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Motor Camp Misgivings

(Another Sleepover Case)

We have in past editions of The Advocate considered the developing case law around sleepovers and the potential that time spent in bed could be considered as work. Some employees in the caregiving industry and acting as school matrons have been found to be paid beneath the minimum wage. Refer the ***Idea Services*** cases in The Advocate 163 and 173 and ***Woodford House*** case (The Advocate 231).

Another recent Employment Relations Authority decision considers sleepovers: ***Hill v. Shand*** ERA 29 April 2014. The case, by way of a wage claim, looks at the issue of the definition of '*work*', an issue that had become problematic following the sleepover decision in the ***Idea Services*** and ***Woodford House*** decisions.

Mr Hill, the applicant, was employed as the Manager of the Murchison Camping Ground. He was contractually entitled to a salary of $30,000.00 and provided with free accommodation by way of an onsite house.

Mr Hill was employed from 1 December 2010 until his dismissal on 3 February 2013. There was no written employment agreement. It was however accepted by the Authority that there was an expectation that Mr Hill would be available to work at the camp 7 days a week, 52 weeks a year.

The relationship was confused by the fact that, notwithstanding an agreement to pay $30,000.00 per annum by way of salary; this sum was not in fact paid because the camp claimed not to be able to afford it. Mr Hill claimed a total of some $69,000.00 by way of unpaid wages. Mr Hill claimed firstly that he was not paid the contracted $30,000.00 and secondly that he was paid beneath the statutory minimums set by the Minimum Wage Act. This latter claim was itself separated into two separate issues, firstly Mr Hill claimed that during the peak season he worked 15 hours per day, 7 day a week. The peak season ran from 1 December to 31 March. Mr Hill claimed that during these months he was obliged to remain on site every day. He claimed to have performed duties at the camp from 7.00 am until 11.00 pm every day. He only left the camp once a week to perform work related duties.

Mr Hill was paid a salary, and on that basis, the employer had not maintained a time and wages record. In this regard the Authority said:

"[11] It is an employer's obligation to ensure wages and time records are kept for employees. Section 131 of the [Employment Relations] Act gives the Authority power to order payment of wages or other money owed to an employee if an employer is in default of payment. Section 131(1)(b) of the Act specifies that the power to award such payments includes situations where any payment has been made at a rate lower than that legally payable."

"[13] In the absence of wages and time records s 132 of the Act provides an employee may give evidence that the employer's failure to keep adequate wages and time records prejudiced the employee's ability to bring an accurate claim under s 131. The employer may give evidence to the contrary to prove the employee's claims are incorrect. However, s 132 empowers the Authority to accept as proved all claims made by the employee of wages actually paid and of the hours, days and time worked by the employee."

In the absence of evidence from the employer regarding the hours of work, the Authority accepted Mr Hill's claimed hours of work, namely 15 hours per day (105 per week) for the busy season, from December through March and 8 hours per day (56 per week) for the remainder of the year. On that basis the Authority found that Mr Hill had been paid under the minimum wage throughout the year.

More interesting however is Mr Hill's primary claim that during the busy season he was entitled to be paid the minimum wage for 24 hours per day. He claimed this on the basis that his duties included the following obligations:

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- to be available up to midnight to check in pre-booked campers;
- to be available throughout the night for non pre-booked campers;
- to be alert to vehicles arriving late and/or leaving early to avoid fees;
- to be alert to ensure campers did not disturb or endanger other campers;
- to be alert to the risks of damage to camp property and buildings by campers and others;
- to be alert to risks to campers and property by or from extreme weather and to be ready to take whatever measures were necessary to ensure the safety of campers;
- to deal with drug and alcohol related incidents;
- to walk around the camp every night at 11.00 pm.

He claimed that his life was constrained because he could not go out at night or leave the camp unattended, and because he was required to live on site. He further claimed that the obligation to be constantly alert and available constrained the amount of alcohol that he was able to consume.

The Authority considered the "*three elements set out by the Employment Court and endorsed by the Court of Appeal in the Idea Services cases. Three factors should be considered when resolving whether an employee is working during rest/sleep time:*

- *What constraints are placed on an employee's freedom he would otherwise have to do what he pleases?*
- *The nature and extent of an employee's responsibilities.*
- *What benefit there is to an employer by the employee performing the role?"*

The Authority, having considered Mr Hill's work constraints determined that:

"[20] There were considerable constraints on Mr Hill's freedom during the evenings. However, his freedom was not constrained to the same extent as Mr Dickson's [Idea Services] or those of the applicants in the Employment Court's recent decision in Law and Colbert et al v Woodford House and Iona College Boards of Trustees. Mr Hill was free to have guests to visit and/or to stay in his home; indeed, Ms Nottle initially stayed from time to time and then lived there for some months. He could to a large degree carry on normal family life. Also, for example, there were no constraints on what Mr Hill could watch on television in the evenings. He could socialise with his friends if he wished to invite them to his home. Whilst he had to be relatively sober and quiet he did not have to be so to the same extent as in Mr Dickson and Ms Law and Ms Colbert's living situations. His privacy was not greatly compromised because he had a separate dwelling, unlike in the Dickson and Law/Colbert cases. He had separate kitchen and bathroom facilities away from the campers. Unlike in Mr Dickson's case he had a separate bedroom and did not have to sleep in the office."

With regard the second test (responsibilities) the Authority found:

"[21] Mr Hill's responsibilities after his last security check at around 11pm were occasional but important. After 11pm he had to react when necessary but I accept that his constant vigilance even while asleep was necessary to care adequately for the camp itself and the campers. Also like in Mr Dickson's case any disturbances are unpredictable in their frequency and timing.
[22] Mr Hill had considerable responsibilities. However, unlike in the Dickson and Low/Colbert cases the campers were not vulnerable people for whose physical and emotional welfare Mr Hill had sole responsibility overnight. For example, Mr Hill was not in loco parentis. He had limited responsibility for the campers' welfare compared to a boarding school matron's or a residential care community service worker's responsibilities."

With regards the benefits of his work the Authority concluded:

"[23] According to the Employment Court the greater the benefit to the employer of having the employee present and available for work overnight and the more critical the role is, the more likely the period in question should be regarded as "work".

[24] There was some benefit to Mr Shand in having Mr Hill on site after 11pm and before 7am. If he was not there the camp would no doubt have missed out on some business, being those campers that arrived after 11pm and left prior to 7am, and perhaps there would have been some further damage to the café when the storm Mr Hill described as damaging its roof happened. Mr Hill was a dedicated worker. However, his overnight presence and readiness to work as necessary through the night was a bonus rather than a necessity of operating the camp. He could have been absent from the camp for some hours during the evening and the night some of the time if he had wished to. The business would have been able to continue to operate in his occasional absence."

Having considered the work done by Mr Hill with the three tests of '*work*', the Authority reached the decision that he was not working for the period 11.00 pm to 7.00 am during the busy period.

The significance of this case, as part of the slowly developing law around sleepovers, is that each case will turn on its own facts. Employees claiming to be paid throughout this period will have to establish separately each of the three elements; constraints, responsibilities and benefit.

We suggest that employers with employees who are required to or do live on site and/or who periodically work significant hours should review their contractual provisions.