VICTORIA
UNIVERSITY OF WELLINGTON
TE WHARE WĀNANGA
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Centre for Labour, Employment and Work

Legal Update: Labour Inspector v Smiths City Group Ltd

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This case was a successful challenge to an Employment Relations Authority determination regarding whether pre-shift morning sales meetings were "*work*" under the Minimum Wage Act 1983 ("the Act").[1] This case has caused significant public comment as many retail employees are required to attend work before or after their scheduled work hours to set up, cash up or attend meetings.

Factual Background

For at least the last 15 years, every Smiths City store has held a daily meeting for waged sales staff before opening for business. These meetings ran for approximately 15 minutes and were usually conducted by store managers. Smiths City produced a standard meeting template which outlined specific points to be discussed in each meeting. These points included store sales figures measured against targets, sales promotions, sales comparisons with the previous day and company announcements. Smiths City considered these meetings to be an integral part of a store manager's job. However, the meetings tended to be relaxed to the point of being informal. It was clear that Smiths City expected sales staff to attend and there was a trend of store managers following up with sales staff who did not attend.

A Labour Inspector issued an Improvement Notice to Smiths City for failure to pay the sales staff for attending these meetings. Smiths City contested the Notice. The Employment Relations Authority found in favour of Smiths City and ordered that the Notice be rescinded.[2] The Inspector challenged that determination.

Employment Court Judgment

The Employment Court first considered whether the meetings constituted "*work*" under s 6 of the Act. The Court considered the Court of Appeal judgment in *Idea Services Ltd v Dickson*[3] and stated that a factual inquiry was required. However, the Court held that the work factors addressed in *Idea Services* – constraints on the employee, responsibilities on the employee, and benefit to the employer – should not be "*slavishly applied*".[4] Instead, the Court preferred to apply the approach suggested by the New Zealand Council of Trade Unions (as intervenor)

[1] [2018] NZEmpC 43.
[2] [2016] NZERA Christchurch 200.
[3] *Idea Services Ltd v Dickson* [2011] NZCA 14.
[4] EC Judgment at [57].

which focused on whether the 'work' was an "*integral part of each employee's principal activities*".[5]

The Court applied this approach first, finding that sales staff only attended the meetings because they were Smiths City employees, that the subject matter was sales, that the meetings were solely for Smiths City's purposes and about Smiths City's business, and that the informality of the meetings was immaterial. Hence, the meetings were an integral part of the employer's activities and were therefore work. In the alternative, the Court also considered the three factors from *Idea Services* and reached the same conclusion.

The Court then considered whether commission and incentive payments should be taken into account when assessing Smiths City's compliance with s 6 of the Act. The Court stated at [73] that:

> "*[w]hile we accept that commissions and incentives qualify as wages that does not provide an answer to the Inspector's notice or satisfy s 6. In* [Idea Services] *the full Court, and the Court of Appeal, held that the key expression in s 6 is the phrase "rate of wages" meaning each unit of time. The only units of time in that legislation are by the hour, day, and week. Which of those units of time is to be used depends on whether the employee is paid by the hour, by piece-work, by the day or otherwise*."

The Court concluded that the Notice was only concerned with permanent or casual employees paid by the hour and that their statutory entitlements must be calculated using the same unit of time. Commissions and incentive payments "*were additional income earned over and above the contractual hourly rate not in substitution for it*".[6] Smiths City's method was also found to be flawed because it excluded from the pay period the time for the morning meetings, during which employees had no opportunity to earn commission or incentive payments – a future opportunity to earn these payments was insufficient for compliance with the Act.

The Court therefore upheld the Inspector's challenge and, as a result, the employees were entitled to back pay for attending the meetings and payment going forward.

[5] EC Judgment at [50].
[6] EC Judgment at [77].