

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 258
3032991

BETWEEN

SAUA LEAUPEPETELE
First Applicant

PATRICIA LEAUPEPETELE
Second Applicant

JERRY LEAUPEPE
Third Applicant

ELIZABETH LEAUPEPE
Fourth Applicant

PAUL SO'OUA
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

LETIA RANGER
Twelfth Applicant

AND

WESLEY COLLEGE BOARD
OF TRUSTEES
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Meikle, counsel for Applicants
Richard Harrison, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 17 March 2020 from Applicants
3 April 2020 from Respondent

Determination: 26 June 2020

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The twelve applicants lodged a statement of problem with the Authority in November 2018 claiming payment from Wesley College Board of Trustees for sleepovers worked. The parties agreed the Authority would investigate and determine the liability issue in the first instance and allow them an opportunity to calculate and agree on any amounts of unpaid remuneration.

[2] In a determination dated 5 July 2019 I concluded that when each of the applicants were undertaking sleepovers they were to be regarded as having been at work or working for the purposes of the Minimum Wage Act 1983 (MWA).¹

[3] The parties were directed to mediation to attempt to agree on the amounts of unpaid remuneration to which the applicants may be entitled. Mediation was successful in some cases but not all. The third to seventh applicants have resolved matters with Wesley College and the remaining applicants have asked the Authority to determine the quantum of their claims.

[4] Accordingly, this determination deals with the question about quantum only.

[5] The parties have provided submissions and information setting out the calculation of the arrears of wages claims for Mr Leaupepetele, Ms Leaupepetele, Ms Pereira, Mr Cudby, Mrs Cudby, Ms Jonck and Ms Ranger. By consent of the parties this determination has been dealt with on the papers before the Authority.

¹ *Leaupepetele & 11 Ors v Wesley College Board of Trustees* [2019] NZERA 400.

[6] 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 but all information has been carefully considered.

Calculation of quantum

[7] Wesley College submitted the Authority must take into account the salary payments received by each of the applicants each week or fortnight and determine whether, based on the number of hours worked in each period, they have received at least the minimum wage for all hours worked.

[8] The applicants' submitted the method of calculation proposed by Wesley College is an averaging exercise and is not the correct approach. The applicants argue the calculation for the sleepovers should be based on the minimum rate of pay for each hour worked as sleepovers and payments received by way of salary should not be taken into account.

[9] Section 4 of the MWA provides that the prescribed minimum rate of pay shall be as determined by Order in Council. Each year Minimum Wage Orders (MWO) are issued. Clause 4 of those MWOs provide for minimum adult rates.

[10] The periods applicable to this determination range from 2009 to 2018. Until 2014 the prescribed rates of wages payable were set out as being by the hour, the day or by the week. From 26 June 2014 a new fortnightly category was included.

[11] The applicants' have relied on decisions from the Court of Appeal and Employment Court to support their calculations of the payments owed to them namely *Idea Services Limited v Dickson*, *Law v Board of Trustees of Woodford House* and *South Canterbury District Health Board v Sanderson*.² Below is a brief summary of each of these cases.

Idea Services

[12] Mr Dickson was engaged by Idea Services as a community service worker and was paid an hourly rate for each hour worked for his day time shifts. When Mr Dickson

² *Idea Services Limited v Dickson* [2009] ERNZ 116; *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25; *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127.

was rostered to work on sleepovers he was paid an allowance per sleepover and was paid an hourly rate when he was required to attend to clients during the sleepover. When he was not required to attend to clients during a sleepover he received only the allowance.

[13] Idea Services argued the Court of Appeal had to take into account the total payment for all work completed over the pay period of a fortnight including the allowance paid in recognition of the requirement on Mr Dickson to undertake sleepovers.

[14] The Court of Appeal did not agree with this approach which it described as averaging. Mr Dickson was paid by the hour and therefore the only applicable unit of time applicable was hourly and not weekly or fortnightly. The Court of Appeal held that if an averaging approach were adopted the outcome would depend heavily on the chosen pay period and such an approach was not referenced in the MWO.³

Woodford House

[15] In this case the plaintiffs were employed to look after boarding hostels. The Employment Court reviewed the terms of employment applying to each of the plaintiffs. In a number of cases the terms of employment specified the starting and finishing times for work based on split shifts. The start and finish times for the first part of the shift started at 6.30 am and ended at 8.30am. The second part of the shift started at 2.45 pm and ended at 11 pm. The method of remuneration was a mixture of salaried and hourly rate payments.

[16] The plaintiffs were rostered on overnight sleep over duties between the hours of 11 pm and 6.30 am. They were paid call out payments for work performed during sleepover rosters.

[17] Based on the terms set out in the applicable employment agreements the Court held that to the extent any sleepovers worked fell within the first 40 hours of an employees' working week, the employer was obliged to pay the employee at least the applicable minimum rate of pay. To the extent that any of the sleepover hours worked

³ *Idea Services Limited v Dickson* [2009] ERNZ 116 at [35].

exceeded 40 in any one week, the employer was obliged to pay the employees at least the hourly rate specified in the relevant MWO for such hours.⁴

[18] The Court was urged to assess compliance with the MWA over the period of a year because that is the period for which the salary was intended to cover. The Court rejected this argument because it required an averaging approach. The Court observed that the strong rejection of an averaging approach by the Court of Appeal in *Idea Services* applies universally, and is not restricted to the circumstances of that case.⁵

[19] The Court stated that the MWA and the relevant MWOs require the Court to gauge whether there was compliance by considering a combination of the working week of up to 40 hours and any hours worked in the same week beyond 40, to determine whether the remuneration received for those weekly periods equated with or exceeded the statutory minima.⁶

Canterbury District Health Board

[20] This case concerned call-back rosters for theatre staff including anaesthetic technicians (AT) outside of business hours. The on-call roster operated outside the normal working hours during which staff were rostered to work shifts.

[21] An argument by the DHB that the salary paid to each AT in each pay period should be offset against any amounts due under the MWA was rejected by the Court.

[22] After considering some examples provided by the DHB the Court held the DHB was averaging the amount received for weekday hours with on-call hours and that this was inappropriate. The Court held that the correct comparison for the on-call period should be between the MWO calculation for the on-call period and the amount actually received for on-call period.⁷

[23] The Court held that the DHB approach did not recognise that each AT was entitled to the minimum wage for each on-call hour, notwithstanding that they received more than the minimum wage for other hours worked.⁸

⁴ *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [210].

⁵ *Ibid* at [218] and [231].

⁶ *Above n 3* at [218].

⁷ *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127 at [165].

⁸ *Ibid* at [166].

[24] Wesley College has invited the Authority to distinguish *Idea Services* and *Woodford* for the following reasons:

- a) The Court of Appeal in *Dickson* was dealing with an hourly paid worker. *Idea Services* was asking the Court to consider the earnings received by the employee for periods exceeding those set out in the Minimum Wage Order.
- b) In *Woodford House* the Employment Court was asked to consider whether the minimum wage legislation applied to salaried employees. While finding that salaried employees come within the “all other categories” section of the relevant minimum wage order it did not set out how this classification is to be applied in practice as the Court was deciding the issue of liability and not quantum.

[25] I am satisfied all three cases referred to by the applicants are distinguishable on their facts. In all three cases the Courts were considering what the payment for sleepovers or on-call rosters would be in circumstances where the appellants had already completed their normal duties. The sleep-overs and on-call duties were additional to the normal duties. The decisions were informed by the contractual arrangements between the appellants and their employer and were fact specific.

Contractual arrangements for remuneration

[26] In this case each of the applicants were subject to written employment agreements which set their hours of work as a minimum of 40 hours each week with an expectation that employees would work such hours as reasonably necessary to achieve the performance standards established in the job description.

[27] The applicants were all engaged as House Parents. They were rostered over a number of consecutive days to have responsibility for a particular hostel. Each rostered shift started at 3.30 pm on one day and ended at 8.30 am the following day.

[28] The employment agreements provide for a salary to be paid to each applicant and states that the salary and other benefits are full compensation for the work required, and the work undertaken as a House Parent.

[29] Wesley College has submitted that the wording of the employment agreements does not limit the salaries paid to the applicants to hours of work that exclude sleepover

or additional hours. The wording is all encompassing, consistent with the generally accepted application of salaries and how they apply to salaried employees.

[30] I find the sleepovers were not in addition to rostered duties (as was the situation in the three cases set out earlier) but were part and parcel of the rostered duty. On that basis I have concluded that the salaries paid to each of the applicants covered all hours worked while working a rostered shift at the hostel which necessarily included the sleepover as part of the ordinary hours of work.

[31] The appropriate calculation in this case is to establish the number of hours worked each week or fortnight, calculate the applicable MWO rate for each hour worked and compare this with the actual salaries paid each week or fortnight. Where actual salaries paid are less than the amount payable under the applicable MWO rate, this amount should be paid.

[32] I am satisfied that the calculations provided by Wesley College are not “averaging” but reflect the correct approach to be taken in assessing the quantum owed to each applicant as arrears of wages.

Orders

[33] Wesley College Board of Trustees is ordered to pay to each of the remaining applicants the following sums within 28 days of the date of this determination:

- a) Saua Leaupepetele - \$10,559.59;
- b) Patricia Leaupepetele - \$2,596.66;
- c) Christina Pereira - \$284.51;
- d) Cheryl Cudby - \$13,691.81;
- e) Murray Cudby - \$13,338.20;
- f) Santa Jonck - \$59,232.95;
- g) Litea Ranger - \$21,040.10.

Interest

[34] The applicants seeks interest on the payments specified in paragraph [33] above. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[35] It is appropriate where a person has been deprived on the use of money to make an award for interest. I am satisfied it is appropriate to order interest be paid on the outstanding amounts and for interest to be calculated from the date of the first determination which identified Wesley College's liability for payment under the MWA.

[36] Wesley College Board of Trustees is ordered to calculate and pay interest within 28 days of the date of this determination on the sums specified in paragraph [33] above calculated from 5 July 2019 until payment is made.

[37] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.⁹

Costs

[38] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the applicants shall have 14 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.

[39] 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

⁹ www.justice.govt.nz/fines/civil-debt-interest-calculator.