

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 49
5462500 and 5519485

BETWEEN	PETER FAIRWEATHER Applicant in 5462500
AND	ADRIAN FIRMIN AND SEVEN OTHERS Applicant in 5519485
AND	HATO PAORA TRUST BOARD Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranney, Counsel for Applicants Richard Harrison, Counsel for Respondent
Investigation Meeting:	6 and 7 July 2015 at Palmerston North
Determination:	22 April 2016

DETERMINATION OF THE AUTHORITY

[1] The applicants claim the respondent, Hato Paora Trust Board (Hato Paora), has breached the Minimum Wage Act 1983. It is what is now colloquially known as a sleepover claim. Hato Paora denies it should succeed.

[2] The parties ask I only determine whether or not there is a breach. If the conclusion is yes they seek to resolve the issue of quantum though request leave be granted for a return in the event they are unable to do so.

Background

[3] Hato Paora operates a boarding school for Maori boys. The applicants were employed as hostel parents for various durations and at various times. Some remained in the Trust's employ at the time the claim was lodged but it appears they no longer perform sleepovers having been replaced by volunteers.

[4] The applicants were paid an hourly rate when working between 8am and 9pm on rostered working days. They were also required, as part of their duties, to sleep at the hostel when so rostered. This was initially unpaid though some of the applicants have, in more recent times, received \$30 for each such duty.

[5] The applicants say that during each sleepover they were:

- a. Responsible for the safety and well-being of the students in their care;
- b. Unable to leave the premises;
- c. Unable to receive visitors;
- d. Unable to drink or take drugs;
- e. Required to be in a fit state to attend to the boys needs if necessary and to do so if and when required; and
- f. Prohibited from engaging in any activity inconsistent with their caring role.

[6] It is asserted the applicants provided a significant benefit, including an economic one, to Hato Paora when so engaged and their duties constitute work within the meaning of s6 of the Minimum Wage Act 1993.

Determination

[7] The concept of being paid for sleeping was first canvassed in *Idea Services Ltd v Dickson*.¹ The resulting conclusion Mr Dickson was working was based on an analysis of three factors. They were:

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

¹ [2011] ERNZ 192 (CA)

[8] These principles were confirmed and applied in a setting similar to this in *Victoria Law & Ors v Woodford House Trust Board & Ors*.²

[9] Considerable evidence was heard with the applicants all attesting to the limitations claimed in [5] above and their view these meant the time spent on sleepovers amounted to work. There was also considerable discussion about the frequency with which each was called upon to respond to the needs of students in their care and the accuracy of the logs recording such activity.

[10] To this I add the evidence of Anthony Lobb which was proffered on behalf of Hato Paora and which I consider important. He was the Director of Living, and the person in charge of the hostel operation.

[11] When questioned Mr Lobb accepted there was an *expectation of first response at all times* from each applicant should something occur while they were rostered on duty as a hostel parent. They were *present and expected to respond if needed*. He added hostel parents were expected to respond to misbehaviour about which they became aware even if not called to do so.

[12] Mr Lobb accepted that to be capable of responding the applicants had to be present and capable of response at all times. Alcohol was therefore prohibited, as were visitors who might distract the house parent.

[13] In other words he accepted the applicants were correct when they asserted the restrictions claimed in paragraph [5] were present.

[14] As Mr Cranney said in submission a simple approach is to ask whether the employee is engaged to be available or available to be engaged?³ If engaged to be available it is work. If available to be engaged (ie: on-call) it is not.

[15] It is clear from Mr Lobb's evidence hostel parents were engaged to be available and therefore the constraints placed upon them when so rostered were considerable. They were similar to those considered and found present in *Law v*

² [2014] NZMC 25

³ *Landeshauptstadt Kiel v Jaeger* [2003] IRLR 804, [2004] All ER 604 (ECJ) referred to and approved in *Law*, n 2 at [193] as capturing the essence of the issue

Woodford House.⁴ As was said in *Law v Woodford House* the plaintiffs *may have slept but, metaphorically, with one ear and/or one eye open*.⁵

[16] Turning to the question of nature and extent of these duties. There can be no doubt these duties were, by their nature, important to Hato Paora. Indeed it was accepted the students could not be left alone and an adult presence was the very purpose of the job.⁶

[17] As to the extent to which the applicants were called I note there is some dispute. There is also dispute as to whether or not some of their responses were necessary. Indeed this was essentially the Board's key argument as to why the claim should not succeed and in this respect it relied on the evidence of Mr Lobb and an ex-pupil who had acted as a House parent.

[18] The difficulty with this is that while these two may have done little overnight that may be explicable for other reasons. For example the ex-pupil was much closer in age to the students than the plaintiffs and it was recognised he had a special mana with the students which may have prevented some misbehaviour.

[19] Opposing this evidence I note what was both required and being done here is factually consistent with *Law v Woodford House* and while Hato Paora's witnesses downplayed the frequency of their interventions there is no doubt they were still required to act on various occasions. I also note the applicants claims about what they were each doing cannot be disturbed and further evidence which suggests that notwithstanding Mr Lobb's attempts to rectify the issue, the logs which record activity are deficient and not everything is recorded. Mr Lobb accepted that to be the case.

[20] Turning to the benefit to the employer. Again this case is hand in hand with *Law v Woodford House*. Not only is an adult presence desirable it is necessary to enable the boarding establishment to function lawfully and practicably.⁷ Similarly, and as with *Woodford House*, operating a boarding facility is integral to the Hato Paora operation and its continued existence.⁸

⁴ n 2

⁵ n 2 at [192]

⁶ Oral concessions by Mr Lobb

⁷ n 2 at [187]

⁸ Refer answers given by Debi Marshall-Lobb, Principle.

[21] Finally I note the sleepover duty is now performed by volunteers and the submission this establishes *sleepover is not integral to the role of house parent*.⁹ I disagree for two reasons. First this disregards the fact the applicants were employees engaged on employment agreements. Second the submission ignores evidence of financial constraints which suggest the Board simply cannot afford paid coverage at night and was compelled to consider such a response to this claim.

[22] Having considered the evidence I conclude this case is indistinguishable from *Law v Woodford House*. The two scenarios are almost identical and the arguments tendered in support of each parties position similar.

[23] The outcome will likewise be similar. The applicants were engaged in work when rostered as House parents at Hato Paora and the Board is liable to pay them accordingly.

[24] As was said in opening, the parties simply ask I determine liability. They then wish to attempt to resolve the question of quantum though leave is reserved to return to the Authority should they be unable to do so.

M B Loftus
Member of the Employment Relations Authority

⁹ Closing submission at [17]