

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 67
5441598

BETWEEN CATHERINE LINDA SIGNAL
 Applicant

AND HUNTLEY SCHOOL BOARD OF
 TRUSTEES
 Respondent

Member of Authority: Michele Ryan

Representatives: Greg Woolleston and Samantha Bills, Counsel for
 Applicant
 Barbara Buckett, Counsel for Respondent

Investigation Meeting: 18 and 19 February 2015

Submissions Received: 10 March from the Applicant
 23 March from the Respondent

Determination: 21 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Huntley School is an independent, co-educational preparatory school for students between years 3-8 inclusive. It provides for both day pupils and boarding students. At the beginning of the 2015 academic year 75 students were recorded as boarding at the school.

[2] Ms Catherine Signal has worked as a Matron within the school's hostel facilities for approximately 9 years and continues to be employed. Her employment agreement provides that she is expected to work during part of the holidays but the practice, with the exception of the week immediately prior to the commencement of each school term, has been that she does not perform duties during school holidays or

on “exeat weekends” when boarding students leave the hostel on Friday afternoon and return on Sunday evening.¹

[3] Ms Signal lodged her statement of problem with the Authority on 2 December 2013². Her action against the school is subject to a limitation period of 6 years and the claim for arrears of wages can therefore only be assessed from 2 December 2007 onwards.³

[4] Ms Signal alleges she has been paid below relevant Minimum Wage Orders. She claims she has either been paid below the minimum wage for those periods of time known as the “sleepover” portion of her work, or her salary is at a rate that is below corresponding minimum wage orders when compared to her hours of work.

[5] The statutory resolution to sleepover work following the judgment of the Court of Appeal in *Idea Services v Dickson*⁴ does not apply to Huntley School.

[6] The school accepts that sleepovers form a component of its Matrons’ duties and that work associated with sleepovers needs to be remunerated according to relevant Minimum Wage Orders. In this respect the school agrees that Ms Signal is owed wages in respect to sleepovers.

[7] Despite that concession, the parties are at odds as to the number of hours Ms Signal has worked. They also disagree as to whether Ms Signal is entitled to be paid according to Minimum Wage Orders for those periods (predominately during school holidays) where she has not been required to attend work. The parties have been unable to resolve these differences and the Authority is now required to determine the matters.

Background

[8] Ms Signal was employed in mid-2006 as a relieving Matron. She initially worked a one-off 24 hour shift (usually 6 or 7 weeks per school term) starting 8.30am on Saturday mornings until 8.30am on Sunday mornings. At the end of 2006 she was given a written employment agreement that stated Matrons will be paid a salary and

¹ Generally two exeat weekends are scheduled per term

² The parties agreed to delay Ms Signal’s claims in anticipation that the defendants in the *Woodford House* would progress an application for leave to appeal that matter in the Court of Appeal

³ Section 142 Employment Relations Act

⁴ [2011] NZCA 14

Relieving Matrons paid a fixed rate per shift and an additional hourly rate for duties outside of shifts. Wages would be paid fortnightly.

[9] In May 2007 Ms Signal's hours of work doubled; beginning 8.30am on Friday mornings until Sunday mornings. She noticed that her pay had not risen proportionally but was advised by the then Bursar that she had been placed on an annual salary and would be paid at the same rate every fortnight over the year including weeks that she did not work.

[10] In March 2012 the school sought to address its obligations following the findings made in *Idea Services* that wage rates for sleepover work must, at the very least, comply with relevant Minimum Wage Orders.⁵ The school entered into discussions with its three Matrons with a view to obtaining agreement to restructure how they were paid. The school wanted to cease payment of annual salaries and have the Matrons return to an hourly rate system.

[11] The school's proposal led Ms Signal to query the rate at which the school had proportioned sleepover and non-sleepover payments. With changes to staff over time the school was unsure how Ms Signal's salary rate had been determined in 2007, or at what rate the sleepover periods were paid. Those matters have remained unresolved between the parties.

[12] Between 2012 and 2014 the school has attempted to negotiate new terms of employment with Ms Signal including an hourly rate based remuneration. Ms Signal has not agreed to alter terms and conditions of employment until her claims are resolved.

What were Ms Signal's hours of work?

[13] Ms Signal's employment agreement does not prescribe the number of hours she was required to work. Nor does it set out shift patterns. Clause 8.3 provides:

The employee shall work such hours as may reasonably be required ...to enable the school to function properly and for the employee to fulfil their responsibilities whether or not such hours exceed 40 hour per week.

[14] The school disputes Ms Signal's self-assessment of working hours and regards her claim for hours of work as over-inflated. Unfortunately the school has not

⁵ Ibid

maintained wage and time records. It considered it was not obliged to do so for salaried employees. As a consequence there are no independent records representing the hours of work undertaken by Ms Signal.

[15] When Ms Signal first raised concerns about her rate of pay the school provided reconstructed payroll records, and these have since been furnished to the Authority. Those documents reflect when salary payments were made to Ms Signal but provide no detail of actual hours worked. In addition, the records contain occasional entries that are not able to be explained and it was not possible to identify a pattern of payments that could be relied upon to establish Ms Signal's hours of work.

[16] The parties agree that: Ms Signal worked a standard pattern of hours during school terms - excepting exeat weekends - as follows:

- from 2/12/2007 - 5/8/2010 at 48 hours per week;
- from 6/8/2010 - 22/04/2012 at 72 hours per week;
- from 23/04/2012 onwards Ms Signal's work pattern changed to include an additional 14 hours on the first weekend of the academic year and on exeat weekends.⁶

[17] What is not agreed is:

- (a) whether Ms Signal was able to take meal breaks according to the employment agreement and statutory requirements and, if not, whether she is entitled to claim for this time;
- (b) whether Ms Signal was required to work additional hours when special events occurred (such as the annual cross country, the triathlon, and end of term school plays and functions);
- (c) when Matron duties conclude on Fridays that coincide with an exeat weekend.

[18] In addition, there was a debate during the Authority's investigation meeting as to whether Ms Signal had, in her statement of problem, waived claims in respect to:

⁶ Commencing on the first Sunday of the academic year when students arrive at school, or on Sundays over exeat weekends when students return to school. In each instance the shift begins at 6pm and continues until the following Monday morning

- (i) extended hours at the end of each academic year (the fourth term);
- (ii) time spent providing “handover” at the conclusion of a work period;
- (iii) “setting up” (the hostel) in preparation for Term 1, and “setting up” for Terms 2-4;
- (iv) attendance at staff meeting/training immediately prior to term commencing.

[19] Both parties were given the opportunity to provide evidence and submissions on the matters referred to at [18]. I consider those components form part of Ms Signal’s employment relationship problem and should be determined.

[20] At the Authority’s investigation the parties each presented wage estimates for years 2007 to 2014. It became apparent that there were flaws in each party’s evaluations, although I commend Mr Signal’s attempts to provide a reliable appraisal.

[21] It was agreed that the Authority would determine the areas of dispute so as to provide a methodology to enable the parties to calculate Ms Signal’s hours of work. As a consequence this determination does not quantify the sum owed to Ms Signal but rather sets out the basis on which wages should be calculated.

[22] Section 132 of the Act provides:

“132 Failure to keep or produce records

(1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—

- (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and*
- (b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.*

(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—

- (a) the wages actually paid to the employee;*
- (b) the hours, days and time worked by the employee.*

...

[23] I accept that the school was unaware of its obligation to keep wage and time records. The omission, however, does not preclude my finding that the failure prejudiced Ms Signal from bringing an accurate claim. In the absence of the respondent proving the claim is incorrect, the Authority is not obliged to accept an applicant's claims but may do so.⁷

[24] I have considered the evidence of the parties and the documents that have been provided. In those areas of dispute where the school has brought no evidence to disprove the claim I have accepted Ms Signal's assertion. In other areas of dispute I have considered what is more likely to have been Ms Signal's hours of work in particular instances. Given the historical and temporal length of Ms Signal's claim, and in the absence of records, my assessment of Ms Signal's hours cannot result in a perfect appraisal.

[25] Evidence on behalf of the school was provided by the school's Headmaster Samuel Edwards and the school's Bursar, Maureen Wigglesworth. The difficulty with aspects of their respective testimonies is that neither was employed by the school for almost half the time period relevant to Ms Signal's claims. Each witness therefore has no direct knowledge of the actual hours worked by Ms Signal prior to their individual appointments.⁸

[26] Mr Edwards' evidence is that Matrons are assisted by teaching staff rostered as Duty Masters. He advised that a Duty Master can expect to work 8 weekend days per year. I note there are clear delineations between the activities of Duty Masters and that of the Matrons. A Duty Master's attendance in the dormitories is generally confined to assisting with students' morning ablutions and in the evening getting them to bed.

[27] Ms Wigglesworth conceded that her involvement with the operative management of the dormitories was limited and that she did not attend the school during the weekends.

[28] Both witnesses, in differing ways, agreed that the day to day running of the hostel has been largely left for Matrons to organise amongst themselves.

⁷ *Rainbow Falls Organic Farm Ltd v Rockwell* [2014] NZEmpC 136

⁸ Mr Edwards commenced working at the school in 2011 in the role of Deputy Headmaster and Ms Wigglesworth began her employment in early 2012.

Term end functions and special sporting events

[29] Ms Signal says that when she increased her hours of work in mid-2007 she was told that she was required to attend the school's end of term and special functions. The school was unable to produce evidence to dispel this aspect of Ms Signal's claim. I accept that when school plays were held, Ms Signal's work pattern would extend to 9.30pm as a consequence, and that she would attend end of year prize giving until 12.30pm⁹. I also accept that the school triathlon and the cross country event - each held once per year immediately prior to students leaving for an exeat weekend - resulted in Ms Signal working until 6.30pm to complete laundry tasks.

Pre-term preparations

[30] The school disputes Ms Signal's claim to payment of 24 hours (to undertake training/meetings and set up dormitories) in the week immediately preceding Term 1 of every year of her claim, and claims for 12 hours for each week preceding Terms 2-4 (inclusive). Ms Signal and Ms Wigglesworth both testified that the work required to ready the dormitories was shared equally amongst the matrons.

Term 1 and training

[31] At the investigation meeting the school furnished timesheets for the two other Matrons for the fortnight preceding Term 1 in 2013 in order to demonstrate matrons require only 12 hours to prepare for the first term and attend meetings¹⁰. One timesheet records 6 hours for training but Ms Signal conceded during questioning that Matrons were not required to attend full training hours and I understand that a portion of training and development days are devoted to teaching staff only. I note however that the total hours recorded in the timesheets of the other Matrons records that each worked 24 hours (or thereabouts) in the week prior to the first term beginning. This evidence tends to support Ms Signal's claim. On balance I assess it more likely that Matrons attended 4 hours of training and then devoted the remaining 20 hours to setting up. I accept Ms Signal's assertions that she worked 24 hours leading into Term 1.

[32] For those times when first aid training was scheduled I accept that Matrons attended these for the duration of the course.

⁹ For the years 2007-2011 prize giving occurred on a Sunday, and years 2012-2014 on a Saturday.

¹⁰ At documents Z

Terms 2-4 and staff development

[33] A timesheet signed by Ms Signal was placed into evidence to demonstrate time usually taken to set up the hostel in preparation for Terms 2-4¹¹. Ms Signal is recorded as working 6 hours (across 2 separate days) in preparation for Term 2, 2013. I have no other independent evidence to assist my assessment of hours of work required to ready the school for Terms 2-4. On balance I find Ms Signal is able to claim 6 hours of work associated with setting up for Terms 2-4.

[34] I was not provided with any evidence that Matrons attend scheduled staff development/training days that occasionally precede terms 2-4, and make no findings in this regard.

Meal Breaks

[35] There was considerable dispute between the parties as to whether Ms Signal had been precluded from taking meal breaks. The school contends that Ms Signal has always been able to take meal breaks and not doing so was of her choice. It says she should not be paid for that time. Ms Signal says that the nature of the work prevented her from taking an unimpeded meal break according to terms and conditions contained in her employment. She says it is unfair for the school to deduct time from an appraisal of hours worked for meal breaks she was unable to take.

[36] I note that in February 2014 the parties agreed to a system that allows for a consolidated break of an hour and a half per 24 hours on site. Ms Signal says the new system is not effective on Sundays when there is no cover, although I have no evidence that she has reported this concern to the school. Having been instructed on 14 February 2014 to take meal breaks (including Sundays) I find Ms Signal has been obliged to do so and do not accept that she cannot.

[37] Ms Signal's claim for time without deduction for meal breaks is confined to the period between 2007 and 14 February 2014.

[38] The parties agree that Matrons attend and supervise students during meal times. At issue is whether Ms Signal was able to take uninterrupted personal meal breaks between 2007 and 14 February 2014. Clause 9 provides for Tea and Meal breaks. Clause 9.1 states:

¹¹ Document ZA

No employee shall be employed for more than five hours continuously without an interval of not less than half an hour for a meal. An interval of ten minutes duration shall be allowed to each employee during the morning and afternoon within the employee's time. At the discretion of the catering manager the employee may be provided with free meals on school premises if the meal times occur during the employee's normal hours of work.

[39] The evidence is that for the period where Ms Signal worked approximately 48 hours beginning Friday mornings until Sunday mornings¹² she would take a break of 1 hour and 40 minutes on Friday afternoons. Ms Signal says that arrangement was agreed with the then Headmaster and paid to compensate for the inability to take breaks over the weekend. In August 2010 when her work pattern expanded and her shift finished on Monday mornings, the Friday afternoon break increased to two hours.

[40] Ms Wigglesworth says Ms Signal is the only matron who has asserted that she has been unable to take unimpeded breaks, although it is acknowledged that the hostel operates differently during the weekends compared to weekdays.

[41] The school additionally asserts that fewer children are present over weekend periods and those who remain are occupied away from the dormitories.¹³ The school says there should be, and has been, sufficient time for Ms Signal to engage in uninterrupted meal breaks. This evidence was undermined by Mr Edwards' candid observation that he was surprised by the frequency and number of students accessing the hostel during weekends. One of the other Matrons reported there was a discernible increase in student contact with the hostel on weekends although she has limited experience in the weekend shift. She advised that students are able to access 'Matrons Work Room' at any time. I understand her evidence to mean that students are not asked to come back at a later time if they need assistance.

[42] I consider it more likely that there was greater engagement between the students, the matron and the hostel during weekends than during the week and I am not assured Ms Signal was able to meal breaks according to the relevant statutory requirements¹⁴. It follows that the school is not able to deduct time purportedly taken for meal breaks from Ms Signal's pattern of work from 2007 to 14 February 2014. I note also that the arrangement to take a lengthy break on Friday afternoons did not

¹² 2007 - August 2010

¹³ Junior boarders (years 3-5) go home most weekends

¹⁴ Section 69ZD(3)

alter the rate at which Ms Signal's salary payments were made. This evidence supports Ms Signal's testimony that it was agreed that this time would be paid.

Handover

[43] The school's assessment of Ms Signal's hours of work have not taken into account the 'handover' period that occurs at the end of a shift. To be fair, it was not entirely clear that Ms Signal was seeking arrears for this component of her work. At issue is the length of time needed to conduct a handover.

[44] I have relied on the 'Matrons Weekly Routine' document which records this activity as lasting half an hour, and further, an email sent by Ms Signal to Ms Wigglesworth on 1 August 2013 which advises of a handover requiring half an hour, as likely to reflect the usual practice. I find the school must include the half-hour handover as an activity as part of the work Ms Signal was required to perform, and should be paid for.

Exeat Fridays

[45] The school says that children are able to leave the school at 3.30pm on Friday afternoons when exeat weekends begin. It says there is no expectation or requirement for Matrons to remain at school when students are not there. In contrast Ms Signal says some parents are late at picking up their children. She says she does not finish until 5.30 pm.

[46] I find it is more than likely that there is some fluidity as to when duties on an exeat Friday conclude and that this is largely dependent on when children leave the school. I find there may be times when Ms Signal worked beyond 5pm and times when she was able to leave before 5pm.

[47] For the purpose of assessing hours of work I determine that Ms Signal's working hours on an exeat Friday as being from 8.30am until 5pm.

Should Ms Signal be paid pursuant to weekly Minimum Wage Orders when her hours of work were either under 40 per week or where she was not required to attend the school at all?

[48] The academic year for Huntley School is spread across either 35 or 36 weeks each year. The school says it should not be required to remunerate Ms Signal during

school holidays when she is not on annual leave and not at work, or that she should be paid a minimum weekly wage when she had not worked a 40 hour week.

[49] The judgement of CJ Colgan in *Law & Ors v. Board of Trustees of Woodford House & Ors*¹⁵ is on point in respect to this aspect of the parties' dispute. Amongst other things, the *Woodford House* case was concerned as to whether a group of salaried Matrons were covered by the MW Act. In addition to concluding that the MW Act applied to employees who receive a salary, the Court found that cl 4(c)¹⁶ -“*in all other cases*”- was the appropriate Minimum Wage Order category for salaried employees at that time. The Court reasoned:

*This is because such employees cannot be described as being “paid by the hour” or by piece work or “paid by the day”.*¹⁷

[50] Clause 4(c)(i) set a minimum wage per week for an eligible worker and at cl 4(c)(ii) a rate for each hour exceeding 40 worked by a worker in a week.

[51] The Court acknowledged (in *Woodford House*) that complications arose with assessing compliance with the MW Act where the respondent schools had previously nominated to pay Matrons an annual salary in equal fortnightly payments despite the existence of periods where service were not required, and where some matrons worked less than full time. The Court however rejected a proposition that those circumstances allow for avoidance of the statutory framework contained in the MW Act and relevant Minimum Wage Orders.

[52] The school seeks to distinguish the facts of *Woodford House* from Ms Signal's circumstances. It says, for example, Ms Signal was provided with meals whilst on duty. There is nothing in Ms Signal's employment agreement that allows the school to set-off the cost of meals against remuneration. Nor do I accept the suggestion that use of the Matrons Work Room whilst on duty can be regarded as “board or lodgings” on which the school can correspondingly deduct a cost from Ms Signal's salary. Next, the school says that the plaintiffs in *Woodford House* resided on the premises of their employer whereas Ms Signal returned to her home when her shift ended. The question as to where a Matron resided was not relevant to whether the parties (in

¹⁵ [2014] NZEmpC 25

¹⁶ The relevant clause contained in Minimum Wage Orders (prior to 1 April 2014)

¹⁷ *Ibid* at n. 14, at [71]

Woodford House) agreed to a salary based remuneration system and I do not consider that factor has any relevance to Ms Signal's claims.

[53] The school's primary argument is that it does not consider Ms Signal should be an "*in all other cases*" worker on grounds that it regards her as a part time employee. It says Ms Signal's hours of work do not equal those of a full time employee working 40 hours a week for 48 weeks of the year. The school proposed several methods by which to assess the sum of wage arrears owed to Ms Signal. Each of these, in different ways, seeks to quantify what is owed to Ms Signal by applying an hourly minimum rate - as opposed to a weekly minimum rate (or fortnightly minimum rate) - to the actual hours worked by Ms Signal.

[54] I am not persuaded that Ms Signal's circumstances are materially different to many of the applicants in *Woodford House*. Ms Signal's individual employment agreement states she is remunerated by way of an annual salary. Following the reasoning set out in *Woodford House*, Ms Signal is placed in the "*in all other cases*" category of entitlement that provides a minimum rate of wages *per week* until 1 April 2014 and a minimum rate of wages *per fortnight* thereafter. [emphasis is mine]

Methodology for quantification of hours of work and corresponding payment

[55] Ms Signal's claim is substantially comparable to that found in *Woodford House*. I have applied a similar methodology to that set out in the judgment.

[56] Beginning with 2 December 2007 and with reference to the relevant school calendars the school will need to calculate the hours of work undertaken (including sleepovers) for each week. When undertaking this calculation the school must apply the findings set out at paragraphs¹⁸:

[16]	the agreed work pattern
[29]	term end functions and special sporting events;
[31] & [32]	term 1 and training
[33] & [34]	terms 2-4 and training
[37] & [42]	meal breaks
[44]	handovers
[47]	exeat Fridays

¹⁸ The methodology is subject also those periods of time that the parties agree Ms Signal was not attending work in accordance with the findings of the work patterns set out in this determination or where the parties have made alternative work pattern arrangements such as the agreement in February 2014 in respect to meal breaks

[57] To the extent that Ms Signal worked fewer than 40 hours each week prior to 1 April 2014 (or did not work at all), she is entitled to minimum payment under cl 4(c)(i) of the relevant Minimum Wage Order. Similarly she is entitled to minimum payment under cl 4(d)(i) from 1 April 2014 on the same basis going onwards. Where hours of work have exceeded 40 per week (or 80 per fortnight from 1 April 2014) Ms Signal is entitled to the relevant minimum hourly payment for each hour above 40 or 80 depending on the corresponding Minimum Wage Order.

[58] Having established Ms Signal's hours of work, the school will then deduct from each week whatever sum has been paid to Ms Signal for the corresponding period. The remaining sum is owed to Ms Signal as arrears of wages.

[59] Given Ms Signal was paid fortnightly I consider any salary payments made prior to 1 April 2014 will need to be halved and then applied to calculate each week's entitlement. The exception to this methodology occurs when Ms Signal was paid her entitlement to annual leave in a lump sum. In those circumstances the lump sum should be averaged over the period for which it applies.

[60] It emerged in evidence that Ms Signal engaged in occasional extra shifts. The school argues that these should not be included in an appraisal of hours worked as extra shifts were often a result of private arrangements between Matrons. For those extra shifts where Ms Signal furnished timesheets (or an equivalent record) in anticipation of payment, I find the school was aware of and condoned the altered shift pattern. Those hours of work need to be included in the school's assessment.

[61] The school is to provide its calculations to Ms Signal. If the parties remain in dispute as to quantification of arrears of wages they should seek to resolve the matter between themselves at first instance. Leave is reserved for any party to apply for further orders if a resolution is not obtained.

Costs

[62] Counsel for the applicant has provided submissions on costs. The parties are encouraged to resolve this matter between themselves at first instance.

[63] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority