

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 341
3062493

BETWEEN

YVONNE THOMPSON
Applicant

AND

CRAIGHEAD DIOCESAN
SCHOOL BOARD OF
PROPRIETORS
Respondent

Member of Authority: Andrew Dallas

Representatives: Linda Ryder and Jeff Goldstein, advocates for Applicant
Richard Harrison, counsel for Respondent

Investigation meeting: 22 and 23 September 2020 in Timaru

Submissions received: During the investigation meeting with further information
provided up to and including 14 October 2020

Determination: 3 August 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Craighead Diocesan School Board of Proprietors (Craighead) is an incorporated charitable trust which operates a boarding house for students of Craighead Diocesan School, a state-integrated “special character” school located in Timaru, South Canterbury.

[2] Yvonne Thompson was employed by Craighead in the salaried positions of “matron”, “boarding manager” and subsequently “director of boarding” between 2007 and 2018. During the employment various employment arrangements and agreements were in force between the parties.

[3] Ms Thompson says she is entitled to arrears of wages, together with any applicable holiday pay and Kiwisaver contributions for a significant period of her employment by Craighead for “sleepovers” and on-call hours. Ms Thompson also claims interest on any finding of arrears.

Issues

[4] The following issues were identified for investigation and determination:

- (i) Does Craighead owe Ms Thompson arrears of wages, Kiwisaver and holiday pay;
- (ii) If so, in what amount;
- (iii) Should interest be made payable on any arrears found owing to Ms Thompson; and
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority’s investigation

[5] Ms Thompson claims against Craighead, together with claims made by other employees, first came before the Authority in a statement of problem lodged by the Service and Food Workers Union (SFWU), as it was then, on 22 October 2014. Ms Thompson’s claim did not settle and the matter proceeded before the Authority by way of amended statements of problem and reply. While Craighead noted Ms Thompson’s original claim did not include assertions of fact about non-payment or underpayment for on-call hours, it did not object when this claim was advanced subsequently in the amended statement of problem and the matter has proceeded on that basis.

[6] During the Authority’s investigation meeting, I heard evidence from Yvonne Thompson and for Craighead, I heard evidence from principal, Lindy Graham, deputy boarding manager, Nicola Merritt, boarding supervisor, Vivianne Wood and bursar, Christine Sparrow.

[7] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I have not referred in this determination to all the evidence or other information provided to the Authority during the investigation. However, I record I have carefully considered all material placed before me. Further, while I have also not referred to all submissions advanced by the parties during the investigation meeting, I have also fully considered these.

[8] This determination is issued outside of the statutory three month timeframe provided by the Act. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist. I apologise to the parties for the delay in issuing this determination which arises out of the collateral consequences of the COVID-19 pandemic on the administration of the Authority.

What caused Ms Thompson’s employment relationship problem?

[9] Ms Thompson says her claims for unpaid wages against Craighead fall into two categories. First, Ms Thompson says she was unpaid for “sleepovers” at or about the boarding hostel for a significant period during her employment. Second, Ms Thompson says she is owed wages due to an extensive requirement to be “on call”.

[10] Craighead conceded it did owe Ms Thompson an underpayment of wages of \$1,183.98 when she was not paid in accordance with the Minimum Wage Order between October 2007 and June 2009 but otherwise vigorously resisted her claims.

Formal employment agreements

[11] During her employment by Craighead, Ms Thompson was party to several employment agreements. However, for an initial period at the commencement of her employment, Ms Thompson said there was no written agreement in place. During this time, Ms Thompson said she was told that her employment was governed by a letter of offer, the advertised job description and an information pack; which she says she never received.

[12] Ms Thompson understood her terms of employment were:

- (i) annual remuneration of \$50,000, payable fortnightly;
- (ii) remuneration based on a 40 hour working week (\$24.04 per hour) to be undertaken during term time only;
- (iii) sleepovers in the boarding house from Sunday to Friday;
- (iv) a requirement to be “on call” should the need arise; and
- (v) ‘family’ accommodation provided at “Salmond House”, a property located on the school’s grounds (with \$75 per week payable by Ms Thompson to help defray electricity costs).

[13] There appeared to be two letters of offers relating to Ms Thompson. Both were issued by Wayne Pahl. The first letter dated 1 September 2007, where Mr Pahl's describes himself as "Acting Principal", sets out terms and conditions consistent with the above. The second dated 5 September 2007, where Mr Pahl's describes himself as "Deputy Principal", sets out, in slightly less formal language than the first letter, substantially similar terms and conditions. However, the letter also contains the following curious passage:

[t]he present incumbent of the position works in the Boarding House from 3-11pm Monday to Thursday, sleepovers in the Boarding House Sunday to Friday inclusive with more daytime hours on a Friday. Of course, as this is a salaried position of a managerial nature, there are other expectations of meetings at various times and the need to be available, on call, should a need arise. It is expected that you would cover these times as well especially as you will be taking up the position during a school term but some negotiation is possible (emphasis added).

[14] As things happened, Ms Thompson wrote to Mr Pahl (in his capacity as Acting Principal) on 4 September 2007 accepting the position. In addition, on 16 November 2007 Ms Thompson signed the acknowledgment attached to the letter dated 1 September 2007, the delay not being material.

[15] Ms Thompson said the absence of a written employment agreement meant it was unclear to whom she reported, what the limits of her authority were in terms of pastoral care at the boarding house and what her other employment entitlements were including leave and payments for overtime, on-call and sleepovers.

[16] In January 2009, Ms Thompson received a four percent remuneration increase. In a letter to Ms Thompson dated 6 April 2009, albeit in an unrelated matter, Craighead described her remuneration as an "annual salary of \$52,000 plus accommodation".

[17] In May 2009, Ms Thompson was required to move out of Salmond House. In place of this provided accommodation, Craighead proposed to pay Ms Thompson a taxable accommodation allowance of \$205 a week. A telephone reimbursing allowance was also to be paid on an "actual" basis up to a value of \$3500 a year. Following discussions, a document described as an "agreement to vary the boarding house manager's employment agreement" was executed by Ms Thompson and Craighead. This document also provided for accommodation in the boarding house "when [Ms Thompson] is required to remain on-call and on the school premises during a rostered over night duty".

[18] As a result of this variation, Ms Thompson's salary was summarised for Craighead's board of proprietors as follows:

- (i) base salary: \$52,000
- (ii) accommodation allowance (\$205 a week): \$10,660
- (iii) tax on the above allowance (\$108.94 a week paid by the Board): \$5,664.88
- (iv) phone expenses (\$52.19 a month): \$626.28
- (v) electricity and heating: \$3,600

Total: \$72,551.16

[19] However, Craighead subsequently asserted, primarily through the evidence of Ms Wood, that although the payment of the accommodation allowance (and the taxable component thereof) constituted a variation to her contract of employment, her annual salary was actually \$65,325 paid in equal fortnightly payments of \$2,633.40.

[20] In June 2009, Craighead commenced paying Ms Thompson a "daily rate" rather than an hourly rate. Ms Thompson said this action was unilateral. On 23 June 2009, Ms Sparrow issued Ms Thompson a letter dated 23 June 2009 confirming the change and advised that the reason for it was to:

... accurately reflect the fact that you are on annual salary and not an hourly rate. Your annual salary of \$52,000 divided by 365 gives you a daily rate of \$142.4658 as shown in your advice and of course you will be paid 14 days each fortnight.

You are now paid the accommodation allowance of \$205 per week and this is shown for the 2 weeks on your advice. As agreed the Board is covering the tax on this allowance.

[21] Ms Thompson said this daily rate, and any subsequent adjustments, was paid to her regardless of the number of hours worked by her on any given day. Ms Thompson said she never accepted being paid a salary and claimed she was paid an hourly rate and then subsequently a daily rate. Ms Thompson said that as a result of the change, her gross pay reduced from \$2,000 a fortnight to \$1,994.52 but she was still only required to work during term time. Ms Thompson's daily rate was increased on 7 May 2013 to \$153.07 then on 12 August 2014 it was further increased to \$155.37 and on 9 February 2016 it was increased to \$209.86.

[22] Craighead's essential view was that Ms Thompson was fully remunerated, other than the underpayment of wages of \$1,183.98 referred to in paragraph [10] above, by way of salary for all work performed. Craighead also said Ms Thompson continued to receive her salary outside term time and her annual leave entitlements. It suggested this was approximately 14 weeks a year.

[23] Craighead said Ms Thompson was not required to complete timesheets unlike other employees in the boarding house being remunerated on an hourly rate basis and only being paid during term time. For the same reason, Craighead would also say it was not necessary for Ms Thompson to indicate, as she was, that she was on-call in the published boarding house roster. Craighead noted Ms Thompson did commence completing timesheets in the latter period of her employment. Craighead said Ms Thompson's salary was expressed as an hourly rate and subsequently as a daily rate for "ease of tracking" and to enable the calculation of leave. It said it explained this to Ms Thompson including when the change to the daily rate was made in 2009.

[24] In 2013, after a period of negotiation, Craighead and Ms Thompson entered into a new employment agreement. The agreement reflected the fundamentals of the earlier accommodation arrangement between the parties (clause 6). The agreement also provided that Ms Thompson's "normal working week [was] Sunday to Friday with 5 nights of sleepovers" (the hours of which were also set out), an requirement to perform additional weekend "on call" work on occasion and manage the opening and closing of the boarding house at the start and finish of each term (schedule 2). In schedule four of the agreement, Ms Thompson's remuneration was recorded as being \$52,000 in 2009, with retrospective increases for 2010, 2011 and 2012, and a salary of \$55,872 with effect from 20 March 2013; in line with Staff Grade C, Step 9 of the Support Staff in Schools Collective Agreement.

[25] Craighead then commenced a restructure of its boarding operation in October 2014. Ms Graham said this restructure was driven in part in response to the sleepover employment cases involving Woodford House and Iona schools. Ms Thompson was offered the "new" position of director of boarding, which Ms Graham said was significantly different from the role Ms Thompson held of boarding house manager.

[26] Ms Thompson accepted the role of director of boarding on 20 December 2015 and she commenced in the role on 25 January 2016. A new employment agreement was signed. Ms Thompson's salary was set at \$76,600 a year. Ms Thompson was required to be "on call" on Monday and Tuesday (during the day) and every second weekend. She was also required to perform one sleepover on a Sunday night.

[27] The employment agreement contained the following provision:

2.3 The remuneration set out in this agreement shall cover all work performed by the Employee including all hours worked; whether on duty, on call, sleepover or undertaking additional hours in order to meet the requirements of the position.

[28] Significantly, the agreement did not provide for the provision of accommodation beyond that necessary for Ms Thompson to perform her sleepover duties. In other words, the agreement extinguished Ms Thompson's previous entitlements to an accommodation allowance and associated payments.

[29] Ms Thompson resigned the position of director of boarding for Craighead in October 2018.

Sleepover claim

[30] Ms Thompson's sleepover claim is in one sense, relatively straightforward. Ms Thompson says she was not paid separately for sleepover hours performed. Craighead claims the payment for sleepovers was incorporated in the annual salary.

[31] Ms Thompson said between October 2008 and April 2015, she worked 42 ordinary hours a week (84 ordinary hours a fortnight) and 40 sleepover hours a week (80 sleepover hours a fortnight). From April 2015, Ms Thompson's sleepover hours were reduced to two nights a week (Thursday and Sunday), and subsequently to one night a week (Sunday) as a result of the boarding operation restructure and her appointment as director of boarding. Ms Thompson said her total hours (ordinary hours, on call hours and sleepover hours) between October 2008 and April 2015 were 130 hours a week or 260 hours a fortnight.

[32] Ms Thompson said she was not paid for sleepover hours between October 2018 and December 2015. She contrasted this with other staff who also undertook sleepover hours but were evidently paid an allowance. Ms Thompson said she was not paid this allowance, given time off or paid in lieu.

[33] Ms Thompson said she raised the issue of non-payment for sleepovers on a number of occasions. For example, during the renegotiation of her employment agreement in 2013, having raised the issue, Ms Thompson was explicitly advised that Craighead believed it was not required to remunerate her for sleepovers via an allowance.

[34] Craighead acknowledged and accepted that Ms Thompson did perform sleepover hours as part of her role, evolving as it did. However, it said that Ms Thompson, as a managerial employee, falls into the “all other cases” category of the applicable Minimum Wages Order(s), Ms Thompson was paid at or above the adult minimum wage for all hours worked, including sleepover hours, except, as noted above, during a period between October 2007 and June 2009. Craighead says it owes Ms Thompson arrears of wages of \$1,183.98 for this period. This figure is based on an analysis undertaken by Ms Sparrow deploying a methodology based on the “all other cases” category.

[35] Ms Thompson’s claim against Craighead for unpaid sleepover hours is \$139,778. This figure being arrived at by calculating the minimum wage for every hour Ms Thompson worked undertaking sleepovers.

On-call claim

[36] Ms Thompson said the basis of her on-call claim is the letter from Mr Pahl dated 5 September 2007 that stated her “need to be available, on call, should a need arise”. Ms Thompson said she took her responsibilities to be on-call very seriously.

[37] Ms Thompson said she was on-call from “6pm, Friday until 6pm, Sunday during the period 28 August 2008 until May 2015”. She said was given an instruction to be available to respond to any call-out within 20 minutes by then principal, Francesca Black when she commenced at Craighead. Ms Thompson said this was in addition to her sleepover responsibilities and “significantly restricted [her] freedom”.

[38] Ms Thompson said Craighead’s entire “senior management team knew [she] was on-call, in town and available every weekend and relied on me to deal with any out of hours incidents that occurred in the boarding house”.

[39] Ms Thompson identified a number of personal restrictions which were necessary to fulfil her asserted on-call obligations. Ms Thompson said she could not attend the cinema with her mobile phone switched off, socialise properly, drink alcohol, join a club, pursue many hobbies, share weekends away with friends, be out of mobile phone coverage or go away for weekends.

[40] Ms Thompson said that while on-call she dealt with multiple weekend problems including: homesickness, staffing issues, difficult parents, emergency hospital visits, bullying and self-harm incidents. Ms Thompson provided specific instances where she was called in: the Salmond House fire in 2009, the Canterbury Earthquakes in 2010 and as a result of major flooding at the boarding house in March 2015. Other sensitive, private and personal examples specific to boarders were also provided.

[41] Ms Thompson said the difficulties she faced being on call were exacerbated by having to move out of Salmond House – rather, than walking 200 metres to the Boarding House, she was required to keep a second car and “drive kilometres to the school”.

[42] Ms Thompson said because of the different qualifications, experience and abilities of boarding supervisors present in the boarding house during weekends, she kept in regular contact with them. Evidence was produced of a large number of phone calls from Ms Thompson’s mobile phone and home phone to the boarding house’s reception office. Ms Thompson said she also regularly attended the boarding house during weekends and Saturday nights, which were “particularly fragile” with only one boarding supervisor responsible for twenty boarders.

[43] Ms Thompson said she was never paid for being on-call in this way. She was never paid for being called into the boarding house nor provided with time off in lieu of such payment. Ms Thompson’s claim against Craighead for unpaid on-call hours between 28 May 2013 and 28 October 2018 is \$43,910.16.¹ This figure being arrived at by calculating the minimum wage for every hour Ms Thompson was on-call during this period.

[44] Ms Thompson’s evidence about being on-call was significantly countered by evidence given on behalf of Craighead.

Ms Sparrow

[45] During the discussions in 2009 about the new accommodation arrangement, referred to above, Craighead said Ms Thompson advanced an argument that it was necessary she and her family were housed on school grounds because she was on duty “24/7”. An investigation undertaken by then principal, Frances Black found no evidence to support this contention. Ms Black found that while Ms Thompson may have been “on-call”

¹ Based on the claim being raised for the first time in an amended statement of problem lodged in the Authority on 28 May 2019

on alternating weekends, she was “called-out” approximately twice over an 18 month period to 20 May 2009. Ms Black’s investigation did confirm however that Ms Thompson was performing “sleepovers” as part of her role.

[46] In response, Ms Thompson said while she may have been aware that Ms Black was investigating her workload, she never disputed the resulting report because she never saw it and it was never discussed with her.

[47] Ms Sparrow gave evidence to the effect that Ms Thompson did not raise on-call payments during agreement negotiations nor request of her, as bursar, to arrange such payments be made to her. Ms Sparrow also said all “managerial” employees were required to be “on-call” various times, including in relation to the boarding house, and also attend promotional events and the like. She said the issues raised by Ms Thompson about the fire at Salmond House and the Canterbury Earthquakes were dealt with by all managerial employees and not just Ms Thompson.

[48] Ms Sparrow said that she reviewed the outgoing phone records for the boarding house. She said these did not suggest a large number of phone calls and this was consistent with Ms Black’s earlier investigation. Ms Sparrow also took issue with Ms Thompson’s assessment of the quality of the boarding supervisors employed by Craighead, their level of responsibility and the availability of medical staff to deal with issues.

Ms Wood

[49] Ms Wood is employed by Craighead as boarding supervisor since 2012. Ms Wood undertakes sleepovers during weekends. Ms Wood said student numbers drop significantly during weekends as many boarders return home. By Saturday night the number of boarders is between 15 and 20 and this means the number of boarding supervisors is reduced from two to one on those nights.

[50] Ms Wood said that as boarding supervisor she has responsibility for the care of the boarders including dealing with those who are unsettled or unwell. Ms Wood said that she was seldom disturbed during the night and estimated that “99% of the time there are no disturbances that would require the assistance of managers”. In the event of a boarder becomes unwell, boarding supervisors contact “Healthline” and Ms Merritt, Craighead’s medical officer.

[51] Ms Wood said she was “surprised” by Ms Thompson’s claims about the need for her to be on-call and that her evidence in this regard is “not at all accurate”. Ms Wood said that Ms Thompson asked her and other boarding supervisors to ring her and advise her of “any issue”. Ms Wood said this was at “her insistence” and was “frankly unnecessary”. Ms Wood said she seldom ever rang Ms Thompson as there was no requirement to do so when she was performing sleepover duties. Ms Wood also said Ms Thompson would ring the boarding house at her own initiative to “check up on” boarding supervisors and ask whether certain things were being done.

[52] Ms Wood said the boarding house keeps a diary, which she says is an accurate record of any incidents, and that anything of the nature described by Ms Thompson would have been recorded there.

Ms Merritt

[53] Ms Merritt gave evidence in her capacity as deputy boarding manager and school medical officer. Ms Merritt has been employed by Craighead since 1993. Ms Merritt said the boarding house kept two diaries. One for managing boarder appointments and the other for recording any issues with the boarders.

[54] Ms Merritt said she could locate diaries in the second category for the years 2008 to 2018. However, she could not locate the diary for 2017. Ms Merritt said a review of the diaries disclosed seven occasions when Ms Thompson was contacted and/or attended the boarding house. Ms Merritt said the limited number of times Ms Thompson was called upon during the periods covered by the diaries was consistent with her own experience: there were not many issues that occurred overnight and those that did, the boarding supervisor and medical staff would deal with them without the need to call a manager.

Ms Graham

[55] Ms Graham said Ms Thompson reported to her as Craighead’s principal in her roles as boarding manager and subsequently as director of boarding. She said Ms Thompson was responsible for management of the boarding house including the boarding supervisors. However, Ms Graham, in rejecting Ms Thompson’s contention to the contrary, said she was responsible for the welfare and safety of boarders and overall in charge of the boarding house.

[56] Ms Graham said some of her responsibilities in relation to the boarding house such as administration, operation and supervision within the boarding house, were delegated to the director of boarding and the position description reflected this; as it did for disestablished boarding manager position. Ms Graham said there was never any uncertainty about the scope of Ms Thompson's position and she met with Ms Thompson on a regular basis.

[57] Ms Graham said she resided in the school grounds and was "on call" should the need arise outside of ordinary hours and at weekends including in relation to the boarding house. Ms Graham said this was the same for all senior managers and responsibility did not solely rest with the director of boarding. Ms Graham said all senior managers were paid a salary and this compensated them for all duties and responsibilities required to be performed.

[58] Ms Graham said Ms Thompson's recording of herself being "on call" in the boarding house roster was not a requirement for the operation of the boarding house. Ms Graham said boarding supervisors were very capable of dealing with any issues arising in the boarding house and that if necessary she, as she lived on site, or another senior manager could assist; not just Ms Thompson.

[59] Ms Thompson provided extensive rebuttal to the evidence of Ms Sparrow, Ms Wood, Ms Graham and Ms Merritt in her written reply evidence and orally during the investigation meeting. I do not record it all here but I do record, for completeness, that I have fully considered it.

The Authority's view of Ms Thompson's employment relationship problem

Ms Thompson's sleepover claim

[60] There is no dispute between the parties that Ms Thompson was working sleepover hours while employed by Craighead. There is also no dispute, indeed it is now beyond question, that undertaking sleepovers is regarded as work for the purposes of the Minimum Wage Act (MW Act) and which must be paid in accordance with the MWO.²

² *Idea Services Limited v Dickson* [2011] NZCA 14 (CA); *Law v Board of Trustees of Woodhouse* [2014] NZEmpC 25

[61] What is in dispute, is whether Ms Thompson was fully remunerated for sleepover hours performed by virtue of her salary or wholly unremunerated for those hours. There is, however, a third possibility – which is, when assessing whether Ms Thompson was being paid in accordance with relevant MWOs - has Craighead adopted an appropriate method of calculation? I shall return to this below.

[62] An early difficulty in seeking to understand whether Ms Thompson has been paid correctly is that her hours of work were not properly specified in contractual terms until 2013. Craighead's early efforts at defining hours were somewhat imprecise and confusing. Ms Thompson is right to contend that both her job and the expectations placed upon her were ill-defined during this period.

[63] Ms Thompson's primary position in respect of her hours is that she was paid for 40 hours a week and was not remunerated for additional sleepover hours. Ms Thompson said she should have been paid for sleepover hours at the rate of the minimum wage. Ms Thompson said this entitlement was not dependent on the categorisation of the payments of minimum wages under s 4 of the MWO.

[64] In the alternative, Ms Thompson says minimum wage assessment under the MW Act is based on the unit of time. So, s 4(a) of the MWO (hourly rate of pay) is applicable for the period 22 October 2008 until 9 June 2009 and s 4(b) of the MWO being the daily rate of pay and payment of the minimum hourly wage for each hour exceeding 8 hours worked in a day is applicable for the period 10 June 2009 until 23 October 2018. In support of this argument, Ms Thompson relied on the Court's decision in *South Canterbury District Health Board v Sanderson*³ where it was found that salaried employees are effectively paid by the hour.⁴

[65] Ms Thompson says the situation is compounded by the way Craighead has assessed its liability for unpaid wages by incorporating her accommodation allowance into her salary, which until her new employment agreement signed in December 2015 was a standalone component of her remuneration. Ms Thompson said only **base** salary should have been used for this calculation because accommodation was initially provided directly by Craighead and then subsequently through an allowance. Ms Thompson said the

³ [2017] NZEmpC 127

⁴ At [167]

accommodation and subsequently the accommodation allowance, was a benefit to encourage her to take up the role and presumably remain.

[66] Ms Thompson asserted the move from provided accommodation to the payment of accommodation allowance (and associated other payments) was set out in a variation to her employment agreement and the agreement remained in "...force until renegotiated or terminated pursuant to any provision of the original Employment Agreement". Ms Thompson said such a termination never happened including when she accepted the position of director of boarding. Consequently she argued the accommodation agreement remained in force until the end of her employment.

[67] Ms Thompson also noted that the value of her accommodation allowance did not increase in line with adjustments to her base salary and she said this was because it was not considered part of her salary. Ms Thompson said it was clear her base salary compensated her for the hours she worked and the accommodation allowance compensated her for losing the on-site accommodation in Salmond House.

[68] Ms Thompson said later representations of Craighead that her salary included her accommodation allowance – which also disadvantaged her pay progression under the Support Staff in Schools Collective Agreement – was an erroneous position and Ms Graham did not respond to a letter of 14 September 2014 rejecting Ms Thompson's assertion of this.

[69] Ms Thompson made a further significant point. She said it was impermissible for Craighead to include the value of board or lodgings for the purposes of calculating ordinary weekly pay or average daily pay under the Holidays Act 2003 and therefore it follows that it is impermissible to use the same approach to calculate minimum wage entitlements.

[70] Craighead says that as Ms Thompson was paid a salary inclusive of all hours worked, her entitlement to be paid at least the minimum wage came within the ambit of the applicable MWOs "all other cases" categories, as amended from 2014. Craighead said it was "self-evident" because her fortnightly remuneration did not reflect the actual hours worked by her and because "realistically there is no other category that could work".

[71] Craighead made a number of further points it claimed were relevant, that:

- (i) the express provisions of Ms Thompson's employment were "clear and unambiguous";
- (ii) Ms Thompson received the same remuneration on a fortnightly basis irrespective of the actual hours worked in the same period;
- (iii) pay records are not contractual documents and were explained through the evidence as a means of tracking and accruing leave;
- (iv) Ms Thompson was not required to complete timesheets;
- (v) Ms Thompson was well remunerated and there were "swings and roundabouts" including generous leave arrangements.

[72] Craighead said if it was accepted Ms Thompson came within the ambit of the MWOs "all other cases" category, then an assessment needed to be made on whether her fortnightly remuneration included her sleepover hours. Craighead said this was a matter of contractual interpretation. Craighead contended that a reasonable interpretation of the statement made by Mr Pahl in his letter of 5 September 2007 to Ms Thompson, (reproduced at paragraph [13] above) was that the stated salary covered the work to be performed (including sleepovers). Craighead said that it was never stated that the role was "a 40 hour per week job" and the expectation was that responsibilities described in the letter of offer would be met by Ms Thompson arranging her own hours/days of work.

[73] Craighead said that the 2009 variation saw a significant remuneration increase by way of the additional accommodation allowance that formed part of the Ms Thompson's taxable earnings and must be the remuneration covering all the hours worked to fulfil the requirements of the position.

[74] Craighead said the 2013 employment agreement did not change the fundamentals of the agreement and they referred to the insertion of the following provision:

- 4.1 This is a full time permanent salaried position, with duties and responsibilities during term time only. The employee's normal term time hours of work are contained in Schedule 3 of this contract.

[75] Craighead said as a result of this agreement, Ms Thompson “continued to be paid in practice the total remuneration as set out in the agreed variation – however the parties agreed to tag the base salary to the salaried staff grade C in the state support staff agreement. This presumably provided cost-of-living increases for [Ms Thompson] to base salary”.

[76] In respect of the 2016 employment agreement, Craighead referred to clause 2.3 as being relevant which provided:

2.3 The remuneration set out in this agreement shall cover all work performed by the Employee including all hours worked, whether on duty, on call, sleepover or undertaking additional hours to meet the requirements of the position.

[77] Craighead’s overarching view is that Ms Thompson was paid at or above the adult minimum wage for all hours worked including sleepover hours, except during the period between October 2007 and June 2009.

Is Ms Thompson owed unpaid wages for “sleepovers”?

[78] I find there is a strong likelihood Ms Thompson is owed sleepover wages. The reasons for this finding are as follows.

[79] I do not accept Craighead’s assertion that the express provisions of Ms Thompson’s employment relationship were “clear and unambiguous”. I do, however, accept Craighead’s submission that Ms Thompson’s employment agreements became more “comprehensive” or clearer over time. Unfortunately, until 2013 there existed a particularly confused, ambiguous and unclear picture and Craighead must accept responsibility for creating this state of affairs.

[80] Further, I do not accept Craighead’s contention that a reasonable interpretation of Mr Pahl’s letter of 5 September 2007 is that the expressed salary of \$50,000 covered all the work to be performed including sleepovers. Mr Pahl’s letter refers to sleepovers within the context of identifying the work activities of the “present incumbent”. He also states that accommodation and associated services are provided and then links the salaried nature of the position to an expectation of attending “meetings at various times” and the need to be “available, on call, should the need arise”. The requirement to perform sleepovers is not specifically alluded to in this context.

[81] Mr Pahl's earlier letter of 1 September 2007 does not really assist Craighead either. The letter states "your hours of work and holiday entitlement is identified in the advertised job description". However, a review of the advertised job description does not reference "hours of work" or "holiday entitlements". The advertised job description refers to an "information pack" being available from the school office but Ms Thompson said she did not receive this.

[82] Craighead's contention that Mr Pahl never stated that the role was "a 40 hour per week job" is clear on a reading of his correspondence but equally there is no reference to any hours of work other than the ill-defined, ambiguous hours of the "present incumbent". While Craighead asserts that their expectation was that duties described in the letter of offer would be performed by Ms Thompson based on a roster set by herself, it is far from clear how or whether this was ever communicated to her.

[83] Notwithstanding that Craighead contends the role was not "a 40 hour per week job", Ms Thompson was remunerated in hour unit of times (paid fortnightly) during the period October 2007 until June 2009. An undisputed fact is that Ms Thompson was paid for 80 hours a fortnight regardless of the number of hours she worked. Ms Thompson said she never accepted that she was paid a salary by Craighead. She said she was paid an hourly rate and subsequently a daily rate.

[84] According to Ms Sparrow's evidence and her pay advices, Ms Thompson was paid fortnightly for 80 ordinary hours work until June 2009, when Craighead commenced paying Ms Thompson a "daily rate". Ms Thompson said in her evidence, which I accept, that this was a unilateral action by Craighead. The confusing written explanation given to Ms Thompson at the time by Ms Sparrow was that it was designed to ensure her pay accurately reflected the fact she was paid an annual salary and not an hourly rate. Subsequently, this explanation evolved in Ms Sparrow's evidence to become about ease of "tracking" and the calculation of leave.

[85] A review of Ms Thompson's payslips from this time discloses that for the pay period ending 9 June 2008, she was paid for 80 hours work x \$25.00 an hour = \$2000 gross. As a result of unilateral change by Craighead, for the pay period ending 22 June 2008, Ms Thompson was paid for 14 days work x \$142.4658 (\$52,000 divided by 365 days) = \$1994.52 gross (and an underpayment of \$5.48 gross a fortnight)

[86] I do not accept Craighead's submission that it is "self-evident" Ms Thompson's situation falls within the ambit of the MWOs "all other cases" category. Ms Thompson was first paid by the hour and then by a daily rate for the entirety of her employment. If Craighead wanted clarity Ms Thompson was being paid a salary, it should have adopted the calculation of either \$1,000 gross a week x 52 pay periods = \$52,000 or \$2,000 gross a fortnight x 26 pay periods = \$52,000, but it did neither. Instead, it moved to a daily rate, which, as observed above, also had the collateral effect of systematically underpaying Ms Thompson.

[87] Ms Thompson said Craighead's compliance with the applicable MWOs should be undertaken with reference to hourly (s 4(a)) and daily (s 4(b)) methodologies. There is considerable force in this submission. Indeed, *Sanderson* is good authority for the proposition that it is not appropriate to apply the "all other cases" category where it is clear that an employee is effectively paid by the hour.⁵ There is nothing to suggest in principle this approach should not apply in circumstances where an employee is also clearly paid by the day (a daily rate).

[88] In any event, as the Court of Appeal observed in *Idea Services*, the Executive branch could not have intended there to be a rigid demarcation between the categories listed in s 4 of the MWOs; the court noting that the essential feature of the scheme being that an employee, no matter how they are paid, must receive the minimum wage for each hour worked.⁶

[89] As I am not convinced on the material before the Authority that Ms Thompson has actually been paid the minimum wage for each sleepover hour of work she performed, Craighead is directed to undertake further calculations to demonstrate its compliance with the applicable MWOs. However, before turning to these calculations, it is necessary to direct Craighead as to the correct salary rate to be applied to the calculations.

[90] Ms Thompson objected to Craighead incorporating her accommodation allowances and aligned or ancillary payments into her salary for the purposes of demonstrating MWO compliance. Craighead said the accommodation allowance formed part of Ms Thompson's taxable earnings and was therefore remuneration for the work performed by Ms Thompson to fulfil the requirements of her position. I do not agree with Craighead in relation to this.

⁵ *Sanderson* para [167]

⁶ *Idea Services* para [31]

As stated above, when Ms Thompson commenced her employment with Craighead she was provided accommodation on-site. Ms Thompson was required to pay \$75 a week to help defray the costs of electricity. On the evidence, no other value was ascribed to the accommodation and no further payments/deductions were required to be made by Ms Thompson in respect of it.

[91] In June 2009, Ms Thompson was required to vacate her accommodation in Salmond House and an accommodation agreement, and what was described as a variation to Ms Thompson's employment agreement, was entered into by the parties. It is clear on the face of this agreement that it superseded any accommodation arrangements in place before it was entered into. Clause 1.1 of the agreement stated: [t]his agreement covers the provisions of accommodation, electricity and phone expenses only and all other terms in the original employment agreement remain unchanged".

[92] The accommodation negotiations occurred at the same time as Craighead was moving Ms Thompson to a daily rate of pay. In her letter confirming this change, Ms Sparrow also noted: "[y]ou are now paid the accommodation allowance of \$205 per week and this is shown for the 2 weeks on your advice. As agreed the Board is covering the tax on this allowance".

[93] Contrary to the submission advanced by Craighead that the 2009 agreement resulted in a "significant remuneration increase" for Ms Thompson, the reality was quite different. The accommodation arrangements set out in the agreement were clearly and unambiguously a replacement for on-site accommodation provided by Craighead. Ms Thompson's pay advices reflect this. For the entire period 22 June 2009 to 26 January 2016 the pay advices clearly and separately identify both the accommodation allowance and tax payable by Craighead on the accommodation allowance from Ms Thompson's daily rate of pay. Ms Thompson also made the point, which I accept, that the separation of her daily rate of pay and accommodation payments was reinforced by the fact that when her daily rate of pay increased through negotiation or operation of her employment agreement, her accommodation payments remained static.

[94] I do not agree, however, with Ms Thompson that the 2009 variation agreement remained in force until the end of her employment, this is not an accurate legal portrayal of the situation. Ms Thompson's 2013 employment agreement contained a provision (cl 1.3) which provided: "this agreement supersedes all previous agreements". This is a clear and

unambiguous statement. I find the 2009 variation agreement was extinguished by operation of this provision. That being said, the accommodation arrangements reached in the 2009 variation agreement were expressly incorporated into Ms Thompson's 2013 agreement and these arrangements continue to stand apart from her published salary of \$55,872 (schedule 4). I note for completeness the word "base" is not used in concert with the word "salary" in the 2013 agreement.

[95] Ms Thompson's analogous submission that as it is impermissible for Craighead to subsume the value of her accommodation payments into the calculations for the purposes of the Holiday Act 2003 it follows that it should be equally impermissible to take the same approach when calculating minimum wages, is well made and I accept it. I find Craighead cannot setoff Ms Thompson's accommodation payments or otherwise seek to dilute its liability under the applicable MWOs through such an arithmetical sleight of hand. The accommodation payments made by Craighead to Ms Thompson are a distinct contractual arrangement set apart from her wages/salary.

[96] Consequently, for the foregoing reasons Craighead is directed to calculate its compliance with the applicable MWO in respect of Ms Thompson's sleepover hours using Ms Thompson's base salary – that is, without reference to the cash value of the lodgings (assuming such was ever ascertained) or accommodation allowance and aligned or ancillary payments. The relevant time periods and the applicable MWO methodologies to be applied are:

- (i) s 4(a) of the MWO to the period 22 October 2008 to 9 June 2009;
- (ii) s 4(b) of the MWO to the period 10 June 2009 to 24 January 2016;
- (iii) s 4(c) of the MWO to the period 22 October 2008 to 25 May 2014; and
- (iv) s 4(d) of the MWO to the 26 May 2014 to 24 January 2016.

[97] The situation is more straightforward for the period 25 January 2016 onwards because Ms Thompson's accommodation allowance, and associated payments were subsumed into her salary when she accepted the position of director of boarding. In her 2016 employment agreement, Ms Thompson's salary is unambiguously stated to be \$76,600 (Schedule 3) and, the only references to accommodation relates to the free provision of accommodation and meals during overnight stays (clause 4).

[98] Due to the significant increase in Ms Thompson's salary upon appointment to the position and given she was only required to perform one sleepover a week in the role, Craighead's compliance with the applicable MWO may well be an academic exercise. However, nonetheless it is exercise that ought to be undertaken.

[99] Craighead is directed to calculate its compliance with the applicable MWO in respect of Ms Thompson's sleepover hours using Ms Thompson's salary of \$76,600. The relevant time periods and the applicable MWO methodologies to be applied are: s 4(b), (c) and (d) of the applicable MWOs to the period 25 January 2016 to 23 October 2018.

[100] Once calculations have been lodged and served, and in order to ensure that the parties are fully heard on the issue, the parties will be invited to provide comment on the calculations they believe are most accurate and appropriate. This should not be a complicated or protracted exercise and may be done with reference to existing evidence and/or submissions.

Ms Thompson's "on call" duties claim

[101] As can be expected in such cases, Ms Thompson relied heavily on her own evidence in support of her claim for unpaid wages for on-call duties. However, this was resisted and contradicted by evidence provided on behalf of Craighead.

[102] Ms Thompson said the applicable legal test was set out by Court of Appeal in *Idea Services* and by the court in *Sanderson*. The three elements of the test are: the constraints placed on the freedom of the employee, the nature and extent of the responsibilities and the benefit to the employer of having the employee perform the role.

[103] Ms Thompson said that her evidence, when analysed correctly, with reference to this test would confirm that she was indeed at work when on call. Ms Thompson said she provided evidence of the constraints placed upon her by being on call and the requirement for her to respond within 20 minutes. Ms Thompson also said that acceptance of external accommodation was a significant change in her terms of employment and reflected the constraints of the role.

[104] Ms Thompson said the nature and extent of the responsibilities placed on her by Craighead were significant. In summary, Ms Thompson said she remained responsible for the well-being of a significant group of vulnerable young people living in a boarding house when on call. In addition, Ms Thompson said she was responsible for supporting the staff who worked in the boarding house while she was on call.

[105] Ms Thompson said the benefits to Craighead of having her be on call were significant, including the ability for her to be available at short notice. Ms Thompson contended that having her on-call meant Craighead could meet and maintain its statutory obligations associated with operating a boarding house. Ms Thompson also said the requirement to be on-call carried over from her predecessor and therefore Craighead must have received a benefit from it.

[106] Ultimately, Ms Thompson said that her circumstances met the test set out in *Idea Services* and she should, therefore, be regarded as having undertaken work the purposes of s 6 of the MW Act through being on-call.

[107] Craighead referred to various decisions dealing with the evolving issue of the treatment of on-call duties as work. This included *Sanderson*, *Idea Services* and the Employment Appeals Tribunal (UK) decision in *Truslove v Scottish Ambulance Service*.⁷ Craighead then identified the important issue of whether Ms Thompson was “engaged to be available” or “available to be engaged” in relation to on-call duties.

[108] Craighead said that Ms Thompson, as manager, set the roster and was available to be called outside her rostered hours. Craighead says this was entirely consistent with being a manager who was available to be contacted by staff as required. Craighead also contended that Ms Thompson was, in effect, the architect of many of the on-call dynamics requiring as she did staff to notify her of developments, checking to see that things were being done or attending the boarding house. Craighead said none of these activities were required or directed by it.

[109] Craighead said this was significantly different from the situation in *Truslove* and *Sanderson* where the employees in question were frontline medical staff who were on-call to attend emergencies or the situation in *Law* and *Idea Services* where the actual care and supervision of students was the responsibility of the rostered staff. Additionally the

⁷ (2014) ICR 1232 (EAT)

situations identified in these cases required employees to be the “first port of call” either onsite or in employer provided accommodation close by, rather than holding managerial positions, as in the case of Ms Thompson, to which such employees reported.

[110] As Craighead said Ms Thompson’s employment agreements became more “comprehensive” over time including by referencing hours of work and identifying sleepover patterns. Craighead said this did not require Ms Thompson to be on-site, such as in a sleepover situation, nor be located in or at any other place. Ms Thompson, it was said, could exercise free choice and was free from the direction of her employer.

[111] Craighead rejected the notion that Ms Thompson was required to respond within 20 minutes. It said even this had been discussed with Ms Black, this was not the position of the current principal, Ms Graham. Craighead also noted that evidence discloses that when Ms Thompson was required to move out of Salmond House it was her view she needed accommodation close by and not that of her employer.

[112] Craighead contended that any constraints on Ms Thompson while on-call were self-imposed and resulted, possibly in part, from a management style involving a degree of micromanagement. Craighead said, as proprietor, it was responsible for the well-being of boarders and meeting all legislative and regulatory requirements. Craighead said the principal was delegated responsibility to ensure it met these on an ongoing basis. And, in turn, the principal delegates to other staff, including the director of boarding, operational or managerial responsibilities. Craighead said, while acknowledging the important contribution made by Ms Thompson, there was no personal responsibility that could realistically be attached to her.

[113] Craighead said the importance to it of having a manager on call was not as significant as having a boarding supervisor present in the boarding house. It said it could meet its legal obligations without the former but not the latter and it was physical presence of staff working on-site, to keep a close eye and ear on the boarders which added value. Additionally, Craighead contended that staffing/boarder ratios, which were set by the school not by regulation, were being met regardless of whether Ms Thompson (or another manager) was on call or not.

[114] Craighead said, in summary, that Ms Thompson was not required to live in accommodation as directed by it while on-call and having sufficient numbers of boarding supervisors and other staff to ensure the care and wellbeing of boarders meant her situation did not meet the requisite threshold of constraint, responsibility and value to her employer. Craighead said the threshold was met for boarding supervisors but it did not extend to the director of boarding. Craighead said to find otherwise would be a significant departure from the current legal position in New Zealand.

Is Ms Thompson owed unpaid wages for “on-call” duties?

[115] Ms Thompson claim’s for unpaid wages for on-call duties faces a very significant legal hurdle.

[116] From the outset, I accept Craighead’s submission that Ms Thompson’s situation is significantly different from that found to exist in *Sanderson*, where those employees were frontline healthcare workers who were on-call to attend emergencies or the situations found to exist in *Law* and *Idea Services*, where the actual care of boarders/residents was the direct responsibility of the rostered staff. I also accept Craighead’s submission that unlike the situations in *Sanderson*, *Law* and *Idea Services*, Ms Thompson was not an employee of “first port of call”, either onsite or in employer provided accommodation close by, but rather a holder of managerial responsibility for those employees that were.

[117] I further accept the submission advanced by Craighead that while the requisite legal test (constraints on freedom of the employee, the nature and extent of the responsibilities and the benefit to the employer) was met for its boarding supervisor positions, this did not extend to the director of boarding position.

[118] Even if Ms Thompson could overcome the legal hurdle confronting her claim, she would then face significant evidential problems. The share imbalance of evidence given by Craighead and directed at the legal test weighs very heavily against her position. There is no doubt, however, based on the evidence, that Ms Thompson was a capable and dedicated director of boarding. Ms Thompson was clearly professional, diligent, efficient and well respected. However, such characteristics do not, of themselves, give to a liability for unpaid wages.

[119] Having carefully considered the matter, the evidence provided by the parties in relation to Ms Thompson's on-call duties falls into three categories:

- (i) the constraints on Ms Thompson's personal freedom away from work were not required by Craighead nor necessary to fulfil the requirements of her position;
- (ii) the managerial oversight responsibilities for boarding supervisors held by Ms Thompson fell short of direct, on-site (or proximate) response responsibilities; and
- (iii) consistent with (ii) on a handful of occasions, over an extended period this level of responsibility was of direct benefit to Craighead (for example, during the boarding house flood, the Salmond House fire and the Canterbury earthquakes) but was otherwise of indirect benefit.

[120] For the foregoing reasons, I find Ms Thompson does not have an entitlement to arrears of wages against Craighead for "on-call" duties.

Interest

[121] Ms Thompson sought interest on any award of lost arrears of wages. This issue is reserved pending finalisation of Ms Thompson's matter before the Authority.

Holiday pay and Kiwisaver

[122] Ms Thompson also sought payment on holiday pay and Kiwisaver contribution on any award of arrears of wages. This issue is also reserved pending finalisation of Ms Thompson's matter before the Authority.

Summary

[123] The following orders are made:

- (a) Craighead is directed to undertake the calculations set out in paragraphs [96] and [99] above and to lodge and serve these within 28 days of the date of this determination;
- (b) Ms Thompson does not have an entitlement to arrears of wages for "on-call" duties;
- (c) Interest on arrears of wages, if any, related to sleepovers is reserved; and

(d) Payment of holiday pay and Kiwisaver contributions on arrears of wages, if any, related to sleepovers is reserved.

Costs

[124] Costs are reserved pending resolution of all matters before the Authority.

Andrew Dallas
Chief of the Employment Relations Authority