

Sleepover Wages (Settlement) Bill

Government Bill

As reported from the Health Committee

Commentary

Recommendation

The Health Committee has examined the Sleepover Wages (Settlement) Bill and recommends that it be passed with the amendments shown.

Introduction

The purposes of the Sleepover Wages (Settlement) Bill are to facilitate the settlement of civil proceedings between certain parties about the payment of wages at the minimum rate prescribed under the Minimum Wage Act 1983 to employees who are allowed by their employers to sleep overnight at their workplaces while on duty; to provide for a staged progression towards full compliance with the Minimum Wage Act in respect of the wages payable to employees who undertake sleepovers; and to provide a mechanism for extending the application of subparts 1 and 2 of Part 2 of the bill to other publicly-funded employers, and to their employees, to allow, among other things, the settling of disputes that involve the same or substantially the same issue.

The bill would give legal effect to certain aspects of a settlement between the Crown, Idea Services Limited, Timata Hou Limited, and

the Service and Food Workers Union Nga Ringa Tota, for the payment of wages to employees in the health and disability sector who are allowed by their employers to sleep overnight at their workplaces while on duty.

Background

A sleepover is a situation in which an employee is required to be at an employer's workplace, is allowed to sleep overnight while on duty, and is required to be available during this period to attend to duties if necessary. For a number of years many people have been paid sleepover allowances that are less than the minimum wage.

In 2007, an employee of Idea Services Limited (a service delivery arm of IHC New Zealand Incorporated), filed proceedings in the Employment Relations Authority, claiming that payment of sleepover allowances at rates below the minimum wage was in breach of the Minimum Wage Act. The authority upheld the claim.

The Employment Relations Authority's determinations were challenged in the Employment Court by Idea Services Limited. The Employment Court issued judgments on 8 July and 11 December 2009 to the effect that sleepovers constitute "work" for the purposes of the Minimum Wage Act and that employees are entitled to be paid no less than the minimum wage for each and every hour of work, including those during sleepovers. Idea Services Limited appealed this decision, but the Court of Appeal's judgment, issued on 16 February 2011, confirmed the Employment Court's decisions.

This had substantial implications, including backdated liabilities for up to six years, and significant future wage increases. There was potential for providers to become insolvent, risking the disruption of services to a very vulnerable group of people.

Idea Services Limited was granted leave to appeal the Court of Appeal's decision, but before a scheduled hearing in the Supreme Court, a conditional settlement was reached between the Crown, Idea Services Limited, Timata Hou Limited, and the Service and Food Workers Union Nga Ringa Tota. The Supreme Court hearing has been adjourned to allow the settlement to be implemented.

Legislation is required to give effect to certain aspects of the settlement agreement. This bill provides for the payment of back wages for certain sleepovers, and the staged progression of payments for

sleepovers towards the hourly rate set by the Minimum Wage Act. It also provides a framework for the settlement, through an Order in Council process, of other sleepover issues for other health and disability providers funded through Vote Health, and potentially other Crown-funded employers.

There is multi-party agreement on the provisions of this bill, and the changes we recommend are minor and intended to make clear the intentions of Parliament.

Payments may be cumulative

We recommend amending the title of clause 17 to remove the risk of its intention being misunderstood.

The intention of this clause is to make it clear that an employee with a valid claim may be entitled to back wages under more than one of clauses 14 to 16. Removing the risk of confusion by changing the title of this section to “entitlements may be several” should make this intention clear.

Calculation of back wages

Clause 19 sets out the formula to be used to calculate any back wages for a sleepover. We recommend a minor wording change to make it clear that the reference to “the amount of taxable allowances actually paid” is to the gross amount payable at the time the employee slept over. This includes any tax that an employer has deducted on behalf of the employee as well as the amount that an employee receives directly.

Implementation of staged progression to the minimum wage through Orders in Council

We recommend inserting new clause 24(2A) to ensure that the staged progression to the minimum wage, allowed for in clause 22, could not be effected in ways that might reduce the employee’s total current wages.

This protection already applies to the health and disability sector under clause 28(e) but does not extend to other sectors. Allowing the legislation to be used so as to reduce the amount paid for sleepovers would be inconsistent with the overall intention of ensuring

that wages increase towards the minimum wage; we recommend removing clauses 27(2)(b) and 28(e) and instead inserting new clause 24(2A) to cover all situations where an Order in Council could be made to allow staged progression to the minimum wage.

Timing of back payment

We recommend a change to clauses 26 and 28 to recognise the practicalities of arranging the payment of back wages within the deadline (which is set in clauses 20 and 21 as no later than two months after the date of the bill's enactment).

For health and disability employers this date can be varied only with the agreement of employees. For other employers, there is no provision to vary this date. This could result in payments needing to be made immediately an Order in Council was made if it took longer than a few weeks from the enactment of the bill to reach settlement. Employers and the Government need some time to calculate, verify, and pay the back wages resulting from a settlement agreement confirmed by the making of an Order in Council. We consider it desirable to recognise this by amending the bill to allow all employers covered by an Order in Council under the bill two months following the commencement of the Order in Council in which to pay back wages, or another date if a majority of employees agree.

Use of Order in Council

We recommend an amendment to clause 27 to require that the relevant Minister advise the leaders of all political parties in Parliament of his or her intention to make an Order in Council imposing a pay settlement relating to sleepovers. We also recommend that the confirmation required by clause 27(2)(b) is in writing.

In the event that other employers and employees in the health and disability sector, or any other employment sector funded through a Vote, cannot reach agreement regarding payment for sleepovers, the bill contains provision for a settlement to be imposed by an Order in Council without the parties agreeing. The relevant Minister may recommend this only if satisfied that the recommendation is supported by the parliamentary leaders of the political parties that together command a simple majority of the House.

We agree that it is important that any such Order in Council have the degree of support that would normally be required for legislation should it be brought before the House; and in the absence of having this tested in the House, we feel another form of clear record is needed to demonstrate that the required support exists.

Compliance orders

We recommend amending clauses 31 and 33 to add a reference to the use of compliance orders.

A compliance order is the standard remedy under the Employment Relations Act 2000 that is used (amongst other things) in cases of non-compliance with certain statutory obligations and non-compliance with orders or decisions of the Employment Relations Authority or the Employment Court. We consider that the bill should be amended to make explicit its availability in cases relating to sleepovers.

Ramifications for the private sector

We received two written submissions. Concern was expressed that the court decisions could have ramifications beyond the employment areas to which the bill is directed. While we acknowledge the submitters' concern these issues are beyond the scope of this bill.

Conclusion

We were pleased to hear from the parties concerned that this long-standing and difficult issue has been settled amicably through the good will and good faith of those involved.

Appendix

Committee process

The Sleepover Wages (Settlement) Bill was referred to the committee on 27 September 2011. We received and considered five submissions from interested groups and individuals. We heard three submissions at a hearing in Wellington.

We received advice from the Ministry of Health and the Department of Labour.

Committee membership

Dr Paul Hutchison (Chairperson)

Chris Auchinvole

Dr Jackie Blue

Kris Faafoi

Kevin Hague

Iain Lees-Galloway

Grant Robertson

Eric Roy

Nicky Wagner

Sleepover Wages (Settlement) Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Tony Ryall

Sleepover Wages (Settlement) Bill

Government Bill

Contents

		Page
1	Title	3
2	Commencement	3
Part 1		
Preliminary provisions		
3	Purposes	3
4	Interpretation	4
5	Act binds the Crown	6
6	Relationship between this Act and other law	6
7	Expiry	7
Part 2		
Sleepover wages		
Subpart 1—Extinguishing claims for sleepover wages		
<i>Preliminary</i>		
8	Application of this subpart	7
<i>Extinguishment</i>		
9	Certain claims for sleepover wages by employees of Idea Services and Timata Hou extinguished	7
10	Certain claims for sleepover wages by employees of other employers in health and disability sector extinguished	8
11	Effect of this subpart on other civil proceedings	8

Sleepover Wages (Settlement) Bill

	Subpart 2—Settlement relating to Idea Services and Timata Hou <i>Preliminary</i>	
12	Application of this subpart	8
13	Effect of this subpart on civil proceedings	9
	<i>Back wages for sleepover</i>	
14	Entitlement of current employees	10
15	Entitlement of recent employees	10
16	Entitlement of historic employees	10
17	Entitlements may be several	11
18	Disentitlement to back wages for other sleepovers	11
19	Calculation of back wages	11
20	When back wages must be paid	12
	<i>Staged progression to minimum wage</i>	
21	Entitlement of employees to specified amount for sleepover performed immediately before commencement of this Act	12
22	Entitlement to be paid minimum hourly rates for sleepovers performed after commencement of this Act	12
	Subpart 3—Miscellaneous <i>Application of subparts 1 and 2 to other employers and other employers' employees</i>	
23	Definitions for sections 24 to 28	13
24	Power to extend subparts 1 and 2 to other employers and other employers' employees by Order in Council	13
25	Modifications or extensions to subpart 1	15
26	Modifications or extensions to subpart 2	15
27	Limitations on modifications or extensions to subparts 1 and 2 if settlement cannot be reached	16
28	Limitations on modifications or extensions to subparts 1 and 2 in relation to health and disability sector	17
29	Application of Acts and Regulations Publication Act 1989 and Regulations (Disallowance) Act 1989	17
	<i>Dispute resolution under Act</i>	
30	Access to mediation services or Employment Relations Authority	17
31	Application of Employment Relations Act 2000	18
32	Enforcement of orders and judgments	19

	<i>Enforcement of obligations under Act</i>	
33	Penalty for non-compliance	19
	<i>Savings</i>	
34	Savings	20

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Sleepover Wages (Settlement) Act **2011**.
- 2 Commencement**
This Act comes into force on the day after the date on which it receives the Royal assent. 5

**Part 1
Preliminary provisions**

- 3 Purposes**
- (1) The purposes of this Act are—
 - (a) to facilitate the settlement of civil proceedings between certain parties about the payment of wages at the minimum rate prescribed under the Minimum Wage Act 1983 to employees who are allowed by their employer to sleep overnight at their workplace while on duty; and 10
 - (b) to provide for a staged progression towards full compliance with the Minimum Wage Act 1983 in respect of the wages payable to certain employees who perform sleepovers; and 15
 - (c) to provide a mechanism for extending the application of **subparts 1 and 2 of Part 2** to other employers that are funded through a Vote and to those employers' employees to enable, among other things, disputes that involve the same, or substantially the same, issue as that described in **paragraph (a)** to be settled. 20
- (2) To those ends, this Act— 25

- (a) gives legal effect to certain aspects of the terms of the settlement of the parties referred to in **subsection (1)(a)**; and
- (b) extinguishes certain claims for sleepover wages in respect of sleepovers performed before the commencement of this Act; and 5
- (c) creates entitlements to back wages for certain sleepovers; and
- (d) provides for a staged progression of payments for sleepovers towards the minimum hourly rate prescribed under the Minimum Wage Act 1983; and 10
- (e) provides ~~a~~ an Order in Council mechanism for extending the application of **subparts 1 and 2 of Part 2** to other employers that are funded through a Vote and to those employers' employees to enable, among other things, disputes that involve the same, or substantially the same, issue as that described in **subsection (1)(a)** to be settled; and 15
- (f) preserves the agreement dated 13 September 2011 between the Crown, Idea Services Limited, Phillip William Dickson, and the Service and Food Workers Union Nga Ringa Tota as it relates to the decision of the Court of Appeal in *Idea Services Limited v Phillip William Dickson* [2011] NZCA 14. 20
- 4 Interpretation** 25
- (1) In this Act, unless the context otherwise requires,—
- applicable minimum hourly rate** has the meaning given to it by **section 19(2)**
- back wages** means wages payable by an employer relating to a past period of time 30
- claim for sleepover wages** means an action for the recovery of sleepover wages commenced in the Employment Relations Authority in accordance with section 11 of the Minimum Wage Act 1983
- current employee**, in relation to an employer, means an employee who is employed by that employer on the commencement of this Act 35

disability support services has the same meaning as in section 6(1) of the New Zealand Public Health and Disability Act 2000

employee means a person of any age employed to do any work for hire or reward under a contract of service 5

employer means a person employing any employee or employees

employer in the health and disability sector means any employer who provides health services or disability support services and is funded through Vote Health (other than Idea Services or Timata Hou) 10

Employment Court means the Employment Court established by section 186 of the Employment Relations Act 2000

Employment Relations Authority or **Authority** means the Employment Relations Authority established by section 156 of the Employment Relations Act 2000 15

health services has the same meaning as in section 6(1) of the New Zealand Public Health and Disability Act 2000

historic employee, in relation to an employer, means an employee who ceased employment with that employer at any time during the period beginning on 1 June 2004 and ending with the close of 30 June 2005 20

Idea Services means Idea Services Limited (in statutory management)

recent employee, in relation to an employer, means an employee who ceased employment with that employer at any time during the period beginning on 1 July 2005 and ending with the close of the day before the commencement of this Act 25

settlement, except in **section 30(3)**, means a settlement in respect of sleepover wages 30

sleepover means a period of time spent by an employee overnight during which the employee, under the terms of his or her contract of service, is—

- (a) required to be at the employee's workplace; and
- (b) allowed to sleep at the workplace while on duty; and 35
- (c) required to be available to attend to his or her duties during the course of the night as necessary

- sleepover wages**—
- (a) means wages in respect of a sleepover payable under the Minimum Wage Act 1983; and
 - (b) includes, as the context requires, wages in respect of a sleepover payable under this Act 5
- Timata Hou** means Timata Hou Limited (in statutory management)
- Vote** has the same meaning as in section 2(1) of the Public Finance Act 1989
- wages**— 10
- (a) includes—
 - (i) back wages;
 - (ii) productivity or incentive-based payments; but
 - (b) does not include—
 - (i) non-taxable allowances paid by the employer to the employee: 15
 - (ii) any payment of an employer contribution to a superannuation scheme for the benefit of the employee
- workplace** has the same meaning as in section 5 of the Employment Relations Act 2000. 20
- (2) A reference in this Act to an employee in relation to the payment of any sleepover wages under this Act must, unless the context otherwise requires, be taken to include a person who, at the time that the payment is required to be made under this Act,— 25
- (a) is entitled to the payment; but
 - (b) has ceased to be in the employment of the employer concerned.
- 5 Act binds the Crown** 30
This Act binds the Crown.
- 6 Relationship between this Act and other law**
This Act applies despite anything to the contrary in the following:
- (a) the Minimum Wage Act 1983: 35
 - (b) any other enactment:

- (c) any rule of law.

7 Expiry

- (1) This Act expires on the close of the day that is 5 years after the date of its commencement.
- (2) On the expiry of this Act, Orders in Council made under **section 24**, and in force immediately before that expiry, are revoked. 5

**Part 2
Sleepover wages**

Subpart 1—Extinguishing claims for sleepover wages 10

Preliminary

8 Application of this subpart

- (1) This subpart applies to—
 - (a) the following employers: 15
 - (i) Idea Services:
 - (ii) Timata Hou:
 - (iii) any employer in the health and disability sector; and
 - (b) each employee of the employers referred to in **paragraph (a)** who performed a sleepover. 20
- (2) **Subsection (1)** is subject to—
 - (a) **section 24** (which provides a mechanism for extending the application of this subpart by Order in Council to other employers funded through a Vote and those other employers’ employees); and 25
 - (b) **section 34** (which is a savings provision).

Extinguishment

9 Certain claims for sleepover wages by employees of Idea Services and Timata Hou extinguished 30

- On the commencement of this Act, a claim for sleepover wages in respect of a sleepover performed before the commencement of this Act by an employee of Idea Services or Timata Hou—
- (a) is unenforceable and of no effect; and

- (b) must be treated as if it had been withdrawn.

10 Certain claims for sleepover wages by employees of other employers in health and disability sector extinguished

- On the commencement of this Act, a claim for sleepover wages lodged after 5 pm on 2 September 2011 in respect of a sleepover performed before the commencement of this Act by an employee of any employer in the health and disability sector—
- (a) is unenforceable and of no effect; and
- (b) must be treated as if it had been withdrawn.

11 Effect of this subpart on other civil proceedings

- (1) On and from the commencement of this Act, an employee to whom this subpart applies—
- (a) cannot name, join, or seek to name or join the employee's employer, the Crown, or any other person as a defendant or a third party or subsequent party in—
- (i) any claim for sleepover wages in respect of a sleepover that is, could be, or could have been the subject of a claim for sleepover wages extinguished under **section 9 or 10**; or
- (ii) any other civil proceedings relating to liability for sleepover wages in respect of that sleepover; and
- (b) cannot apply in any civil proceedings for any remedy or relief from the employee's employer, the Crown, or any other person in relation to any sleepover wages in respect of a sleepover that is, could be, or could have been the subject of a claim for sleepover wages extinguished under **section 9 or 10**.
- (2) This section is subject to **section 13(2) and (3)**.

Subpart 2—Settlement relating to Idea Services and Timata Hou

Preliminary

12 Application of this subpart

- (1) This subpart applies only to—
- (a) the following employers:

- (i) Idea Services;
 - (ii) Timata Hou; and
 - (b) each employee of Idea Services or Timata Hou who performs or performed a sleepover.
 - (2) **Subsection (1)** is subject to— 5
 - (a) **section 24** (which provides a mechanism for extending the application of this subpart by Order in Council to other employers funded through a Vote and those other employers' employees); and
 - (b) **section 34** (which is a savings provision). 10
- 13 Effect of this subpart on civil proceedings**
- (1) On and from the commencement of this Act, an employee to whom this subpart applies—
 - (a) cannot name, join, or seek to name or join the employee's employer, the Crown, or any other person as a defendant or a third party or subsequent party in— 15
 - (i) any claim for sleepover wages in respect of a sleepover to which the employee is, could be, or could have been entitled under this subpart; or
 - (ii) any other civil proceedings relating to liability for sleepover wages in respect of that sleepover; 20
and
 - (b) cannot apply in any civil proceedings for any remedy or relief from the employee's employer, the Crown, or any other person in relation to any sleepover wages in respect of a sleepover to which the employee is, could be, or could have been entitled under this subpart. 25
 - (2) This section does not limit or prevent an action by an employee to whom this subpart applies for— 30
 - (a) the recovery of sleepover wages in respect of a sleepover to which the employee is entitled under this subpart; or
 - (b) the enforcement of any obligation imposed on an employer by this subpart.
 - (3) This section— 35
 - (a) does not limit or affect any agreement entered into between the Crown and any person in relation to all or any of the matters dealt with by this Act; and

- (b) does not prevent any of the parties to the agreement commencing any proceedings in relation to—
 - (i) the interpretation or implementation of the agreement; or
 - (ii) the enforcement of any obligation imposed on a party to the agreement. 5

Back wages for sleepover

14 Entitlement of current employees

- (1) A current employee to whom this subpart applies is entitled to be paid back wages for a sleepover if the employee— 10
 - (a) performed the sleepover during the period beginning on 1 July 2005 and ending with the close of 30 June 2011; and
 - (b) lodged a claim for sleepover wages by 5 pm on 2 September 2011. 15
- (2) The amount of back wages payable to the current employee under **subsection (1)** is the amount calculated in accordance with the formula set out **section 19(1)**.

15 Entitlement of recent employees

- (1) A recent employee to whom this subpart applies is entitled to be paid back wages for a sleepover if the employee— 20
 - (a) performed the sleepover during the period beginning on 1 July 2005 and ending with the close of 30 June 2011; and
 - (b) lodged a claim for sleepover wages by 5 pm on 2 September 2011. 25
- (2) The amount of back wages payable to the recent employee under **subsection (1)** is the amount calculated in accordance with the formula set out in **section 19(1)**.

16 Entitlement of historic employees

- (1) A historic employee to whom this subpart applies is entitled to be paid back wages for a sleepover if the employee— 30
 - (a) performed the sleepover no earlier than 1 June 2004 during the 6-year period immediately before the date

- on which the employee lodged a claim for sleepover wages; and
- (b) lodged that claim by 5 pm on 2 September 2011.
- (2) The amount of back wages payable to the historic employee under **subsection (1)** is the amount calculated in accordance with the formula set out in **section 19(1)**. 5
- 17 ~~Payments may be cumulative~~ Entitlements may be several**
 To avoid doubt, an employee to whom this subpart applies may be entitled to payments for back wages under any or all of **sections 14 to 16**. 10
- 18 Disentitlement to back wages for other sleepovers**
 To avoid doubt, an employee to whom this subpart applies is not entitled to back wages for a sleepover except as provided in **sections 14 to 16**.
- 19 Calculation of back wages** 15
- (1) Any back wages for a sleepover payable under any of **sections 14 to 16** must be calculated in accordance with the following formula:
- $$(((a \times 9) - b) + c) \times 0.50 = d$$
- where— 20
- a is the applicable minimum hourly rate
- b is the amount of taxable allowances ~~actually paid for a sleepover that was actually payable~~ by the employer to the employee to whom this subpart applies ~~for the sleepover at the time the employee performed the sleepover~~ 25
- c in relation to the sleepover, is the difference between—
- (a) the amount the employer would have paid in respect of annual holidays taken by the employee to whom this subpart applies had the applicable minimum hourly rate been paid for the sleepover; and 30
- (b) the amount actually paid by the employer to the employee to whom this subpart applies in respect of annual holidays taken by the employee

d is the gross amount of back wages payable to an employee to whom this subpart applies before tax is withheld.

- (2) In **subsection (1), applicable minimum hourly rate** means the minimum hourly rate of wage prescribed under section 4 of the Minimum Wage Act 1983 that applied at the time the employee to whom this subpart applies performed the sleepover. 5

20 When back wages must be paid

An employer must pay any back wages for a sleepover that are payable to an employee to whom this subpart applies no later than 2 months after the date of commencement of this Act. 10

Staged progression to minimum wage

21 Entitlement of employees to specified amount for sleepover performed immediately before commencement of this Act 15

- (1) During the period beginning on 1 July 2011 and ending with the close of the day before the commencement of this Act, an employer must pay an employee to whom this subpart applies an amount calculated in accordance with the formula set out in **section 19(1)** (which applies with any necessary modifications) for each sleepover that the employee performed during that period. 20
- (2) An employer must pay any amount payable to the employee under **subsection (1)** no later than 2 months after the date of commencement of this Act. 25

22 Entitlement to be paid minimum hourly rates for sleepovers performed after commencement of this Act

- (1) An employer must pay an employee to whom this subpart applies for each hour of sleepover that the employee performs during the period specified in the first column of the following table at the minimum hourly rate opposite that period specified in the second column of the following table: 30

Specified period	Minimum hourly rate	
Period beginning on the commencement of this Act and ending with the close of 30 June 2012	50% of the applicable minimum hourly rate	
Period beginning on 1 July 2012 and ending with the close of 24 December 2012	75% of the applicable minimum hourly rate	
Period beginning on 25 December 2012 and ending with the close of 30 June 2013	100% of the applicable minimum hourly rate	
(2) On and after 1 July 2013, an employer must pay an employee to whom this subpart applies for each hour of a sleepover performed by the employee at not less than the rate of minimum hourly wage that applies under the Minimum Wage Act 1983.		
(3) To avoid doubt, this section does not limit or affect any deductions that may lawfully be made to an amount payable under subsection (1) or (2) .		5

Subpart 3—Miscellaneous

	<i>Application of subparts 1 and 2 to other employers and other employers' employees</i>	10
23	Definitions for sections 24 to 28 In sections 24 to 28 ,— other employer means— (a) any employer in the health and disability sector: (b) any employer in any other employment sector funded through a Vote other employer's employees means any employees of the other employer who perform or performed sleepovers relevant Minister means the Minister who is, with the authority of the Prime Minister, for the time being responsible for the administration of the Vote that is most closely connected with funding the services provided by the other employer.	20
24	Power to extend subparts 1 and 2 to other employers and other employers' employees by Order in Council	
(1)	The Governor-General may, by Order in Council made on the recommendation of the relevant Minister after consultation	25

with the Minister of Labour, modify or extend both **subparts 1 and 2**; or only **subpart 2**, to apply to the following (to whom those subparts do not, or that subpart does not, otherwise apply):

- (a) any other employer; and 5
- (b) that other employer's employees.

(1) The Governor-General may, by Order in Council made on the recommendation of the relevant Minister after consultation with the Minister of Labour, modify or extend the application of— 10

(a) both **subparts 1 and 2** in relation to the following to whom those subparts together do not otherwise apply:

- (i) any other employer; and
- (ii) that other employer's employees:

(b) only **subpart 2** in relation to the following to whom that subpart does not otherwise apply: 15

- (i) any other employer; and
- (ii) that other employer's employees.

(2) An Order in Council made under **subsection (1)** may, subject to **subsection (2A)** and **section 25, 26, 27, or 28** (as the case may be), modify or extend any provisions of **subparts 1 and 2** for either or both of the purposes stated in **section 3(1)(a) and (b)** as if they related to the other employer and that other employer's employees. 20

(2A) An Order in Council made under **subsection (1)** must not provide for a process for achieving a staged progression to the minimum hourly rate of wage that applies under the Minimum Wage Act 1983 if that process will result in the other employer's employees receiving payment for a sleepover at less than the rate they were receiving from the other employer immediately before the Order in Council is made. 25 30

(3) An Order in Council made under **subsection (1)**—

- (a) may specify a date in accordance with **section 25(b) or 26(a)** that is before, on, or after the date on which the Order in Council comes into force; but 35
- (b) may be retrospective only to the extent provided in **paragraph (a)**.

25 Modifications or extensions to subpart 1

In order to give effect to a proposed settlement between any other employer and that other employer's employees, a modification or extension of a provision in **subpart 1** may do 1 or more of the following: 5

- (a) extend the application of that subpart by declaring the other employer to be an employer to which that subpart applies: 5
- (b) specify different dates or different requirements in relation to the extinguishment of claims for sleepover wages made by the other employer's employees: 10
- (c) in relation to an employer in the health and disability sector, make any modifications to extend the effect of **section 9** to that employer.

26 Modifications or extensions to subpart 2

In order to give effect to a proposed settlement between any other employer and that other employer's employees, a modification or extension of a provision in **subpart 2** may do 1 or more of the following: 15

- (a) specify different dates by which claims for sleepover wages must be made in order for the other employer's employees to be entitled to back wages: 20
- (b) substitute different periods of sleepovers performed by the other employer's employees in respect of which back wages are payable: 25
- (c) prescribe a different formula or method for calculating back wages for those sleepovers:
- (ca) provide for a different period by which back wages must be paid as long as—
 - (i) that period is within 2 months after the date of commencement of the Order in Council concerned; or 30
 - (ii) the relevant Minister is satisfied that the proposed period for payment has been agreed to by a simple majority of the other employer's employees: 35
- (d) provide for a different process for achieving a staged progression to the minimum hourly rate of wage that

applies under the Minimum Wage Act 1983 for the other employer's employees.

27 Limitations on modifications or extensions to subparts 1 and 2 if settlement cannot be reached

- (1) This section applies if a settlement between any other employer and that other employer's employees cannot be reached. 5
- (2) If this section applies,—
- (a) the relevant Minister must not recommend the making of an Order in Council under **section 24** that modifies or extends **subparts 1 and 2**; or only **subpart 2**; unless the relevant Minister is satisfied that the recommendation has the written support of the parliamentary leaders of the political parties represented in Parliament that together command a simple majority in the House of Representatives; and 10
- (b) a modification or extension of a provision in **subpart 2** may only provide for the matter specified in **section 26(d)** if the effect of the modification or extension is that the other employer's employees will receive payment for a sleepover at not less than the rate they were receiving from the other employer immediately before the Order in Council is made. 15
- (2) If this section applies, the relevant Minister must not recommend the making of an Order in Council under **section 24** that modifies or extends **subparts 1 and 2**, or only **subpart 2**, unless the relevant Minister— 25
- (a) has given written notice to the parliamentary leaders of all political parties represented in Parliament of the proposed recommendation to make the Order in Council; and 30
- (b) is satisfied that the recommendation has the written support of the parliamentary leaders of those political parties that together command a simple majority in the House of Representatives. 35

28 Limitations on modifications or extensions to subparts 1 and 2 in relation to health and disability sector

Despite **sections 25 and 26**, a modification or extension of **subparts 1 and 2**, or only **subpart 2**, that relates to any employer in the health and disability sector and that employer's employees must not do any of the following: 5

- (a) amend the formula for calculating back wages set out in **section 19(1)** unless the amendment relates to specifying a different multiplier for variable "a" in order to reflect the number of hours of a sleepover performed by the other employer's employees: 10
- (b) extend the deadline for paying 100% of the applicable minimum hourly rate to a date later than 30 June 2013:
- (c) substitute a different period ~~within which back wages must be paid under **section 20**~~ or within which the specified amount referred to in **section 21(1)** must be paid under **section 21(2)** unless the relevant Minister is satisfied that the proposed period has been agreed to by a simple majority of the other employer's employees: 15
- (d) provide for any of the matters specified in **section 25(b) or 26(a) or (b)**. 20
- (e) ~~provide a different process for the matter specified in **section 26(d)** if that process will result in the other employer's employees receiving payment for a sleepover at less than the rate they were receiving from the other employer as at 1 July 2011.~~ 25

29 Application of Acts and Regulations Publication Act 1989 and Regulations (Disallowance) Act 1989

An Order in Council made under **section 24** is a regulation for the purposes of— 30

- (a) the Acts and Regulations Publication Act 1989; and
- (b) the Regulations (Disallowance) Act 1989.

Dispute resolution under Act

30 Access to mediation services or Employment Relations Authority 35

- (1) This section applies to a dispute between an employee and that employee's employer about—

- (a) any entitlement to, or calculation of, any sleepover wages payable to the employee under this Act; or
- (b) any failure by the employer to pay sleepover wages to which the employee is entitled under this Act.
- (2) If the dispute is not disposed of between the employee and the employer's employer,—
- (a) the parties may access mediation services provided under section 144 of the Employment Relations Act 2000 and, subject to **subsection (3)**, sections 145 to 154 of that Act apply to the mediation services provided to the parties:
- (b) proceedings to resolve the dispute may be commenced before the Employment Relations Authority in accordance with section 158 of the Employment Relations Act 2000.
- (3) Despite **subsection (2)(a)**, section 148A(2) of the Employment Relations Act 2000 does not apply in relation to any agreed terms of settlement in which a party agrees to forgo all, or part, of that party's minimum entitlements to the extent permitted by this Act.
- (4) In **subsection (3)**, **minimum entitlements** has the same meaning as in section 5 of the Employment Relations Act 2000.

31 Application of Employment Relations Act 2000

- (1) If proceedings are commenced before the Employment Relations Authority in accordance with **section 30(2)(b)**,—
- (a) the Authority has all the powers and functions it has under the Employment Relations Act 2000; and
- (b) the provisions of the Employment Relations Act 2000 and of any regulations made under that Act apply, with any necessary modifications, to the extent that those provisions are relevant to the resolution of the dispute.
- (2) Without limiting **subsection (1)**, the following provisions of the Employment Relations Act 2000 apply; ~~with any necessary modifications, to the proceedings~~ (with any necessary modifications):

- (aa) sections 137 to 140 (which relate to compliance orders made by the Employment Relations Authority or the Employment Court):
- (a) sections 157 to 160, 162 to 165, and 173 to 176 (which relate to the role, functions, duties, and powers of the Authority): 5
- (b) sections 177 to 184 and 188 to 199 (which relate to the referral of questions of law, challenges to determinations of the Employment Relations Authority, the removal of proceedings to the Employment Court, and provisions applying to the Employment Court): 10
- (c) sections 214 to 215 (which relate to appeals to the Court of Appeal and Supreme Court on questions of law).

32 Enforcement of orders and judgments

An order made or judgment given by the Employment Relations Authority or the Employment Court under **section 31** may be filed in any District Court and is then enforceable in the same manner as an order made or judgment given by the District Court. 15

Enforcement of obligations under Act 20

33 Penalty for non-compliance

- (1) An employer who fails to comply with an obligation imposed on the employer by this Act is liable to a penalty imposed by the Employment Relations Authority.
- ~~(2)~~ ~~Section 135 of the Employment Relations Act 2000 applies, with any necessary modifications, to the imposition and recovery of a penalty imposed under **subsection (1)**.~~ 25
- (2) For the purposes of **subsection (1)**, the following provisions of the Employment Relations Act 2000 apply, with any necessary modifications, in relation to a penalty imposed under that subsection: 30
 - (a) section 135 (which relates to the amount and recovery of penalties):
 - (b) sections 137 to 140 (which relate to compliance orders made by the Employment Relations Authority or the Employment Court). 35

Savings

34 Savings

Nothing in this Act limits or affects the agreement dated 13 September 2011 between the Crown, Idea Services, Phillip William Dickson, and the Service and Food Workers Union 5
Nga Ringa Tota as it relates to the decision of the Court of Appeal in *Idea Services Limited v Phillip William Dickson* [2011] NZCA 14.

Legislative history

27 September 2011

Introduction (Bill 331–1), first reading and referral to Health Committee
