickson may be satisfied.

[2] To assist us in deciding this second issue, we invited submissions from Business New Zealand and the Council of Trade Unions. We also granted leave to the National Residential Intellectual Disability Providers Incorporated ("NRIDP") and Mr Semmens, a Labour Inspector, to be heard as interveners. The NZCTU was not separately represented but adopted the submissions of Mr Cranney. We record our gratitude for the submissions we received from all parties and the assistance it has provided us.

[3] In our first judgment we decided the nature of the relationship between Idea Services Limited ("Idea Services") and Mr Dickson. This included a finding of fact that Mr Dickson was paid by the hour for the purposes of the Act. We also found that the wages he received were calculated in accordance with the applicable collective agreement, at the rate of $17.66 for each hour worked during shifts. He also received the sum of $34.00, described as an allowance, for each sleepover, the duration of which was between 8 and 10 hours. On the occasions he was required to attend to service users during a sleepover and completed an incident report, Mr Dickson was also paid $17.66 for each hour of attendance.

[4] The current Minimum Wage Order ("the Order") prescribes the minimum rate of wages for workers paid by the hour as $12.50.

[5] The case for Idea Services is that the requirements of the Act are met if, at the end of each fortnightly pay period, Mr Dickson received an average of not less than $12.50 per hour for the total number of hours he had worked in that period. This would allow Idea Services to set off the $17.66 per hour Mr Dickson received for his shift work against the $3.50 per hour or so he received for sleepovers.

[6] For Mr Dickson it is contended that the combined effect of the Act and the Order is that the sufficiency of payment for a worker paid by the hour must be assessed on an hour by hour basis and that Mr Dickson was entitled to be paid not less than $12.50 for each and every hour he worked. On this basis, Mr Dickson will be entitled to retain the $17.66 per hour he has been paid for shift work and to have the money he has received for sleepovers made up to not less than $12.50 for each hour worked.

Legislation

[7] The following are the sections of the Act and the parts of the Order referred to in the submissions:

An Act to consolidate and amend the law relating to minimum wages

> ***4. Prescription of minimum wages—****(1) The Governor-General may, by Order in Council, prescribe the minimum rate of wages payable to—*
>
> *(a) workers—*
>
> *(i) who are 16 years of age or older; and*
>
> *(ii) to whom neither paragraph (b) nor (c) applies:*
>
> *(b) workers who are new entrants, being workers who are 16 or 17 years of age except workers—*
>
> *(i) who have completed 3 months or 200 hours of employment, whichever is the shorter; or*
>
> *(ii) who are supervising or training other workers; or*
>
> *(iii) to whom paragraph (c) applies:*
>
> *(c) 1 or more classes of workers—*
>
> *(i) defined in the order; and*
>
> *(ii) who are employed under contracts of service under which they are required to undergo training, instruction, or examination for the purpose of*

becoming qualified for the occupation to which their contract of service relates.

(2) A minimum rate of wages prescribed under subsection (1) may be prescribed as—

(a) a monetary amount; or

(b) a percentage of any other minimum rate prescribed under subsection (1).

(3) However, a minimum rate prescribed for the purposes of subsection (1)(b) must not be less than 80% of any rate prescribed for the purposes of subsection (1)(a).

*(4) In subsection (1)(b)(i), **employment**—*

(a) includes employment undertaken with more than 1 employer; and

(b) includes any employment undertaken before the commencement of the Minimum Wage (New Entrants) Amendment Act 2007; but

(c) does not include any employment undertaken before a new entrant turns 16 years of age.

...

***6. Payment of minimum wages—**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.* (Emphasis added)

***7. Deductions for board or lodging or time lost—**…*

(2) No deduction in respect of time lost by any worker shall be made from the wages payable to the worker under this Act except for time lost—

(a) By reason of the default of the worker; or

(b) By reason of the worker's illness or of any accident suffered by the worker.

***8A. Wages and time records—**(1) Every employer who employs any worker whose wages or rates of wages are prescribed or paid pursuant to this Act shall keep a record (called the wages and time record) showing, in the case of each such worker,—*

(a) The name of the worker:

(b) The worker's age, if under 20 years of age:

(c) The worker's postal address:

(d) The kind of work on which the worker is usually employed:

(e) The contract of service under which the worker is employed:

(f) The classification or designation of the worker according to which the worker is paid:

(g) The hours between which the worker is employed on each day, and the days of the worker's employment during each week:

(h) The wages paid to the worker each week and the method of calculation:

(i) Such other particulars as are prescribed.

(2) Every employer shall, upon request made at any reasonable time by a Labour Inspector, produce forthwith for inspection by that Labour Inspector every wages and time record that is, or at any time during the

preceding 6 years was, in use under this Act in respect of any worker employed by that employer at any time in those 6 years.

(3) Where an employer keeps a wages and time record in accordance with the Employment Relations Act 2000, the employer is not required to keep a wages and time record under this Act in respect of the same matters.

11. Recovery of wages—*Without affecting any other remedies for the recovery of wages or other money payable by an employer to any worker whose wages are prescribed under this Act, where there has been any default in payment of any such wages or other money or where any payment of any such wages or other money has been made at a rate lower than that prescribed under this Act or otherwise legally payable to the worker, the whole or any part, as the case may require, of any such wages or other money may be recovered by the worker or by a Labour Inspector to the use of the worker by action commenced in the Employment Relations Authority in the same manner as an action under section 131 of the Employment Relations Act 2000, notwithstanding the acceptance by the worker of any payment at a lower rate or any express or implied agreement to the contrary, and subsection (2) of that section shall apply accordingly.*

[8] The latest Order[1] provides:

4 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, $12.50 per hour:

(b) for an adult worker paid by the day,-

(i) $100 per day; and

(ii) $12.50 per hour for each hour exceeding 8 hours worked by a worker on a day:

(c) in all other cases, -

(i) $500 per week; and

(ii) $12.50 per hour for each hour exceeding 40 hours worked by a worker in a week.

…

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order, which come into force on 1 April 2009, revokes and replaces the Minimum Wage Order 2008.

The order increases the minimum rates of pay for adult workers, new entrants, and trainees.

The new minimum hourly rates of pay are as follows:

[1] Minimum Wage Order 2009, which came into force 1 April 2009

- *the rate for adult workers is increased from $12.00 to $12.50 per hour; and*
- *the rates for new entrants and trainees are increased from $9.60 to $10.00 per hour.*

Submissions for Idea Services Ltd

[9] Mr Toogood summarised the essential issue as being whether s6 of the Act requires that an employee to whom the section applies must be paid an amount of wages, for every hour in question, which is not less than the minimum specified by the Act, irrespective of whether the employee has received payment of an amount above the minimum for any other hour worked. He submitted that the correct approach, which we shall refer to as the "averaging approach", in determining whether the payments received by Mr Dickson satisfied the requirements of s6 was as follows:

> (a) For the purposes of determining the hours worked by Mr Dickson in the relevant period, in accordance with our earlier decision, the entire period of any sleepover is to be regarded as work.
>
> (b) The total wages paid to Mr Dickson at the time the wages fell due (which will usually be at the end of each pay period) is to be determined by reference to an application of the entitlements to wages and allowances as set out in the collective agreement. These should be divided by the total number of hours worked by him during that period.
>
> (c) The quotient of that division will be the rate of wages per hour received by Mr Dickson for his work during the relevant period.
>
> (d) If the rate received is not less than the rate prescribed under the Act, its requirements will have been satisfied.

[10] Mr Toogood submitted that the Act provides a statutory minimum rate for the payment of wages, below which no worker may lawfully be paid. He contended that

the Act does not alter contractual arrangements between workers and their employers and relied on the opening words of s6:

> *Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, …*

[11] He submitted that the dictionary meaning of the word "*rate*" in s6 is a "*stated numerical amount of one thing corresponding proportionally to a certain amount of some other thing*" (Shorter Oxford English Dictionary). More simply, it was a "*measure, quantity or frequency measured against another quantity or measure*" (Compact Oxford English Dictionary online). He contended that the "*rate*" referred to in s6 is the money amount of wages paid, measured against the time worked. This, he submitted, was instructive because it implies a calculation based on a consideration of payments made over a period. He observed that the Order also refers to "*minimum rates*".

[12] Mr Toogood submitted the Act and the Order do not prescribe how the "*rate*" actually paid is to be calculated in determining whether the wages received by a worker satisfy the requirements of the Act. He contended that if, as counsel for Mr Dickson argued, each hour worked is to be looked at exclusively from every other hour worked, the section would more appropriately have included the word "*amount*" in place of the word "*rate*".

[13] Mr Toogood relied on *Mickell v Whakatane Board Mills Limited*[2]. That case involved a claim by a worker for a shift not worked during a suspension of work in the defendant's mill. The claim was for either the ordinary time rate of pay as provided in the relevant award, or for a sum calculated in accordance with the minimum wage prescribed by the Minimum Wage Act 1945. The evidence established that, in respect of the 32 hours of work at ordinary time which the plaintiff performed during the week in question, he had received a sum in excess of what he would have received had he worked 40 hours at the minimum wage rate.

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[2] [1950] NZLR 481

[14] Mr Toogood submitted that, in *Mickell*, the Court was called upon to consider a similar argument to that in issue in the present case and that Finlay J directly addressed the averaging question which must be determined by this Court. He focussed on the statement of Finlay J that the "working week" was "*universally regarded as the unit with respect to remuneration"* and submitted:

> *24.* ***THE*** *Court found that, if a worker received during a working week a sum in excess of that which he would have received had he been working on the terms prescribed in the 1945 Act, the Act had no application. As the plaintiff had received a sum in excess of what he would have received under the 1945 Act for the week in question, his claim was dismissed.*

[15] Mr Toogood accepted that the reference in *Mickell* to the "*universality*" of the working week, as a unit with respect to remuneration, should be treated with some caution as today a fortnightly pay period may be just as common, even for waged employees. He submitted that the principle to be taken from the *Mickell* case is that the relevant pay period is the appropriate calculation period for determining the "*rate*" paid. He submitted that this must be right because, until the payment falls due and is made, there cannot be any assessment of the sufficiency of payment for the purpose of ensuring compliance with the statutory minimum wage.

[16] Mr Toogood submitted that the reasoning of Finlay J in *Mickell* was consistent with that of the Court of Appeal in *Hopper v Rex Amusements, Ltd*[3]. There the worker was employed under an award as a performance worker for a maximum of 3 hours for each performance. Mr Toogood submitted that the Court of Appeal emphasised that the 1945 Act prescribed "*minimum rates of pay*". He also submitted that the Court of Appeal (at p369, lines 6-15) held that the issue of whether an hourly worker's wages complied with the statutory minimum should be assessed across the whole working week.

[17] Mr Toogood submitted that the decision of the full Court of the Employment Court in *Sealord Group Ltd v NZ Fishing Industry Guild Inc*[4], also supports the averaging approach. There, the crew of fishing vessels were paid an agreed amount

[3] [1949] NZLR 359
[4] [2005] ERNZ 535

each fortnight together with a "*share of catch*" bonus at the end of each voyage cycle. The Court determined that:

> *[22] The effect of this arrangement is that the sufficiency of payment for the purposes of the Minimum Wage Order 2005 must be determined on a voyage cycle basis for the vessel on which the employee works.*

[18] Mr Toogood submitted that this approach supports his fundamental submission that compliance with the Act can only be assessed at the time wages fall due and are paid. He suggested that an advantage of the averaging approach is that it covers a wide range of payment arrangements including piece work and commission payments and enables all amounts paid, including shift allowances and other non-reimbursing allowances, to be taken into account.

[19] Turning to s8A of the Act, which requires the keeping of wage and time records, Mr Toogood submitted that its purpose is only to assist in the enforcement of the Act by Labour Inspectors and that it is not relevant to the interpretation and application of s6. In contrast Mr Toogood submitted that the Act does not give any specific guidance about how to assess compliance with s6.

[20] Finally, Mr Toogood submitted that if Mr Dickson is permitted to rely on the Act to claim an additional amount for hours worked during sleepovers, this will have the effect of varying the collective agreement to provide an additional contractual entitlement beyond that already agreed between the parties. He submitted that there is nothing in the Act that creates contractual obligations which are inconsistent with the express terms of the collective agreement so as to secure to Mr Dickson an additional advantage.

Submissions for Business New Zealand

[21] Mr Cleary told us at the outset that Business New Zealand supported the submissions filed on behalf of Idea Services and the NRIDP. He made additional submissions relating to the purpose of the Act, based principally on the history of minimum wage legislation.

[22] Those submissions traced the history of the legislation from its origins in the Factories Act 1901 through to the first general minimum wage statute passed in 1945. Mr Cleary submitted that, generally speaking, the development of the minimum wage legislation showed that its objective was to protect those employees not covered by national awards. He also submitted that from the very first legislation, the focus has been on the minimum rate of pay, rather than an absolute level of entitlement per unit of time worked or piece produced.

[23] Mr Cleary observed that the 1983 Act is part of New Zealand's minimum code and that it establishes statutory minima rather than regulating the terms and conditions of actual employment agreements. He compared the Act with the Holidays Act 2003, noting that the latter requires an averaging process in the calculation of annual holiday pay under s21(2) and in the use of the term "*average weekly earnings*" which is defined as the sum of all earnings in a year divided by 52.

[24] Like Mr Toogood, Mr Cleary submitted that the reference in the Act to *"rates of wages"*, as opposed to amounts of wages or simply wages, is significant. He noted that s4 of the Act provides only for rates of wages to be prescribed. He submitted that this militates against the argument advanced on behalf of Mr Dickson that each and every hour worked results in a entitlement to a specific amount of pay.

[25] Mr Cleary also relied on s11, the enforcement provision, where it refers to the recovery of "*wages or other money*" by the worker or by a Labour Inspector. He submitted that these words suggest that both wages and other money are to be taken into account together in assessing whether there has been default in payment at the minimum rate. In his submission, this leads to the conclusion that compliance with the minimum rate must take into account all payments whether by way of wages or otherwise. This, he submitted, supports Idea Services' interpretation of the Act, which allows averaging over the relevant period.

[26] Mr Cleary submitted the averaging approach is consistent with the earlier authorities and that, if Mr Dickson is allowed to claim the benefit of contractual rates of wages as well as the benefit of the Act, this will represent a departure from the principles established in those cases.

[27] Mr Cleary submitted that the averaging approach also provides the easiest means of calculating whether the requirements of the Act have been met. It enables all aspects of remuneration to be taken into account, including situations where the agreement provides for payment by way of piecework. He submitted that in interpreting the Act, text and purpose are key, and the text here leaves a vacuum. The objective of allowing simple calculations for the purpose of enforcement should be adopted. He submitted that this is consistent with s8A which requires the calculations to be recorded. He relied on the following passage from *Finau v Atlas Speciality Metals Ltd*[5]:

> *[21] The correct interpretation of the section becomes clear, in our view, if one thinks about its purpose. What an employer faced with a lawful strike wants to know is: can I employ someone else to do the work which, but for the strike, the striking workers would have been doing? Non-striking employees for their part want to know in particular whether they can be made to do the work of their striking colleagues. Parliament must have intended these questions to be answered easily, based on information readily available to both employer and employee at that time. As we shall see, the interpretation we favour best meets that Parliamentary purpose.*

Submissions for NRIDP

[28] NRIDP is an incorporated society and registered charity. The Society's 54 member organisations make up approximately 90 percent of the providers of residential care for intellectually disabled persons across New Zealand and support approximately 6,500 people with intellectual disabilities. The members of NRIDP have a significant interest in the outcome of this case as many of them employ staff doing similar work to Mr Dickson and on similar terms including those relating to sleepovers.

[29] On behalf of NRIDP, Mr White adopted Idea Services' submissions and made three further submissions in support of the averaging approach:

(a) the plain words of the Order contemplate rate based calculations using the total amount paid during a period fixed by agreement and the total number of hours worked during that period;

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[5] [2009] NZCA 348

(b) a rate based calculation is necessary to apply the Act and the Order to employment in which wages are wholly or partly paid by reference to factors other than time worked;

(c) the Court has previously applied an averaging, or rate based, calculation when applying the Act.

[30] Mr White also placed some reliance on the explanatory note accompanying the Order which records that the intended effect is to increase minimum rates of pay and to set "*new minimum hourly rates of pay*". Acknowledging that explanatory notes *"do not control the meaning of regulations"*, Mr White submitted that the use of the term "*hourly rates of pay*" conveys two important meanings:

(a) it reinforces the intent of the Act and the Order that "*rates*" of pay rather than "*amounts*" of pay for each time period are prescribed; and

(b) workers referred to in each category of the Order enjoy the same minimum hourly rate of entitlement regardless of whether they are paid by the hour, piecework, day, or otherwise.

[31] Mr White addressed the situation of salaried, commission and piecework employees. He submitted that, if the Act is taken to apply to each individual hour worked, that might have the effect of providing additional remuneration for work which has already been paid for. That, he submitted, would be contrary to what Finlay J said in *Mickell*.

[32] Mr White noted that s6 of the Act refers to what the worker "*shall be entitled to receive from his employer*". He submitted that the section does not say when the worker is entitled to receive payment and it is the contractual arrangement of the parties which will determine this. He submitted, therefore, that the Act contemplates the concept of a pay period or some other measure of when the money actually becomes payable. He submitted that it is at the end of the pay period when the overall wages paid are to be assessed for compliance with the Act.

Submissions of the Labour Inspector

[33] The Labour Inspector supported the averaging approach as a pragmatic solution to ensure compliance with the Act. Mr Gane submitted that there is nothing in the Act which prevents the averaging of wages over periods of time and that this will provide the factual pattern of payment by an employer against which compliance with the Act can be assessed. He submitted that, because Mr Dickson has been paid each fortnight, the period over which his entitlement to the minimum wage must be calculated is a fortnight. At the end of that period the wages must be paid in a manner that meets the requirements of the Act for the hours worked during that fortnight, including sleepovers.

[34] Mr Gane submitted that the opening words of s6 isolate obligations under the Act from contractual obligations. The obligations under the Act cannot be contracted out of, and s11 allows recovery of wages where the employee is paid at a rate lower than the minimum wage "*notwithstanding the acceptance by the worker of any payment at a lower rate or any express or implied agreement to the contrary*". He submitted also that the Act must be able to operate even when there is no written employment agreement or no payment at all has been made. In Mr Gane's submission, the factual question whether the Act has been complied with crystallises either when payment occurs, at the end of each pay period in terms of the agreement or, if payment does not occur, when the employee became entitled to payment and it was not paid.

[35] Mr Gane accepted that neither the Act nor the Order stipulates when an employee must be paid. That will give rise to a question as to what period determines whether the minimum rates are being paid or not. He submitted that when payment for work occurs at set times, for example daily, weekly, fortnightly, or monthly, the employee has a legal entitlement to be paid all that is owed to him or her for that period in accordance with the Act and this cannot be departed from. Mr Gane noted that Mr Dickson did not, in fact, receive payments from his employer after each hour he worked. The reality is that payment for his work was made every 2 weeks.

[36] Mr Gane submitted that, if the case advanced on behalf of Mr Dickson is accepted, he will be entitled to receive the difference between the sleepover allowance and the minimum wage for every hour worked during the sleepover, while retaining the higher rate received for his other work. Mr Gane submitted this could have significant ramifications for a wide range of sectors and remuneration arrangements including salaries, commission-only workers, seasonal workers and those whose workload varies from time to time. He suggested that, at present, some degree of averaging occurs in such circumstances.

[37] As to the *Sealord* decision, Mr Gane noted that the full Court said:

> *[8] … The* time *at which wages are to be paid is an issue to be determined in each case by reference to the employment agreement governing the employment relationship. In some cases, there will be express agreement when wages are to be paid. In other cases, the time of payment will be a matter of inference from the practice of the parties over time*.

[38] Mr Gane observed that the difficulty with the Court's approach in *Sealord* is applying it where there is no formal employment agreement. If the pattern of payment shows fortnightly payments then it will be correct to average out the hours worked over each fortnight and compare that with payment that has actually been made. The factual pattern of payment, he submitted, sets the framework against which compliance with the Act can be assessed. In some cases the pay period will not be clear, particularly if there is no formal employment agreement or regular pay period. Care will then need to be taken to ensure that the method of calculation used does not undermine the intent of the Act in setting a wage floor. This may apply to situations of piecework or commission based remuneration, where payment is based on an open-ended contingency which may happen in the future. Mr Gane said that, for the Labour Inspector, this is a factual enquiry, not dependent upon the terms of the agreement.

[39] Mr Gane submitted that the requirement to set out the method of calculation in s8A is to avoid the use of reimbursing allowances to meet the minimum entitlements. If the method of calculation has to be set out, this should ensure transparency and avoid such allowances being used for purposes for which they were not intended.

Submissions on behalf of Mr Dickson

[40] Mr Cranney presented this helpful summary of his submissions at the outset:

a) The word "rate" in both the Act and the Order means the amount per unit of time.

b) It does not mean "average rate over a period" or "average rate over a pay period".

c) The averaging approach advanced by Idea Services is not authorised by the Act or the Order and is inconsistent with the plain language contained in them.

d) In any event the higher hourly rate of $17.66 for non-sleepover work is payment for that work and is a separate and distinct contractual entitlement for that work.

e) The $17.66 hourly rate cannot be used in whole or in part to satisfy Idea Services' obligation to pay Mr Dickson at the minimum rate for sleepovers.

[41] Mr Cranney relied on s4(2), which states that a minimum rate of wages may be prescribed as either "*a monetary amount*" or a percentage of any other minimum rate prescribed. He submitted that the precription of an amount requires the prescription of a unit of time to which the prescribed amount relates. The Order therefore identifies minimum rates of wages payable in the form of an identified amount for an identified unit of time being hour, day or week. He submitted that there is to be a minimum payment for each hour and each day, and relied on the following passage from *Hopper* at p369 ff:

> *… just as for each hour's work the minimum payment is to be so much, and for each day's work – that is, a working-day not twenty-four hours – the minimum payment is to be so much, so in other cases (para.(c)) the minimum payment is to be ascertained on the basis of a working-week at so much, and it accomplishes this result in each case by the simple expedient of prescribing rates of pay and not amounts of pay.*

[42] In reliance on this statement Mr Cranney submitted that the Act achieves its purpose in each case by the "*simple expedient*" of prescribing rates of pay, in the sense of prescribed amounts per unit time, and not "*amounts*" of pay, in the sense of totals per pay period or any other period. He pointed out that the Act and the Order contain no reference at all to the concept of pay period or to averaging. He submitted that the legislation is concerned with the rate at which workers are paid: the amount per unit time, not the total amount over a pay period or any other period. He observed that in every case the "*minimum rate*" is prescribed by reference to a time period in the Order; by the hour, by the day or by the week.

[43] Mr Cranney submitted that, under the scheme of the Act and the Order, whether any particular worker is a "*worker paid by the hour*" or a "*worker paid by the day*", is a question of fact. He submitted that where a worker's wages are calculated "*by reference to an hourly rate*" and to "*time factors measured in hours*" as here, the worker is paid by the hour regardless of whether payment of those wages is made daily, weekly, fortnightly or otherwise. He relied on s8A of the Act which requires that the record of wages paid to the worker must include the method of calculation and a record of the "*hours between which the worker is employed on each day, and the days of the worker's employment during each week*" (s8A(1)(g)).

[44] Mr Cranney submitted that s6 operates regardless of whether the agreement contains a lower rate of payment and the Act confers a statutory entitlement to receive payment at not less than the minimum rate. If parts of the worker's work are paid for at rates above the minimum rates prescribed, he submitted that the Act does not affect them. He contended that the Act does not license the Court to lower those rates or to order that they be credited towards other hours paid at a rate less than the statutory minimum. Mr Cranney noted the use of the word "*rate*" in s11, the enforcement section. Mr Cranney submitted that the word "*rate*" is unambiguous and means the prescribed amount for the prescribed period of time and does not mean the average rate over a pay period or any other arbitrarily chosen time period. He submitted this is supported both by the *Hopper* decision and also *Brown (Inspector of Factories) v Manawatu Knitting Mills, Limited*[6].

[6] [1937] NZLR 762

[45] Mr Cranney accepted that Finlay J reached the right decision in *Mickell* but submitted that the case was distinguishable on the facts. He also criticised the reasoning, much of which he described as *obiter*.

[46] Turning to the *Sealord* decision, Mr Cranney submitted that the Court had rejected the type of pay period argument now being advanced by Idea Services and had held that the time at which payment was required to be made was irrelevant to the issue of whether the minimum entitlements were paid. He accepted that the Court had referred to a "*voyage cycle basis*" as a means for assessing compliance with the legislation. Mr Cranney submitted, however, that this was a proviso to its conclusion that the arrangements for payment were not in breach of the Act, and the Court was simply stating that the minimum wage obligation applied at all times during the voyage cycles. He accepted that certain phrases in the judgment could be read as supporting the concept of averaging, at least in a piece rate situation, but submitted that no issue of averaging was raised or argued in the case and averaging was not referred to in the judgment. He submitted that the case is therefore of little use in determining the present matter.

[47] Mr Cranney submitted the averaging approach creates multiple difficulties in applying other employment protection legislation, including the Holidays Act 2003. He submitted the averaging approach would render wholly uncertain the concept of *"relevant daily pay"* which is defined in s9(1)(a) of that Act as "*the amount of pay that the employee would have received had the employee worked on the day concerned"*. Mr Cranney then used the following example to illustrate his point:

> *For example, a 40 hour hourly worker receiving say $3 per hour for eight hours worked each Monday and say $16 per hour for each of 32 hours worked on Tuesday to Friday would be entitled to just $24 as relevant daily pay if a public holiday fell on a Monday (or if he or she were sick or attended to a bereavement on a Monday; or if an alternative holiday were taken on a Monday).*

[48] Mr Cranney noted that similar issues will arise under s79 of the Employment Relations Act 2000 (ERA) which defines payment for employees taking employment relations education leave by reference to the definition of relevant daily pay in s9 of the Holidays Act.

Discussion and Decision

[49] In determining this aspect of the matter, we must decide the proper meaning and application of the Minimum Wage Act 1983 and successive Minimum Wage Orders. In doing so, we must apply the principles of statutory interpretation set out in the Interpretation Act 1999 as explained in the decisions of the superior courts.

[50] Section 5 of the Interpretation Act 1999 provides that: *"The meaning of an enactment must be ascertained from its text and in the light of its purpose."* Describing how this ought to be applied in practice, Justice Tipping said in *Commerce Commission v Fonterra Co-Operative Group Ltd*[7] :

> *[22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.*

[51] We also have regard to the passage from the decision in *Finau* referred to us by Mr Cleary where the Court of Appeal said in relation to questions arising out of the application of practical statutes:

> *Parliament must have intended these questions to be answered easily, based on information readily available to both employer and employee at that time.*

[52] In this case, the key provisions to be understood and applied are several sections of the Minimum Wage Act and clause 4 of the Minimum Wage Order. The meaning of provisions contained in the Act must be ascertained in the context of the Act and in light of the perceived purpose of both that section and of the Act as a whole. As delegated legislation, clause 4 of the Minimum Wage Order must be construed not only in light of the purpose of the Order but also of the statute under which it was made, the Minimum Wage Act. We approach the matter on that basis.

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[7] [2007] 3 NZLR 767 (SCNZ)

[53] The scheme of the legislation is clear and simple. Section 4 of the Act creates a power to prescribe minimum rates of wages for classes of workers. Section 6 prevents contracting out of the Act and provides that workers are entitled to be paid for their work at a rate of wages not less than that prescribed. Section 7 restricts deductions from wages payable under the Act. Section 8A requires employers to keep detailed records relating to every worker to whom the Act applies. These include information about the time worked, the wages paid and how those wages are calculated. Section 11 provides for recovery of wages payable under the Act.

[54] The Order sets out minimum rates of wages for three classes of workers. Clause 4 prescribes the rates payable to adult workers, such as Mr Dickson.

[55] A key expression used in both the Act and the Order is *"rate of wages"*. This expression is not defined in either the Act or the Order but its general meaning is straightforward. A rate of wages is the amount of money payable to the worker for each unit of time. The only units of time included in the legislation are those set out in the Order, that is hour, day and week. Which of those units of time should be used in the calculation of a particular worker's rate of wages depends on whether the worker is paid *"by the hour"*, *"by piecework"*, *"by the day"* or otherwise. In this case, we made a finding of fact that Mr Dickson was paid *"by the hour"*. Thus, in terms of clause 4 of the Order, the only measure of time involved in calculating his rate of wages is the hour. He must receive not less than $12.50 per hour.

[56] As we have observed, s6 entitles the worker to payment at not less than the minimum rate of wages provided for in the Order. It therefore deals with the amount of wages payable. What is not provided in s6, or indeed anywhere in the Act or the Order, is any requirement about when those wages are to be paid or the frequency of payment. Given that the legislation is concerned with minimum entitlements, that is surprising. It means that the timing of payment is a matter for agreement by the parties or, failing agreement, by implication from their conduct, from custom or from other circumstances of the particular employment relationship. In this case, it was a term of the applicable employment agreement that Mr Dickson be paid fortnightly.

[57] The fact that Mr Dickson was paid fortnightly is at the heart of the case advanced on behalf of the plaintiff. Mr Toogood submitted that, because payments were made fortnightly and the sufficiency of payment could therefore only be assessed on a fortnightly basis, the amount of wages payable should also be assessed over a fortnightly period. Mr Cleary, Mr White and Mr Gane made similar assumptions in their submissions.

[58] This approach confuses two quite distinct issues: the amount of wages payable and when those wages are to be paid. As we have said, the Act deals with the former but not the latter.

[59] This approach also introduces into the statutory scheme a time period not provided for in the legislation. Given that the Order provides three different time periods for calculating the minimum wages payable to a worker, there is no need to imply a further period where one or more of those periods applies.

[60] In this case, our finding of fact that Mr Dickson is paid by the hour means that the only time period for calculation of his minimum rate of wages is the hour. Pursuant to clause 4 of the Order and s6 of the Act, Mr Dickson is entitled to receive payment of not less than $12.50 per hour and, as that is the only time period applicable under clause 4, the entitlement must be to not less than $12.50 for each and every hour he works. There is no indication in the Order or the Act that this entitlement is to be subject to any other time period. Equally, in our view, there is no need to imply such a qualification of the simple words of the Order, as implemented through the Act.

[61] A factor which reinforces our view is the inclusion in the Act of s8A. This requires employers to keep detailed wage and time records for every worker whose minimum wages are prescribed under the Act. Those records include the hours worked each day and the days of the week worked. They also include the wages actually paid to the worker and *"the method of calculation"*. This information enables a worker or, in the case of alleged default, a Labour Inspector, to know exactly what wages are payable to the worker and what has been paid. The requirement to record both hours and days worked enables the minimum wages

payable to be readily calculated in all cases, whether the rate at which they are payable is per hour, per day or per week.

[62] The requirement in s8A to record the method of calculation further assists in determining whether payment has been made for each time period in question. In this case, detailed records were kept by Idea Services of the wages paid to Mr Dickson. What they showed was that his wages were calculated on the basis of $17.66 for each hour worked during shifts and while performing qualifying duties during sleepovers. The calculations also showed that, otherwise, Mr Dickson received only the allowance of $34 on each occasion for his 8 to 10 hours' work during sleepovers. If, as counsel submitted, the sufficiency of payment was only to be calculated over entire pay periods, there would be no reason for s8A to include a requirement to record the method of calculation or the days on which hours were worked. All that would be required would be the number of hours or days worked during each pay period.

[63] It is significant that the record keeping requirements in s8A are identical to those in s130 of the ERA where their purpose is to enable employees and Labour Inspectors to assess compliance with employment agreements. There can be no question that an entitlement to be paid at a certain rate of wages per hour under an employment agreement is enforceable for each and every hour.

[64] In our earlier judgment we asked counsel to consider whether the opening words of s6 might be thought to isolate obligations under the Act from contractual obligations. What prompted that request was that the position adopted by Idea Services in the initial hearing involved allocating the money actually paid to Mr Dickson on one basis for the purposes of his employment agreement and on quite a different basis for the purposes of the Act. On behalf of Idea Services, Mr Toogood's response was that the opening words of s6 do not have the purpose suggested but rather they are to prevent contracting out of the Act. We agree. Mr Toogood went on, however, to submit for other reasons that there was no connection between the employer's obligations under the Act and its obligations under the applicable employment agreement. He submitted that there was no difficulty at all with the money paid to Mr Dickson being accounted for in two inconsistent ways.

[65] We have grave difficulty with this submission. It introduces a measure of unreality into the employment relationship. It is also inconsistent with the inclusion in s8A of the Act of the requirement to record how wages paid to a worker have been calculated. That calculation will necessarily reflect the provisions of the employment agreement. That record is kept as a requirement of this particular statute, the Minimum Wage Act. That being so, it cannot be correct to assess whether the requirements of the same statute have been met in a manner inconsistent with that record. Thus, in this case, the record shows Mr Dickson was paid only $34 on each occasion for his 8 to 10 hours' work during sleepovers yet Idea Services asks the Court to accept that he received a minimum of $12.50 per hour for that work.

[66] Before leaving s8A, we note Mr Gane's submission that the purpose of requiring wage and time records to include the method of calculation is to enable a Labour Inspector to distinguish between wages and non-taxable allowances. With respect, that submission overlooks the fact that non-taxable, or reimbursing allowances, are not wages and therefore would not be recorded as such.

[67] An hour by hour, day by day and week by week construction of the legislation is not without difficulty in some cases. One is when an employer fails to keep the records required by s8A. Mr Gane touched on this possibility in his submissions and suggested that, because a broad averaging approach required less information, it should be favoured. While we understand the practical issue raised by this submission, as a matter of principle it cannot be right that the construction of legislation should be influenced by the possibility that those bound by it will not comply with their statutory obligations.

[68] Another potential source of difficulty may be workers paid *"by piecework"*. The word "piecework" is not defined in the legislation but is generally understood to mean payment according to the number of individual pieces of work completed. For example, it used to be common in the meat processing industry for workers to be paid on the basis of an amount per animal processed. Clause 4 of the Order sets the minimum rate of wages for such workers at $12.50 per hour. In practice, it may be difficult in some cases to determine how many pieces of work have been completed

each hour and therefore whether the worker has become entitled to payment of at least $12.50 for work done in that hour. This will particularly be so when the pieces of work are time consuming so that work on each piece may extend over more then one hour. Similarly, when the pieces are small and very numerous, it may not be realistic to measure output every hour. In such cases, pragmatism may require the output over several hours or a day to be averaged over the hours worked.

[69] In this case, the applicable employment agreement requires Idea Services to pay Mr Dickson a single sum of $34 for each sleepover without defining how much of that sum is payable in respect of particular hours worked. That omission is understandable in the circumstances because Idea Services did not regard sleepovers as work. At a practical level, however, it can only be dealt with by averaging the contractual entitlement over the number of hours worked in the sleepover.

[70] It was submitted that the need to adopt a measure of averaging to make the legislation work in cases such as these requires the broad averaging approach contended for by the plaintiff and the interveners to be adopted. We think that submission goes too far. To the extent that averaging may be required to give effect to the legislation in some piecework situations, that need only be over a few hours or, at most, a day. That does not justify adopting a general construction of the legislation which, in this case, would involve averaging over a fortnight. We are also aware that payment by piecework is relatively uncommon today and workers paid on this basis will comprise a very small proportion of the workforce to whom the minimum wage legislation applies. These issues are a factor we ought properly to take into account in deciding the proper construction of the legislation and we record that we have done so. We find, however, that the factors in favour of the interpretation we have adopted are far more persuasive.

[71] In our view, the text of the relevant provisions of the Act and the Order mean, in this case, that Mr Dickson is entitled to receive payment from Idea Services of not less than $12.50 for each hour he has worked. We are also of the view that this construction is consistent with other provisions of the Act. We turn now to consider whether that construction is consistent with the purpose of the Act as a whole.

[72] The Act does not contain an object section, nor is the long title helpful. Its purpose, therefore, must be determined from its content and from its social and historical context.

[73] Mr Cleary provided us with a helpful historical perspective on the 1945 predecessor of the current legislation which suggested that its original purpose was to provide a minimum level of income for male workers sufficient to enable them to provide a reasonable standard of living for a family consisting of two parents and three children. We accept that this was certainly one of the purposes of the original legislation when it was introduced in 1945. As the level of minimum wages prescribed under the 1945 Act was set at or below the minimum rates in most awards, however, it assisted relatively few people in this way. From the outset, the legislation had other purposes as well. Minimum wages were prescribed for women but only at 60 percent of the rate for men and well below the level required to support a family. More significantly, the form in which the legislation was enacted also applied to workers other than those working full time. Just as the current Act does, the 1945 Act applied to workers paid by the hour, the day and otherwise. It provided not only minimum weekly wages but also daily and hourly minima. It therefore applied to workers employed on a casual or part time basis as well as those engaged in regular weekly work. This structure suggests that another important purpose of the legislation was to ensure that workers received a minimum rate of wages for every part of their work. By this means, it countered exploitation of vulnerable workers, many of whom were employed on a casual or daily basis.

[74] We regard the current legislation as being aimed at a broadly similar range of objectives but that the relative importance of those objectives has changed as society has changed. In particular, the incidence of casual and part time work today is much greater than it was in 1945. As a result, the purpose of the Act to ensure that workers receive a minimum rate of pay for every part of their work is of even greater significance now than it was previously.

[75] Overall, we find the construction we have placed on the Act and the Order are consistent with the overall purpose of the legislation.

[76] We find this construction also avoids injustice which may arise in calculating payment under other statutes if an averaging approach is taken. Mr Cranney referred to the example of *"relevant daily pay"* used extensively in the Holidays Act 2003 and imported into other statutes such as s79 of the Employment Relations Act 2000. We repeat that definition:

> … *the amount of pay that the employee would have received had the employee worked on the day concerned.*

[77] As Mr Cranney submitted and Mr Gane acknowledged, the application of this definition to the two approaches contended for by the parties will produce differing results. Mr Cranney provided a hypothetical example but we think the point is demonstrated equally, and perhaps better, by reference to Mr Dickson's actual circumstances. If Mr Dickson works a 10-hour sleepover on a public holiday, he must be paid in accordance with s50 of the Holidays Act which provides:

> ***50 Employer must pay employee at least time and a half for working on public holiday***
>
> *(1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of—*
>
> *(a) the portion of the employee's relevant daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or*
>
> *(b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.*

[78] Adopting the approach that, as a worker paid by the hour, Mr Dickson is entitled under the Minimum Wage Act to receive not less than $12.50 for each hour worked, his relevant daily pay would be $125. The additional amount to which he would then be entitled for working on the public holiday would be half of that amount or $62.50.

[79] If the averaging approach urged on us by the plaintiff and the interveners is adopted, Mr Dickson would have no specific entitlement to receive the minimum wage for hours worked on the day in question. His only entitlement would be that provided for in the applicable collective agreement and his relevant daily pay would

therefore be $34. For performing that work on a public holiday, therefore, Mr Dickson would only be entitled to an additional $17.

[80] Completing the averaging approach, the sufficiency of Mr Dickson's pay for the purposes of the Act would be assessed at the end of the pay period. That assessment would be done on the basis of the hours worked during the fortnight and without regard to the requirement to pay him at not less than time and a half for work performed on public holidays. Provided he had worked sufficient other hours at $17.66 per hour, he would ultimately receive no more than an additional $17 for working 10 hours on the public holiday.

[81] A more extreme example would be if Mr Dickson was rostered to work only sleepovers during a particular fortnight and was sick for the whole period. Under the Holidays Act, he would be entitled to sick pay for each day he was absent based on his relevant daily earnings. Taking the averaging approach, his relevant daily earnings would be $34 and that would be the amount of his sick pay for each day. As he had not actually worked during the fortnight, he would have no entitlement under the Minimum Wage Act. Dealing with the same situation on an hour by hour basis, Mr Dickson would be entitled to $125 per day.

[82] The substantial differences which emerge from these examples arise from two sources. One is the fact that entitlements under the Minimum Wage Act are based on the work the employee has actually done whereas entitlements under the Holidays Act are based on what the employee would have earned had he or she worked. The other source of difficulty is that applying the averaging approach in this case effectively delays any consideration under the Minimum Wage Act until the end of each fortnight. It therefore takes minimum wage considerations out of the relevant daily rate assessment which is the basis for payment under the Holidays Act.

[83] The purpose of the Holidays Act as a whole is set out in s3:

> ***3 Purpose***
> *The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—*

> *(a) annual holidays to provide the opportunity for rest and recreation:*
> *(b) public holidays for the observance of days of national, religious, or cultural significance:*
> *(c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:*
> *(d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement.*

[84] It must be an essential and integral part of achieving this purpose that holidays and leave provided under the Holidays Act are on pay which is at a level comparable to an employee's usual rate of earnings. The results produced by applying the averaging approach, as demonstrated in these examples, do not accord with that purpose. This militates further against the averaging approach.

[85] Another of the questions we asked counsel to address in their submissions was the extent to which we might be assisted by the decisions in four previous cases in which minimum wage legislation had been discussed. With the assistance of the submissions of counsel, we have reached the following conclusions about those decisions.

[86] The decision of Myers CJ in *Brown (Inspector of Factories) v Manawatu Knitting Mills Limited* is plainly distinguishable. It concerned the extent to which deductions might properly be made from minimum wages rather than how minimum rates of wages ought to be applied. It was also decided under quite different legislation which prescribed only minimum weekly rates of wages.

[87] The case of *Hopper v Rex Amusements, Ltd* appears to be the only decision of the Court of Appeal on minimum wage legislation, albeit the 1945 Act in its original form. The matter came before the Court of Appeal by way of a case stated by the Court of Arbitration. It concerned Mr Guy who was employed by Rex Amusements Ltd for about 21 hours per week and was paid per 3-hour period of work. The claim made on his behalf was for the weekly minimum rate of wages. Two questions were asked. The first was whether Mr Guy was paid by the hour, and therefore entitled to the minimum rate of wages per hour or "otherwise" and entitled to the minimum rate of wages per week. The Court of Appeal found as a matter of mixed fact and law that Mr Guy was paid by the hour. As what he had been paid was more than the

statutory minimum rate of wages per hour, that conclusion effectively disposed of the case.

[88] The Court of Appeal went on, however, to consider the second question which was, if Mr Guy was entitled to be paid at the minimum rate of wages per week, whether he had received what was payable to him. In light of the Court's conclusion on the first question, this part of the judgment was *obiter dicta* but we have nonetheless given proper respect to the views expressed. The argument advanced on behalf of Mr Guy was that, if he was entitled to a minimum rate of wages per week, he must be paid not less than that sum regardless of the number of hours worked. Counsel had to concede that the logical extension of this argument would be that Mr Guy was entitled to the minimum weekly wage if he had worked only 3 hours in a week. The Court of Appeal rejected that argument. On the basis that the applicable award provided for a maximum of 36 hours per week, the Court found that Mr Guy would have been entitled to a fraction of the weekly minimum wage in proportion to the hours he had worked. Thus, if he worked 21 hours in a week, he would be entitled to not less than 21/36 of the minimum weekly wage. The Court said that a similar result would apply to hourly and daily rates of wages and that the statute *"accomplishes this result in each case by the simple expedient of prescribing rates of pay and not amounts of pay."*[8]

[89] While we have regard to this statement, we must do so in context. As we have noted, it was not the basis on which the case was decided. It was also said in relation to the issue of whether one of the statutory periods of time, the week, was divisible for the purposes of assessing entitlement to payment. That is not what is in issue in this case and it is clear from the case stated and from the judgment in *Hopper* that the Court was not asked to consider averaging.

[90] The case of *Mickell v Whakatane Board Mills Limited* appears to be the only previous decision in which the concept of averaging under the Minimum Wage Act has been directly discussed. In that case, Mr Mickell lost 8 hours of work when the mill was closed due to a shortage of fuel. He claimed that the employer was

[8] page 370 of the report

prevented from making any deduction from wages payable to him under the applicable award by s2(5) of the 1945 Act, the current equivalent of which is s7(2) of the 1983 Act. Finlay J found that the section applied only to wages payable under the Act and did not apply to wages due to Mr Mickell under the award.

[91] As an alternative, it was argued for Mr Mickell that he was entitled to payment under the Minimum Wage Act for work he was ready and willing to do on the day the plant was closed. After accepting the proposition that the expression *"for his work"* in s2(1) of the 1945 Act – now s6 of the 1983 Act – meant *"for the hours he has agreed to work"*, Finlay J said:

> *I refer to the question whether the minimum hourly rate prescribed by the Act applies to an average over the ordinary weekly working-hours or whether it applies to each hour irrespective of the worker's earnings over the other hours. This involves the question whether there is any unit of time over which the question must be judged as to whether an award secures to the workers under it a reward in excess of that prescribed by the Minimum Wage Act, 1945. It is noteworthy in this respect that the plaintiff bases his claim upon a right to work five shifts of eight hours in each week. He thus adopts a working-week as commonly understood as the unit of calculation. That he is right in so doing I feel constrained to agree, for several reasons. In the first place, under an award prescribing payment at a high rate per hour, a man might lose a shift during the week for some reason not expressly mentioned in subs. 5 but receive a reward much in excess of the minimum for the rest of his ordinary working-hours in that week. To attribute a meaning to subs. 5 which would allow him to claim in addition for the time lost at the minimum rate fixed by the Act would impugn the real purpose of the Act, which was to fix a minimum wage of general application.*
>
> *The effect of such a construction would be to fix a minimum for the individual, which minimum might be many times in excess of the minimum to which the great mass of workers are entitled. Then, to disregard a working-week as the unit would be to disregard what is universally regarded as the unit with respect to remuneration. The universality of the conception was expressed in* Hopper's *case where it is said : "It is well known that in all occupations there is a period known as the "working-week". Then, finally, to disregard such a unit would involve a disregard of the true meaning of the word "lost," for, in that event, a shift lost might be claimed for, whilst in fact the time alleged to have been lost might well have been made up later. That seems to have happened here, for the eight hours lost at ordinary time rates of pay were made up at the end of the week as overtime at higher rates of remuneration. I think, therefore, that the test period is the ordinary working-week.*
>
> *It follows that, if a worker in fact receives during a working-week a sum in excess of that which he would have received had he been working on the terms prescribed by the Act, then the Act has no application.*[9]

[9] Page 487-488 of the report

[92] Mr Toogood, Mr White and Mr Gane relied on this decision and quoted in support of their submissions parts of what Finlay J said. To understand the Judge's reasoning properly, however, it is necessary to put those conclusions into the context of the extended passage reproduced above. What this shows is that his reasoning and conclusion was based on the proposition that all work is done on the basis of a "working week". While that may have largely been so in 1950, and we have doubts about that, it is most certainly not true today. In this respect, the decision is based on a view of society which is no longer valid.

[93] With respect to Finlay J, we see the reasons he gave for adopting the "working week" approach as questionable. It seems to have initially been a response to the plaintiff relying on the provisions of the award which provided for five shifts per week. Subsequently, Finlay J relied on what the Court of Appeal said in *Hopper*. In that case, the Court of Appeal adopted a working week as the basis for assessing entitlement to the minimum weekly wage. It did so in preference to regarding a "week" for that purpose as 7 days. The Court in *Hopper* never suggested that the working week ought to be used as a basis for assessing the entitlement of workers paid by the hour yet, by quoting the sentence in question, Finlay J sought to rely on it for that purpose. It is also apparent from Finlay J's judgment that he did not base the "working week" approach on any provision of the 1945 Act or consider whether it was consistent with the wording of that Act.

[94] From the judgment, it also appears that Finlay J saw the provision of a basic weekly wage as the sole purpose of the Act. Again, that may have been the perception of many in 1950 but, for the reasons we have given, we see the legislation as having multiple purposes and applications, particularly in contemporary society.

[95] There are also difficulties in seeking to rely on cases decided under the 1945 Act in support of a particular interpretation of the 1983 Act. While the 1945 Act contained many of the key provisions which remain in the current Act, there is at least one important difference. The current Act includes s8A which, for the reasons we have given, we regard as significant in construing s6 of the Act and clause 4 of the Order.

[96] For these reasons, we do not find the decision in *Mickell* helpful in deciding this case and, to the extent it may be said to still have precedent value, we decline to follow it.

[97] In the *Sealord* case, a full Court considered the payment made to the crew of fishing vessels. The applicable employment agreements provided for the payment of the remuneration due to the workers in several ways over a cycle of voyages. These included fortnightly payments variously characterised as "retainer", "pay advance" or "base salary". The Labour Inspector argued that those fortnightly payments must be of at least the minimum amount payable under the Order. We disagreed and concluded that the sufficiency of payment was to be assessed when all of the payments had been made. The decision largely turned on the distinction we have made in this case between assessment of the minimum amount of wages payable and the time at which payment is to be made. We concluded that neither the Act nor the Order dealt with the timing of payment and that, provided the total amount paid in respect of the work to which it related was not less than the amount payable under the minimum wage legislation, the requirements of that legislation were met.

[98] Both Mr Toogood and Mr White submitted that this decision supported an averaging approach to calculation of the amount payable under the minimum wage legislation. We think this misconstrues the decision. The amount of wages payable to the workers was never in issue in the *Sealord* case. Accordingly, there was no discussion about how such amounts were to be calculated. The full Court in that case certainly never considered the issue dealt with in this decision.

[99] Overall, we have obtained little assistance from the decided cases in reaching our conclusion in this case. They do not persuade us to adopt a different conclusion to that reached following our initial analysis.

Conclusion

[100] We find that, on a proper construction of the Minimum Wage Act 1983 and the Minimum Wage Orders, Mr Dickson was entitled to be paid not less than $12.50

for each and every hour he worked for Idea Services Limited, including the work done during sleepovers.

[101] Pursuant to s183(2) of the Employment Relations Act 2000, the determination of the Authority challenged in WRC 31/08 is now wholly set aside and this judgment, together with our earlier judgment dated 8 July 2009 (WC 17/09), stand in its place. Both judgments also represent our decision on the questions of principle in WRC 34/08.

[102] The consequence of our decision is that Mr Dickson is very likely entitled to additional payment for his work. We expect the parties will attempt to resolve issues of quantum by agreement but, in the event that any differences remain, leave is reserved to put them before the Court for resolution by a single Judge.

Costs

[103] Costs are reserved. This case has been conducted in the name of an individual employee and his employer but, as the outcome is undoubtedly of broad application and significance, it is very much a test case. The parties have recognised that in the presentation of their cases and we understand that Mr Dickson is fully supported in this litigation by his union. For that reason, it may well be a case in which no order for costs should be made but we do not decide that now. The parties are invited to discuss the matter with a view to agreement but leave is reserved for Mr Dickson to seek an order for costs if necessary. In that event, Mr Cranney should file and serve a memorandum within 42 days after the date of this judgment. Counsel for Idea Services will then have a further 28 days in which to respond.

A A Couch
Judge

Judgment signed at 10.30am on 11 December 2009

JUDGE B S TRAVIS

[104] I agree with and adopt everything in the judgment of the Chief Judge and Judge Couch except, regretfully because the full Court prefers, whenever possible, to speak with one voice, their discussion and decision and conclusion.

[105] The two sets of contrary arguments presented to the Court in this case are both compelling and logical but are completely irreconcilable. I found no express provision in the Act or the legislative history which gives clear and unequivocal guidance as to which approach is to be adopted. There are consequences for adopting one approach rather than the other. Some of those consequences may require resolution on another day, regardless of which approach is adopted in this case.

[106] After considerable deliberation, and not without some hesitation, I have decided to adopt Idea Service's submissions and the averaging approach, supported as they were by Business New Zealand, NRIDP and the Labour Inspector. These are my reasons for so doing.

[107] Section 5 of the Interpretation Act 1999 requires the meaning of an Act to be ascertained from its text and in the light of its purpose. In considering the purpose of the Act I have been guided by the approach of the Court of Appeal in the *Finau* case cited by Mr Cleary and set out in para [27] above. Both the employee and the Labour Inspector have the right to enforce the Act (s11). An approach which provides the easiest means of calculating whether the requirements of the Act have been met in any particular case is likely to be the approach the legislature intended, provided that approach fits with the purpose of the Act.

[108] When ascertaining the purpose of the Act in the absence of any legislative guidelines it is important to note that it is part of the employment safety net statutes. It ensures no adult worker receives less than a statutory minimum amount for his or her work. It is not intended to deal with situations where the total remuneration received for the relevant period exceeds that statutory minima. If the amount paid to the employee exceeds the statutory minima then the Act has not been breached and

its purpose has been met. This purpose underlies the decision of the Court of Appeal in *Hopper* and of Finlay J in *Mickell*, to which I will refer later.

[109] I accept Mr Cleary's submission that, from the very first legislation, the focus has been on a minimum rate of pay, rather than an absolute level of entitlement per unit of time or piece worked. The latter simply provides a means for calculating the statutory minimum. I also agree with the submissions of all counsel arguing in favour of the averaging approach that the wording of the Act and the Order support this approach.

[110] Section 4 of the Act states only that rates of pay can be prescribed and does not state the wages that are to be prescribed. This supports the view that it is not each and every hour of work that draws a specific amount of pay, regardless of what may have been paid for other hours during the pay period.

[111] Section 6 of the Act refers to what the worker "*shall be entitled to receive from his employer*". This section does not deal with when the worker is to receive that entitlement. It must be the contractual arrangements or the parties' practice that determines this.

[112] The parties cannot contract out of the Act. Section 11 allows employees to recover wages paid to them at a lower rate than the minimum wage, regardless of whether there has been acceptance or any express or implied agreement to the contrary. As Mr Gane submitted, the Act will also apply even when there are no formal terms of employment, or where no payment at all has been made to the worker. I accept Mr Cleary's submission that the words "*wages or other money*" in s11 suggest that both wages and other money together are to be taken into account in determining whether or not what has been paid falls below the statutory minimum. This supports the averaging approach.

[113] I am not persuaded that the obligation to provide records in s8A undermines the averaging approach. I consider Messrs Toogood and Gane provided adequate explanations for the record keeping requirements. The wording of s6 and its predecessors were consistent with the averaging approach before s8A was enacted

and a provision to assist in enforcement is unlikely to have been intended to change that interpretation.

[114] I was assisted by Mr Toogood's analysis of the wording of s6. If it was intended that each hour worked was to be looked at exclusively from every other hour worked, the section would more appropriately have included the word "*amount*" in place of the word "*rate*". The minimum rate of pay for hourly workers under the current legislation is $12.50 an hour. Mr Toogood did not seek to argue that the relevant rate of pay was any different, and accepted that "*rate*" equals an amount per unit of time, in accordance with the dictionary definitions.

[115] The question that arises in this case is therefore: what is the rate which has been paid to Mr Dickson, or, in cases where there has been no payment, what rate ought to have been paid? To answer that question it is necessary to determine the rate which has been paid, or ought to have been paid, under the contractual arrangements. Once that has been determined the next question is whether or not that rate is equal to or greater than the minimum rate of $12.50 an hour, $100 a day or $500 a week.

[116] To determine the rate that has actually been paid it is necessary to know the period over which payment is to be made. The most appropriate unit of time for determining sufficiency is the pay period. In this case it was fortnightly, notwithstanding that the calculation of Mr Dickson's pay was by the hour. If the pay period is not clearly defined by the contractual arrangements then the pattern that has emerged from practice may assist the Labour Inspector who has to enforce the provisions of the Act.

[117] In determining the amount that has actually been paid I accept Mr Toogood's submissions that all the remuneration paid in the period can be taken into account. Reimbursing allowances cannot be taken into account as they are not remuneration and are not taxable. They refund the employee for expenses incurred.

[118] Mr Cranney advised the Court that Mr Dickson had conceded, in the present case, that the $34 allowance paid for sleepovers can be taken into account, but the

argument that he has presented would not permit this, if strictly applied. His argument is that the Act requires $12.50 to be paid for each and every hour worked, irrespective of whether additional amounts have been paid for other hours worked or allowances paid.

[119] I am supported in the view that I have reached by the reasoning of Finlay J in *Mickell*. In an earlier case, *NZ Forest Products, Limited v Craike*[10], Fair J had declined to answer a similar question in the following terms:

> *The only matter that might appear open to serious argument would appear to be whether the 2s. 9d. per hour applied to an average over the ordinary weekly working-hours, or to each hour, irrespective of a worker's earnings over the other hours. The former basis would appear reasonable and more logical. But it seems contrary to the ordinary and natural meaning of subss2 and 5 in reference to hourly and daily rates. Moreover, this basis was not argued before me, and I should not, I think, consider the appeal from this aspect.*

[120] The amount set out in that paragraph was the amount under the 1945 Act at the time. In *Mickell*, Finlay J said he could not avoid deciding the question[11]. After rejecting the plaintiff's claim that s2(5) created an independent and positive rule of law applicable to all contracts for services, His Honour stated[12]:

> *The purpose of the legislation was, therefore, to prescribe a standard definitive of the minimum terms upon which workers coming within its scope could be employed. Beyond the prescription of a minimum, the Act nowhere purports to abrogate or affect contracts, industrial agreements, or awards.*

[121] Finlay J held that the section was not intended to insure workers against the results of time lost and, where the award had taken into account temporary suspensions of work and rates of remuneration had been added in consequence, to have accepted the interpretation advanced by the plaintiff would be to provide him with "*an additional reward beyond that already agreed or allowed*"[13] Finlay J stated:

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[10] [1949] NZLR 128 at 133
[11] p485
[12] p486
[13] p487

> *Clear words would be necessary to impose a condition entitling anyone or any class of person to disclaim an express term of an agreement in this way, and so secure an additional advantage*.

[122] To further support the main conclusion Finlay J reached, in the passages set out above in para [91], he held that the 1945 Act can apply an average over the ordinary weekly working hours, rather than each hour, irrespective of the worker's earnings over the other hours. This was a matter that was argued before him by two learned senior counsel and in which he reached a conclusion contrary to the tentative opinion expressed by Fair J in *Craike*. It was not a conclusion that can be held to be *obiter dicta* or simply an observation. With respect, I adopt Finlay J's reasoning.

[123] That conclusion was consistent with that of the Court of Appeal in *Hopper*. There, as Mr Toogood submitted, it was held that the issue of whether an hourly worker's wages complied with the statutory minimum should be assessed across the whole working week, or pay period, as opposed to considering each actual payment made on an hour by hour basis. It is also consistent with the full Court's decision in *Sealord* which found that compliance with the Act had to be determined on a voyage cycle basis.

[124] It is arguable that by passing s6 in virtually identical terms to that contained in the 1945 Act, the legislature intended that the section be given the same meaning that Finlay J gave to it[14]. Although, as the learned authors of *Statute Law in New Zealand* observe, reservations have been expressed in the cases about the reliability of legislative endorsement of an interpretation in a judicial decision, it is a factor which can be taken into account[15]. Although *Mickell* would not otherwise be binding on this Court, as a matter of precedent, I have found it highly persuasive. The fact is that the legislature had the opportunity, not long after the decision was issued, to change the provision if it did not consider that Finlay J's interpretation was correct. The legislature's passing of the provision in the same form invites endorsement of the averaging approach.

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[14] *Barras v Aberdeen Steam Trawling & Fishing Co Ltd* [1933] AC 402; [1933] All ER 52 (HL)
[15] JF Burrows and RI Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 194

[125] I reject Mr Cranney's submission that the adoption of the averaging approach creates difficulty with the Holidays Act 2003. I observe that s6 is to take effect, notwithstanding anything to the contrary in any enactment. The Holidays Act and the Minimum Wage Act deal with different matters and the averaging approach under the Minimum Wage Act will not prevent a proper determination of the appropriate payments under the Holidays Act. The Minimum Wage Act deals with payment for work; the Holidays Act deals with holidays and payments for them. The provisions in an enactment passed some 20 years after the enactment being construed, when the latter Act makes no express or implied reference to the earlier enactment, are unlikely to provide helpful guidance as to the interpretation of the earlier enactment.

[126] Mr Cranney cited *Moon v Kent's Bakeries, Ltd*[16] and *NZ Freezing Companies Association v Wages Tribunal*[17]. Both are decisions of the Court of Appeal. The former dealt with the Annual Holidays Act 1944 and the word "*rate*" in the context of ordinary time rate of pay. The latter dealt with pieceworkers not being paid at an hourly rate or paid by the week or any longer period. I did not find either decision adversely affected the averaging approach.

[127] Taken literally, Mr Cranney's argument would require Mr Dickson to have been paid for each hour actually worked. As the other counsel submitted, this would create considerable difficulties for those employees on piecework or commission only. It would also cause practical difficulties in dealing with remuneration arrangements, such as those found by the full Court in *Sealord*, to have complied with the Act. In the absence of clear words in s6 I am not persuaded that this was the legislative intent.

[128] For all these reasons, I accept Idea Services' case that s6 does not prevent it from applying an averaging approach to Mr Dickson's fortnightly payments in order to determine whether the statutory minimum payable under the Act has been met. The averaging approach also meets the legislative purpose of ensuring that all workers receive the statutory minima.

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[16] [1946] NZLR 476
[17] [1978] 1 NZLR 243

Costs

[129] I agree with the majority's comments that this is a test case which has wide effects beyond the parties to the present litigation and in which a costs order would not normally be appropriate.

B S Travis
Judge

Judgment signed at 10.45am on 11 December 2009