

21 September 2012

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For: Dr Judy McGregor

IS CARERS' "IN BETWEEN" TRAVEL TIME WORK UNDER SECTION 6 OF THE MINIMUM WAGE ACT 1983?

Introduction

1. The Human Rights Commission recently released its Report on the Inquiry into the Aged Care Workforce, *Caring Counts: Tautiaki Tika*.
2. One issue identified in the report is that carers in the community sector who are required to drive between clients' homes are not typically paid a wage for their travel time between clients (except for the travel time from their home to their first client and from their last client to their home).
3. You have asked for advice as to whether such "in between" travel time is likely to constitute "work" under the section 6 of the Minimum Wage Act 1983.
4. In summary, our advice is that:
 - (a) There is a good argument that "in between" travel time constitutes work under section 6 of the Minimum Wage Act, and we would therefore regard a test case in respect of "in between" travel time as having a reasonable prospect of success.
 - (b) If the Courts were to uphold that argument:
 - (i) section 6 would be breached if carers are not paid at least the minimum wage in respect of that "in between" travel time; and
 - (ii) it would not be sufficient to comply with section 6 that, after "in between" travel time is taken into account, a carer's average hourly wage equals or exceeds the minimum wage.
5. This memorandum is structured as follows:
 - (a) Background.
 - (b) The effect of section 6 of the Minimum Wage Act.
 - (c) Is "in between" travel time work under section 6?

Background

6. By way of background, we understand that:
 - (a) Certain community carers provide "home-based" support to clients.
 - (b) This requires the workers to drive from one client's home to another, with carers typically allotted fifteen minutes to travel from one client to the next.
 - (c) The carers who provide such support are paid a per hour wage in respect of the time actually spent with each client.
 - (d) While the carers are paid their normal hourly rate for the travel time from their home to their first client and from their last client to their home, they are not paid a wage for their travel time between clients' homes over the course of the working day (we refer to such time in this advice as "in between" travel time).¹
 - (e) Carers are not free to be elsewhere when travelling between clients. In other words, their "in between" travel time is not their own time in which they can undertake personal activities such as lunch, shopping, etc.
7. In terms of broader context, we note that *Caring Counts* found that a combination of "ageing in place" policies, consumer preference and cost-controlling has seen home-based support services providing care and support to people with much more complex and acute medical and social needs than in the past. Further, it has been estimated that the group with high support needs requiring daily assistance will increase from 54,700 to 147,700 in the period between 2006 and 2036.²

The effect of section 6 of the Minimum Wage Act

8. Section 6 of the Minimum Wage Act provides that:

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, 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.

9. Accordingly, if "in between" travel time constitutes "work" under section 6, carers are entitled to a wage for that time that is not less than the minimum prescribed rate (ie the "minimum wage").³
10. As you know, in the context of community carers, the leading authority on the meaning of "work"⁴ under section 6 is the Court of Appeal's decision in *Idea Services Ltd v Dickson* ("**Dickson**").⁵

¹ We also note that workers are paid a "reimbursement" for their travel costs (intended to cover costs such as petrol, car maintenance costs, and insurance). However, we have not been asked to advise on payments for those costs.

² J Badkar *The future demand for paid caregivers in a rapidly ageing society* (Department of Labour, Wellington, 2009).

³ Currently, the Minimum Wage Order 2012 prescribes a minimum hourly rate of \$13.50.

11. In *Dickson*, the Court agreed with the Employment Court's view in the decision under appeal that, for the purposes of assessing whether an activity is work under section 6, it is useful to consider:⁶
- (a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleased;
 - (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.
12. Further, the Court of Appeal agreed that:

[8] The greater the degree or extent to which each factor applied (that is, the greater the constraints, the greater the responsibilities, the greater the benefit to the employer), the more likely it was that the activity in question ought to be regarded as "work". The [Employment] Court said that the question has to be approached in an "intensely practical" way, adopting what was said by this Court in *NZ Fire Service Commission v NZ Professional Firefighters Union*.⁷

⁷ At [63], citing *NZ Fire Service Commission v NZ Professional Firefighters Union* [2007] 2 NZLR 356 (CA) at [12].

13. We note also that the Court of Appeal found that an employee is entitled to the minimum wage for each hour worked, not as an average of hours worked.⁷ In other words, it is not sufficient that a person's average overall wage equals or exceeds the minimum wage, if for any of the hours worked that person is paid less than the minimum wage.

Is "in between" travel time work under section 6?

14. In our view, applying the three factors identified in *Dickson*, there is a good argument that "in between" travel time is work under section 6. We discuss the application of each *Dickson* factor in turn.
15. First, it appears that the "in between" travel time imposes significant constraints on carers' freedom. We understand that, generally, clients expect carers to arrive at pre-arranged times and that, in order to meet their case load, carers typically have to travel straight from one client to another. Further, we note that in *Dickson* the constraints on Mr Dickson's freedom - which the Court considered to be significant - were less acute than those imposed by "in between" travel time. Whereas Mr Dickson had an element of choice as to what to do when not attending his clients' needs, the carers here have no choice but to travel from client to client because of the home-based nature of their work.
16. Secondly, we understand that carers owe significant responsibilities to their clients, who rely heavily on the in-home support the carers provide. Some of the responsibilities include monitoring clients' medication, providing access to food and drink, undertaking or assisting with personal care, and being the "eyes and ears" of the community for primary health concerns such as

⁴ Which is not defined in the Minimum Wage Act.

⁵ *Idea Services Ltd v Dickson* [2011] 2 NZLR 522 (CA).

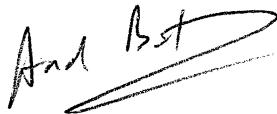
⁶ At paragraph 7.

⁷ At paragraphs 33 to 36.

dehydration, depression and identification of hazards in the home. Travelling to these clients is, therefore, an integral part of discharging those responsibilities. That is, it is one of the means by which clients' needs and expectations are met.

17. Thirdly, "in between" travel time confers a clear benefit on carers' employers. In simple terms, this is because travel to clients is part of the service that carers' employers have contracted to provide and, as we understand it, there is no other way that the home-based service could be offered on a cost-effective basis. These factors mean that "in between" travel time is an essential part of the service offered by the employers' business.
18. Taking all of these three factors in account, we consider that carers have a good argument that "in between" travel time constitutes work under section 6 of the Minimum Wage Act and, therefore, that they are entitled to the minimum wage for that travel time.
19. In addition, we note that in *Dickson* the Court of Appeal emphasised that it would be irrelevant for the purposes of section 6 if, despite Mr Dickson not being paid a wage for some of the hours he worked, his average wage for each hour worked equalled or exceeded the minimum wage.
20. In our view, the same reasoning is likely to apply in the case of "in between" travel time. That is, it will be irrelevant if, despite non-payment for that travel time, a carer's average wage equals or exceeds the minimum hourly wage. Rather, if "in between" travel time is work under section 6, our view is that carers must receive at least the minimum wage for that work.
21. For the reasons set out above, we would regard a test case in relation to "in between" travel time as having a reasonable prospect of success.

Yours faithfully
RUSSELL McVEAGH



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