

## Minimum wage calculation

### *Introduction*

1. The Ministry of Business Innovation and Employment (MBIE) has issued a discussion document on the government's proposal to amend the Minimum Wage Order 2014 to recognise periods of more than one week for the purpose of determining whether or not a worker is being paid the minimum wage.
2. There has since been increasing media exposure following the release of the discussion document. The NZCTU is strongly opposed to it. Press coverage, however, has not been particularly informative, and it appears many businesses are not clear on the nature of the issue and its implications for them.
3. This briefing note sets out the issues leading to the Government's proposal, and supports its approach.

### *The law*

4. New Zealand has had a minimum wage law since 1945. The current Minimum Wage Act, introduced in 1983, made no material changes to the original.
5. Currently the Adult Minimum Wage is \$14.25 per hour.
6. The Minimum Wage Order 2014 requires that workers
  - a. paid by the hour receive a minimum of \$14.25 per hour.
  - b. paid by the day receive a minimum of \$114 for the day plus \$14.25 for each hour worked over 8; and that,
  - c. in **all** other case, receive a minimum of \$570 per week plus \$14.25 for each hour worked over 40 in each week.
7. The courts (Employment Court and Court of Appeal) have recently decided that:
  - a. All hours the worker works must be paid at least the minimum wage rate. This arose from the so-called "Sleepovers" case<sup>1</sup> where a worker who was required to sleep at their place of work was found to be wrongly paid because the allowance they were paid for doing so was less than the minimum wage rate.
  - b. a worker on an annual salary cannot have that salary averaged for the purposes of determining whether or not they are paid the minimum wage<sup>2</sup>. In the most recent case<sup>3</sup>, teachers paid an annual salary were found to be in breach of the Act because they were not specifically paid the minimum wage rate for each hour over 40 they worked each week.

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<sup>1</sup> Idea Services v Phillip Dickson CA 405/2010.

<sup>2</sup> Ibid

<sup>3</sup> Law & Ors v Board of Trustees of Woodford House [2014] NZEmpC 25 WRC 29/12

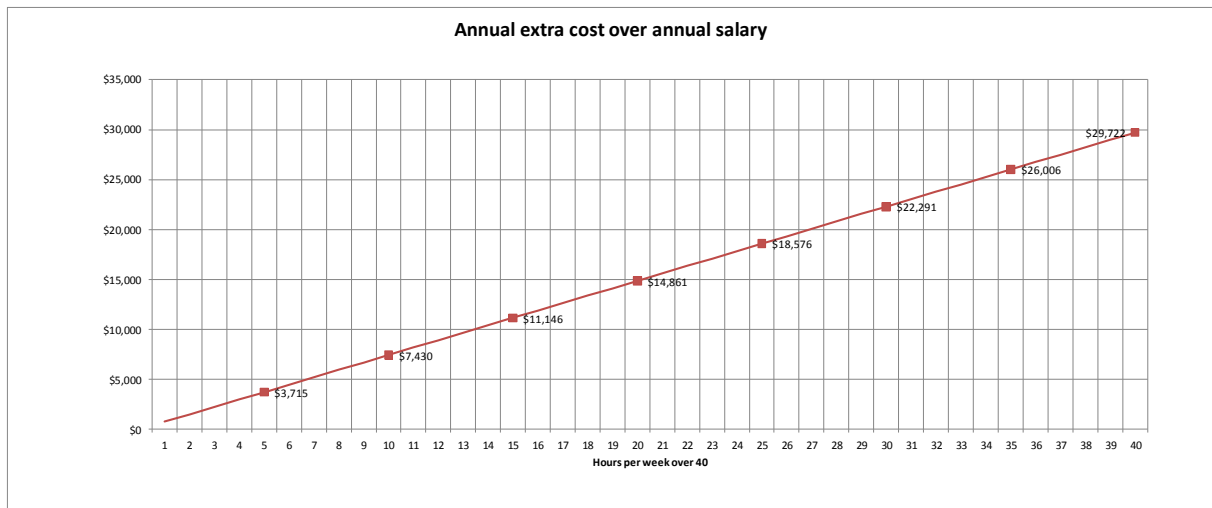
8. More recently still, acting on the basis of the courts' decisions, government labour inspectors have challenged a number of farmers whose workers have worked more than 40 hours per week in some weeks without being paid for the extra hours at the minimum wage rate.

### *The Issue*

9. The Act is designed to provide protection to the lowest paid. It was never intended to create extra earning opportunities for the higher paid, most of whom are salaried workers.
10. Salaried workers are paid on the basis of a fixed annual amount, paid in equal, regular (usually weekly, fortnightly or monthly) instalments. They may work less than 40 hours one week and more than 40 in another; this is normal, and even required in some cases, e.g. seasonal vocations such as farming. They may also work shift patterns where their roster has them working a different number of hours each week. However, the regularity and consistency of salary payments provides a high degree of certainty to the worker when making spending and investment decisions.
11. The effect of the court rulings is to load extra cost onto every week a worker's hours exceed 40, **irrespective** of the amount of the worker's annual salary, i.e. up to and including the highest paid chief executive. This will be unsustainable in many if not most cases. Many salaried workers work long hours, sometimes for sustained periods, for which they are usually adequately compensated already. Usually it is agreed that their salary is deemed to recognise that they are required to work "such hours as are reasonably necessary for the performance of the duties". The court's decision, however, overturns this recognition, and in essence dismantles the "swings and roundabouts" principle underpinning the idea of annual salaries.
12. While the Woodford case involved teachers, its wider impacts include the likes of managers, policy advisers and regulatory officials (who often work long hours in any given week) and rostered workers (e.g. manufacturing process workers, doctors, nurses, firefighters and police officers) where different hours are worked each week<sup>4</sup>. Examples of other impacts include teachers on school camps and workers on standby or callout duty. Doubtless there are many more.
13. The graph below illustrates the per worker annual extra costs of the courts' decisions on **any** salaried worker.

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<sup>4</sup> For instance a worker on the now common 12 hours on 12 hours off roster will work 36 hours one week and 48 the next. If that worker is salaried, as many are, they would now receive their normal salary (paid at an average 42 hours per week) plus an extra 8 hours at \$14.25 in the weeks they worked 48 hours. This equates to an extra cost to the employer of \$114 every second week or \$2,964 per annum **for each worker**.



14. The impact of the court's decision in Woodford if played out in full is significant and severe. The cost implications are huge both directly and indirectly. Administratively it would require manual intervention each time a salaried worker's hours topped 40 in a given week, which in turn would impact the efficiency of salaried payrolls, vastly complicate the work of payroll workers, require many more of them, and increase the chances for pay errors.

#### *Our view*

15. Notwithstanding the issues created, it is strongly arguable that such a scenario was never contemplated when the Minimum Wage Act was enacted in 1945 or modernised in 1983 to protect the lowest paid and least skilled. In our view, the courts' interpretation in the context of the modern world of work, where 7 day weeks and widely varied different patterns of work are the norm, should not create unintended windfall gains. The situation created by the Woodford case where those who are now entitled to gain most are those already well paid, is unsupportable.
16. The courts have, in effect, recognised that the Act creates this anomaly but consider that they are constrained by the specific wording of the Act and the accompanying Minimum Wage Order.
17. This means that the only long-term solution is to amend the Act, preferably by permitting averaging of all remuneration over a year and requiring that the average not fall below the minimum wage rate. This, however, will take time, and the serious implications of the courts' decisions are immediate.
18. An interim, non-legislative, solution is to amend the Minimum Wage Order to recognise periods longer than a week. Interim because it does not solve the issue at all levels. However, it will avoid the majority of problems as it is less common for workers to work more than 80 hours in a fortnight than it is for workers to work more than 40 hours in any one week. The Government's proposed addition of a minimum wage amount for those paid fortnightly should suffice in this regard.

*We recommend*

19. We recommend that you

- a. support the government's interim proposal to amend the Minimum Wage Order 2014 to provide for a fortnightly minimum wage rate; and
- b. encourage the government to amend the Minimum Wage Act to permit averaging of remuneration over a year, provided that the average does not fall below the Minimum Wage rate.