IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 138
5354530

	BETWEEN	KATHLEEN HAY AND 8 OTHERS Applicants
	A N D	BLIND & LOW VISION EDUCATION NETWORK NZ Respondent
Member of Authority:	T G Tetitaha	
Representatives:	P Cranney, Counsel for Applicants R Harrison, Counsel for Respondent	
Investigation Meeting:	11-16 February 2016 at Auckland	
Submissions Received:	16 and 26 February 2016 from Applicants 16 February and 1 March 2016 from Respondent	
Date of Determination:	3 May 2016	

DETERMINATION OF THE AUTHORITY

A. The applicants were working during the material period that they participated in the sleepover roster and are entitled to remuneration pursuant to the Minimum Wage Act 1983.

B. Costs are reserved. This appears an appropriate case given its public interest for costs to lie where they fall. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] This is a continuation of a number of sleepover wages cases. The applicants are current and past employees of Blind and Low Vision Education Network NZ who volunteered to do rostered sleepovers. They were able to sleep but had to be available to assist in an emergency. They were paid a sleepover allowance but if required to assist night staff during their sleepover, the applicants were able to claim a minimum of two hours pay.

[2] The applicants seek a declaration that they were working during the entire period they participated in the sleepover roster. If correct, they are entitled to be paid per hour of the sleepover at the applicable minimum adult wage pursuant to the Minimum Wage Act 1983 (MWA).

Time limitation

[3] Section 142 of the Employment Relations Act 2000 (the Act) provides that no action may be commenced in the Employment Relations Authority in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[4] This action was commenced in the Authority on or about 12 August 2011. These proceedings are not personal grievances. They are proceedings under the MWA seeking payment of minimum wage rates for sleepovers. Section 11 of the MWA allows recovery actions to be commenced in the Authority in the same manner as an action under s.131 of the Act for remuneration arrears proceedings generally. Section 131 is subject to the time limitation of six years in s.142 of the Act.

[5] It follows that the applicants' claims cannot relate to breaches of the Minimum Wage Act before 12 August 2005 that is six years before the claims were brought to the Authority. The applicants do not object to that approach on the basis that it is without prejudice to their rights on appeal.

[6] Accordingly, the material period of time for recovery of wage arrears in respect of this application shall be 12 August 2005 to April 2013 when sleepovers finished.

Relevant Facts

[7] The respondent employer was at all material times Blind and Low Vision Education Network NZ (BLENNZ). BLENNZ is an education facility for blind and low vision children and young people. It also offers a residential service for students who attend schools.

[8] In the period between 2005 and 2011 BLENNZ operated two hostels for their students known as Oak and Manuka Hostels. The students in Manuka Hostel attended the BLENNZ Homai Campus School, James Cook High School satellite class or Manurewa High School. The students in the Oak Hostel (some of whom had additional disabilities) attended the Homai Campus School.

[9] Following a directive from the Ministry of Education, students with additional disabilities were gradually transitioned back to their local communities and their families. This resulted in a declining number of students and the decision to transition the two hostels into one hostel in 2011. The remaining hostel was known as Nikau Hostel.

[10] The applicants were employed by BLENNZ. They were also part of a voluntary roster to sleepover nights in the hostels. They were able to sleep but had to be available to assist night staff in an emergency with evacuation of the students. They were required to be present at the BLENNZ hostel for the period they were rostered to sleepover.

[11] Their collective agreement provided for a sleepover allowance to be paid of $35 per night increasing to $45 per night[1]. If required to assist night staff during their sleepover, the applicants were able to claim a minimum of two hours pay at the applicable wage rate.

[12] Night staff were required to stay awake during the sleepover roster. They attended any immediate issues that arose for the students during the night time for example illness, inability to sleep, home sickness, medication etc.

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[1] Collective agreement between BLENNZ and Service & Food Workers Union 2008-2009 and 2010-2011

Were the sleepovers "work" for the purposes of the Minimum Wage Act 1983?

[13] Every worker is entitled under the MWA to receive payment for his or her work at not less than the minimum rate[2]. Each case will turn on a factual inquiry as to what is required by an employer of an employee and whether that constitutes "work" for the purposes of s.6 of MWA. This factual inquiry should focus on three areas[3]:

(a) Constraints on the employee;

(b) Responsibilities of the employee; and

(c) Benefit to the employer.

Constraints on the employee

[14] It is common ground the applicants were required to remain onsite from 10pm until 6.30am. Any absence had to be with the Night manager's permission, excepting short absences, for example if an applicant smoked they were required to do so outside the BLENNZ hostel.

[15] As a result of being confined to the BLENNZ premises, the applicants were also required to comply with its general policies. They were unable to smoke, drink alcohol or take non-prescription drugs during the period of time they were on the premises. They were also constrained in the types of activities they could engage in. They had to ensure these did not disturb the students. Applicants were able to listen to the radio or television or use the staff computer as long as it was not disruptive.

[16] The Court of Appeal regarded similar constraints to be significant[4]. I come to the same conclusion.

Responsibilities of the employees

[17] It is common ground that the primary responsibility of the applicants during sleepovers was to assist in an emergency if required. They were not required to undertake any other duties, although some did during the material time. Night staff were responsible for the residents' non-emergency requirements.

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[2] Section 6 MWA.

[3] *Ideal Services Ltd v Dickson* [2011] NZCA 14 at [10] citing with approval factors applied by lower Court in *Ideal Services Ltd v Dickson* [2009] ERNZ 116.

[4] See above *Idea Services Ltd* above.

[18] The respondent submits because the sleepover roster was voluntary and these applicants did not have a high level of responsibility, their sleepovers did not fall within the definition of work.

[19] It cannot make any difference whether the rostered sleepovers were voluntary. If the applicants accepted the sleepovers, the same constraints, responsibilities and benefits to the employer would have applied.

[20] The respondent referred to Employment Court dicta[5] that "the greater the degree or extent of these factors [i.e. constraints, responsibilities, benefits], the greater the likelihood of sleepovers being work" as the basis for its submission that the applicants' responsibilities were not high and therefore they were not working. This cannot be correct. The amount of physical or mental exertion in defining "work" has been specifically rejected by the Court of Appeal.[6]

[21] As in other sleepover cases,[7] these applicants were responsible for the health and safety of hostel residents. They may not have undertaken the same extent of duties but the applicants' mere presence enabled assistance to night staff with students[8] including medication.[9]

[22] The applicants were at times the first point of contact because there are records of them being disturbed in their sleep by students[10]. They were required to be aware of students who were at risk of self-harm[11] and report any concerns. One applicant was woken to assist during an emergency[12] during the relevant period of time.

[23] These were residents with high needs. There were up to 13 residents, some with multiple disabilities including blind and low vision, lack of mobility (wheelchair bound), autism, seizures and mental health issues e.g. self-harming. While there may have been fewer numbers of students than in other sleepover cases, the applicants' responsibility was no less.

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5 *Victoria Law & Ors v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [181].
6 *Ideal Services Ltd v Dickson* [2011] NZCA 14 at [13].
7 *Victoria Law & Ors v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [186].
8 RBD Vol 1 pp38 and 61.
9 RBD Vol 1 pp101 to 182.
10 RBD Vol 1 pp37, 54, 77 and 100.
11 RBD Vol 1 pp79 to 100.
12 RBD Vol 1 at pp63ff records Donna Rerurkura being woken to assist with a fire alarm evacuation.

[24] Both parties referred me to various decisions from the United Kingdom Employment Appeal Tribunal and European Court of Justice. Some cases turned principally upon the interpretation of the National Minimum Wage Regulations 1999.[13] There is no similar legislative scheme here.

[25] The applicants referred to a decision noted by the Court of Appeal[14] that drew a distinction between a doctor who is "on call" but not required to be present at his work place and one required to be at the hospital. The hospital based doctor was "subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required."[15] This appears to suggest the greater the constraints of being away from home the more likely the employee was working.

[26] However I draw more assistance from a UK Employment Appeal Tribunal case that dealt with a similar issue of whether "sleep-in" duty was time work.[16] An important consideration was why an employer required the employees presence:[17]

> *... If he requires the employee to be on the premises pursuant to a statutory requirement to have a suitable person on the premises "just in case" that would be a powerful indicator that the employee is being paid simply to be there and is thus deemed to be working regardless of whether work is actually carried out. ...*

[27] This is the case here. As noted below the applicants were paid to be on the premises pursuant to a legislative requirement for staffing to assist in emergencies. This was a responsibility that indicated they were working.

Benefits to employer

[28] The BLENNZ hostels were subject to the Education (Hostels) Regulations 2005. Regulation 61(3) required BLENNZ to ensure the hostel "is at all times staffed

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13 For example *British Nursing Association v Inland Revenue* [2002] IRLR 480 proceeded upon the interpretation of Regulation 15(1) of the National Minimum Wage Regulations 1999; *Shannon v Rampersad & Rampersad t/a Clifton House Residential Home* UK EAT 0050/15/LA turned upon the interpretation of Regulation 16 of the National Minimum Wage Regulations 1999 that specifically excluded periods of time when a worker was asleep from counting as salaried hours.

14 *Landeshaupstadt Kiel v Jaeger* [2003] IRLR 102 (ECJ) cited with approval in *Ideal Services Ltd v Dickson* [2011] NZCA 14 at [20].

15 *Landeshaupstadt Kiel* at [65].

16 *Esparon v Slavikovska* UK EAT/0217/12/DA

17 See above at [53].

with a ratio of staff to boarders present at the hostel that ensures the safety of those boarders having regard to … the number of them and their ages and needs …".

[29] BLENNZ operational policy for sleepovers in residential hostels recorded the employer's intent to take "all practical steps" to ensure student safety while resident in the hostels.[18] Its policy further stated to ensure the efficient and safe evacuation of students in an emergency situation, "BLENNZ will ensure that there will be one awake staff member and one sleepover staff member present from 10.00 pm to 6.30 am."

[30] The benefit to BLENNZ in the applicants' sleepovers was to ensure statutory and legislative compliance with their legal obligations in running hostels.

Determination

[31] Taking into consideration the above, I find that the applicants were working during the material period that they participated in the sleepover roster and are entitled to remuneration pursuant to the Minimum Wage Act 1983.

[32] The issue of quantum remains extant. The parties have signalled they intend negotiating quantum between themselves without further assistance from the Authority.

[33] Costs are reserved. This appears an appropriate case given its public interest for costs to lie where they fall. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

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[18] Operational Policy – Sleepovers in Residential Hostels Document 8 Respondents Bundle of Documents (RBD) Vol 1 at p 11.