

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 400
3032991

BETWEEN

SAUA LEAUPEPETELE
First Applicant

PATRICIA LEAUPEPETELE
Second Applicant

JERRY LEAUPEPE
Third Applicant

ELIZABETH LEAUPEPE
Fourth Applicant

PAUL SO'OULA
Fifth Applicant

NELLIE KAITANI
Sixth Applicant

ALI'ITASI SALESA
Seventh Applicant

CHRISTINE PEREIRA
Eighth Applicant

CHERYL CUDBY
Ninth Applicant

MURRAY CUDBY
Tenth Applicant

SANTA JONCK
Eleventh Applicant

LITEA RANGER
Twelfth Applicant

AND

**WESLEY COLLEGE BOARD
OF TRUSTEES**
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Meikle for Applicants
Richard Harrison for Respondent

Investigation Meeting: 11 April 2019

Submissions Received: 11 April 2019

Additional Information Received: 15 and 17 April 2019

Determination: 5 July 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination deals with the question about whether Wesley College Board of Trustees owes arrears of wages to any of the 12 applicants pursuant to the Minimum Wage Act 1983 (MWA).

[2] Wesley College operates the Wesley College boarding Hostel. Each of the 12 applicants were or continue to be employed by Wesley College as house parents. Wesley College denies it owes any arrears of wages and says that a number of the claims are outside the statutory time limitation period.

Issues

[3] The parties have agreed that if Wesley College is found to be liable the parties should have an opportunity to calculate and agree on any amounts of unpaid remuneration. Accordingly this determination deals only with the issue of liability.

[4] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Background

[5] Wesley College was established in 1844 and is a private boarding establishment. The College currently has 253 boarding students who reside in one of the following hostels:

- Caughey;
- Harding;
- Te Whare Maia;
- Te Whare Pakeke;
- Te Whare Taina;
- Te Paea (female students only);
- Denton.

[6] Wesley College aims to create a family environment for each of the students. The hostel parents are part of creating that environment as they live on site, in some cases, with their own families.

[7] The house parents report to the Director of Boarding. If there is a significant health issue or incident during the night, the Director of Boarding is notified and he then becomes responsible.

[8] Generally the house parents are allocated a hostel and a house, either fully or semi-detached from the hostel, which is their permanent place of residence. It is their home and a tenancy agreement setting out the terms of the tenancy is signed by the parties. Others reside off site.

[9] Each of the house parents is paid a salary which is intended to fully compensate them for all work undertaken, whether during a roster or otherwise.

[10] The roster for house parent duties is set each school term for each hostel. The roster allocates the house parents to set days of the week. Their usual work times were from 6 am to 8.30 am and from 3.30 pm to 10.30 pm each rostered day. The parents are required to settle students in the hostel through until lights out which is between 9.30 pm and 10.30 pm.

[11] In some cases two house parents were rostered to work at the same hostel on the same day. In those cases the house parents arranged between which of them would be available to do overnight sleepovers (as described at paragraph [15] below).

[12] Prior to December 2014 the expectation was that the house parents rostered on would be on call after 10.30 pm if required to supervise or assist with the care of any student. Since 2015 the Director of Boarding has had overall responsibility for the supervision and care of students. The House Parents report to the Director of Boarding.

[13] Since December 2014 the Trust Board has engaged night security to undertake supervision and security duties between 10.30 pm and 6 am. The expectation is that this person does the rounds of all of the hostels and checks that students are in bed and asleep. They also attend to any disturbances or incidents that may occur during the night with the exception of the girls hostel (Te Paea). The responsibility for responding to issues in Te Paea has remained with the house parents rostered on for that hostel.

[14] The rosters only operate during term time. During term breaks the house parents continue to be paid their salary despite not being required to provide duties as a house parent.

Sleepovers

[15] The question for determination is whether the hostel parents were “sleeping over” and if so whether the sleepovers constitute work for the purposes of s 6 of the MWA. I have used the term “sleepover” loosely to define the circumstances in which house parents either physically slept in a hostel or slept in their own accommodation while having responsibility for responding to any issues arising during the hours of 10.30 pm and 6 am the following day.

[16] In *Idea Services Ltd v Dickson* the Court of Appeal approved the three factors which the Employment Court in its earlier decision found helpful.¹

- a) The constraints placed on the freedom the employee would otherwise have to do as he or she pleases;

¹ *Idea Services Ltd v Dickson* [2011] NZCA 14 at [7].

- b) The nature and extent of responsibilities placed on the employee; and
- c) The benefits to the employer of having the employee perform the role.

[17] As stated by the Court of Appeal:²

The greater the degree or extent to which each factor applied (that is, the greater the constraints, the greater the responsibilities, the greater the benefit to the employer), the more likely it was that the activity in question ought to be regarded as “work”. The Court said that the question has to be approached in an “intensely practical” way, adopting what was said by this Court in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*.

Constraints on the house parents

[18] Until the changes in 2014, during rostered duty periods the house parent was required to sleep in accommodation provided in the boarding hostel rather than their own accommodation.

[19] The applicants all gave evidence that their sleep would often be disturbed when undertaking the sleepover duties. For example the internal and external doors were alarmed and it was not uncommon for students to set the alarms off during the night. This required the house parent to investigate and reset the alarms.

[20] When students were homesick or ill the house parent provided care through the night. All of the applicants told me they had to deal with students setting off smoke alarms and fighting. They also told me that when they were on duty they could not entertain friends or go out for a drink and that there were constant interruptions.

[21] The College produced a list of incidents recorded by the house parents which indicated there were few occasions when house parents were actually disturbed during a sleepover. I accept not all incidents were recorded and that there would have been many minor disruptions which would not warrant recording.

² Ibid at [8].

The nature and extent of the house parents responsibilities

[22] Until December 2014 the house parent was responsible for ensuring the students went to sleep, some students often talked after 10.30 pm and the house parents were responsible for looking after the students during the night from 10.30 pm to 6 am the following day. The College made a decision in December 2014 that house parents would no longer be responsible for the students after 10.30pm.

[23] Instead, alarm buttons were installed in each of the hostels and security guards were engaged to respond to the alarms when pressed. If necessary the security officers will escalate matters to the Director of Boarding who is on call to attend to any issues.

[24] From the evidence I heard it became apparent this system worked for the boys hostels but the security guards could not access the hostel used by female students and the house parents rostered on to Te Paea continued to be responsible for responding to issues during the night.

Benefit to Wesley College from the house parents performing their roles

[25] Until the changes implemented by the College in December 2014 the College benefited by having the house parents available to deal with a wide range of issues which was a significant factor in the College's ability to continue to offer boarding opportunities to its students.

[26] Having the house parents available on sleep over was very important to the College and the continued success of its Boarding facilities.

Conclusion

[27] I have concluded that in all the circumstances, when each of the applicants were undertaking sleepovers they are to be regarded as having been at work or working for the purposes of the Minimum Wage Act.

Post December 2014

[28] In December 2014 the College implemented a new system to look after issues arising between 10.30 pm and 6 am the following day. The College has engaged security officers whose role it is to address any security or student issues.

[29] The evidence at the investigation meeting was that house parents still continued to be called upon. That however, was no longer their role and their duty finished at 10.30 pm each day. I can understand their desire to continue to react to issues as they arose, however, they were not required to and when they did respond they did so voluntarily.

[30] As identified above, the only exception to the use of security officers to settle matters with students during the night was in Te Paea where the house parents rostered on continued to be available and to respond to issues as they arose.

[31] Based on the evidence produced to the Authority, I have concluded that any claims for sleepover payments, apart from those rostered on to Te Paea are limited to up to December 2014. To find otherwise would have the effect of exposing the College to a liability to pay for security officers to work overnight to address matters as they arose while at the same time being liable for minimum wages for sleepovers that were not required.

Statutory limitation period

[32] The College says a number of the claims raised by some of the house parents are outside the jurisdiction of the Authority because they extend beyond the six year limit provided for in the Act.

[33] Section 142 of the Act prohibits parties from commencing an action that is not a personal grievance in the Authority or Court more than six years after the date on which the cause of action arose.

[34] A claim for arrears of wages, including payment of minimum wages, is an employment relationship problem that is not a personal grievance.³ The causes of action arose on the date the applicants claim they should have been paid minimum rates for sleepovers. The proceedings for the applicants were commenced in the Authority on various dates between 2015 and 2018.

[35] The Authority can only consider claims where the causes of action arose six years prior to the date an applicant commenced proceedings. Accordingly, when

³ *Law v Board of Trustees of Woodford House* [2014] ERNZ 576 at [78].

considering each of the applicants' claims I have addressed the limitation period as it applies to the individual applicant.

Liability

Saua Leaupepetele

[36] Mr Leaupepetele was employed as a house parent between 2009 and February 2017. Mr Leaupepetele commenced his proceedings in the Authority on 12 July 2018. Mr Leaupepetele is entitled to claim minimum wages for all sleepovers undertaken by him between 12 July 2012 and December 2014.

Patricia Leaupepetele

[37] Ms Leaupepetele was employed as a house parent in 2009. Ms Leaupepetele commenced her proceedings in the Authority on 12 July 2018. Ms Leaupepetele is entitled to claim minimum wages for all sleepovers undertaken by her between 12 July 2012 and December 2014.

Jerry Leaupepe

[38] Mr Leaupepe was employed as a house parent from May 2014 to December 2016. He commenced his proceedings in the Authority on 12 July 2018. Mr Leaupepe is entitled to claim minimum wages for all sleepovers undertaken by him between May and December 2014.

Elizabeth Leaupepe

[39] Ms Leaupepe was employed as a house parent from May 2014 to November 2018. She commenced her proceedings in the Authority on 12 July 2018. Ms Leaupepe is entitled to claim minimum wages for all sleepovers undertaken by her between May and December 2014.

Paul So'Oula

[40] Mr So'Oula has been employed as a house parent since May 2012. He commenced his proceedings in the Authority on 12 July 2018. Mr So'Oula is entitled to claim minimum wages for all sleepovers undertaken by him between 12 July 2012 and December 2014.

Nellie Kaitani

[41] Ms Kaitani is employed as a house parent, a role she has held since August 2016. Ms Kaitani was also employed between February 2003 and 2010. Ms Kaitani commenced her proceedings in the Authority on 12 July 2018. Ms Kaitani's claims for her first period of employment between February 2003 and 2010 are statute barred.

[42] At the investigation meeting Ms Kaitani told me she lives off site and goes home when her rostered shift ends at 10.30 pm. As Ms Kaitani did not work sleepovers after she returned to work in 2016 her claim for payment of minimum wages is declined.

Ali'itasi Salesa

[43] Reverend Salesa was employed as a live in relief hostel parent from January 2009 to December 2010. She commenced her proceedings in the Authority on 12 July 2018. The causes of action relating to Reverend Salesa's claims are more than six years prior to the date on which she commenced her proceedings. Reverend Salesa's application for arrears of wages is statute barred and is accordingly declined.

Christine Pereira

[44] Ms Pereira was re-employed as a house parent in July 2018 after previously being employed between February 2009 and July 2014. Ms Pereira commenced her proceedings in the Authority on 6 November 2018. Ms Pereira is entitled to claim minimum wages for all sleepovers undertaken by her between 6 November 2012 and July 2014.

[45] At the investigation meeting Ms Pereira told me that while she no longer does sleepovers an alarm connected to her residence still goes off and she will respond. Ms Pereira is not required to be available to respond to alarms and has not been required to do so since she was engaged in July 2018. Accordingly her claim relating to sleepovers after July 2018 is declined.

Cheryl Cudby

[46] Ms Cudby has been employed as a house parent since February 2007. Ms Cudby commenced her proceedings in the Authority on 3 January 2018. Ms Cudby is

entitled to claim minimum wages for all sleepovers undertaken by her between 3 January 2012 and December 2014.

Murry Cudby

[47] Mr Cudby has been employed as a house parent since February 2007. Mr Cudby commenced his proceedings in the Authority on 3 January 2018 Mr Cudby is entitled to claim minimum wages for all sleepovers undertaken by him between 3 January 2012 and December 2014.

Santa Jonck

[48] Ms Jonck was employed as a house parent from 30 June 2005 to April 2018. She commenced her proceedings in the Authority on 4 March 2015. Ms Jonck was one of the house parents with responsibility for Te Paea. This means she continued to have responsibility to respond to issues arising at that hostel after December 2014.

[49] Ms Jonck is entitled to claim minimum wages for all sleepovers undertaken by her from 4 March 2009 to April 2018.

Litea Ranger

[50] Ms Ranger was employed from 29 June 2003 to April 2018. She commenced her proceedings in the Authority on 4 March 2015. Ms Ranger was one of the house parents with responsibility for Te Paea. This means she continued to have responsibility to respond to issues arising at that hostel after December 2014.

[51] Ms Ranger is entitled to claim minimum wages for all sleepovers undertaken by her between 4 March 2009 and April 2018.

Calculation of claims

[52] Each of the applicants was paid by way of annual salary paid in equal monthly instalments. The parties have agreed to return to mediation and attempt to resolve the issue of quantum between them. What follows is intended to assist the parties in their discussions at mediation.

[53] Section 4 of the annual Minimum Wage Orders sets out the rates of minimum wages payable. The minimum rate applicable to the applicants is specified under s

4(d) of the Minimum Wage Order because their pay was not calculated by the hour, by the day or by the week.

[54] Even though the applicants were paid monthly it may assist if they could establish each week of work performed by each applicant by reference to the boarding house roster for the period of their claims. They can then calculate the number of hours worked (including sleepovers) during each of those weeks. This could be followed by an assessment of the extent to which each applicant worked 40 or fewer hours including sleepovers during each of those weeks.

[55] Extrapolating that information out to record fortnightly information may assist the parties to ensure the minimum fortnightly payments payable under the applicable Minimum Wage Order has been met.

Direction to mediation

[56] The parties are directed to mediation to calculate and agree the amounts of unpaid remuneration to which the applicant's may be entitled.

[57] Leave is reserved for any of the applicants to revert to the Authority to apply for any further orders that may be required.

Costs

[58] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do the applicants shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The College shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[59] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority