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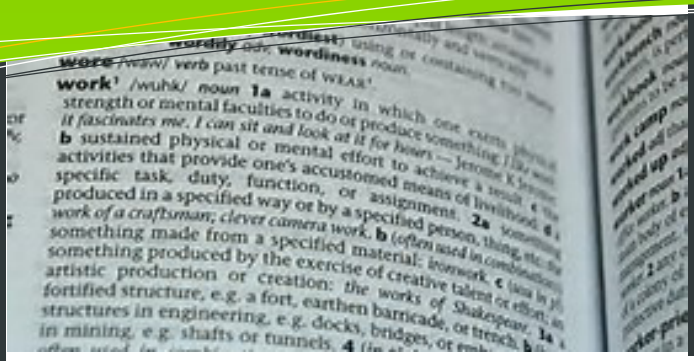


## Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

# On-Call Work

We have in recent years considered a series of cases where the concept or definition of work has come to be considered by the Courts. Most significantly are the '*Sleepover*' decisions culminating in the Court of Appeal decision '***Idea Services v. Dickson***' [Issues 163 and 173 of The Advocate] which resulted in a decision that the affected employees were working while on sleepover and therefore entitled to remuneration under the Minimum Wage Act. The Court took a three pronged approach to define work:

*"a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;*
*b) the nature and extent of responsibilities placed on the employee; and*
*c) the benefit to the employer of having the employee perform the role."*

*[6] The Court emphasised that the greater the degree or extent to which each factor applied, the more likely it was that the activity in question ought to be regarded as work. The Court also said that the assessment has to be undertaken in an intensely practical way."*

A recent Employment Court decision, ***South Canterbury District Health Board v. Sanderson & Oers*** has taken this a step further by looking at the relationship between '*on-call*' and the Minimum Wage Act.

In this case six Anaesthetic Technicians (ATs) working for South Canterbury District Health Board claimed to be '*working*' while they were on-call. The Board ran surgical services during the day and Monday to Friday and emergency services at night and during the weekend. ATs were on-call for one night a week and one weekend every 6 or 8 weeks.

The Board expected ATs to attend the hospital within 10 minutes of being called. Each of the 6 claimants resided outside the boundaries of the town and on that basis the Board provided free accommodation at which they could stay when they were on-call.

The decision was on appeal by South Canterbury District Health Board from an Employment Relations Authority decision. In that decision the Authority had considered the three pronged definition of work from ***Dickson*** and concluded that the ATs were working because the constraints were significant, the extent of responsibilities while on-call were significant and that they were providing a significant benefit for the Board.

The six ATs all lived outside the city boundaries and more than 10 minutes from the hospital, some a significant distance from the town. They had all known about the 10 minute requirement at the time they moved from the city centre or at the time of applying for the position.

Looking to the three pronged ***Idea Services*** test; the ATs provided evidence of the significant detrimental consequences of having to stay at the hospital accommodation and the restrictions that this placed on their lives, in much the same way as the sleepover employees had argued in the ***Idea Services*** decision.

## 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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Their evidence was that the requirement to live in accommodation separated them from their families and normal activities and that while on-call, the time limit (10 minutes) within which they needed to attend the hospital if called out, restricted their freedom. The Board however disagreed stating that the restraints were quite different. They argued that on-call, as opposed to '*sleepover*', staff were free to come and go as they pleased. The only real restraint being the 10 minute on-call time. With regards the responsibilities of being on-call, the Court determined that the obligation of being ready to respond promptly at any time to deliver surgical services was a significant or very significant responsibility.

Similarly the Court concluded that the ability to call back the ATs to deliver emergency healthcare was a significant benefit to the DHB.

The Court considered but distinguished the Court of Appeal statement in ***Idea Services*** where they (the Court of Appeal) had said that *"there were considerable differences between the typical on-call doctor who would be under relatively few constraints and someone like a community worker who is on a sleepover*". It was the Employment Court's view that the *"statement was made in response to a submission of counsel to that Court; the example appears to have related to a doctor who was on call at his or her own residence.*

*The circumstances of the ATs in the present case are very different. So as to meet the employer's expectations, the employees accepted the offer of DHB accommodation which was located at or very near the hospital, and away from their own homes. The reality was that they had to take that step. The Court of Appeal did not contemplate such an example."*

Like the Court of Appeal in ***Idea Services***, the Court considered overseas (European) decisions. Two significant cases; ***Simap*** and ***Jaegar*** dealt with the difference between working time and rest time. In ***Simap*** doctors who were required to live in the hospital while on call were considered to be working. A Scottish case, ***Truslove v. Scottish Ambulance Service*** was also considered. There on-call nightshift staff were required to reside within three miles of the Station, keep the ambulance with them and respond within 3 minutes.

In conclusion the Court determined that in the particular circumstances of these 6 ATs, they were at work while on-call. As in the ***Idea Services*** case the Court was then left with the issue of how pay should be calculated under the Minimum Wage Act. In essence whether they should be paid at the required minimum hourly rate of $15.75 or whether it was sufficient to pay them by averaging their weekly remuneration to ensure a minimum of $630.00 per week plus $15.75 for every hour over 40.

The ATs were paid under a Collective Agreement that confusingly referred to both salary and hourly rates. Call backs were paid on an hourly rate as was the on-call allowance.

The Court determined that the Board could not offset the call-out time against total remuneration because to do so would require the Board to ignore the fact that the ATs were entitled to the minimum wage for each hour that they were on-call.

The Court determined that the ATs were entitled to the minimum wage for every hour that they were on-call, less the on-call pay (of some $4.04 per hour). The ATs were, in addition paid for hours when they were called back, they were paid at an hourly overtime rate. This payment could only be deducted for the actual hours worked. It could not be averaged over the period.

While this case turned on its own facts, it has the potential to significantly affect some on-call provisions. Employers who require on-call work should revisit their employment agreements and are advised to seek advice. The media reports that the Board is appealing this decision.

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