IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 237
EMPC 217/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GATE GOURMET NEW ZEALAND LIMITED First Plaintiff
AND	SHAUN JOILS Second Plaintiff
AND	SUHKJEET SANDHU First Defendant
AND	HUIPING WU Second Defendant
AND	SELLIAH NESUM NIRANJALA Third Defendant
AND	ROSALINA LEANNA Fourth Defendant
AND	SUTHARSHINI ANTHONY RUPS MIRANDA Fifth Defendant
AND	NEW ZEALAND COUNCIL OF TRADE UNIONS First Intervener
AND	BUSINESS NEW ZEALAND Second Intervener

Hearing: 13 October 2020
(Heard at Auckland)

Court: Chief Judge Christina Inglis
Judge J C Holden
Judge Kathryn Beck

Appearances:	E Butcher, counsel for plaintiffs M O'Brien, counsel for defendants P Cranney and A Kent, counsel for NZ Council of Trade Unions as intervener P Kiely and S Worthy, counsel for Business New Zealand as intervener
Judgment:	21 December 2020

JUDGMENTS OF THE FULL COURT

JUDGE J C HOLDEN AND JUDGE KATHRYN BECK

[1] The proceedings before the Court arose in the context of the COVID-19 pandemic and Level 4 lockdown, initiated by the Government and commencing on 26 March 2020.

[2] The first plaintiff, Gate Gourmet New Zealand Ltd (Gate), provides in-flight catering services to passenger aircraft, both domestically and internationally. At the relevant time it had over 130 employees, including the five defendants in these proceedings. The defendants are all members of the Aviation Workers United Inc Union (AWU). The second plaintiff, Mr Shaun Joils, is the General Manager of Gate.

[3] In April 2020, the defendants, through AWU, filed a statement of problem with the Employment Relations Authority (the Authority), alleging, first, that Gate had taken unilateral action in relation to employees and their terms and conditions of employment and had failed to properly consult with AWU about the proposed changes. Second, the defendants claimed Gate had acted unlawfully in paying them below the minimum wage of $756 per week. The defendants sought penalties against both plaintiffs.

[4] The Authority Member said that, although he recognised that there was a difference of view about whether or not AWU, on behalf of its members, agreed to Gate's proposed reduction in payment, he did not have to conclusively reach a view on that because, in any event, Gate was in breach of the Minimum Wage Act 1983 (MWA).[1] The Authority found that, if the defendants were ready, willing and able to carry out their function in an essential industry, Gate was required to pay them at least the minimum wage, notwithstanding any agreement it may have made to the contrary. Accordingly, the Authority found Gate had breached the MWA and ordered it to reimburse the defendants for the difference between what they had been paid to date and their entitlement to the minimum wage. However, no penalties were imposed.[2]

[5] The plaintiffs challenged the determination of the Authority on a non-de novo basis. That means that the matters for the Court are significantly more limited than those that were before the Authority.[3] The plaintiffs' challenge is directed at the correctness of the Authority's determination that the entitlements under the MWA applied to the defendants, despite the defendants, at the relevant times, performing no work for Gate.

[6] The parties filed a joint memorandum of counsel in which they say that the key issues in the case are legal ones, relating to the interpretation of the MWA and common law issues around an employee being "ready, willing and able to work". They jointly sought to have the challenge determined on the basis of the facts as stated in the determination of the Authority with the hearing only consisting of legal submissions. The challenge proceeded on this basis.

[7] Given the obvious importance of the issues, and the desirability of providing a degree of certainty to the broader business community and to employees as to their rights and obligations, leave was granted to Business New Zealand (Business NZ) and the New Zealand Council of Trade Unions (NZCTU) to appear and make submissions at the hearing.[4]

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1 *Sandhu v Gate Gourmet New Zealand Ltd* [2020] NZERA 259 at [35] (Member O'Sullivan).
2 At [44].
3 Employment Relations Act 2000, ss 179, 182(3)(b).
4 *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 133.

The relevant facts are as found by the Authority

[8] The parties filed an agreed statement of relevant facts in the Authority. These were the basis on which the Authority reached its determination, and were set out in its determination but amended for style.[5] For present purposes, the key facts are as set out below.

Events following Level 4 Lockdown

[9] On 23 March 2020 the Government announced the Level 4 lockdown from 26 March 2020. The Director-General of Health subsequently made an order requiring all premises to be closed, unless they came within excepted categories, which included those where essential businesses were performed or delivered.[6] Gate was an essential service and was permitted to stay open for business throughout the lockdown. The Court accepts, however, that there still was an expectation that even essential services would restrict their activities to only those that were essential.[7]

[10] Each of the defendants' employment agreements provide for full time employment for a minimum 40-hour week. Prior to 30 March 2020, they were paid $17.70 per hour, which equated to the then minimum hourly wage. They are paid weekly.

[11] Following the imposition of the Level 4 lockdown, Gate advised employees and the unions representing them (including AWU) that, as a result of having very little work to offer employees because of the COVID-19 pandemic, it would need to partially shut down operations.

[12] On 26 March 2020, Gate proposed to its employees:

(a) The implementation of a partial close-down;

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5 *Sandhu v Gate Gourmet New Zealand Ltd,* above n 1, at [4].
6 Ashley Bloomfield "s 70(1)(m) Health Act Order"(25 March 2020).
7 New Zealand Government "Unite against COVID-19 - Essential businesses" (27 March 2020) <https://covid19.govt.nz/>.

(b) employees being paid 80 per cent of their normal pay, conditional on Gate receiving the Government wage subsidy; and

(c) employees could choose to use their annual leave entitlement to supplement the 80 per cent of normal pay being offered, meaning that an employee could receive 100 per cent of their pay by using one day of their annual leave per week.

[13] On 26 March 2020, Gate confirmed both to its employees and to AWU that, if an employee had not been rostered on, and Gate had not asked them to come to work, that meant Gate had no work for them and they should stay at home. On the same day Gate applied for the Government wage subsidy for 132 employees.

[14] On 27 March 2020, Gate emailed all employees with a notice of closedown. In that notice Gate stated:

(a) It was an essential service and was able to keep operating.

(b) It was closing down part of its business.

(c) It was presenting a written offer setting out the three options that it was offering employees, namely:

(i) Option one – employees take all entitled annual leave until it is exhausted, at which point the employee could move to option two;

(ii) Option two – conditional on Gate receiving the wage subsidy, it would pay the employee at the rate of at least 80 per cent of their normal pay;

(iii) Option three – conditional on Gate receiving the wage subsidy, it would pay the employee at the rate of at least 80 per cent of their normal pay, and the employee could then use their annual leave entitlement to supplement their income in order that they receive 100 per cent of their normal pay.

[15] On 27 March 2020 the AWU, on behalf of its members (including the defendants) rejected option one and agreed to options two and three, subject to Gate complying with all applicable legislation.

[16] The defendants have not worked much since the partial lockdown of Gate's operations, although the fifth defendant did some shift work at the beginning of Alert Level 4 and has worked since 28 April 2020 at Alert Level 3.

Minimum wage increase

[17] On 1 April 2020, the minimum hourly wage increased to $18.90 per hour.

[18] On 1 April 2020, Gate emailed all employees, including the defendants advising them that Gate believed only employees who worked would be paid at the new minimum wage rate of $18.90 and that the employees who were not rostered, and did not work, would continue to be paid at the rate agreed (in other words 80 per cent of their normal pay as at the date of the commencement of the partial closedown).

[19] On 3 April 2020, AWU objected to Gate's approach to applying the minimum wage increase. It also advised Gate that it believed Gate was not entitled to reduce the pay of any defendant who was engaged on a full-time basis, below the minimum wage of $756 per week.

[20] On 6 April 2020, Gate agreed to apply the new minimum wage rate of $18.90 per hour to the defendants from 1 April 2020, whether they were working or not. However, Gate maintained its position that the agreed rate of 80 per cent of normal pay meant that it was only required to pay the defendants who were not working 80 per cent of their normal pay, including the increased minimum wage rate.

[21] Therefore, since 1 April 2020, the defendants have been paid at 80 per cent of their normal pay or $604.80 gross per week, unless they have been carrying out duties for Gate, in which case they were paid their contracted rate.

The issue before the Court is confined

[22] Employees' rights derive from legislation, common law and employment agreements. New Zealand employment legislation contains what is often referred to as a minimum code, which includes minimum standards in the Employment Relations Act 2000, the Holidays Act 2003, the Wages Protection Act 1983 and the MWA.

[23] The COVID-19 pandemic, and response from the Government, upended employment in New Zealand. This meant that employers, employees, unions and other stakeholders in the employment framework, including government departments, were confronted with circumstances that are unique in the history of New Zealand and which required everyone to respond to urgently. We acknowledge the pressure that this has placed on all those involved. The short point is, however, that the pandemic, and the Government's response, did not act to suspend employee rights or employer obligations.

[24] Ms Butcher, counsel for Gate, acknowledges that employees may have entitlements to payments even when they are not working, which may arise from a statutory requirement, from an employee's terms and conditions of employment, or otherwise as influenced by the common law. However, she says no entitlement arises under the MWA, even when the affected employees are not working because of decisions made by the employer but are otherwise ready, willing and able to work.

[25] At the hearing, Gate submitted:

(a) Gate can only have acted in breach of the MWA if the MWA applied to the defendants at the relevant time;

(b) section 6 of the MWA only applies at times when employees are working;

(c) being "ready, willing and able" to work is not the same thing as working;

(d) earning wages and/or being contractually entitled to payment is not the same thing as working;

(e) the MWA does not apply to an employee who is ready, willing and able to work or to an employee who is contractually entitled to payment, unless the employee is actually working;

(f) at the times the defendants were not working the MWA had no application to them and did not require the first plaintiff to pay them the minimum wage; and

(g) Gate did not breach the MWA.

[26] Business NZ supported the submissions of Gate. It said, where no work is performed, there is no obligation under the MWA to pay the minimum wage. It said this is consistent with the text and purpose of the MWA and case law interpreting and applying the MWA. It also said this is consistent with government advice provided at the time.

[27] The defendants' principal submission at the hearing was that s 6 of the MWA must be read as extending to situations where an employer decides an employee, who is ready, willing and able to work, is not required to actually work their contracted hours. Pursuant to s 6 of the MWA, those contracted hours must, it was said, be paid for at no less than the minimum wage.

[28] Likewise, the CTU submitted s 6 of the MWA entitles employees to receive from their employer payment for their work at not less than the minimum rate of wages where work was guaranteed but not provided.[8]

[29] After the hearing the Court sought and received further submissions on what effect, if any, s 7(2) of the MWA has on the question of law before the Court.

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[8] The CTU also argued that the employment agreement, and any alleged variation of that employment agreement, must be relevant to this matter, and that it does not turn only on the MWA. However, by agreement of the parties, those issues are not before the Court.

Minimum Wage Act provides for minimum rates of wages in exchange for work

[30] When the Minimum Wage Act 1945 was enacted, it provided minimum hourly rates for employees paid by the hour or by piecework, minimum daily rates for employees paid by the day and minimum weekly rates for all other employees.[9] In 1952, the 1945 Act was amended to provide for the rates to be set by the Governor-General by Orders in Council (MWOs), presumably for reasons of efficiency. This mechanism continued into the MWA, although, in 2014, the categories of workers were changed in the MWO for that year and ongoing to specifically include workers paid by the week and then to provide a minimum fortnightly rate for all other workers.[10]

[31] Section 6 of the MWA provides that, subject to ss 7 – 9, a worker covered by the MWA "shall be entitled to receive from [their] employer payment for [their] work at not less than that minimum rate".

[32] Section 7 makes provision for deductions from the minimum wage for board or lodging or time lost. Section 8 allows a lower rate to be provided for workers whose performance is limited by a disability. Section 9 excludes certain categories of workers from the application of MWA.

[33] Section 7(2) provides that no deduction in respect of time lost by any worker shall be made from the wages payable to the worker under the MWA except for time lost by reason of the default of the worker, or by reason of the worker's illness or of any accident suffered by the worker.

Parties disagree on relevance of s 7(2)

[34] In its further submissions, Gate says s 7(2) is of limited relevance to the question currently before the Court. It says s 7(2) only comes into play if s 6 covered the employee concerned, which was not the case at the relevant times here. Business NZ agrees with this approach.

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9 Minimum Wage Act 1945, s 2(2) and (3).

10 This was done to address a perceived possible difficulty with respect to low paid salaried workers.

[35] The defendants' further submissions can be distilled to that s 7(2) reinforces that minimum wage workers are entitled by the MWA to be paid their contracted hours, including for "time lost", unless the employee is in default. The CTU agreed, submitting that, read together, s 6 and s 7(2) of the MWA protect minimum wage entitlements whether time is worked or not worked (in the absence of default, sickness or accident).

This case only concerns obligations under the MWA

[36] The purpose of the MWA is to ensure that employees receive a base wage for their work to enable them to meet their daily living expenses for themselves and their family.[11] However, the MWA does not provide for a guaranteed minimum income. The concept, reflected in s 6, is of a minimum payment in exchange for work performed by an employee.[12] A MWO made under the MWA then provides the current minimum rate an employee must be paid for time actually worked.[13]

[37] Other obligations to pay, outside the MWA, may arise when an employee is not working. Perhaps the most obvious legislative obligation is to pay holiday pay as required by the Holidays Act. The Employment Relations Act also requires reasonable compensation to be paid for periods where an employee is required to be available for work in addition to the employee's guaranteed hours of work or where shifts are cancelled.[14] Employment agreements must include any agreed hours of work or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work.[15] Employment agreements also may make provision for payment to an employee when they are not working, for example as a standby allowance. Hence, the terms of an employment agreement are likely to require payment where an employer unilaterally decides an employee is not required to work. While all these obligations are important, none are relevant to the matters currently

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11 *Faitala v Terranova Homes & Care Ltd* [2012] NZEmpC 199, [2012] ERNZ 614 at [19].
12 *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347 at [18].
13 *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) at [50].
14 Employment Relations Act 2000, s 67D(3)(b); s 67G(2)(b) and (6).
15 Employment Relations Act 2000, s 65(2)(iv).

before the Court, given the limited focus of the challenge. Accordingly, we say nothing more about these potential avenues for redress.[16]

The key issue is whether there is an entitlement under s 6

[38] We acknowledge that the relationship between s 6 and s 7(2) is not straightforward. It is for that reason the Court sought further submissions on this issue. As is apparent, it also has led to a divergence of view in the Court. The view we have reached is that the first question is whether the employee is entitled under s 6 to be paid the minimum wage for the period in issue.

[39] It is only if wages are due under s 6 that the question of whether s 7 entitles the employer to make a deduction arises.

[40] This is apparent from the use of "deduction", which must be a deduction from something, in this case, the wages otherwise payable under the MWA. The argument as it applies to s 7(2) may seem circular, and in the current employment environment where employment agreements are expected to address agreed hours of work, of limited application. However, current employment legislation is more comprehensive than when what is now s 7(2) of the MWA was first enacted as s 2(5) of the Minimum Wage Act 1945. Further, there is now greater recognition of a wider concept of the meaning of "work" to include much of what may previously have been seen as 'down time' or "time lost".[17] That there are no cases that deal with s 7(2) of the current MWA may be indicative of its now limited application.

[41] What follows from this analysis is that s 7(2) is not engaged in the present case. Gate was not making deductions from wages otherwise due under the MWA. The case turns on whether s 6 requires wages to be paid in circumstances where the employee is not working. If it does, wages are payable and that is the end of the enquiry; if no wages are payable under s 6, there are no wages from which a deduction can be made.

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16 It follows that neither *Mana Coach Services Ltd v New Zealand Tramways and Public Transport Union Inc* [2015] NZEmpC 44, [2015] ERNZ 598, nor *Miles v Wakefield Metropolitan District Council* [1987] AC 539 (HL), on which the defendants sought to rely, are helpful, as they do not deal with entitlements under the MWA.

17 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] ERNZ 192 (CA) at [13].

No work was done while the defendants were not at work

[42] The MWA does not define "work". Its meaning is to be ascertained from its text and purpose. We do not accept that the expansive interpretation urged on us by Mr O'Brien and Mr Cranney at the hearing is one that can sensibly be applied. To do so would be to read in words that Parliament has omitted.[18] It would also undermine the core concept of s 6, namely the exchange of payment for work, which we have already referred to. This concept has been central to recent cases under s 6 that commenced with the "sleepover" case, *Idea Services v Dickson*.[19] These cases were premised on claims that the employees were working at the times in question, and therefore entitled to payment under the MWA. The judgments identified the factors to be considered to determine whether an activity was "work", as follows:[20]

(a) the constraints placed on the freedom the employee would otherwise have to do as they please;

(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.

[43] We agree with the defendants and NZCTU that Parliament has made it plain that the preservation of minimum employment rights is of central importance. That does not, however, provide a free rein insofar as statutory interpretation is concerned. We see no persuasive basis for departing from the well-established approach to the assessment of "work" for the purposes of s 6 and decline to do so.

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18 Counsel referred to *Mickell v Whakatane Board Mills Ltd* [1950] NZLR 481 (SC), but we do not see that case as supporting the argument or of assistance here as it was directed to a different issue.

19 *Idea Services Ltd* (CA), above n 17; *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC). See also *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576 at [1]-[2]; *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127, [2017] ERNZ 749 at [1]; *Labour Inspector (Ministry of Business, Innovation and Employment) v Smiths City Group Ltd* [2018] NZEmpC 43, [2018] ERNZ 124 at [1]-[4] and *Ovation New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2018] NZEmpC 151, [2018] ERNZ 455 at [1].

20 *Idea Services* (CA), above n 17, at [7]-[10].

[44] Although the defendants did not advance an argument that they were working in the sense used in this line of cases, for completeness we note that, applying the factors here, at the relevant times:

(a) there were no constraints placed on the defendants' activities by Gate;[21]

(b) the defendants had no responsibilities to Gate; and

(c) there was no benefit to Gate.

[45] Accordingly, when the defendants stayed home, they were not working for the purposes of s 6 of the MWA, the MWA was not engaged, and no statutory minimum wage entitlements arose.

No orders made; costs reserved

[46] Gate seeks an order for the repayment of money paid to the defendants in satisfaction of the determination. Given the confined question dealt with in this judgment, we are not in a position to find the amounts were not payable, only that payment was not required by the MWA. Hopefully, the parties will be able to resolve any repayment between them, absent which leave is reserved for either party to come back to the Court to have the contractual issues resolved.

[47] In its statement of claim, Gate also sought costs, and the parties agreed that costs should be assessed on a Category 3B basis. It may be, that on reflection, the nature of the case makes it inappropriate for an award of costs. However, if Gate wishes to pursue costs, and they cannot be agreed between the parties, it may apply by memorandum filed and served by 4 pm on 2 February 2021. If an application is made, the defendants are to file and serve submissions in response within a further 15

[21] Recognising that at lockdown Alert Level 4 constraints were put on all New Zealanders but not by employers.

working days, with any reply to be filed and served within 5 working days thereafter. The application then will be dealt with on the papers.

Final observation

[48] We note that this is the first case that the Court has heard relating to employment rights and obligations arising during the pandemic. That is perhaps surprising given the case was heard more than six months after the Government imposed the first lockdown. We raised this issue with counsel at the hearing, including enquiring whether consideration had been given to the power contained within s 178 of the Employment Relations Act to remove matters to the Court. That provision enables the Authority, either on application or of its own motion, to order the immediate removal of a matter to the Court for hearing, including where the case is of such a nature and of such urgency that it is in the public interest that it be removed to the Court, or the Authority is of the opinion that in all of the circumstances the Court should determine the matter. It seems that urgency was sought and granted in the Authority; removal was not considered.

J C Holden
Judge
(for herself and Judge Kathryn Beck)

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS (Dissenting)

[49] I have had the advantage of considering the majority's draft judgment in this matter and respectfully take a different view. Where I part company is in relation to the correct interpretation of s 6 and then the application of s 7 of the Minimum Wage Act 1983 (the Minimum Wage Act).

Analysis

[50] A statutory minimum code of employment rights exists in New Zealand. The Minimum Wage Act is one of the cornerstones of the code. Its importance was described by a full Court of the Employment Court in *Faitala v Terranova Homes & Care Ltd* (a case involving deductions for Kiwisaver contributions from the pay of minimum wage workers) in the following way:[22]

> Plainly it does not bear the same constitutional status as the New Zealand Bill of Rights Act 1990 …, but it is a statute of fundamental importance in the sphere of employment law in New Zealand. It is a statute that is designed to impose a floor below which employers and employees cannot go. It is directed at preventing the exploitation of workers, and is a statutory recognition of the diminished bargaining power of those in low paid employment.

[51] Section 6 of the Minimum Wage Act provides that:

> **6 Payment of minimum wages**
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> 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.

[52] As the wording makes clear, s 6 confers an entitlement on workers to receive from their employer payment for their work at not less than the minimum rate. As is also clear, "that" minimum rate is a reference to the rate of wages prescribed under the

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[22] *Faitala v Terranova Homes & Care Ltd*, above n 11, at [39]. The observation was subsequently endorsed by the Court of Appeal in *Terranova Homes and Care Ltd v Faitala*, above n 12, at [28].

Act, namely the prevailing minimum rate of wages prescribed under ss 4, 4A or 4B.[23] Relevantly, s 6 must be read subject to s 7. And, as s 6 also makes clear, it applies notwithstanding any enactment, award, collective agreement or contract of service, emphasising the focus for assessment in terms of compliance is the applicable terms and conditions of employment.

[53] Section 7 specifies limited circumstances in which an employer may make a deduction from (or fall below) minimum wages. It provides that:[24]

> **7 Deductions for board or lodging or time lost**
>
> (1) In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.
>
> (2) *No deduction in respect of time lost* by any worker *shall be made from the wages payable to the worker under this Act* except for time lost—
> (a) by reason of the default of the worker; or
> (b) by reason of the worker's illness or of any accident suffered by the worker.

[54] The combined effect of ss 6 and 7 is to reinforce the starting point, namely that payment of minimum wages is inviolable subject to very limited exceptions. In other words, the payment of minimum wages is a floor with carefully defined trap doors which an employer must go through if they want to pay less than the prescribed minimum wage.

[55] There are four trap doors: deductions for board or lodging; deductions for time lost by reason of the worker's default; deductions for time lost by reason of the worker's illness; and deductions for time lost by reason of any accident suffered by the worker. Each of the four is ring-fenced in terms of the amount that may be deducted: s 7(1) empowers an employer to make a deduction for board or lodging, not exceeding a 15 per cent deduction in the minimum wage payable in respect of the

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[23] Minimum Wage Order 2020, cl 4. Under the Order different rates are set for hours, days, weeks and fortnights.

[24] Emphasis added.

former; a 5 per cent deduction in respect of the latter. Any deduction under s 7(2) is calculated according to the amount of time lost.

[56] Whether there has been a breach of the Minimum Wage Act requires a stepped approach. It is s 6 which provides the gateway through to entitlement. If there is an entitlement, has there been a deduction? If there has been a deduction, is it lawful? If not a finding of breach follows.

[57] In my view the correct approach to s 6 is to ask whether, under the applicable terms and conditions, the employee has been engaged to provide work and, if so, does the agreement provide for the employee to be remunerated at a rate that equals or exceeds the applicable minimum wage under the Minimum Wage Act? The relevant question is not whether the employee is actually engaged in performing work at the particular point in time a claimed unlawful deduction is made, but rather whether their terms and conditions would have them do so.

[58] In many cases the answer to the gateway (entitlement) question is obvious and will not require an inquiry into whether the terms and conditions require "work" to be undertaken. In other cases the issue of work becomes the central focus. *Idea Services v Dickson* is an example.[25] It is notable that none of the judgments referred to by counsel considering an entitlement to minimum wages under s 6 were concerned with the sort of situation that arises in this case, namely an employment agreement which plainly requires work (in either the narrow or expanded common law sense) to be done in exchange for payment at the minimum wage for a guaranteed minimum 40 hours per week. I note in passing that the non-issue of "work" in this case is underscored by the fact that the employer did decide to require attendance at work for some employees (for example, the fifth defendant) for part of the contracted time and it paid 100 per cent of the applicable wages required under the employment agreement.

[59] It will be apparent that I do not regard *Idea Services*, and related cases, as authority for the proposition that an employee must actually be working at the particular point in time a deduction from their wages is made in order to engage s 6.

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[25] *Idea Services Ltd v Dickson*, above n 17.

[60] Once the gateway question is answered in the affirmative, s 7(2) can apply. The majority has accepted the argument from counsel for the company and Business NZ that, where work is not performed, wages are not "payable" and therefore s 7(2) has no effect. In my respectful view this ignores the widely understood common law rule that, where there are agreed hours of work cancelled by the employer, wages remain "payable" provided that the employee was ready and willing to work those hours.[26]

[61] The following examples may illustrate the point:

- There is an agreement that provides that a task will be performed between the hours of 6 pm and 10 pm in exchange for $30. The task is plainly work (narrow or expanded common law). The task is performed between the specified hours. Section 6 applies because the agreement is for work. Section 7(2) is not engaged because the work is performed with no time lost. The Minimum Wage Act has been breached because the agreed rate of $30 in exchange for four hours work does not comply with the rates prescribed under the Act.

- There is an agreement that a task will be performed between the hours of 6 pm and 10 pm in exchange for $18.90 per hour. The task is plainly work. The task does not end up being performed because an epidemic breaks out and the employer closes their premises where the work must be performed. The employer decides not to pay anything to the employee. Section 6 applies because the agreement is for work. Section 7(2) requires the employer to continue to pay the minimum wage, absent employee default, illness or injury. The Minimum Wage Act has been breached because the reason why work could not be performed had nothing to do with the employee's default, illness or injury.

- There is an agreement that a task will be performed between the hours of 6 pm and 10 pm in exchange for $30. The task is *not* work (narrow or

[26] See for example *Inspector of Awards v Duncan* (1919) 14 MCR 53.

common law). It is performed. Section 6 does not apply because there is no contract for work.

- There is an agreement that a task will be performed between the hours of 6 pm and 10 pm in exchange for $30. The task is *not* work. It is not performed because the employer decides to cancel it on a whim. No payment is made to the employee. Section 6 does not apply because the contract is not for work. Section 7(2) does not apply because the s 6 gateway has not been passed through. The employee may have a claim against the employer for breach of the employment agreement but not under the Minimum Wage Act.

[62] The present case falls squarely into scenario 2 above.[27] The "sleepover" situation in *Idea Services* was scenario 1, although viewed by the employer as scenario 3.

[63] The meaning of "payment for work" advocated for by the plaintiffs and Business New Zealand cannot, in my view, be correct. It would make the caveats in s 7(2) redundant – an employee who loses time as a result of being sick is not 'working' for the purposes of s 6. Nor is there anything in the wording of s 7(2) that indicates an employee must be "working" at the time a deduction is made to benefit from its protection. Wages must be "payable", but this requirement can be met not only through the employee "working".

[64] The majority has found that s 7's role is largely spent, having regard to what is said to be the original purpose of the predecessor section.[28] I disagree. As s 6 of the Interpretation Act 1999 makes clear, statutory provisions apply to circumstances as they arise. Advanced age does not make them mute. And relegating s 7 to the expired use-by date pile overlooks the fact that s 2(5) of the predecessor Act was re-enacted (as s 7) when the 1983 statute came into force. The 1983 Act makes it clear that the two provisions work together and emphasises that s 6 is to be read subject to s 7. And

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27 See also *Duncan*, above n 26.

28 That is, to codify the common law understanding that the only legitimate reasons for deducting pay were sickness, absence, and strike, which are now dealt with by other legislation, for example the Holidays Act 2003 in respect of sick leave.

while there is no doubt that employment case law and legislation have progressed significantly since 1983, and even more since 1945, the common law rule that wages are payable in circumstances where employees are ready and willing to work remains in place.[29]

[65] Nor do I agree with counsel for the plaintiffs' analysis of *Mickell*.[30] A coal shortage forced the shutdown of the company premises. Mr Mickell was scheduled for a shift which was cancelled prior to his arrival at the premises. He was not paid for that particular shift, but did pick up an alternative shift (which he was paid for). Two arguments were raised by the employee. The first was under the common law, seeking payment for the cancelled shift on the basis that he was still ready and willing to perform it. That claim was rejected because, under the relevant Award, the employer had a right to cancel a shift in certain circumstances and to not pay wages for the cancelled shift.[31] He also argued that the failure to pay him amounted to an unlawful deduction under the Minimum Wage Act. That claim was also rejected, but on the basis that the Minimum Wage Act did not apply. I read the judgment as finding that the claim would have succeeded under s 2(5) (now s 7(2)) but for the fact that Mr Mickell was not a minimum wage worker. The Court found that the Award provided for wages in excess of the minimum wage.[32]

[66] In *Mana*[33] the workers advised the company that they intended to take strike action but then cancelled it at the eleventh hour, complaining when they were not given work that they still ought to have been paid. The Court found that the wages would have been payable despite the employees not working during the period for which wages were withheld, as it was accepted that they were ready and willing to work. The only reason the wages were not payable was that the employees, on behalf of their union, acted in bad faith, meaning the time lost was a result of their default.[34]

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29 The principle was confirmed at least as recently as 2015: *Mana*, above n 16, at [155].
30 *Mickell*, above n 18.
31 The Award and the validity of that clause was discussed and approved in the earlier case of *New Zealand Forest Products Ltd v Craike* [1949] NZLR 128.
32 *Mickell*, above n 18, at 486. Issues may arise as to whether the detail of analysis would continue to apply, but it is not necessary to deal with that issue in the context of this proceeding.
33 *Mana*, above n 16.
34 At [171].

[67] The employees in *Mickell* and *Mana* were not successful in their claims, but both cases make it clear that "time lost" refers to time periods where work was agreed to be performed but then, for whatever reason, not performed. In other words, where hours of work are agreed, and end up not being performed, an employee is still entitled to be paid the amount they would have been paid had the work been performed. The only exceptions to this under s 7(2) are where the reason for the work not being performed is the employee's default, illness or injury. In other words, s 7(2) reflects the clear common law rule that existed at the time and continues to exist that an employee is entitled to wages in circumstances where they are ready and willing to perform work.

[68] In interpreting minimum standards legislation it is, I think, desirable to return to the basics. The Minimum Wage Act provides a floor beneath which wages cannot go; s 7 provides limited exceptions to that. The combination of provisions is clearly designed to guard against the erosion of wages for minimum wage workers. This, in turn, reflects the original purpose of the Minimum Wage legislation, namely, to provide a guaranteed basic level of wages designed to support an individual and (at the time of the enactment of the first Minimum Wage Act 1945), a family.[35] The limited power to deduct for board and lodgings under s 7(1), but only to a certain percentage of wages payable under the Act, reflects that underlying policy intent.

Conclusion

[69] As the employment agreements (as reflected in the agreed statement of facts) make clear, each of the defendants was employed on a full-time basis for a minimum 40-hour week at the hourly minimum wage rate. That means that, for the purposes of the Order, the prescribed minimum adult hourly rate applied (s 4(a)). There is no dispute that they were engaged to carry out work. The pandemic intervened and they could not work the guaranteed minimum of 40 hours. The reason why they could not work the 40 hours had nothing to do with their default, illness or accident, and so no deduction could be made from the minimum wage they would otherwise be entitled to receive. The defendants could have (genuinely) agreed to temporarily amend their

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[35] See (7 December 1945) 272 NZPD 459.

terms and conditions of employment to reduce their hours of work (for example, to 32 hours per week) but could not agree to a reduction in their wages to 80 per cent. To do so would constitute an unlawful deduction in terms of the Minimum Wage Act.

[70] In my respectful view, the interpretation adopted by the majority has the effect of putting a gloss on s 6 which is not there. Further, it has the effect of taking away from the most vulnerable group of employees – those on the minimum wage – in circumstances where Parliament has evidently intended to provide them with an income floor.

[71] I would have held that, having regard to the agreed statement of facts, there was a breach of the Minimum Wage Act in relation to minimum wage workers and dismissed the challenge on that basis.

Christina Inglis
Chief Judge

Judgment signed at 3.30 pm on 21 December 2020