IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 125
5384262 and 5384265

	BETWEEN	VICTORIA LAW AND OTHERS Applicants 5384262
	A N D	BOARD OF TRUSTEES OF WOODFORD HOUSE Respondent 5384262
	A N D	JAN COLBERT AND OTHERS Applicants 5384265
	A N D	BOARD OF TRUSTEES OF IONA COLLEGE Respondent 5384265

Member of Authority:	G J Wood
Representatives:	P Cranney for Applicants R Harrison for Respondents
Investigation Meeting:	By way of submissions on the papers
Submissions	Received by 11 October 2012
Date of Determination:	16 October 2012

DETERMINATION OF THE AUTHORITY

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[1] These separate employment relationship problems had been consolidated by the Authority at the point of investigation, because they both relate to the issue of "sleepovers" in school boarding houses. The Service and Food Workers Union represents all of the workers. It relies on *Idea Services Limited v. Dickson* [2011] NZCA 14 to support their claim for the minimum wage while doing *sleepover* work. The terms of the statutory resolution to the problems in *Idea Services* do not apply to these workers. The respondents (Woodford and Iona), consider that *Idea Services* can be distinguished, and therefore do not accept that they have any liability in this matter.

[2] The parties had originally suggested a determination on liability before mediation, as it was considered unlikely to be constructive before liability was determined.

[3] At a conference call on 9 October 2012 to set the matter down, the parties informed the Authority that they wished to have the matter removed to the Employment Court for it to determine without the Authority investigating the matter further. In a joint memorandum the parties stated:

> *…2. This is the first case in which applicants seek to apply the principles of* Idea Services Limited v Dickson *outside of the residential disability sector. The principal defence of the respondent is that the applicants are not conducting "work" at the material times as that word is used in the Minimum Wage Act 1983.*
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> *3. The case is therefore likely to involve the important issue of the extent or breadth of the appropriate application of the* Dickson *principles. This case raises a mixed issue of fact and law, but the legal issue is a significant one. It is likely to have ramifications in other parts of the education sector, and other "sleepover" situations outside of the residential disability sector. For that reason, removal is warranted under s 178(2)(a).*
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> *4. The parties are also aware that the issue is significant to them, and consider that a challenge to the Authority's determination is very likely or inevitable. That circumstance together with the matter just referred to, warrants removal under s 178(2)(d)…*

[4] The issue of whether or not an Authority determination is likely to be challenged is seldom relevant. There are a multitude of cases where the parties claim that a challenge is inevitable, but in actual fact a challenge does not eventuate from any of them. The issue is different when it comes to an important question of law. In *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 it was held at p.7:

> *First, it is necessary to identify a question of law arising in the case other than incidentally; and secondly to measure the importance of that question …*
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> *It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s 94. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the*

> *question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous… It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it, or a material part of it.*

[5] I accept that here it is fundamental to the case (as a question of mixed fact and law) whether or not provisions of the Minimum Wage Act apply to the relevant workers when conducting *sleepovers*. While the issues have been dealt with in depth in the *Idea Services* case, I accept the joint submission of the parties that the Courts' findings have not been extended to other sectors and, in particular, the education sector. I also accept that the determination of this matter could potentially affect a number of other employers in the education and other sectors. Therefore the matter, as its predecessor case *Idea Services* showed, does involve an important question of law.

[6] I therefore conclude that a question of law will arise in the determination of these cases and certainly not in an incidental way. The grounds for removal under s.178(2)(a) have therefore been made out. The Authority still has a residual discretion whether or not to remove a case, even where important questions of law do exist other than incidentally. In this matter there are no reasons to refuse to exercise the discretion in the parties' favour. As was held in *Cocks v. Foote Cone & Belding Ltd* [1994] 1 ERNZ 180, the Authority should not be astute to try and find reasons for rejecting an application where experienced counsel both agree that the matter should be removed. Clearly both representatives in this case meet the experience test.

[7] There are no grounds for otherwise rejecting the application, especially given that the Authority can probably deal with the matter no more quickly than the Court. The issue of mediation can be reconsidered at the Court level, if necessary.

[8] I therefore order the removal of the employment relationship problems 5384262 and 5384265 to the Employment Court, for it to hear and determine without the Authority investigating them.

G J Wood
Member of the Employment Relations Authority