

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 484
3047314

BETWEEN SHARON LUKITAU-NGAAMO
Applicant
AND THE NELSON COLLEGE BOARD
OF TRUSTEES
Respondent

Member of Authority: Christine Hickey
Representatives: Luke Acland, counsel for the Applicant
Richard Harrison, counsel for the Respondent
Investigation Meeting: 12 March 2019 in Nelson
Submissions Received: At the investigation meeting
Date of Determination: 19 August 2019

DETERMINATION OF THE AUTHORITY

[1] This determination has been issued outside the statutory period of three months after receiving the last submissions. The Chief of the Authority has decided that exceptional circumstances exist for providing this outside the latest date specified in s174C(3)(b) of the Employment Relations Act 2000.

Employment Relationship Problem

[2] Sharon Lukitau-Ngaamo began working for the Nelson College Board of Trustees (the College) as a teacher in 2007 under the Post Primary Teachers' Association Collective Agreement. In 2017 she was appointed as Housemaster of Fell Hostel/Rutherford House. She began at the end of January 2018.

[3] Ms Lukitau-Ngaamo and her family lived in a separate apartment in the same building as the boarders. She claims that she should be paid for all the hours she worked on call in the boarding house, being 8.5 or 9 hours per night. She claims that the College should pay her for all the hours worked, despite the fact she had an opportunity to sleep.

[4] Ms Lukitau-Ngaamo claims interest on the unpaid money. She also claims holiday pay related to annual leave and public holidays, if there is any owed to her.

[5] She asks the Authority to impose a penalty on the College for its failure to keep and produce wages and time records and for failure to pay her wages.

[6] The College denies that the sleepover principles apply to Ms Lukitau-Ngaamo because her individual employment agreement (IEA) sets out how she was to be remunerated. The College says it agreed to pay her for any time sheeted hours actually worked monitoring, caring for or supervising boys between 10.30pm and 7am on nights she was in residence. However, she has not claimed any time sheeted hours. It also says she was remunerated by other provisions in her IEA.

[7] The College has tried to negotiate a solution with Ms Lukitau-Ngaamo, it offered her a lump sum payment to settle the matter.

[8] During the investigation meeting Mr Harrison argued that Ms Lukitau-Ngaamo's claim was not pleaded as a minimum wage claim and therefore could not be argued as a sleepover case. He said that if it was to be dealt with as a sleepover case then the College would need an adjournment to bring new evidence targeted at the sleepover claim. I disagree. In the case management conference I held on 17 December 2018, we specifically discussed that the issues that arose in the claim were related to the interpretation of clause 4.3 of the IEA and the sleepover cases. That was confirmed in the Notice of Direction sent to the parties on 18 December 2018:

Issues

[2] The applicant claims that clause 4.3 of her employment agreement is in recognition of and is a summary of the "sleepover" cases law. She claims she should have been paid the minimum wage for each hour between 10:30pm and 7:00am when she is responsible for overnight care of the boys ...

[9] This determination will apply the sleepover case principles to Ms Lukitau-Ngaamo's overnight work and set out how what the College owes Ms Lukitau-Ngaamo should be worked out. The parties will then have an opportunity to come to an agreement on the calculation of the amount owed. If they are unable to agree, Ms Lukitau-Ngaamo may return to the Authority for a determination of the amount owed.

The agreement governing the Housemaster position

[10] The relevant clauses of Ms Lukitau-Ngaamo's IEA are:

The objective of this agreement is to promote and maintain to the highest professional standards, the Boarding Department of Nelson College by providing a cost effective caring environment in which students can best develop.

Nothing in this agreement is intended to circumvent legislation in existence that relates to the employment and rights of the parties to this agreement. All conditions of employment as outlined in the PPTA Collective Employment Contract will be maintained while employed as Housemaster at Nelson College.

To allow The Housemaster to fulfil the responsibilities of the position and separate the teaching duties from The Housemaster's duties, The Housemaster will be granted Long Term Relieving for the term of the appointment to the position of housemaster. At the end of the term of the contract, The Housemaster will return to the teaching position as held on the date of appointment.

...

PART THREE: PROVISIONS RELATING TO HOURS OF WORK

3.1 Hours of Work

The hours of work shall be those when rostered, on call, and other hours necessary to meet the requirements of the position.

3.2 The Employee will be allowed an unpaid meal break of 30 minutes for each ordinary work shift that is longer than four hours. Breaks will be taken at times that take into account the needs of the organisation.

PART FOUR: PROVISIONS RELATING TO REMUNERATION

4.1 You will be allocated **eight non-contacts** per teaching week for the position of Housemaster.

4.2 You will be paid a housemaster allowance of \$4,000.

4.3 You will be paid \$15.75 per hour [gross] time sheeted at times when the Housemaster is required to monitor/care for or supervise boys

between the hours of 10.30pm and 7.00am when the housemaster is in residence.

Housemaster's job description

[11] The duties of the Housemaster are set out in detail in Schedule 1 to the IEA. The job description made it clear that it is a live-in position. The Housemaster reports to the Deputy Principal (Commercial) and is responsible for the house supervisors, matron and cleaners.

The Housemaster must:

perform all necessary tasks with consultation and agreement with the Deputy Principal (Commercial) to ensure a high standard of care and environment for the boys in the Hostel.

[12] The job description sets out the following requirements of the Housemaster:

- (a) The boarding house needs to have an environment that promotes equality, warmth and positive attitudes, and healthy competition. The Housemaster needs to maintain such a culture.
- (b) Establish and maintain good relationships and communication with parents and boys.
- (c) Communication, for example, talking through problems with the boys (i.e. homesickness), formal and informal discussions with the staff and boys and appropriate conversation with parents.
- (d) Demonstrate a standard of behaviour and professionalism in line with the Housemaster's position as a role model and supervisor of adolescent boys. Demonstrate this in social and informal interactions with both students and parents.
- (e) Develop a collegial and collaborative management culture with the Hostel which is based on high levels of professional and personal integrity.
- (f) Ensure policies, procedures and the professional code of conduct are adhered to.
- (g) Manage leave requests and ensure that the location of each boy in the boarding house is known and approved by their parents.
- (h) Responsibility for the corporate life of the boarding house and be involved in co-curricular activity, pastoral care and academic support.

- (i) Set and administer daily routines to ensure the efficient and effective operation of the hostel.
- (j) Oversee the supervisors attached to the hostel and ensure that they maintain high standards in their care of the students.
- (k) Meet regularly with boarding management and the other Housemaster to establish and maintain common procedural and discipline practices.
- (l) Allocate dormitories and other resources.
- (m) Appoint Matrons, Supervisors and cleaning staff alongside boarding management and provide training and appraisal.
- (n) Participate with boarding management in budget planning and property maintenance.
- (o) Understand and adhere to all College policies particularly those related to cyber-safety, alcohol, drugs, student vehicles and bullying.
- (p) Liaise with the Day School administration and deans with regard to absences and discipline issues of students from the House and have an overall responsibility for House discipline in general.
- (q) Be rostered on duty for four hours per week.
- (r) Cover one weekend duty per term.
- (s) Perform other reasonable tasks associated with the position.
- (t) Ensure all agreed facilities are available for letting groups.

[13] Schedule 1 also included a clause saying that the rent for the accommodation for the Housemaster residence was \$375.00 per week “this is paid for by the school”.

[14] In addition, it included a section entitled Principles of the Roster:

- Housemaster covers 4 hours supervision in the roster, but the expectation is that they are in additional support often anyway.
- Supervisor covers 6 hours supervision in the roster, that is two duties over two nights, one long and one short.

Time sheets

[15] Despite clause 4.3 suggesting that Ms Lukitau-Ngaamo would record any monitoring, supervision of or care for the boys between 10.30pm and 7am no timesheets were ever provided to her, she did not record her time and no-one asked her to provide time sheets. In September 2018 Ms Lukitau-Ngaamo realised that she had not been paid for any work she had undertaken at nights and enquired about that. It was then she discovered that she was paid on a different basis to the Housemaster of Barnicote House, and was paid less than him.

[16] The College maintains that Ms Lukitau-Ngaamo should have filled in timesheets and should only be paid for any hours she was actively working through caring for, monitoring or supervising boys during the night hours. It says she was well remunerated in her Housemaster role and points to the free family accommodation she received as well as non-contact hours during the school day. The College denies Ms Lukitau-Ngaamo worked 24 hours a day and says that would have been impossible.

[17] I consider it necessary to separate out Ms Lukitau-Ngaamo's role as a teacher, engaged under the PPTA Collective Agreement, from her Housemaster duties. The non-contact hours are a cost to the school because they have to pay another teacher for those hours. However, Ms Lukitau-Ngaamo is effectively remunerated for them within the provision of the collective agreement, as if she had taught those hours. She receives no additional remuneration related to her Housemaster role. Instead, she uses those hours for the Housemaster's duties of management and administration of Fell House and the boys' academic and other needs during the day.

[18] However, Ms Lukitau-Ngaamo's night time duties are not remunerated or covered under the PPTA collective agreement. Therefore, they must be and are covered solely by the separate IEA she and the College entered into.

[19] That IEA makes it clear that nothing in it is intended to circumvent any legislation or to override any employment rights. I consider that the Minimum Wage Act 1983 may apply to the hours Ms Lukitau-Ngaamo was in charge of the boarders and the boarding premises overnight.

Boarding house staff roles

[20] During 2018 and early 2019 the structure of the College boarding staff was:

- (a) Head of Boarding – Gary O’Shea, Headmaster who lives on site at the College.
- (b) Director of Boarding – in early 2018 the Director lived on site at the College, but he left the College part way through 2018. The current Director of Boarding lives off site.
- (c) Housemasters – One Housemaster who lives in Barnicote Hostel and Ms Lukitau-Ngaamo, living in Fell House/Rutherford Hostel.
- (d) Assistant Housemaster – this role was introduced part way through 2018. He lives on site and assists Ms Lukitau-Ngaamo with the Housemaster’s management workload.
- (e) Supervisors – Three supervisors live on site at Fell House/Rutherford Hostel. One lives in a separate house from the boarding house, the other two live in separate apartments in the boarding house.

Housemaster work at Fell House

[21] Ms Lukitau-Ngaamo wrote the weekly roster, which is staffed by different staff on different shifts.

[22] The matron works a split shift each weekday from 7am to 10.30am and then from 3pm to 6pm. The matron wakes the boys up and ensures that they have breakfast, checks their uniform and checks that they make their bed and leave their rooms tidy. She is also in charge of the cleaning staff. The matron is responsible for after school activities between 3pm and 6pm. The matron hands over to whoever is rostered on as the evening supervisor.

[23] That will be either the Assistant Housemaster or one of the three supervisors who work supervising the boys either between 6pm to 8.30pm, on the short shift, or from 6.30pm to 10.30pm, on the long shift. Ms Lukitau-Ngaamo worked a long shift every Thursday evening.

[24] The weekend officially starts on Friday evening and is rostered differently. Ms Lukitau-Ngaamo, the Assistant Housemaster and the supervisors are responsible for the boarders for two weekends each, each term. The supervision hours at the weekend are from 6pm to 11pm on Friday, 8am to 11pm on Saturday and 8am to 6.30pm on Sunday.

[25] The only hours that Ms Lukitau-Ngaamo is claiming she should be paid for are the overnight, or sleepover, hours every night in every term that she was “on call” overnight after the supervisors’ shifts finished.

The applicable legal principles on sleepovers

[26] Ms Lukitau-Ngaamo’s overnight circumstances must be assessed under the sleepover principles confirmed by the Court of Appeal in *Idea Services v Dickson*¹. Therefore, I will consider the following three factors:

- (i) The constraints placed on the freedom Ms Lukitau-Ngaamo would otherwise have to do as she pleases;
- (ii) The nature and extent of the responsibilities placed on her; and
- (iii) The benefit to the College of having Ms Lukitau-Ngaamo perform the role.

[27] Each case needs to be assessed on its particular facts. However, arguably, Ms Lukitau-Ngaamo’s circumstances are similar in a number of respects to those in the Employment Court case of *Law v Board of Trustees of Woodford House*², which considered the work of matrons and housemistresses of the boarding houses of two secondary schools, Woodford House and Iona College.

The constraints placed on Ms Lukitau-Ngaamo’s freedom to do as she pleased

[28] The Housemaster is required to live on site. Ms Lukitau-Ngaamo and her family lived in the same building as the boarders although in a separate apartment.

[29] Ms Lukitau-Ngaamo’s evidence is that while in residence during term time she was solely responsible between the hours of 10.30pm to 7.00am on Sunday, Monday, Tuesday, Wednesday and Thursday nights. On Friday nights she was solely responsible between 11pm

¹ [2011] NZCA 14, [2011] 2 NZLR 522.

² [2014] ERNZ 576.

and 8am. There is no other staff member rostered or on call over that time. There were other adult staff living in but they were not expected to be interrupted at night, except on the rare occasion Ms Lukitau-Ngaamo was absent and had arranged for them to fill in for her.

[30] During the night hours Ms Lukitau-Ngaamo had to remain available for a text, telephone call or someone ringing her doorbell throughout those hours. She gave as examples of times she was called on as being because a boy had vomited and needed to be taken down to the nurse in the 'san', a boy was very homesick, someone was worried or felt unsafe, someone was returning late to the hostel, conflict between boys and a boy coming to tell her another boy or boys were going to sneak out at night. Sometimes parents would call her too, especially if they were worried about a contact they had with their son.

[31] Ms Lukitau-Ngaamo said that constraints included having to be home during those hours every night, or having to organise for someone else to be there in her place. She could not drink more than one alcoholic drink as she needed to remain alert and capable of dealing with any situation that might arise, including, for example, an evacuation due to a fire alarm or an earthquake.

[32] Ms Lukitau-Ngaamo was constrained in the kind of social life she could lead while living-in as Housemaster.

[33] Ms Lukitau-Ngaamo and her family had to be considerate in relation to noise levels so as not to disturb boys. They had to pay particular care when their 3 year old child was outside as there is no safe and fenced outdoor play area, as there likely would have been in a separate family home.

[34] She was not simply able to enjoy uninterrupted sleep every night because there was an expectation from the College and the parents that she remain in a state of readiness to respond to any situation that required her response. She regularly checked out any unusual noise after lights out and responded to any call, knock or text.

[35] As Chief Judge Colgan wrote in the *Law* decision, Ms Lukitau-Ngaamo:

[92] ... had to spend those sleepover periods in a state of readiness ... and to react in the manner expected of [her by the College]. The nature of [her] duties and responsibilities meant [she] could not expect those times to be [her]

own for uninterrupted sleep or whatever other activities in which [she] might wish to engage.

...

[94] In that sense, [Ms Lukitau-Ngaamo's] entitlement and ability to rest or sleep during those periods was necessarily secondary to [her] obligations to ensure the safety and wellbeing of boarders and property. [She was] employed more on an "as and when" basis than simply "just in case".

...

[97] ... Whilst [Ms Lukitau-Ngaamo was] able to rest and sleep during some of those periods, and sometimes for substantial proportions of them, there was both a significant disruption to [her] and the need to be constantly available to deal with unpredictable events ...

[36] There were significant restrictions on Ms Lukitau-Ngaamo's freedoms when in residence overnight and responsible for the boarders.

What was the nature and extent of Ms Lukitau-Ngaamo's responsibilities?

[37] As Housemaster Ms Lukitau-Ngaamo was responsible for pastoral and academic support, discipline and general health and wellbeing of between 65 to 72 teenage boys in 2018, and 54 teenage boys in 2019 overnight. She was responsible for knowing where each boy was at all times. That is a high level of responsibility.

[38] She was responsible for ensuring the College's compliance with the Education (Hostels) Regulations 2015 and related legislation. For example, she was responsible for ensuring plans were in place for boarder evacuation and temporary accommodation, if required, in emergencies. She was responsible for ensuring all hostel staff were trained in fire and earthquake evacuation procedures.

[39] Ms Lukitau-Ngaamo carried out regular random bed checks after lights out and she organised and carried out fire evacuation drills every term.

The benefit to the College

[40] In his evidence, Gary O'Shea, the College's Headmaster pointed out that he has the ultimate responsibility for the school overnight as he lives on site. For example, he would be called in serious situations like a boy being taken to hospital or arrested.

[41] I do not consider the possibility that Mr O'Shea would sometimes have to be woken at night in serious cases detracts from the work Ms Lukitau-Ngaamo remained available to do during the night. In addition, Mr O'Shea agreed that in practice it is more likely that a boy who required some adult assistance at night would go to the nearest adult. For boys in Fell House that was Ms Lukitau-Ngaamo.

[42] Put bluntly the College could not have run the boarding houses in the way they then did if there was not a responsible adult living on site overnight. The College had a responsibility to ensure that there was sufficient staffing for the required staff to student ratio to meet its lawful obligations.

Conclusion

[43] I consider that Ms Lukitau-Ngaamo must be regarded as having been at work overnight on all the nights during term times that she was present and living at the boarding house. In terms of s 6 of the Minimum Wage Act 1983, Ms Lukitau-Ngaamo was a worker who was entitled to receive the minimum wage for each hour worked by her. However, the following issues also need to be considered in calculating the amount owed.

How do the other remuneration provisions relate to the overnight hours worked?

[44] Non-contact hours are related to Ms Lukitau-Ngaamo's role in managing the boarding house and the boarders. That role is expected to be undertaken during the day. Ms Lukitau-Ngaamo does not receive any additional payment for the non-contact hours. Her full-time teaching hours are paid through the provisions of the PPTA Collective Employment Agreement.

[45] It is unclear what the housemaster allowance, which for Ms Lukitau-Ngaamo was \$4,000 gross per annum, was payment for. It may have been in recognition of the long supervision shift she worked on Thursdays, or the two weekends each term she was responsible for, in addition to her overnight duties. The parties will need to consider this when working out how much the College owes Ms Lukitau-Ngaamo.

[46] In addition, the parties will have to work out how s 7 of the Minimum Wage Act applied to Ms Lukitau-Ngaamo's situation. The IEA states the agreed value of the accommodation rental to be \$375 per week. Is that the appropriate deduction to be taken off the weekly amount of minimum wage owed, before it is paid to Ms Lukitau-Ngaamo?

[47] If the parties are unable to agree on a calculation method and amount owed within a reasonable time, Ms Lukitau-Ngaamo may return to the Authority to have the amount set.

Costs

[48] In resolving the issue of what further pay is owed to Ms Lukitau-Ngaamo, the parties should also seek to agree on legal costs. However, the issue of costs is reserved and if it cannot be agreed the party seeking costs may make costs submissions to the Authority once the payment issue is resolved. The investigation meeting lasted less than a full day.

Christine Hickey
Member of the Employment Relations Authority