

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2019] NZERA 183
3033191**

BETWEEN

KAREN KIDD
Applicant

AND

EPSOM GIRLS GRAMMAR
SCHOOL BOARD OF
TRUSTEES
Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Meikle, Counsel for the Applicant
Richard Harrison, Counsel for the Respondent

Investigation Meeting: 7 March 2019

Determination: 28 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Karen Kidd, claims that she is owed monies by the Respondent, Epsom Girls Grammar School Board of Trustees (the Board), pursuant to the Minimum Wage Act 1983 (MW Act) in respect of occasions when she was required to ‘sleepover’ as part of her work duties during her period of employment.

[2] The Board denies that there has been a breach of the MW Act.

Note

[3] At the commencement of the Investigation Meeting the parties confirmed that the correct identity of the Respondent is Epsom Girls Grammar School Board of Trustees.

The issue

[4] The issue requiring investigation and determination is whether or not:

- The sleepovers were work

If so:

- Is Ms Kidd is owed monies as a result of a breach of the MWA by the Board.

Background

[5] Epsom Girls Grammar School is a state secondary school for girls with a roll of approximately 2000. This includes approximately 140 boarders who live in Epsom House, a building located near to the school premises.

[6] Ms Kidd was employed at Epsom House initially as a Night Supervisor but subsequently as House Manager in which position she commenced on 16 April 2012. Ms Kidd was issued with a fixed term individual employment agreement (the 2012 Employment Agreement) which contained the following clauses:

2. DURATION OF AGREEMENT

This Agreement comes into force when the employee commences employment on **16 April 2012** and is a fixed term agreement in accordance with Section 66 of the Employment Relations Act 2000.

4. HOURS OF WORK

This is a full time position and the normal hours of work are forty (40) per week to be worked within the hours of 6.30am to 10.30pm on a Monday to Friday or any other variation as may be required from time to time. Due to the nature of this live in position there is also a requirement to be on call overnight in the event of emergencies.

The level of remuneration reflects the fact that from time to time additional hours may be required to be worked to ensure that the responsibilities of the position are adequately met. No additional payment will be made for these hours.

Where significant additional hours are worked, time off in lieu may be granted at the discretion of the Director of Epsom House. For the purpose of this clause "significant additional hours" shall mean working more than 50 hours in any one week, and in that event one day off, as time in lieu may be granted, provided that such day off in lieu shall be taken on a day determined by the Employer. No time in lieu will be apply unless any extra hours worked are recorded on the employee's timesheet.

4.2 For the purposes of this agreement a week is defined as each period of seven days covered by the pay period operating in the hostel. The period is calculated from midnight to midnight.

4.4 A timetable setting out your correct working hours shall be affixed and maintained in some conspicuous place in the office. The employer shall give you as much notice as is reasonably practicable if there is any change in the days fixed for your weekly days off.

5. REMUNERATION

5.1 You will receive a total remuneration package of **\$43,000** per annum made up of the following components:

1. An annual base salary of \$36,708.01
2. A living allowance of \$6291.99

5.2 Your gross salary will be paid in 26 equal instalments. Payments will be made in arrears by direct credit to your nominated bank account. You are liable for tax on the living allowance. This will be deducted each fortnight from your salary. As at the commencement of this agreement the amount to be paid back to the School for the accommodation is \$173.52 per fortnight.

[7] The 2012 Employment Agreement was renewed as fixed term employment agreements in March 2013, November 2013 and April 2014 on identical terms and conditions of employment but with salary increments.

[8] In 2012 the supervision of Epsom House consisted of a Director to whom Ms Kidd reported as Night Manager; three Night Supervisors employed to work on a roster basis with one Night Supervisor being responsible for the supervision and wellbeing of students throughout the night; and a Charge Supervisor.

[9] Ms Kidd was provided with a job description which stated at section 6 'General' that her responsibilities included: "Is on call for and attends to any event or emergency while on site in line with emergency procedures in the staff manual".

[10] In late December 2014 Ms Kidd ceased to be required to live-in or sleepover on a rostered basis.

Nature of the sleepovers April 2012 to December 2014

[11] During the period April 2012 until late December 2014 Ms Kidd said that she worked an alternating two week pattern of sleep over shifts from 10.30 p.m. to 6.30 a.m. In the first week she would work three sleepover shifts and in the second week she would work two sleepover shifts. During the nights when she did not work sleepovers she returned to her home which was approximately 20 minutes away from Epsom House.

[12] Ms Kidd said that her normal work duties involved pastoral care of the girls at Epsom House, from 7.00 a.m. when they awoke and after the school day ended at approximately 3.15 p.m. Her role also involved some maintenance duties.

[13] When on a sleepover Ms Kidd said she was rarely required to deal with emergency situations, recalling 3 occasions when she accompanied a girl to the hospital, an occasional fire alarm, and two occasions when a Night Supervisor woke her in connection with a maintenance issue.

[14] However, although her contractual hours were from 6.30 a.m. until 10.30 p.m. and during her sleep over shifts there was a Night Supervisor to carry out regular checks on the girls during the night and deal with any illness, Ms Kidd said that there was always some disturbance during the nights she was required to do a sleepover.

[15] After 10.30 p.m. there would be a settling in period of approximately one hour when Ms Kidd attended to minor issues and queries from the girls. The girls would often seek her out with their concerns during the night rather than contacting the Night Supervisor. Ms Kidd said her bedroom was a few steps away from one of the Epsom House dormitories which was occupied by year 9 girls (approximately twelve years old) and the girls might be getting up and talking. As it was very close to the bathroom there could also be disturbance from girls using the bathroom.

[16] In addition Ms Kidd said that the nature of the sleepovers meant that she could not entertain friends, travel away from Epsom House or drink alcohol.

[17] If a Night Supervisor was unwell which sometimes occurred, and she was unable to find a replacement, Ms Kidd said she would be solely responsible for the care of the girls throughout the night.

[18] Ms Christine Barnes, Epsom House Boarding Administrator, said that the responsibility for dealing with issues that arose in the night lay with the Night Supervisor, and the House Manager was there only as a backup if the Night Supervisor required assistance. She said that the Night Supervisors were specifically appointed to deal with any disturbances, incidents or students being unsettled during the night without any recourse to the Night Manager.

[19] In addition, the Charge Supervisor lived permanently on site at Epsom House and was available to assist the Night Supervisor irrespective of whether or not she was actually on duty. Ms Barnes stated that in practice it was the Charge Supervisor who was called upon by the Night Supervisors for assistance.

[20] Ms Barnes said the expectation was that if a girl became unwell and needed medical assistance, the Charge Supervisor would take the student to hospital or otherwise address an emergency leaving the Night Supervisor to continue to be responsible for Epsom House.

[21] Ms Barnes said that she had reviewed the timesheets for the period and also the Night Supervisor diary for 2014, however she had found no evidence that Ms Kidd was called upon to undertake work or assist between 10.30 p.m. and 6.30 a.m. during the sleepover periods.

[22] Ms Kidd said that the only occasion when she was required to complete a timesheet was to make a claim in respect of a statutory holiday claim for time and a half.

Were Ms Kidd's sleepovers work?

[23] The timesheets provided by the Respondent are minimal in number and do not cover the entire period April 2012 to December 2014. They contain in total only three entries, one relating to a sickness absence, and the other two itemised hours claimed in respect of Auckland Anniversary Day and Waitangi Day 2014. I therefore prefer Ms Kidd's evidence concerning the completion of timesheets.

[24] In *Idea Services Limited v Dickson* the Court of Appeal noted that the Employment Court had identified three factors as helpful in considering whether or not a sleepover constituted 'work':¹

- (a) The constraints placed on the freedom the employee would otherwise have to do as he or she pleases;
- (b) The nature and extent of responsibilities placed on the employee; and
- (c) The benefit to the employer of having the employee perform the role.

[25] The Employment Court had observed that the greater the degree or extent to which each factor applied, the more likely it was that the activity in question would be considered as 'work'.²

[26] The *Idea Services* case involved consideration of sleepover work performed in residential care facilities. A later case, *Victoria Law & Ors v the Board of Trustees of Woodford House & Ors* concerned sleepover work performed in boarding schools.³

[27] In that case, which confirmed and applied the approach taken in *Idea Services*, the Court found that sleeping over placed considerable constraints on the plaintiffs freedoms, they had significant and extensive responsibilities being responsible for the safety and wellbeing of substantial number of teenage girls, and there was benefit to the schools because without the immediate availability of a responsible adult in the hostels at night, the schools could not have maintained the schools lawfully or practicably.⁴

[28] Mr Harrison submits that the present case can be distinguished from that in *Woodford House* on the basis that:

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

² *Idea Services Ltd v Dickson* (2009) 6 NZELR 666 at [64] and [65]

³ *Victoria Law & Ors v the Board of Trustees of Woodford House & Ors* [2014] NZEmpC 25

⁴ *Above n 3* at [185] – [188]

- The employment agreements issued in 2012, 2013 and April 2014 describe the nature of the live in position as being on call overnight, which is consistent with being available to be engaged;
- There were three Night Supervisors employed, one of whom would be on shift during the night and they were responsible for the supervision and well-being of the students;
- There was no benefit to the employer in having Ms Kidd work over this period because there were Night Supervisors employed for that purpose. There was no legal requirement for the arrangement because it was not a requirement of a hostel licence.
- The Charge Supervisor lived on site and would provide additional support to Night Supervisors if there was an incident or disturbance that required additional assistance; and
- The timesheets over the period disclose that Ms Kidd was not required to additional duties during the night.

[29] Mr Harrison submitted, given the above, that Ms Kidd's situation is consistent with an on-call situation, any issues during Ms Kidd's sleepover periods being dealt with the Night Supervisors or by the Charge Supervisor.

[30] Mr Meikle submits that the case of *South Canterbury District Health Board v Sanderson* in which the Employment Court ruled that anaesthetic technicians who were rostered on a call back roster outside of working hours could be considered as undertaking work during the rostered on hours even if they were not actually called in, is relevant.⁵

[31] Specifically, adopting the *Idea Services* principles, in *South Canterbury District Health Board v Sanderson* the Employment Court found that the key features included a significant constraint on the technicians' freedom, a significant extent of responsibility, and the District Health Board obtained a significant benefit, namely the delivery of healthcare.

[32] Turning to Ms Kidd's circumstances and examining each factor I find the following relevant.

⁵ *South Canterbury District Health Board v Sanderson* [2017]NZEmpC 127

Constraints on the employee

[33] Ms Kidd was required in accordance with the employment agreements to live-in on a rostered basis. On the nights she was contractually required to sleep over in accordance with the roster, she could not leave the Epsom House premises, could not consume alcohol and in general, was unable to enjoy the comforts and freedom she would exercise when living in her own home.

[34] She was required in accordance with her job description to be on call to attend to any event or emergency. Although I accept that Ms Kidd's evidence was that in practice she dealt with few emergencies during the period from 2012 to late December 2014, I accept that she was disturbed on occasion after 10.30 p.m. by girls bringing their concerns to her.

[35] In *South Canterbury DHB* Judge Corkill found the constraints imposed on the technicians were significant:⁶

I conclude that the constraints which were imposed by having to live away from their homes and families in shared accommodation where they were unable to undertake their normal range of activities were significant. Their time was not their own as would otherwise have been the case.

[36] I find In Ms Kidd's case that the constraints placed upon her whilst she was performing a sleep over were significant.

Degree of responsibility

[37] The students in Epsom House were vulnerable in the sense of being away from the care of their parents who entrusted that care and protection to the school. This I find is reflected in the wording of Ms Kidd's job description as House Manager which states that she was responsible during the sleep over periods for the care of the girls in Epsom House, being expected to protect the: "emotional safety of student" and: "the physical safety of students".

[38] Whilst there was a Night Supervisor whose role was to carry out regular checks on the girls during the night and deal with any illness, Ms Kidd's evidence was that she occasionally took students to the hospital leaving the Night Supervisor on site at Epsom House. In addition in the event that a Night Supervisor was unable to attend for work, and she was unable to find a replacement, Ms Kidd would be solely responsible for fulfilling her responsibilities overnight.

[39] I note the evidence of Ms Barnes that the Charge Supervisor was permanently resident in Epsom House and frequently assisted the Night Supervisors when required,

⁶ Above n 5 at [97]

however there was no oral evidence from the Charge Supervisor, or documentary evidence supporting that evidence and therefore I accept Ms Kidd's evidence in this respect.

[40] I find that the degree of responsibility placed upon Ms Kidd whilst she was performing a sleepover was significant.

Benefit to the employer

[41] Epsom House engaged Night Supervisors for the purpose of fulfilling statutory requirements regarding hostel licences.

[42] It was important that someone was on hand to take responsibility should a girl become unwell in the night, or require being taken to hospital.

[43] In the event that a Night Supervisor was unwell and unable to attend for work on a particular night, Ms Kidd fulfilled that role. Even if a Night Supervisor was available, Ms Kidd was sometimes required to take a girl to hospital whilst the night Supervisor remained on site

[44] I find that having Ms Kidd sleepover was beneficial to the employer, enabling it to fulfil parental expectations and its responsibility in respect of the girls in its care at Epsom House.

[45] I determine that Ms Kidd was performing work during her sleepover periods.

Is Ms Kidd owed monies as a result of a breach of the MWA?

[46] Ms Kidd's remuneration was made up of a base salary and a living allowance, and was paid in 26 equal instalments irrespective of the hours worked by Ms Kidd. The living allowance was identified separately and was not part of her annual salary. The school charged Ms Kidd \$173.52 per fortnight in respect of accommodation.

[47] Mr Harrison submits that as Ms Kidd was a salaried employee, the correct calculation under the MW Act should reflect this arrangement. I agree and find that Ms Kidd is covered by s6(4) of the MW Act

[48] The Court of Appeal in *Idea Services* rejected the averaging argument.⁷ In *Woodford* the argument was again raised in respect of boarding school employees who were paid a salary:⁸

⁷ Above n 1

⁸ Above n 3 at [218]

... The MW Act and the relevant Minimum Wage Orders require the Court to gauge whether there was compliance by considering a combination of a working week of up to 40 hours and any hours worked in the same week beyond 40, and to determine whether the remuneration received for those weekly periods equated with or exceeded the statutory minima.

[49] Later in that judgment His Honour Chief Judge Colgan addressed the issue of calculating payment taking into account the sleepover periods:⁹

[50] Therefore the approach to be taken in this case requires the parties to:

1. Establish and tabulate the weeks in which sleepover shifts occurred by reference to the Epsom House rosters;
2. Ms Kidd's contractual hours were set at 40 hours per week to be worked between the hours of 6.30 a.m. and 10.30 p.m. Monday to Friday;
3. Calculate the total number of hours worked, including sleepover shifts (at 8 hours per sleepover), during each of the weeks;
4. Ensure that the minimum payment under cl 4(c)(i) of the relevant Minimum Wage Order has been met in practice i.e. in each Minimum Wage Order period, namely 1 April 2012, 1 April 2013 and 1 April 2014.
5. If the analysis of hours worked in each week reveals that there were more than 40 hours worked, payment for each hour over 40 must be for a sum not less than the minimum hourly rate under cl 4(c)(ii) of the relevant Minimum Wage Order.

[51] The calculation accordingly would take as a starting point the number of hours worked in each week. If there were more than 40 in any one week, payment for the extra hours would need to be made at the appropriate hourly rate i.e. \$13.50 per hour from 1 April 2012, \$13.75 per hour from 1 April 2013, and \$14.25 per hour from 1 April 2014.

[52] Any weeks during which Ms Kidd was remunerated but did not perform any sleepovers she will also be entitled to payment in accordance with her employment agreement at not less than the cl 4(c)(i) minimum payment by reference to the appropriate Minimum Wage Order.

⁹ Above n 3
Above n 3 at [236] – [238]

[53] The parties are therefore required to recalculate the amounts paid to Ms Kidd during the period 16 April 2012 until week beginning 10 December 2014 in order to ascertain if there is any payment due to her.

[54] It would be useful to prepare a spread sheet analysis of the type provided by Ms Fiona Merritt, previously Human Resources Manager at Epsom Girls Grammar School, covering payments made to Ms Kidd over the relevant periods.

[55] If the parties cannot resolve the issue of whether or not there is a requirement for further payment to be made to Ms Kidd, leave is granted for the parties to revert to the Authority for further assistance.

Costs

[56] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[57] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority