

Labour Inspector v Smith City Group Ltd EMPC 313/2016

Every morning, before Smith City Group Ltd opened its stores to customers, it conducted a short meeting with sales staff. Attendance at these meetings was expected but no wage and time records were kept for the time at these meetings and the attending sales staff were not paid for their time.

These sales meetings had been conducted for the last 15 years in Smith City stores, commencing at approximately 8.45am before staff who were on duty that day opened the stores at 9am. Staff were paid from when the stores opened. The meetings were usually conducted by Store Managers who used a standard template to discuss store related business, including sales promotions and presentations made by staff. The template enabled a record to be kept of the meetings.

Smith City considered the meetings to be an integral part of a store managers' job and had a regional manager check in with each store bi-monthly to ensure the meetings had been held.

This case was brought by the Labour Inspector who considered that the time spent by the staff in attendance at these meetings was work time. As such, it was claimed the company must keep records for the time staff were in attendance and pay them for it.

Further, the Labour Inspector considered that in some cases, Smiths City was failing to meet its obligations under the Minimum Wage Act when the additional time spent in the meetings was factored into hours of work for these staff.

The Labour Inspector issued an improvement notice to Smiths City on both grounds. Smiths' City objected to the notice and challenged it in the Employment Relations Authority. The Authority rescinded the improvement notice – the Inspector appealed the Authority's determination to the Employment Court.

Smith City argued that the sales staff were not working at these meetings and therefore there was no obligation to keep records or to pay staff for attending the meetings. The company provided examples of staff eating breakfast, reading the paper or arriving late for meetings and said this flexibility also extended to allowing staff to take longer breaks if the stores were quiet or finishing early.

Alternatively, Smith City argued that if the Court did find that these staff were working during the meeting time, they had met the requirements of the Minimum Wage Act by taking into account commission and incentive payments earned in the relevant pay period.

Some staff told the Court they felt the meetings were compulsory and some had been told off for being late. It was clear however, that staff were expected to attend and there was evidence provided by managers who followed up with staff who were late to ask for an explanation.

Improvement notice

The improvement notice issued by the Labour Inspector stated that Smith City was failing, or had failed to comply with the Minimum Wages Act in respect of the failure to pay the prescribed minimum rate. The notice therefore was confined to a limited class or group of employees being those paid on or near the minimum wage. The notice required Smith City to comply with the Act.

The issues identified by the parties for determination were:

- Whether the daily morning meetings constitute "work" for the purposes of s6 of the Minimum Wages Act; and

- If so, whether commission and incentive payments should be taken into account in assessing compliance with the Minimum Wage Act 1983; including:
 - Is there a distinction between commission and incentive payments for this purpose?
 - How should commission and incentive payments apply to a pay period?

The Court noted that 'work' is not defined in any statute for the purposes of the Minimum Wage Act and referred to the decision of *Idea Services Ltd v Dickson*. This decision considered if Mr Dickson, a community service worker was working when he was required to sleepover. In that decision the Court decided if an activity was work turned on a factual inquiry. This included considerations of all the facts under these three headings; constraints on the employee, responsibilities of the employee and the benefit to the employee.

Applying these three considerations to this situation, the Court rejected that the Smith City staff could choose not to attend because this was not a requirement in their employment agreement. The Court found that there was an expectation on them to attend and pressure was placed on staff which was "direct and forceful". The practical reality for staff was that to satisfy this expectation, and so as not to be seen as poor performers, they had to attend.

In respect of responsibilities, the Court considered that while during the meetings the staff did not have 'active' responsibilities to discharge, they were obligated to listen to the work related information that was being imparted and to absorb it. Employees making presentations were actively discharging work related responsibilities.

With regard to considering the benefits to the employer, the Court considered this factor pointed to these meetings being work for all staff who attended. The benefit of the meetings was exclusively enjoyed by Smiths' City because it had a cost-free opportunity to prepare staff for the working day. This was not offset by any potentially enhanced opportunity that staff may have had to improve their ability to earn commissions or incentive payments. It was also not offset by occasionally having longer breaks or being able to leave early.

Applying the three factors the Court concluded the morning meetings were work.

As a result of this, the Court found that the permanent employees of Smith City who were paid by the hour were entitled to be paid for time spent at the meetings. This time was over and above the hours of work in their employment agreements and commissions and incentive payments were additional income earned over and above the contractual hourly rate and not in substitution for it.