

Submission

By



to the

Health Select Committee

on the

Sleepovers Wages (Settlement) Bill

29 September 2011

PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 6550

Sleepovers Wages (Settlement) Bill

The Committee will appreciate that it has been necessary to prepare this short submission after a less than thorough consideration of the above legislation. BusinessNZ must express disappointment that the legislation addresses state sector difficulties while leaving private sector concerns unmet. The settlement is confined to the state sector with the possibility of extension beyond health and disability to 'any employer in any other employment sector funded through a Vote' (clause 23 (b)). Unfortunately it seems likely that this premature acknowledgement of the need to pay the minimum wage in circumstances where, as the Employment Court concluded, constraints and responsibilities are placed on the employee for the employer's benefit (paragraph 64, *Idea Services Ltd v Dickson*, WC 17/09), will have an effect far beyond the employment areas to which the current bill is directed. Should this prove to be the case, many private sector employers may find their ability to employ severely undermined. While cl13 prevents an employee covered by the bill from making further sleepover wages claims, there remains the possibility of claims from employees not covered by the bill who work in areas other than the health and disability sector.

BusinessNZ also regrets that at an individual level the bill has the potential to create a liability for private persons partly funded by the Ministry of Health, for example, to have someone living in overnight to provide protection for a disabled person or persons. Such a situation has come to BusinessNZ's attention and if the proposed legislation (while not itself providing any remedy) does prove to impose liability, it would mean the person ('employer') concerned would be unable to continue a satisfactory and long standing arrangement. This in turn would mean the disabled person in question would no longer be able to enjoy a degree of personal independence but more likely than not, would have to be taken into care.

It is probable that there will be other arrangements of a similar nature affected by the proposed legislation's acceptance of the need to pay the minimum wage for all sleepover hours. And, as previously noted, this liability has been accepted before the Supreme Court could finally determine the matter. BusinessNZ would urge the Select Committee to satisfy itself that when the proposed legislation comes into force, it will not have the particular effect referred to in the above paragraph and also that consideration will be given to alleviating the further difficulties the current interpretation of the Minimum Wage Act is likely to cause. In upholding the Employment Court's finding, the Court of Appeal noted the Act's 'rather simplistic formulation' when contrasted with the sophistication of the equivalent legislation in the United Kingdom (paragraph 25, *Idea Services v Dickson*, CA 405/2010, [2011] NZCA 14). The Court also noted that the Act itself is effectively in the same terms as the original 1945 legislation and 'very much premised on the idea of employees working nine to five'. It would seem from those statements that the Court considered that in changing times the Act itself may be in need of change.

A point of detail. It is suggested that in clause 3(1)(a) the reference should be to employees 'who are *required* (emphasis added) by their employer to sleep overnight...'. The word 'allowed' (as at present) suggests a completely different situation where the employee has asked permission to sleep over. That was not an element of the requirement to pay the minimum wage as envisaged in paragraph 64 of the Employment Court judgment and the Court of Appeal did not refer to the Employment Court's stated indicia. Using the term 'allowed' in the purpose statement conflicts with the definition of sleepover in clause 4.

Background Information on BusinessNZ

Encompassing four regional business organisations (Employers' & Manufacturers' Association, Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), its 71 member Major Companies Group comprising New Zealand's largest businesses, and its 76-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is New Zealand's largest business advocacy body. BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.