

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 200
5609861

BETWEEN SMITHS CITY GROUP
LIMITED
Applicant

A N D A LABOUR INSPECTOR OF
THE MINISTRY OF BUSINESS
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Peter van Keulen

Representatives: Kylie Dunn, Counsel for Applicant
Geraldine Kelly, Counsel for Respondent

Investigation Meeting: 2 August 2016 at Christchurch

Submissions Received: 5 August 2016 from Applicant
5 August 2016 from Respondent

Date of Determination: 4 November 2016

DETERMINATION OF THE AUTHORITY

- A. The improvement notice dated 28 January 2016 is rescinded.**
- B. Costs are reserved with a timetable set for submissions if required.**

Employment relationship problem

[1] The applicant, Smiths City Group Limited (Smiths City), objects to an improvement notice dated 17 November 2015 that the Labour Inspector, Richard Lewis, issued on 28 January 2016 (the Improvement Notice).

[2] Smiths City has made an application pursuant to s 223E of the Employment Relations Act 2000 (the Act) seeking to have the Improvement Notice rescinded.

[3] The Improvement Notice sets out that the Labour Inspector reasonably believes that Smiths City is failing, or has failed, to comply with:

- a. Section 6 of the Minimum Wage Act 1983 as Smiths City has failed to pay not less than the prescribed minimum wage; and
- b. Section 8A of the Minimum Wage Act as Smiths City has not kept an accurate record of hours worked for the purposes of calculating pay.

[4] The Labour Inspector says that these two failings arise because employees are required to attend work at 8:45am but Smiths City only pays for work from 9:00am and it only records employees' attendance at work from 9:00am.

[5] Because of the nature of activities undertaken in the 15 minutes between 8:45am and 9:00am the Labour Inspector says this is work. Therefore, Smiths City should record attendance at these meetings and it should pay employees for this time.

[6] Smiths City says the 15-minute period is not work, employees are not required to attend and therefore, the Minimum Wage Act does not apply to this period.

[7] In the alternative, Smiths City says if the Minimum Wage Act applies then the additional top up payments and commissions paid to employees means it has complied with the stated requirements of the Minimum Wage Act.

Facts

[8] Smiths City operates 29 stores and four clearance centres nationwide. Smiths City sells a range of home appliances, home furnishing, home heating products, carpets and sporting goods. Smiths City employs approximately 400 store based employees nationwide.

[9] At 8:45am every morning staff meetings are conducted in each of the Smiths City stores (the Morning Meetings). The Morning Meetings are held to provide information to employees to enable them to sell more effectively throughout the day. The meetings also provide a basis to ensure that staff arrive at work sufficiently early to be ready for opening at 9:00 am.

[10] Each store manager normally conducts the Morning Meetings. In his or her absence then the assistant manager or some other appointed person will conduct the

Morning Meetings. There is no formal structure to the Morning Meetings and the way they are conducted and the content will change from day to day and vary between stores. Typically, however, the store manager uses Morning Meetings to discuss sales figures and targets, any promotions of relevance, any customer and staff feedback, any upcoming events and to recognise staff achievements.

[11] Morning Meetings will last between 10 to 15 minutes, but this will vary from day to day and between the stores. They will always finish before 9:00 am to allow the employees to have some time to get ready before the store opens.

[12] Morning Meetings are described as being relaxed and informal with the staff sitting on furniture in the store, wearing slippers, taking time to have coffee and, it would appear, have some social interaction before the store opens.

[13] Smiths City says employees are not required to attend, but they are expected to attend. That is they expect employees to attend because the information provided in Morning Meetings is for their benefit to enable them to be more effective sales people and therefore meet their targets and attain commission payments. As there is no compulsion to attend, employees are not subject to any disciplinary action for being late or not attending Morning Meetings at all.

[14] The expectation on employees to contribute when they do attend Morning Meetings varies between stores. In some instances store managers suggested to me that they expected a reasonable level of participation, asking questions of employees and expecting them to engage in discussions. Other store managers suggested to me that they would not be particularly concerned if employees did not engage or were even distracted by other things such as looking at their mobile telephones. However, they did say that if this continued to be a regular occurrence they would check with an employee to ascertain why he or she was attending Morning Meetings if they were not engaging in the process.

[15] In some instances employees were expected to present at Morning Meetings, although this appears to be rare. On these occasions, an employee is tasked with presenting on a new product and would present a short summary and answer any questions about the product. This is one instance where there clearly is a compulsion on an employee to attend Morning Meetings and engage for the benefit of Smiths City and the other employees.

[16] Employees who are not rostered to start in a store at 9:00 am are not expected to attend Morning Meetings. These employees will keep up to date with product developments, promotions and sales figures by reading the information provided on the staff notice board or by speaking to the store managers on a later occasion. Some store managers will print a copy of the daily sales report and give a copy of this to staff who do not attend Morning Meetings.

[17] Witnesses who were existing employees of Smiths City and ex-employees of Smiths City described their experience of Morning Meetings and their views of the requirement to attend in different ways.

[18] Some employees were clear that they accepted that attendance was not compulsory and therefore chose not to attend Morning Meetings. In fact one employee, Rhys John, chose not to attend Morning Meetings at all despite being rostered to start work at 9:00 am most days and the expectation that he should attend. He said he could not be bothered attending Morning Meetings as he did not think they would be of any benefit to him. He also confirmed that he did not suffer any disciplinary consequences or any threat of disciplinary action by choosing not to attend Morning Meetings.

[19] Other employees described that they did not attend Morning Meetings because they had childcare or other arrangements and this was never an issue with Smiths City.

[20] Some employees who attended Morning Meetings on a regular basis would occasionally be late and would simply text the store manager or ring on their way into work to advise that they would be late. There was no consequence for any such lateness and, it was clear to me from the evidence I heard, that there was a somewhat relaxed attitude about excuses for not attending Morning Meetings. So, for example, it was perfectly acceptable to simply advise a store manager that an employee was running late because of traffic and would not be at a Morning Meeting. This would have no consequence for the employee. However, a different approach might be taken if an employee was regularly late for a 9:00 am start without reasonable excuse.

[21] In contrast two ex-employees gave evidence that whilst Morning Meetings were never described as being compulsory, they felt compelled to attend. They suggested that pressure was exerted on employees if they did not attend and even

went so far as to say that one was threatened with being given a written warning for a continued failure to attend Morning Meetings on time. Smiths City denies that it would discipline staff for non-attendance at Morning Meetings or being late.

[22] Store managers took varying degrees of approaches to consistent failure to attend Morning Meetings. In some instances, store managers suggested that they would speak to that employee to see why it was that they were not attending. They would reiterate that whilst the meeting was not compulsory it was encouraged and they believed it would be in the employee's interest to attend because they would receive information that would assist them with their sales. Other store managers appeared to take a more relaxed approach about lateness or non-attendance at Morning Meetings, suggesting there was very little follow-up with non-attendees.

[23] The result is that most sales employees would attend Morning Meetings if they were rostered on at 9:00 am. I did not receive any figures about the percentage of attendance, but it seemed from the evidence that I heard that this was a likely occurrence for a sales employee at Smiths City.

[24] All employees who gave evidence confirmed that Smiths City allows some flexibility to working hours, that is employees are rostered to start and finish at certain times, but have some flexibility within that as to when they take their breaks including extended breaks in order to undertake personal activities such as attending to shopping or going to the bank. There might also be an occasion where Smiths City would allow employees to leave early if a store was particularly quiet, but there was also an expectation that employees would stay after closing if customers were still in the store.

[25] Smiths City does not pay its employees for the 15 minutes that they might be at the store attending Morning Meetings, prior to the store opening.

The issues

[26] When an objection to an Improvement Notice is lodged with the Authority pursuant to s 223E of the Act, the function of the Authority is to determine:

- a. Whether the employer is failing or has failed to comply with the specified provisions of the relevant Acts; and

- b. The nature and extent of the employer's failure to comply with the provisions; and
- c. The nature and extent of any loss suffered by an employee as a result of such failure (if applicable).

[27] On this basis, therefore, I must determine whether Smiths City is failing or has failed to comply with the Minimum Wage Act in respect of paying the minimum wage to its employees and keeping accurate records for the purposes of such payments. If I am satisfied that there is a failure then I need to determine the nature and extent of that failure to comply with the Minimum Wage Act and any loss that may be suffered by employees as a result if that is applicable in this case.

[28] Once I have determined these aspects I can then confirm, vary or rescind the Improvement Notice as I think fit.¹

[29] The Labour Inspector says that Smiths City is failing to comply with ss 6 and 8A of the Minimum Wage Act.

[30] Section 6 of the Minimum Wage Act provides:

6. Payment of minimum wages

Notwithstanding anything 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.

[31] Section 8A of the Minimum Wage Act was amended or repealed on 1 April 2016 by s 5 of the Minimum Wage Amendment Act 2016. However, the amendments made by the 2016 Act do not apply to conduct that occurred before the commencement of that Act, so therefore the actions complained of pre-date 1 April 2016, the old s 8A of the Minimum Wage Act is still relevant. That section provided:

8A. Wages and time records

(1) Every employer who employs any worker whose wages or rates of wages are prescribed or paid pursuant to this Act shall keep a record (called the wages and time record) showing, in each case of such worker, -

- a. the name of the worker:

¹ Section 223E(3) of the Employment Relations Act 2000

- b. the worker's age, if under 20 years of age:
 - c. the worker's postal address:
 - d. the kind of work on which the worker is usually employed:
 - e. the contract of service under which the worker is employed:
 - f. the classification or designation of the worker according to which the worker is paid:
 - g. the hours between which the worker is employed on each day and the days of the worker's employment during each week:
 - h. the wages paid to the worker each week and the method of calculation:
 - i. such particulars as are prescribed.
- (2) ...
- (3) Where an employee keeps a wages and time record in accordance with the Employment Relations Act 2000, the employer is not required to keep a wages and time record under this Act in respect of the same matter.

[32] Smiths City and the Labour Inspector accept that sales staff are employees to whom the Minimum Wage Act applies. That is they are workers for whom, under the Minimum Wage Act, a minimum rate of wages applies and they are entitled to receive that from Smiths City for the work that they perform.

[33] In addition, Smiths City should keep wage and time records as detailed in s 8A of the Minimum Wage Act either as separate wage and time records pursuant to the Minimum Wage Act² or as wage and time records kept in accordance with the Employment Relations Act³.

[34] It follows, therefore, that the matter in dispute between Smiths City and the Labour Inspector is not that there is a prescribed minimum wage that applies to the employees at Smiths City, nor is it in dispute that there is an obligation to keep wage and time records in respect of these employees. The issue is simply whether employees who attend Morning Meetings are working and therefore should be paid the minimum wage for the additional 15 minutes per day that they attend this meeting and whether the wage and time records should record this attendance.

[35] So the issue that I must determine in this matter is – is the attendance at Morning Meetings work for the purposes of the Minimum Wage Act?

² Section 8A(1) of the Minimum Wage Act 1983

³ Section 8A(3) of the Minimum Wage Act 1983

Discussion

[36] In *Idea Services Ltd v. Dickson*⁴ the Court of Appeal discussed what constituted work for the purposes of the Minimum Wage Act. It referred to the earlier decision of the Employment Court and approved the consideration of three factors being the constraints placed on the freedom of an employee, the nature and extent of responsibility and the benefit to the employer of having the employee in the role. The Court of Appeal said:

[7] In deciding whether sleepovers constitute work for the purposes of this section, the Employment Court found it helpful to consider three factors:

- a. 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.

[8] The greater the degree or extent to which each factor applied (ie 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 Court said that the question has to be approach in an “intensely practical” way, adopting it was said by this Court in *NZ Fire Service Commission v. NZ Professional Fire Fighters Union*.

[9] ...

[10] We agree with the factors the Employment Court found helpful. We also agree with the Court’s application of those factors to the facts as it found them.

[37] I will consider each of these factors in light of the facts outlined above.

Constraints placed on the freedom of the employee

[38] There are two aspects to the constraints placed on an employee in respect of Morning Meetings. The first is whether an employee is required to attend Morning Meetings and therefore there is a constraint imposed on his or her time because of the

⁴ [2011] NZCA 14

requirement to be at a Smiths City store. The second is the restraint on an employee's time once he or she attends Morning Meetings.

[39] My first observation is that Smiths City is treading a fine line between compulsion to attend Morning Meetings and simply an expectation of attendance. Whilst it describes its position as attendance being expected rather than compulsory, I do accept witness evidence that suggests some employees feel compelled to attend notwithstanding it is expressed as not being a compulsory meeting.

[40] However it is equally clear that some employees, such as Mr John, feel no compulsion to attend Morning Meetings and others are not even expected to attend, such as those who have child care responsibilities that prevents them attending.

[41] In between there is a range of feeling about attendance, some appearing to accept they should attend but being somewhat indifferent about timeliness. This is a product of the different approach of store managers to employees who fail to attend Morning Meetings or are consistently late.

[42] Smiths City needs to be clearer about the obligation to attend, ensuring that employees do not feel compelled to attend, if it wishes to maintain its stance that attendance at Morning Meetings is not work for the purposes of the Minimum Wage Act.

[43] My second observation is that from one perspective attendance at Morning Meetings is a red herring because there is an expectation that employees would arrive at work early in any event in order that they can ensure they are ready to work when the store opens. That is, if there were no Morning Meetings Smiths City would still expect employees to arrive early to ensure they have time to get dressed appropriately for work, catch up with colleagues, have coffee and possibly even breakfast, check the sales figures and/or find out about any product updates or specials that might apply to them.

[44] The point is, on one analysis, attending Morning Meetings is simply an extension of the obligation most employees would feel in any event to ensure they are ready to commence work at 9:00 am. This is no different to: an employee arriving at work before a shift starts in order for the finishing employees to do a handover; or an employee who arrives early at work to clear emails in order to be ready for work; or

an employee who attends work to find out what is required on site that day, perhaps get updates on processes or aspects of work such as health and safety.

[45] This point is even stronger if there is no compulsion to attend Morning Meetings.

[46] Next is the question of what an employee can do during Morning Meetings. Must an employee sit quietly or even contribute to Morning Meetings? There was varying evidence in respect of the expectation once an employee does attend Morning Meetings. It seems to me that in most stores once an employee does attend, then there is at least an expectation that they will not be obstructive or distracting to other employees during Morning Meetings. There is no requirement that they participate (with the exception being those employees who might be asked questions, or those who are tasked with presenting in Morning Meetings). Indeed, I received various answers to my questions posed to different store managers about what they might do if an employee was using his or her mobile phone or reading the newspaper during Morning Meetings. Some said they would make comment after the meeting and advise the employee that it is not appropriate that they do that, others suggested they would do nothing at all unless it continued on a number of occasions or only if it was distracting others.

[47] Overall, I believe, once an employee attends a Morning Meeting there is a restriction on his/her time. An employee may not be required to participate but there they are limited in what they can do if they do not want to listen or participate. That said, because there is no obligation to participate, the employee could do nothing at all or read the newspaper in some circumstances and so there is some constraint but it is not absolute.

Responsibility placed on employee

[48] It is clear to me that when attending Morning Meetings an employee does not have the normal responsibility that he or she would have during store hours. So, for example, there is no requirement to be dressed to the standard expected once the store is open; there was evidence that employees wear slippers rather than shoes whilst they are in Morning Meetings. In addition, there is clearly no requirement to be walking around the store tidying stock, arranging presentations or even dealing with customers.

[49] Any responsibilities placed on employees during Morning Meetings only relate to an obligation to participate, particularly when an employee is asked a question or if they are tasked with presenting on a product in that meeting. In most cases, employees do not have any real responsibility imposed upon them during Morning Meetings.

Benefit to employer

[50] Smiths City suggested there was little benefit to it in holding Morning Meetings, but rather Morning Meetings were primarily for the benefit of the employees to assist them with their sales so that they might reach their targets and therefore attain sales bonuses. Whilst I accept that that is an appropriate summary of the benefit for employees, it also follows there is a benefit from Morning Meetings that flows to Smiths City. It is obvious that increased sales from employees is likely to translate to increased profits for Smiths City and therefore there is some benefit in having staff attend Morning Meetings.

[51] It is also clear that if employees attend Morning Meetings then they will be at the store and ready to work at 9:00 am, fully informed for the day, so for example they will have information about sales targets, any promotions that are relevant and any new products. This is a clear benefit to Smiths City.

Conclusion

[52] In *Dickson*, the Court of Appeal said it is not simply the three factors outlined that are relevant to the consideration of what constitutes work. The Court identified that neither Parliament nor any Court, considering the question of what constitutes work, should outline the examination of what constitutes work on a prescriptive basis. Rather, it should apply the legislation and the factors outlined to the circumstances as they arise, these factors being merely guidance as to the influences that will ordinarily be relevant in deciding whether a person is working.

[53] The fact is, the specific situation of the person will impact on whether an employee is actually working. That is a factual analysis guided by the observations that the Court has provided. This reflects the wide variety of work that can be undertaken and the various circumstances in which it may take place.

[54] The Court sated at [9]:

[9] The Court considered that all three factors applied to a significant degree in this case, and so concluded that Mr Dickson's sleepovers constituted "work" for the purposes of s 6 of the Act. The Court did not attempt to be more prescriptive than Parliament had chosen to be and we, with respect, think that was appropriate. As the Court noted, legislation applies to the circumstances as they arise and so it would be a brave Court that attempted to divine or craft an exhaustive definition of what work meant in 1983, or in 1945 (the date of the Act the current legislation is modelled on), or, for that matter, what it means in 2010. What the Court did do was offer some guidance as to what factors would ordinarily be relevant in deciding whether a person is working. The Court's approach appropriately reflects, we think, the wider variety of work that can be undertaken and the circumstances in which it may take place. It also acknowledges the fact that what people ordinarily consider to be "work" has changed and will change over time. Parliament no doubt enacted the legislation with these points in mind.

[55] Based on this observation, applying the three factors on a general basis to ascertain whether employees are working when they attend Morning Meetings is problematic. The factual analysis appropriate to each factor varies from store to store or from employee to employee within Smiths City. So, for example, some store managers may be more forceful in the expectation that employees attend Morning Meetings, to the extent this is compulsion, whilst others may be quite relaxed. It may also be the case that particular employees feel the need to contribute or indeed are required to contribute on a more regular and compulsory basis than other employees.

[56] Contrast two examples:

- a. An employee attends a particular Morning Meeting and having been asked to do so, makes a presentation on a new product and answers questions about it; and
- b. An employee, who does not feel compelled to attend Morning Meetings, turns up late to a meeting, having a sent text message to the store manager advising of a delay in traffic, and then simply sits on one of the couches drinking a cup of coffee without participating in the meeting, perhaps checking the news on his or her phone.

[57] It seems to me that on a factual analysis, the first employee is likely to be working and the second is not.

[58] Overall, my conclusion in respect of whether attendance at Morning Meetings constitutes work is that for some employees in specific stores, particularly when tasked with specific obligations in respect of Morning Meetings, it will amount to work. However, on the basis that Morning Meetings are not compulsory and many employees are not obliged to participate nor have any responsibility in that meeting, it is unlikely to be work for many.

[59] It is also my conclusion that I cannot determine that attendance at Morning Meetings is work, as a rule. As I have indicated, it is clearly not work for those employees such as Mr John who never attended Morning Meetings, but it is work for those employees who must attend because they make a presentation in the meeting. The bulk of the employees fall somewhere in between where they may feel a range of compulsion to attend and compulsion to contribute, but this is largely subjective and I cannot make a determination that every employee is working when attending Morning Meetings.

No breach of the Minimum Wage Act in any event

[60] Smiths City says that even if the Morning Meeting is work it has complied the Minimum Wage Act because employees are all paid more than the applicable minimum rate once additional payments such as commissions for sales are factored in.

[61] I accept that commission payments must be considered when deciding if an employee has been paid at the applicable minimum rate⁵.

[62] There was no evidence before me that once the time spent in Morning Meetings was calculated against the remuneration received by an employee there was a failure to pay at the applicable minimum rate.

[63] Again, it is one of these situations where specific evidence is required. That is evidence in relation to employees' attendance at Morning Meetings and the payments that were received during that week. With this evidence I could then determine if there has in fact been a breach of the Minimum Wage Act.

[64] In the circumstances I am unable to determine if there has been a breach of the Minimum Wage Act and even if there has, the extent of such breach.

⁵ *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 and *Gunning v Bankrupt Vehicle Sales and Finance Limited* [2013] NZEmpC 212

Conclusion

[65] I conclude it is not safe to say that every employee attending Morning Meetings at any Smiths City's store is working for the purposes of the Minimum Wage Act. For those for whom it might be work I cannot say if Smiths City has paid those employees the applicable minimum rate for this work. Therefore, I cannot determine if Smiths City has failed to comply with the Minimum Wage Act.

[66] On this basis, I find that Smiths City's objection to the Improvement Notice is appropriate.

[67] In the circumstances, I determine that the Improvement Notice should be rescinded.

Costs

[68] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[69] If they are not able to do so and I am required to make a determination on costs, then any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority