



Salaries and Averaging under the Minimum Wage Act

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Readers may recall the **Idea Services** case that we reviewed in *The Advocate* at Nos 163 and 173. This is the series of cases around sleepovers in what was then IHC that ultimately led to the Sleepover Wages (Settlement) Act 2011. Among other issues, the Courts in this series of cases determined that employers who paid by the hour could not average total remuneration so as to avoid, in whole or in part, the effect of the minimum hourly wage.

A recent Employment Court case considered this averaging concept in circumstances where employees were paid not by the hour but by salary. The case **Law & Oers v. Board of Trustees of Woodford House & Ors**, 17 February 2014, also involved employees working sleepovers. Among other things the Court considered whether the Minimum Wage Act applies to employees “who are remunerated by an annual salary paid periodically throughout the year”.

While the outcome of this case is subject to an ongoing appeal, this issue has of itself led to an amendment to the Minimum Wage Act which may offer some relief to employers who employ salaried staff who occasionally work extended hours or work irregular patterns.

The Minimum Wage Act as it currently stands specifies rates of pay which are set out in annual wage orders. The current Order (valid from 31 April 2014) states:

- “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, \$14.25 per hour;
 - (b) for an adult worker paid by the day,—
 - (i) \$114 per day; and
 - (ii) \$14.25 per hour for each hour exceeding 8 hours worked by a worker on a day;
 - (c) in all other cases,—
 - (i) \$570 per week; and
 - (ii) \$14.25 per hour for each hour exceeding 40 worked by a worker in a week.”



Considering this provision (albeit with different rates) the Court went on to explain that it considered that there were “. . . several minimum rates of wages payable to adult workers, categorised by pay periods. Under (a) the first category is for adult workers “paid by the hour or by piecework”. The second category under (b) is for adult workers “paid by the day” which sets out a minimum rate per day and a minimum rate per hour for each hour exceeding eight worked by a worker on a day, that hourly overtime rate being the same as the hourly rate under (a).

Finally, (c) provides what might be called a “catch-all-others” described as “in all other cases”. This provides a minimum rate of wages at a figure “per week” and the same hourly rate as under (a) “for each hour exceeding 40 worked by a worker in a week”.

The Court therefore determined that each week was to be looked at individually and (at least on the facts of this case) that remuneration could not be averaged to provide for a balancing of weeks with longer working hours against shorter working weeks.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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What this means for employees who work occasional extended hours or varying patterns is that the week in which the hours are worked must confirm with the minimum rates of the Act. For example, if someone normally works 40 hours per week but in one week works 90 hours they must as a minimum be paid \$570.00 for the first 40 hours plus \$712.50 (\$14.25 x 50), a total of \$1,282.50. Therefore in this example unless the employee is on a salary equivalent to or in excess of \$64,090, a claim under the Minimum Wage Act will succeed.

Some relief to these scenarios has been provided by an amendment to the way in which Minimum Wage Orders are drafted.

From 26 June 2014 a fourth category of payment will be provided, namely employees who are paid by the fortnight will have a minimum wage of \$1,140 per fortnight plus \$14.25 for each hour in addition to 80 hours.

While this amendment will not resolve all concerns for some employers/employees, it may address some anomalies in limited situations where salaried staff occasionally work hours significantly extended from their norm, because it doubles the period of time (weekly to fortnightly) over which total earnings will come to be considered under the Minimum Wage Act.

Using the above example, an employee who is paid fortnightly and works 90 hours one week and 40 the next will only have a Minimum Wage Act claim if they are paid a salary of less than \$45,565.00 because they are able to average the fortnightly earnings to the equivalent of 80 hours per week.

A press announcement regarding the change from Minister Simon Bridges considered other potential benefits of the new provisions; in particular the case where a salaried employee works a pattern of varied hours above and below 40 per week.

"Before the Court ruling, salaried employees might work 30 hours in one week and 50 hours the next, and be paid 80 hours for the fortnight. However, following this ruling, employers would need to pay 90 hours at the minimum wage rate for the 80 hours worked. This is because the first week must be paid at a minimum of 40 hours and the second week for every hour over forty)."

In this example a claim would only have arisen where the employee earned a salary of \$37,000 or less, but under the amendment a claim would only succeed where they were paid at the minimum rate of \$29,640 per year.

This is at best a minor change in what is becoming an increasingly vexed issue. While the move to acceptance of fortnightly averaging will help some employers it does not resolve the larger and ongoing issues raised in this recent series of cases.

If you have any concerns regarding the Minimum Wage Act and its potential consequences on your employees please contact the team at MGZ.



Payments to Increase from 1 July 2014

The maximum amount of parental leave payment for eligible employees will increase from \$488.17 to \$504.10 a week.

The minimum amount of parental leave payment for self-employed persons will also increase, from \$137.50 to \$142.50 a week.

Budget Announcements:

The following changes to parental leave were announced in the 2014 Budget:

- Paid parental leave will be extended from 14 weeks to 16 weeks from 1 April 2015, and then to 18 weeks on 1 April 2016.
- The Parental Tax Credit will be increased from a maximum of \$150 per week for eight weeks to a maximum of \$220 per week for 10 weeks from 1 April 2015.
- The eligibility for paid parental leave will also be extended from 1 April 2016 to people in less-regular jobs and workers with more than one employer and to "Home for Life" caregivers and people with similar permanent care arrangements.