IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 25
WRC 29/12

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	VICTORIA LAW AND OTHERS First Plaintiffs
AND	JAN COLBERT AND OTHERS Second Plaintiffs
AND	BOARD OF TRUSTEES OF WOODFORD HOUSE First Defendant
AND	PAULINE OVENA CAMPBELL, FIONA JOSEPHINE McGLASHEN AND COLIN LLOYD ENGLISH AS TRUSTEES OF IONA COLLEGE, A REGISTERED CHARITABLE TRUST UNDER REGISTRATION NUMBER CC27347 Second Defendants

Hearing:	13-15 May 2013 and by further evidence filed on 17 June 2013 (Heard at Hastings)
Appearances:	Peter Cranney and Oliver Christeller, counsel for plaintiffs Richard Harrison, counsel for defendants Sally McKechnie, counsel for the Secretary for Education as intervener by leave
Judgment:	17 February 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

A **The Minimum Wage Act 1983 applies to the employment of the plaintiffs by the defendants when the remuneration for which was expressed as annual salaries.**

B **The plaintiffs are only entitled to claim in respect of causes of action which arose within six years before their proceedings were brought in the Employment Relations Authority.**

C **When undertaking "sleepovers" as matrons or housemistresses in the defendants' boarding hostels, the plaintiffs were working and so covered by s 6 of the Minimum Wage Act 1983.**

D **At such times as the plaintiffs were paid by the hour, the plaintiffs were entitled to be paid no less than the minimum hourly rate set out in cl 4(a) of the relevant applicable Minimum Wage Order for each hour worked during a sleepover.**

E **When their remuneration was expressed as an annual salary, the plaintiffs were entitled, pursuant to cl 4(c) of each relevant applicable Minimum Wage Order, to the minimum remuneration there set out and calculated by the methodology specified in [237]-[244] of this judgment.**

F **Leave is reserved for any party to apply for any further orders or directions if the plaintiffs' entitlements are not able to be agreed between them.**

G **Costs are reserved.**

INDEX

Introduction

[1] The questions for decision in these cases, removed by the Employment Relations Authority for hearing at first instance in this Court,[1] concern the plaintiffs' entitlements to statutory minimum remuneration for so-called "sleepovers" in the boarding hostels of two schools.

[2] The plaintiffs seek declarations that they were working during those sleepover periods and thus entitled to minimum remuneration under the Minimum Wage Act 1983 (what I will call the MW Act). The second question, if those employees were working during sleepovers, is how their minimum remuneration is to be calculated.

[3] Counsel agree that if the defendants are found to be liable to the plaintiffs, the parties should have an opportunity to calculate and agree on the amounts of unpaid remuneration and any interest to which the plaintiffs might be entitled. Leave should be reserved for any plaintiff to apply further to fix any such compensatory payments for which the defendants may be liable if agreement cannot be reached.

[4] The case involves mixed issues of fact and law that can be encapsulated in two questions, the first solely of law, and the second of fact and law. The question of law is whether the MW Act applies to employees who are remunerated by an annual salary paid periodically throughout the year. The question of mixed fact and law is whether employees on "sleepovers" were working during those times and so entitled to wages at the relevant minimum rate under s 6 of the MW Act. This involves both a decision of what happened during sleepovers and, guided by recent and authoritative case law, whether that constitutes work. Logically, the question of law needs to be decided first because if the salaried employees are not subject to the MW Act, then there can be no significance in whether those employees may have been working during sleepovers during the majority of their employment when they were on annual salaries.

[1] [2012] NZERA Wellington 125.

[5] Each of the plaintiffs works or worked as a matron or a housemistress at the boarding houses of one of the two defendant schools at which pupils live during the school term. At least at one of the schools, these titles have now been replaced by the more modern one of "boarding supervisor". Because they were used by the parties at the hearing, I will continue to use the old descriptions of the plaintiffs' roles. The plaintiffs had other boarding house duties either immediately before and/or after their rostered sleepovers. All lived or stayed at the boarding house premises at nights and were responsible for the safety, security and wellbeing of the pupils staying and sleeping there.

[6] Regrettably, the case was not able to be concluded at the hearing on 15 May 2013. Documents continued to emerge for the first time on the eve and over the nights of the hearing. It appears that the parties had not undertaken formal disclosure and document inspection processes under the Employment Court Regulations 2000. Although documents disclosed in this way often win or lose cases, parties are nevertheless free to choose informal (and therefore sometimes incomplete and unenforceable) discovery.

[7] This resulted in original diaries and other record books (of which no copies for other counsel or the Court had been made) being put to witnesses in evidence during the course of the trial, but which could not be readily identified for later consideration. Counsel offered me the opportunity to have all of this voluminous material to read at my leisure to "get a feel"[2] for the case. I declined to do so, at least for that purpose. In the end I said I would consider those documents that had been referred to by witnesses in evidence cross-referenced with the transcript, and an indexed bundle which counsel said would take a month to prepare and agree upon after receipt of the transcript (which was produced within a day or so after the end of the hearing).

[8] Although not wishing to be unduly critical of counsel involved, such an informal approach to relevant documentary evidence not only risks omitting vital evidence that may be very influential on the outcome of a case, but makes the work

[2] See the fictitious case before the High Court of Australia as portrayed in the film "The Castle", where the case for the appellants was "all about the vibe".

of a judge deciding it more difficult, which thereby delays decision making. In such circumstances judges are loath simply to refuse to admit in evidence, and thereby not have regard to, very belatedly disclosed and presented documentation, especially if a party not responsible for that situation agrees to, or even acquiesces in, their production in evidence. If such documents may be crucial to the outcome of the case, that is to a just decision of the real issues between the parties, judges will usually conclude that the interests of justice trump insistence on timely compliance with rules. That is the approach that I took to this situation in this case.

The Secretary for Education as intervener

[9] The Secretary for Education applied for leave to appear and be represented by counsel in this case pursuant to cl 2(2) of sch 3 to the Employment Relations Act 2000 (the Employment Relations Act). The Secretary's grounds included that the outcome of the case may be relevant to the terms and conditions of people employed by state or integrated schools' boards of trustees who work in boarding hostels and special residential schools. The Secretary also advised the Court that he negotiates, and is a party to, collective agreements that govern the employment of staff at state and integrated schools. The Secretary did not propose to lead evidence or cross-examine witnesses but wished to appear at the hearing "to maintain a watching brief" and to preserve an opportunity to make written submissions if he considered this necessary.

[10] There was no objection to the Secretary's application for leave and it was granted. On 1 May 2013, counsel for the Secretary, again with the consent of the plaintiffs, proposed that he be allowed to seek leave at the hearing to "ask questions" (effectively to cross-examine witnesses) in exceptional circumstances, and signalled his wish to file submissions on legal issues and to be heard by the Court on these.

[11] Whilst the Court appreciates the submissions made by counsel for the Secretary on the regulatory requirements of school boarding hostels affecting sleepovers, the Secretary's stance on other aspects of the case was both partisan and, in one instance, argued an issue not relied on (at least strongly) by the defendants. I do not mean to say that the Secretary involved himself in the disputed facts of the

case and Ms McKechnie, as counsel, was careful not to do so. Rather, the Secretary advanced a strong preliminary argument that the MW Act does not apply to workers whose remuneration is expressed as a salary. The defendants also took this point.

[12] However, the Secretary also put forward submissions about the role and significance of accommodation (board or lodging) provided to the plaintiffs and, in particular, how this was affected by s 7 of the Wages Protection Act 1983. This was not a point taken by the defendants and there was little, if any, evidence about how the plaintiffs' remuneration may have been affected by their accommodation arrangements and the application of s 7 of the Wages Protection Act in particular. In these circumstances, counsel for the plaintiffs was critical of the Secretary's assertive partisan position on these issues, particularly because no governmental funding is affected by this case between these parties.

[13] I accept that the Secretary for Education, as the funder or partial funder of state and integrated school boarding hostels, has an interest in the potential application of novel issues decided in this case to other educational institutions. However, I do not propose to embark on an examination of the Wages Protection Act issue raised by the Secretary in the absence of the parties having made this an issue for the Court and in the absence of evidence and submissions from them about it. The parties may well have elected not to do so in view of the contents of the various employment agreements at issue in this case which appear, at least at first glance, to not address s 7 issues in any event. That will have to be an issue for another case in which there is evidence on the question.

Section 4 of the Minimum Wage Act 1983

[14] There are two versions of s 4 of the MW Act that affect this case and even then a new s 4 has superseded these with effect from 30 April 2013, although that latest version is of no relevance in the present instance.

[15] As from 17 June 2003 (pursuant to s 3 of the Minimum Wage Amendment Act 2003), s 4 provided:

4 Prescription of minimum wages

(1) The Governor-General may, by Order in Council, prescribe the minimum rates of wages payable to either or both of the following:

- (a) 1 or more classes of workers—
  - (i) defined in the order by reference to the age of the workers; and
  - (ii) to whom paragraph (b) does not apply:
- (b) 1 or more classes of workers—
  - (i) defined in the order; and
  - (ii) who are employed under contracts of service under which they are required to undergo training, instruction, or examination for the purpose of becoming qualified for the occupation to which their contract of service relates.

(2) Any minimum rate of wages prescribed pursuant to subsection (1) of this section may be prescribed as a monetary amount or as a percentage of any other minimum rate of wages prescribed pursuant to subsection (1) of this section

[16] With effect from 1 April 2008 s 4 was amended, pursuant to s 5 of the Minimum Wage (New Entrants) Amendment Act 2007, to allow separate provision to be made for young "new entrant" workers. Although, in my assessment, this amendment does not affect the claims at issue in this case, I will nevertheless set out this 2008-2013 version of s 4 because it governs a number of the claims:

4 Prescription of minimum wages

(1) The Governor-General may, by Order in Council, prescribe the minimum rate of wages payable to—

- (a) workers—
  - (i) who are 16 years of age or older; and
  - (ii) to whom neither paragraph (b) nor (c) applies:
- (b) workers who are new entrants, being workers who are 16 or 17 years of age except workers—
  - (i) who have completed 3 months or 200 hours of employment, whichever is the shorter; or
  - (ii) who are supervising or training other workers; or
  - (iii) to whom paragraph (c) applies:
- (c) 1 or more classes of workers—
  - (i) defined in the order; and
  - (ii) who are employed under contracts of service under which they are required to undergo training, instruction, or examination for the purpose of becoming qualified for the occupation to which their contract of service relates.

(2) A minimum rate of wages prescribed under subsection (1) may be prescribed as—

- (a) a monetary amount; or
- (b) a percentage of any other minimum rate prescribed under subsection (1).

(3) However, a minimum rate prescribed for the purposes of subsection (1)(b) must not be less than 80% of any rate prescribed for the purposes of subsection (1)(a).

(4) In subsection (1)(b)(i), employment—

(a) includes employment undertaken with more than 1 employer; and

(b) includes any employment undertaken before the commencement of the Minimum Wage (New Entrants) Amendment Act 2007; but

(c) does not include any employment undertaken before a new entrant turns 16 years of age.

[17] As already noted, a new s 4 was substituted with effect from 1 May 2013 by s 4 of the Minimum Wage (Starting-Out Wage) Amendment Act 2013. Because it does not affect this case, I will not set it out.

The scheme of the Minimum Wage Act 1983

[18] Both applicable sections 4 (to which I will refer simply as s 4) enable the Governor-General by Order in Council (in effect the Minister of Labour) to prescribe minimum rates of wages payable to workers. Subsection (2) of s 4 allowed, at the time with which this case is concerned, for such minimum rates to be expressed as a monetary amount or as a percentage of any other minimum rate prescribed under the MW Act.[3]

[19] Pursuant to s 5 the Minister must review annually any minimum rates then in force and may recommend to the Governor-General any adjustments to those minimum rates. So although there must be an annual review, there is no requirement for an annual, or indeed any, adjustment to minimum rates. In practice, minimum rates have been revised (increased) annually over recent years, at least those with which this case is concerned.

[20] Although the prescribed minimum rates are currently, and have traditionally been, expressed as a monetary amount in hourly, daily, and weekly terms, there is nothing in the legislation to prevent a prescription being expressed in any other way including, for example, monthly or even annually. The only statutory requirements

[3] Subsection (2) has subsequently been amended from 1 May 2013 by s 4 of the Minimum Wage (Starting-Out Wage) Amendment Act 2013 to require that rates must be prescribed as monetary amounts.

are that the expression of the rate has to be as a monetary amount or as a percentage of one. Ultimately there has to be a base monetary amount expressed.

[21] The MW Act refers at all relevant parts to "wages" and not, for example, to such other recognised words and phrases as "remuneration", "salary" or the like. It also refers to "workers" as opposed to the more modern and inclusive word "employees".

[22] Entitlement to payment of minimum wages is, under s 6, afforded to workers who belong "to a class of workers in respect of whom a minimum rate of wages has been prescribed …". Section 9 provides that the MW Act will not apply to some workers, including apprentices and inmates of charitable institutions.

[23] Section 11B(1) of the MW Act provides that, subject to the provisions of subss (2)-(3) of that section, every employment agreement must fix at not more than 40 the maximum number of hours (exclusive of overtime) to be worked in any week by any worker bound by that employment agreement.

[24] Subsection (2) of s 11B provides an exception to subs (1) in circumstances where "the parties to the agreement agree" that the maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week may be more than 40.

[25] Subsection (3) of s 11B provides that where the maximum number of hours (exclusive of overtime), fixed by an employment agreement to be worked by any worker in any week is not more than 40, the parties to the agreement must endeavour to fix the daily working hours so that those hours are worked on not more than five days of the week.

[26] The authors of *Mazengarb's Employment Law* provide an interesting and helpful background to their commentary on the minimum wage legislation:[4]

> New Zealand was one of the first countries to introduce minimum wage legislation. In providing a statutory wages floor by fixing minimum rates

[4] *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at [1086].

> across the board in all employment, the legislature originally had in mind employees who were not covered by an award, and who were thus dependent upon individual negotiation. While compulsory arbitration was in force, minimum wage legislation had only slight importance due to the fact that award minima were almost invariably higher than the floor rates fixed by the now repealed Minimum Wage Act 1945.

[27] *Mazengarb's* notes, albeit in relation to another aspect of the legislation that:[5]

> Prior to the 1990 Minimum Wage Order, there had been no definition of what comprised a day's or week's work, a lacuna which gave rise to inequities since a person working 48 hours a week would only have been entitled to the same wage as a person working 40 hours a week. The main impact of the change was expected to be upon the documents negotiated by employees, such as dairy farm employees, who commonly work longer hours at low rates of pay. A maximum is set on the deductions permissible for board and lodging. An Inspector may grant an exemption permit to workers who are limited by disability in carrying out work requirements, where it is reasonable to grant exemption from the prescribed minimum rates. …
>
> If an employee is paid by the week the Order fixes a statutory minimum weekly rate, which is referable to a working week. If the relevant employment agreement fixes the working week as 36 hours, and a worker has worked 21 hours, that worker is entitled only to a proportionate part of the full weekly minimum rate. If there is a contractual provision for overtime and overtime has been worked, payment should be calculated on the basis of that provision. It is erroneous to perform the calculation on the basis of the rate payable under the 1983 Act. …

The Minimum Wage Act 1983 - Salaried employees

[28] The plaintiffs were, at most times during their employment with the defendants, receiving remuneration that was expressed in their individual employment agreements or in relevant collective agreements, as an annual salary. As in the case of most, if not all, other employees in New Zealand receiving annual salaries, their remuneration was payable periodically, either weekly or fortnightly, as a one-fifty-second or a one-twenty-sixth of that annual salary figure. In many cases, however, the employees were working only during the school year of between 38 and 40 weeks of the calendar year so that, excluding annual holidays of four weeks, this left a balance of about eight weeks per year when the plaintiffs were not working but during which they were paid.

---

[5] At [1087.3].

[29] In these circumstances it is necessary to address the preliminary argument that the MW Act does not apply to annual salaried remuneration. This position was advanced principally by the intervener, the Secretary for Education appearing by leave and represented by Ms McKechnie, but also by the defendants.

[30] In advancing this submission, counsel for the defendants and for the intervener sought in effect to limit significantly the application of the MW Act, which is recognised as one of the constituents of the minimum code of employment rights, to persons who are paid "wages", that is those employees whose remuneration is expressed to be calculated hourly, daily or weekly. Ms McKechnie emphasised the absence of any reference in the MW Act to "salary" and compared this to other employment legislation in which the word appears either alone or in conjunction with "wages". For example, s 65(2)(a) of the Employment Relations Act, which sets out the matters that must be included in any individual employment agreement, refers at (v) to "the wages or salary payable to the employee …". I note, inconsistently however, s 131 of the Employment Relations Act provides for the recovery of "any wages or other money payable by an employer to an employee under an employment agreement" which may be in default. "Salary" is not mentioned there as such, but is arguably caught by the phrase "or other money payable".

[31] I doubt whether, in enacting the Employment Relations Act, Parliament intended to make some provisions relating to employee remuneration applicable to wages alone and to exclude salaries although, in relation to other provisions, to cover both (or indeed potentially other) forms of remuneration. Amongst the very broad class of "employees" covered by the Employment Relations Act, significant numbers were, in the year of its enactment in 2000, paid salaries. That situation has not changed subsequently, except probably to increase. I do not consider that an examination of the relevant provisions of the Employment Relations Act sheds useful light on this question of the interpretation of the MW Act, at least in the way advanced by Mr Harrison and Ms McKechnie.

[32] Further, Mr Harrison, for the defendants, argued that the MW Act does not contain a definition of the word "wages". That is in contrast to the Wages Protection

Act which defines "wages" as meaning "salary or wages". Counsel submitted that this difference would tend to suggest that the MW Act is more limited in its coverage than the Wages Protection Act, and is confined to "wages" excluding salaries. This was a more respectable argument than that based on the Employment Relations Act analogy because both Acts (Minimum Wage and Wages Protection) were passed in conjunction with one another, and form part of the minimum code of employee rights in employment.

[33] Turning to the Holidays Act 2003, Mr Harrison submitted that this distinguishes between "wages" and "salary", for example in defining "gross earnings".[6] On the other hand, counsel submitted, the Employment Relations Act appears to use the term "wages" to cover both and does not define it. However, as counsel pointed out, and as has been noted already, the Employment Relations Act, in requiring terms of employment to be included in an individual employment agreement, includes "the wages or salary payable to the employee".[7] Finally, Mr Harrison submitted that, consistently with the Holidays Act, the Equal Pay Act 1972 also distinguishes between "wages" and "salary" when defining an employee's remuneration.[8]

[34] The defendants say that the reference in the Minimum Wage Orders made under s 4 of the MW Act to the phrase "in all other cases" does not assist with the definition of "wages" or, in particular, whether it extends to salary that is paid by the year or divided into equal fortnightly or monthly instalments. So, Mr Harrison submitted, in the absence of a definition in the MW Act of "wages" which widens its traditional meaning, it must follow that salaried employees are outside the class of workers covered by the MW Act.

[35] Historically, the word "salary" has been used generally to describe the remuneration payable to so-called 'professional' employees[9] and has coincided with this being expressed as an annual or sometimes a monthly sum. "Wages" has

---

[6] Section 14(a)(i).
[7] Section 65(2)(a)(v).
[8] Section 2.
[9] Sometimes distinguished from other employees by the shorthand of shirt collar colours 'white' and 'blue'.

traditionally been the word used to describe the remuneration of other employees, usually coincident with its calculation on an hourly, daily or weekly basis. Although, historically, salaries may have been paid in less frequent instalments than wages, nowadays most employees are paid either weekly or fortnightly (or at most monthly) irrespective of whether their remuneration is described as "wages" or "salary". As a general observation, also, there may now be more employees (including in the private sector) whose remuneration is expressed in the form of a salary than as wages. One of the reasons for that change has been the trend since about 1990 to wrap up in a single periodic figure what was previously expressed as wages and (sometimes numerous) allowances or perquisites.

[36] When the first MW Act was passed by Parliament in 1945, the vast majority of workers whom it was intended primarily to protect, earned remuneration that was expressed in hourly, daily or, at most, weekly terms. Those employees earning annual salaried remuneration may not have been seen to be in the same need of the statutory protections of a minimum wage. Most were state sector employees whose then distinct public service environment offered its own protections against exploitation.

[37] The first MW Act was passed by Parliament in 1945, if not following immediately, then in contemplation of the end of a world war that caused New Zealand, among other nations, to re-examine its commitment to peace and prosperity and how this might best be achieved. For almost three decades after the end of the earlier cataclysmic world war and the establishment of the International Labour Organisation, it had been recognised that fair and decent conditions of work were important to these objectives as well as to individual workers. It is no coincidence, then, that when nations came to formulate and adopt the Universal Declaration of Human Rights in 1948,[10] work rights were among those proclaimed. Article 23(3) of the Universal Declaration provided, and continues to state that:

> Everyone who works has the right to just and favourable remuneration ensuring for themselves and their family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

[10] GA Res 217 A(III).

[38] When combined with the right under art 23(1) of everyone to work, to free choice of employment, and to just and favourable conditions of work, the application of one of the manifestations of those rights in New Zealand (the MW Act) should be interpreted to give effect to those fundamental aspirations to which New Zealand not only committed itself, but indeed was instrumental in formulating. To adopt a narrow and niggardly interpretation of the MW Act in this regard would be to treat that fundamental international human rights declaration in similar fashion.

[39] The report in Hansard of the ministerial speech at the commencement of the Second Reading in the House of the Minimum Wage Bill in 1945, does give some indications of the intention for its breadth and application. The acting Minister of Labour said:[11]

> This Bill provides for a minimum wage for all workers. For many years there has been a minimum wage in certain industries in New Zealand; a minimum wage has been declared by the Court of Arbitration, and there has been a minimum wage in factories. A basic wage has frequently been proclaimed by the Court itself. Unfortunately, many of those declarations do not cover all the people of New Zealand, and now, for the first time, we are discussing a real Minimum Wage Bill.
>
> …
>
> This measure does not leave out anyone; it covers all the people, whether they are covered by an agreement or not. In considering a Minimum Wage Bill, we have to take into consideration what would be the natural definition of wages. That has been set out in dictionaries and encyclopaedias as, "A reward for labour". If an adequate reward based on a comfortable standard of living is granted, that is quite alright and we are happy about it, but if the reward is inadequate we come to a rather wretched state of affairs.
>
> …
>
> From then on a basic wage has been declared from time to time, but they only covered awards and agreements, and left very much to be desired, because there were some employers who took no notice of awards and agreements, and when there was a surplus of workers they had to work for next to nothing or not work at all. There are good employers and there are bad employers, and it is the bad employers which make it necessary for the Government to introduce legislation such as we are considering now.

[40] As this case illustrates, however, circumstances affected by statutes change over time. It is necessary for the Court to consider whether the language of legislation enacted originally almost 70 years ago and which did not change materially when it was re-enacted 30 years ago, applies to circumstances as now present themselves.

---

[11] (6 December 1945) 272 NZPD 459-460.

[41] Much modern legislation (including the Employment Relations Act) affecting employee remuneration does not distinguish between wages and salaries in its relevant provisions either relating to the setting of these, or to their enforcement. Nor does the common law of employment to the extent that it has not been superseded by legislation. An action for breach of contract for non-payment of remuneration of an employee does not differentiate between wages and salaries.

[42] There is so much incoherence that is not logically explicable, between the references to remuneration in a number of employment statutes that I am not helped by them in determining the question of whether employees on annual salaries are covered by the MW Act. The best that can be said is that the modernity or antiquity of the first iteration of such legislation seems probably to account for these inconsistencies but that is not, of itself, a particularly helpful pointer to the meaning of "wages" in the MW Act and, in particular, whether this now embraces salaries.

[43] The starting point for decision of this question is the MW Act itself. Importantly, s 2 defines "worker" as having the same meaning as that given to the term "employee" by s 6 of the Employment Relations Act. That in turn means, under s 6(1)(a), "any person of any age employed by an employer to do any work for hire or reward under a contract of service …". The antiquated phrase "for hire or reward" is, in my assessment, broad enough to encompass both wages and (annual) salaries of employees. In this sense, references in the MW Act to "wages" may be seen to include "salaries" as being a category of the "reward" paid to employees ("workers") under s 6 of the Employment Relations Act. The express link to the Employment Relations Act also indicates an intention by Parliament that the MW Act should continue to accommodate and apply to the modern world of employment.

[44] Whereas, however, the s 6 Employment Relations Act definition of an "employee" (and therefore a "worker" under the MW Act) includes persons of any age, the MW Act's provisions differentiate between ages. They do so, however, not to exclude some employees (workers) from coverage under the MW Act[12] but to create different classes of minimum payments under that Act. That there are exclusions from the application of the MW Act by reference to age means that the

[12] Except for those aged under 16 years: see s 4(1)(a).

absence of any exclusion by reference to "salary" favours the plaintiffs' interpretation of the Employment Relations Act. If Parliament had intended to exclude salaried "workers", it would have said so, if not in 1945, then in 1983. It did not do so.

[45] As already noted at [22], s 9 of the MW Act excludes expressly from its coverage apprentices and inmates of charitable institutions. It is consistent with the plaintiffs' argument that having expressly excluded some classes of workers, the MW Act should therefore be interpreted to include those who have not been specifically excluded including, in this case, workers paid by salary.

[46] Section 6 of the MW Act is at the heart of this question and this case and provides:

> **6 Payment of minimum wages**
> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[47] The reference to a "contract of service" in s 6, alongside other remuneration-fixing mechanisms, favours a broad interpretation of the application of the Act, including to salaried employees.

[48] To determine whether a worker is covered by s 6, he or she must belong to a class of workers in respect of whom a minimum rate of wages has been prescribed. That is to be ascertained by looking at the applicable Minimum Wage Orders that are, although re-made periodically, all materially identical for the purpose of this aspect of the case. So, to take, as an example, the Minimum Wage Order 2007,[13] cl 4 provides:

> **4 Minimum adult rates**
> The following rates are the minimum rates of wages payable to an adult worker:
> (a) for an adult worker paid by the hour or by piecework, $11.25 per hour:

[13] Predecessor and subsequent Orders do not differ except as to the prescribed rates themselves.

(b) for an adult worker paid by the day,—
  (i) $90 per day; and
  (ii) $11.25 per hour for each hour exceeding 8 hours worked by a worker on a day:
(c) in all other cases,—
  (i) $450 per week; and
  (ii) $11.25 per hour for each hour exceeding 40 worked by a worker in a week.

[49] There are several minimum rates of wages payable to adult workers, categorised by pay periods. Under (a) the first category is for adult workers "paid by the hour or by piecework". The second category under (b) is for adult workers "paid by the day" which sets out a minimum rate per day and a minimum rate per hour for each hour exceeding eight worked by a worker on a day, that hourly overtime rate being the same as the hourly rate under (a).

[50] Finally, (c) provides what might be called a 'catch-all-others' described as "in all other cases". This provides a minimum rate of wages at a figure "per week" and the same hourly rate as under (a) "for each hour exceeding 40 worked by a worker in a week". Mr Cranney's argument for the plaintiffs is that a worker paid an annual salary falls into category (c), that is "in all other cases". While the actual rates under other Orders differ and will have to be applied chronologically, these descriptors of how the different rates will apply have not varied over the time covered by this case.

[51] Addressing the practical consequences of accepting the salary exclusion argument, Mr Cranney emphasised the potential for cynical avoidance of the minimum wage legislation. He highlighted the possibility for abuse by unscrupulous employers who might stipulate in all cases that new employees are to be engaged on annual salaries which could, for practical purposes, provide remuneration at below MW Act rates.

[52] There is much force in counsel's submission. Low and modestly paid employees seeking new employment are not in a strong position to negotiate terms and conditions and would be even less so as to whether remuneration is salarised. It would be outrageous that an employee could be paid less than a MW Act equivalent, simply because his or her remuneration was expressed, at the employer's stipulation, as an annual salary. The Court should strive for an interpretation that would avoid

such an egregious and cynical undermining of the philosophy of minimum code legislation.

[53] I do not suggest that the defendants did so for the purpose of attempting to ensure that their matrons or housemistresses would not be subject to the MW Act. However, it is illuminating that these employers were able to stipulate that very modest remuneration for work that has not traditionally been regarded as 'professional', was to be expressed as an annual salary. Further, although it did not happen in this case, it is not difficult to imagine the 'Hobson's choice' response of an employer to an aspiring employee such as a school boarding hostel matron seeking to renegotiate a standard form of employment agreement so that remuneration was paid at an hourly rate rather than as an annual salary.

[54] The MW Act exists to provide minimum essential terms and conditions of employment and to avoid the exploitation of employees with little or no bargaining power. It should be interpreted accordingly and not so artificially that it could easily be rendered impotent. The MW Act can hardly be said to create a bonanza of riches for employees covered by it. Those who should justifiably expect its protection should not be turned away from it by the technicality of an employer's choice of an annual salary as the method of remuneration payment.

[55] Courts must also interpret legislation as applying to circumstances as they arise or have developed since the legislation was enacted,[14] even where the legislation is antiquated. As the full Court noted in its judgment in *Idea Services Ltd v Dickson*,[15] although the MW Act was enacted in 1983, this largely replicated its 1945 predecessor. Remuneration practices have changed significantly, especially since 1945 but also since 1983. Fewer employees have their remuneration determined by collective instruments than in those earlier times and, therefore, fewer employees are paid on an hourly or daily basis. A greater proportion of the workforce is now remunerated by annual salaries even although these are actually paid on a monthly, fortnightly, or sometimes even weekly basis in equal amounts. The legislation should apply to such changes if its provisions will bear such changes.

---

[14] Interpretation Act 1999, s 6.
[15] [2009] ERNZ 116.

[56] It may be debatable whether Parliament, in 1945, actively considered whether the coverage of the first MW Act should extend to salary earners (and, as noted in *Idea Services*, the extraneous interpretive materials do not assist much, if at all). However, by 1983 many more workers (as they were then still called in legislation) were remunerated in a variety of ways, including by annual salaries. In addition, the wording relating to remuneration of subsequent associated legislation, such as the Employment Relations Act, was sufficiently broad to not limit narrowly its application to wages and not to salaries (calculated annually).

[57] The MW Act is part of the so-called minimum code of employment rights and obligations. It, and its statutory companions (the Wages Protection Act 1983, the Parental Leave and Employment Protection Act 1987, the Holidays Act 2003, aspects of the Health and Safety in Employment Act 1992, and aspects of the Employment Relations Act 2000), apply universally to employees (workers) unless specifically and clearly exempted.

[58] The legislative instruments making up the minimum code are to be interpreted in accordance with relevant international conventions and other instruments to which New Zealand has either acceded to specifically or which are of a body or bodies of which New Zealand is a member, principally the International Labour Organisation.[16]

[59] International instruments applicable to the interpretation and application of statutory employment law were addressed in the judgments in the *Idea Services* litigation. I will not repeat what was said about them except to say that they favour a broad application of the MW Act and not one which would exclude its application to a very substantial proportion of the workforce now being paid by salary including, if this case is anything to go by, occupational groups who are very modestly remunerated.

---

[16] See *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]-[25], applied by the Employment Court in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 at [56].

[60] New Zealand ratified the International Labour Organisation's Minimum Wage-Fixing Machinery Convention in 1938.[17] Article 1(1) of the Convention provides that:

> Each member of the International Labour Organisation which ratifies this Convention undertakes to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of the trades or parts of the trades (and in particular in home working trades) in which no arrangements exist or the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low.

[61] This Convention appears to have been considered judicially only once, albeit recently, by both this Court in *Faitala v Terranova Homes & Care Ltd*[18] and by the Court of Appeal in the same proceeding *Terranova Homes & Care Ltd v Faitala.*[19] Both courts observed that art 2(1) of the Convention stipulates that minimum rates of wages shall not be subject to abatement by individual agreement, thereby endorsing a strict interpretation of s 6 of the MW Act.

[62] I note that a subsequent Minimum Wage-Fixing Convention which came into force in April 1972 has not been ratified by New Zealand.[20] It is of much broader application than the 1928 Convention and requires that member states not only establish appropriate wage-fixing machinery but also to take into account social and economic factors when setting minimum wages.

[63] To exclude salaried employees from coverage by the MW Act would be to apply an interpretation of that legislation inconsistent with New Zealand's international obligations under the Minimum Wage-Fixing Machinery Convention. This obliges New Zealand to implement and maintain a form of minimum wage-fixing machinery for all workers. An interpretation of that legislation, which excluded salaried employees, would leave them without any coverage by such machinery and, therefore, New Zealand in default of its international obligations.

---

[17] Minimum Wage-Fixing Machinery Convention 39 UNTS 3 (opened for signature 16 June 1928, entered into force 14 June 1930).
[18] [2012] NZEmpC 199 at [40].
[19] [2013] NZCA 435 at [32].
[20] Minimum Wage-Fixing Convention 825 UNTS 77 (opened for signature 22 June 1970, entered into force April 29 1972).

[64] Also relevant is the all-encompassing language of the 1983 MW Act which refers to "every worker" and adopts the broad definition of "employee" under s 6 of the Employment Relations Act. To exclude salaried remuneration from coverage by the MW Act would be inconsistent with the original legislative intent in 1945 that "wages" were not to be confined in a technical sense but were seen, rather, in more general terms as a "reward" for labour performed. It is not significant, in my assessment, that the Wages Protection Act includes an express definition of "wages" which includes salaries. This is more a reflection of the inclusion of a similar provision in the Wages Protection and Contractors' Liens Act 1939 and has much the same insignificance as the absence of an express definition of "wages" in the MW Act which reflects an absence of this word in its 1945 predecessor. What do judgments say about this question? There is little available on this point, at least other than in the Employment Relations Authority or the Employment Tribunal and even then their absence of analysis means that these decisions are not authoritative or decisive of the issue.

[65] The first decision is one of the Employment Tribunal in *Mills v Ball & Patrick (t/a Cedar Park Motor Lodge).*[21] There, the Tribunal rejected an argument that the MW Act applied exclusively to waged and not salaried workers. It said:[22]

> I have no doubt the Minimum Wage Act applies to [the applicant's] employment. Counsel for the respondent referred to it being associated with the "industrial model of employment" and suggested it applied only to "wage" workers. Certainly it is spoken of generally in respect to "waged" employment probably because salaried employment would rarely come under consideration in this regard.
>
> However, the Act clearly applies to "every worker" (s 6). [The applicant] is a worker for the purposes of the Act – there was no argument about that. The debate over "salary" and "wages" is irrelevant in my view – the relevant section of the Act (s 6) entitles the worker to receive from his/her employer **payment for his/her work at not less than the minimum rate**.
>
> (original emphasis)

[66] Although the decision of the Tribunal in *Mills* was appealed, this aspect of it was not expressly reconsidered by the Court.[23]

---

[21] AT148/93, 14 June 1993.
[22] At 8.
[23] AEC58/94, 20 September 1994.

[67] Next, in *Kennard v Le Bon Bolli Restaurant Ltd*[24] a part-time restaurant kitchen employee claimed she had not been paid minimum wages under the MW Act. The employee's employment agreement provided that she would be employed full-time to work an average of 50 hours per week on a roster for an annual salary of $19,350 plus non-taxable allowances. In practice, however, remuneration received by the employee varied depending on the number of days that she worked in each week, but was calculated by dividing the annual salary by 52 (weeks) and then by five (days). The non-taxable allowances were not similarly apportioned – she was paid 1/52nd of the annual allowance per week regardless of the number of hours or days worked. The Employment Relations Authority found that Ms Kennard was paid a set sum per shift regardless of the hours actually worked, that set sum being calculated by dividing the annual salary by 52 and then five. At [26] of its determination the Authority wrote:

> [The employer] argued for an averaging process on the basis that salaried staff worked more hours in the busy season and fewer hours in the quiet season for the same payment. There are problems with that approach. The salary is simply too low for the average hours specified. At an average of 50 hours, it should have been at least $22,100.00 pa to avoid a problem ($340.00 plus $8.50 times 10 hours per week times 52 weeks). In any event, payment by salary is not a license to breach the provisions of the Minimum Wage Act 1983 and its regulations. The applicable Minimum Wage Order provided for $8.50 per hour, $68.00 per day or $340.00 per week if paid by the hour, day or week respectively. Hours beyond 8 (per day) or 40 (per week) must be paid at an extra $8.50 per hour.

[68] Other cases in which the Authority employed the same averaging approach as it did in *Le Bon Bolli*, include *Duggan v Hori t/a Orete Dairy Farm*,[25] *Li v Astral Management Ltd*,[26] and *Moreland v Johnstone*.[27] These do not contribute significantly or authoritatively to the decision of this question.

[69] Turning to dictionary assistance, *Black's Law Dictionary* defines "salary" as: "an agreed compensation for services – esp. professional or semi-professional services – usu. paid at regular intervals on a yearly basis, as distinguished from an hourly basis".[28] *Black's* defines "wages" as "[p]ayment for labor or services, usu.

---

[24] CA27/05, 25 February 2005.
[25] [2011] NZERA Auckland 304.
[26] CA54/07, 15 May 2007.
[27] AA142/10, 26 March 2010.
[28] Bryan A. Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul, 2009) at 1454.

based on time worked or quantity produced; specif., compensation of an employee based on time worked or output of production" and as including "every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer."[29]

[70] Taking account of all of the foregoing interpretive assistance, I find for the plaintiffs and against the defendants and the Secretary of Education on this issue. The words "wages" and "salary" are different descriptions of essentially the same thing, that is remuneration paid to employees for work performed. That a "salary" can also describe the remuneration of others who are not employees (for example office holders) does not mean that an employee's remuneration must be categorised exclusively as wages alone, or specifically as either wages or salary.

[71] I conclude that an employee in receipt of a salary (or of remuneration so expressed) is not thereby excluded from coverage and falls under the category of "in all other cases" in the rates specified in the statutory Minimum Wage Orders as discussed at [48] earlier in this judgment. That is because such employees cannot be described as being "paid by the hour" or by piece work or "paid by the day". Salaried employees are not excluded from coverage by the MW Act because of the description of their remuneration as being on an annual basis.

[72] That is not the end of the 'salary question' however. The legislation is silent, or at least unclear, about how one assesses whether remuneration expressed as an annual salary complies with the minimum rate of wages set out in the Orders in Council made under s 4.[30] I deal with that novel question later in this judgment.

A limitations question

[73] There is another preliminary question on which the parties disagree. It is whether the plaintiffs can recover any remuneration lost, liability for which may

[29] At 1716.
[30] Using the 2007 Order in Council example, cl 4(c) set out at [48].

have arisen more than six years before the plaintiffs issued their proceedings in the Employment Relations Authority in March 2012.

[74] Mr Cranney submitted that the opening words to s 6 of the MW Act 1983 mean that there are no overriding time limitations to recovering wages paid at less than minimum rates. Those words say:

> Notwithstanding anything to the contrary in any enactment … every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[75] Mr Cranney submitted that such an entitlement to receipt of remuneration trumps the general six year limitation period contained in the Limitation Act 2010[31] and any relevant time limitation constraints in the Employment Relations Act which may affect the question.

[76] I disagree. The entitlement relied on by Mr Cranney under s 6 is one to receipt of wages. Limitations periods affect, however, rights to issue proceedings, even although these proceedings may, as in this case, be for remuneration not paid in breach of a provision such as s 6.

[77] There is no need to determine the point by reference to the Limitation Act 2010 (or to determine whether this Act or its predecessor the Limitation Act 1950 applies under the transitional provisions of the 2010 Act) because the position is dealt with specifically by s 142 of the Employment Relations Act. This provides:

> No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[78] The plaintiffs' proceedings began in the Authority before their removal to this Court. The proceedings were and are "in relation to an employment relationship problem". "Employment relationship problem" is defined broadly by s 5 as including "a dispute, and any other problem relating to or arising out of an employment relationship …". The plaintiffs were in employment relationships with either one of the defendants and, in the case of one plaintiff, both defendants

[31] Or its predecessor, the Limitation Act 1950.

although at different times. The proceedings issued are not personal grievances. The plaintiffs' causes of action arose on the dates on which they claim they should have been paid minimum wage rates for sleepovers. No application for an order extending the time within which the proceedings may have been brought has been made either under ss 219 or 221 of the Employment Relations Act.

[79] Section 11 of the MW Act provides that recovery actions may be brought by a worker or by a labour inspector for the use of the worker, by action commenced in the Employment Relations Authority in the same manner as an action under s 131 of the Employment Relations Act. Section 131 deals with remuneration arrears proceedings generally and is subject to s 142.

[80] So it follows that, applying s 142 of the Employment Relations Act, the plaintiffs' claims cannot relate to breaches of the MW Act where the causes of action accrued before 12 March 2006, that is six years before the claims were brought to the Authority.

Material facts

[81] There are many relevant features of their employment of staff that are common to both defendants. They operate boarding hostels at two girls' schools in the Havelock North area of Hawke's Bay. Pupils live in those hostels during school term times including, in most cases, at weekends. The schools are responsible for the wellbeing and safety of those boarders at those times which include generally the hours between about 4 pm and 8.30 am the following day on week days, and at all times over weekends. Those periods are broadly subdivisible into two sub-periods when boarders are in their hostels. The first is when the boarders are awake and undertaking activities. The second is when they are, or at least are expected to be, asleep. Those latter periods vary depending on the ages of the boarders but cover at least the hours of about 11 pm to 6.30 am or 7 am on the following day.

[82] In the cases of both schools, the plaintiffs worked and lived in the boarding hostels which were part of the schools' campuses. Also resident on the campuses, although in separate homes, were the schools' boarding managers, the schools'

principals and their deputies. If events in the boarding hostels warranted this, those managers were available to be called upon by the boarding housemistresses to attend at the boarding houses, although this occurred in practice only very rarely.

[83] There is one matter of reputational concern to the defendants that I should address at the outset. The principals of the two schools were understandably concerned that there should be no unduly negative impression of their schools taken from the evidence of the plaintiffs about the activities of boarders at night. I did not do so and it bears repeating what I said at the hearing, that the vast majority of boarders behave well, unexceptionally, and as they are expected to do by the schools. As in any similar community, there is a small number who occupy a disproportionate amount of time of those responsible for their welfare and even then most of this is not for blameworthy misbehaviour. The plaintiffs' case is, of course, not about disruptive or misbehaving boarders but, rather, about the whole range of events with which they have to be available to deal in an institutional environment of large numbers of teenage girls and in which physical and emotional safety and security are paramount.

[84] The plaintiffs were employed in the boarding houses to both supervise the boarders' waking hours of structured study and recreational activities and also to be present and available to attend to boarder-related events and circumstances during those periods when boarders were, or were meant to be, sleeping. It is these latter periods, referred to loosely as "sleepovers", that this case concerns. That is because the plaintiffs were provided with accommodation in the boarding houses which enabled them to rest and sleep whilst being available to supervise boarders after 'lights out' and until the boarders awoke each morning.

[85] There is no dispute that the plaintiffs were constrained in their activities when rostered to sleepover duties at night. These restrictions included, in the case of Iona College, being prohibited from having any visitors at night and from having male visitors in the (upstairs) hostel accommodation at any time. The Iona College housemistresses were to remain sober at all times, and could not consume alcohol, be affected by drugs, or smoke tobacco. Their ability to socialise whilst on the school property was significantly limited. All visitors to the site had to sign in with

boarding staff on arrival and staff were expected to conduct themselves in a manner that was consistent with the values of the school and act as adult role models to the pupils. There were also restrictions on internet use by boarding house staff. They were expected to conduct themselves so quietly that boarders would not be disturbed by voices, radio or television sound or the like, especially during sleepover periods. During rostered sleepover periods, the housemistresses were expected to be in a position to respond immediately to an emergency or other disturbance or event that might occur. Similar restrictions applied at Woodford House.

[86] Some of the housemistresses used their accommodation (rooms or small bed-sitting rooms) in the boarding houses as their homes, at least during school term time so that although there were additional constraints on their freedoms when rostered for sleepovers, there were also constraints upon them even when not rostered and so off duty.

[87] What happened in practice during those hours from about 11 pm until about 6.30 am or 7 am on the following day was controversial and the subject of much evidence during the hearing. It is necessary to prefer the evidence of one side to the contrary evidence of the other on this issue to determine whether the plaintiffs were working during sleepovers.

[88] As Mr Cranney identified correctly, the factual differences between the parties in this case turn on the extent to which hostel matrons were or were not able to enjoy uninterrupted rest or sleep between the hours of about 11 pm and 7 am on the following day when rostered to undertake sleepovers.

[89] In an attempt to contradict the evidence of the plaintiffs about the nature and frequency of their activities in the hostels during the times when they were permitted to rest or sleep (sleepovers), the defendants relied on written records of incidents in the hostels and on evidence of those rare occasions when the hostel managers or senior staff of the schools were required to attend at the hostels personally. That was always going to be a difficult exercise for the defendants unless the credibility of the plaintiffs was able to be impeached or even shaken in cross-examination, which it was not. Although there may have been some elements of

single incident repetition, hearsay and even some hyperbole in the evidence of the plaintiffs, they generally impressed me as fair, loyal, and honest employees and witnesses whose accounts of relevant events were not merely plausible but true. Importantly, however, their evidence about the written records they made, upon which the defendants relied, confirms the unreliability of these documents to portray accurately and fully what actually went on during sleepovers.

[90] The defendants may have expected the plaintiffs to have created written records of all incidents or other occurrences which interrupted their rest or sleep periods in the hostels. However, I am satisfied that for understandable reasons the plaintiffs only recorded the most serious and, therefore, relatively rare incidents. So whilst events such as false fire alarms and needing to take boarders to a medical centre or hospital, which did occur rarely, are disclosed in the records, not mentioned are what I accept were the much more frequent and minor events and attendances which nevertheless interrupted the plaintiffs during sleepovers or otherwise kept them awake and engaged during those periods. These included periodic building security checks, minor disturbances among the boarders, instances of homesickness, minor illnesses, and any one of the broad range of events that occur when significant numbers of teenaged boarders are living together.

[91] Nor do I accept the defendant's case that if the plaintiffs had truly been disturbed during their sleepovers or had undertaken the proactive security and monitoring duties that they said they did, the level of claims for payment would have been much higher than it was. Having seen and heard the plaintiffs give evidence, I do not consider that they were out to claim everything to which they may have been entitled strictly. Rather, they regarded such self-generated or incident-generated disruptions to their sleepover periods as incidents of their employment that did not warrant laborious recording and monetary claims that were the subject of sometimes arbitrary acceptance or rejection. I also consider that even when they may have been entitled to have called out a boarding manager or other senior school staff, the plaintiffs tended not to do so unless an event was of such seriousness or urgency that this could not be avoided. As in the case of scant recording, the absence of call-outs of the principals, their deputies, and boarding managers does not warrant an

inference that the plaintiffs were able to enjoy uninterrupted sleep during most of their sleepovers.

[92] In practice, the plaintiffs' rest/sleep periods on rostered sleepovers were disturbed, both to respond to incidents and for proactive safety reasons. In addition, the plaintiffs had to spend those sleepover periods in a state of readiness to do so and to react in the manner expected of them by the defendants. The nature of their duties and responsibilities meant that they could not expect those times to be their own for uninterrupted sleep or whatever other activities in which they might wish to engage.

[93] I conclude, also, that the defendants would have wished the plaintiffs to have acted in practice as I am satisfied they did, even if such performance may appear to be innocuous or uneventful and was treated by the plaintiffs as unworthy of recording formally. That expectation by the defendants would have reflected the same expectation of the boarders' families.

[94] In that sense, the plaintiffs' entitlement and ability to rest or sleep during those periods was necessarily secondary to their obligations to ensure the safety and wellbeing of boarders and property. The plaintiffs were employed more on an 'as and when' basis than simply 'just in case'.

[95] So, in summary, in addition to having to be available immediately to deal with incidents during sleepover periods, the plaintiffs also regularly attended not only to a broad range of minor incidents, but also to what might be called preventative maintenance during the sleepover period. The attendances at those minor events ensured, for the most part, that these did not become major events, whilst the preventative maintenance (for example security checks) likewise minimised the possibility of major occurrences which, unlike these minor incident attendances and preventative maintenance, would probably have been recorded and thereby known to the management of the schools if they had occurred.

[96] I would not wish it thought that the Court has rejected, as untruthful, the evidence of the principals and other senior management staff of the schools about what went on during sleepovers. They gave evidence of what they believed

happened from (limited) personal experience and what they assumed happened by reference to documentary records. These may perhaps have been better kept but they were, for whatever reason, not an accurate reflection of what happened in practice. In these circumstances, the Court has been particularly careful to assess the credibility of the evidence of the plaintiffs but, overall, their accounts have not been so effectively contradicted that they can be disbelieved.

[97] Finally, I do not consider that either the defendants or the parents and families of the boarders would have wished the plaintiffs to have spent their sleepovers other than in the ways I accept they did. Whilst the plaintiffs were able to rest and sleep during some of those periods, and sometimes for substantial proportions of them, there was both a significant disruption to them and the need to be constantly available to deal with unpredictable events that could not have meant that they were simply paid to sleep and to be available to turn to only very occasionally.

[98] At material times, the plaintiffs working at Iona College were paid a salary which covered all rostered work (including sleepovers) although if they agreed to sleep over for additional (unrostered) nights, there would be an additional payment of $25 for each. In more recent years, if staff members were woken during the night, they were able to claim payment of an hourly rate for that time, although on many occasions they considered that these attendances did not warrant making claims that were met or declined by Iona somewhat arbitrarily.

[99] At both schools, matrons or housemistresses had their own individual studio apartments within the boarding houses. Some matrons used these as their permanent residences while others, who had their own homes elsewhere, used them only for sleepovers. Even in the latter case, however, these studios were personal to the staff and could be used at almost any time they wished.[32] In addition to these studios, meals, electric power, access to a telephone for national use, and internet were all provided and available to staff at no additional cost. Staff could watch television in

[32] The exception to this was when the accommodation was needed for a matron performing a sleepover who had no accommodation therefor.

their studios and sleep there, but noise levels and other disruptive consequences had to be kept to a very minimal level.

[100] At both schools also, the principal, deputy principal, and director of boarding all lived either on the site or immediately adjacent to it and were able to be contacted if required between 11 pm and 7 am with one of those three being designated as "on call" at the weekends. In practice, such recourse to management was rare with almost all incidents able to be dealt with effectively by the matrons in the hostels.

[101] Iona College expected its matrons to report daily in writing and orally to its director of boarding who, in turn, was to report daily to the deputy principal, deans or principal, and formally on a weekly basis to the principal. Iona College expected boarding staff (the plaintiffs) to deal with minor incidents, its director of boarding to deal with "more serious" incidents, and the principal with "major" incidents. Iona College has a sick bay on site with a registered nurse there during the mornings from Monday to Friday. A doctor held twice-weekly clinics on site, as did a physiotherapist, and a clinical psychologist acted as a counsellor for students at a weekly clinic. These facilities meant that serious incidents during sleepovers could be dealt with appropriately at a later time. They were not in substitution for night time attendances. As in the case of Woodford, also, after hours emergency medical care was available locally although this, too, was required only infrequently. The employers' witnesses relied substantially on incident or other written records created by the matrons or their supervisors, to determine the nature, frequency and duration of interruptions during sleepovers. The employees themselves, however, gave evidence of many more frequent interruptions, and the consequences of these, than were recorded at the time. In the end, there was really no effective challenge to the plaintiffs' accounts and, at most, they were only able to be criticised by the defendants for their inadequate record keeping and occasional hyperbole. They were not, however, reprimanded for the former at the relevant times or otherwise required to improve their performances in this regard.

[102] Each of the plaintiffs is a mature woman, and several continue to be employed by the defendants. They impressed me as pragmatic, fair minded, not prone to exaggeration, and well disposed to the schools. Each was a person who

enjoyed the trust and confidence of her employer to ensure that the high expectations of parents, that the schools would care for their daughters, were carried out in practice.

[103] As already noted, much time was spent in evidence asserting or denying whether particular and general sorts of incidents took place during sleepover times. The plaintiffs' evidence came from their own experiences, the defendants' largely from the implications of written accounts that were meant to be kept by staff to record such events. However, as the principal of Iona College accepted, merely because an event is not recorded does not mean that it has not occurred.

[104] The incompleteness of the defendants' recorded incident-based analysis of work performed during sleepovers is also illustrated by its failure to record or take into account what might be termed proactive or preventative monitoring of their hostels by the matrons or housemistresses. So, for example, active responses to even very minor disturbances, periodic walk-around checks of the boarding houses, and a consequent awareness amongst the boarders of the matrons' propensities to keep a close eye and ear on their charges during nights (all of which activities were largely not recorded), in turn probably reduced the frequency of behavioural incidents which, if they had occurred, would probably have been recorded. This was the operation in practice of the aphorism "an ounce of prevention is worth a pound of cure".[33]

[105] This analysis does not extend, of course, to unforeseen and unplanned events and disturbances such as illnesses, malfunctioning alarm systems and the like. However, in my view it probably accounts for the modest number of reported incidents attended by matrons and housemistresses upon which the defendants rely, and their assertions that most of the plaintiffs could therefore enjoy uninterrupted sleep most of the time on their sleepovers. The reality of nights in the boarding hostels was not well or even adequately reflected in the written records of incidents alone.

[33] Attributed to Benjamin Franklin, 1706-1790.

[106] It is significant that no current or former matron or housemistress was called to contradict the plaintiffs' evidence about what actually occurred on sleepovers. It is not a persuasive argument that matrons' and their supervisors' daily reports, which were generally written in a deliberately positive tone, thereby tended to establish an absence of active work by the matrons and housemistresses during sleepovers.

[107] Independently of the absence of direct contradictory challenge to the veracity of the plaintiffs' accounts of these events, I found each of them to be an honest witness of truth and otherwise well disposed to her current or former employer and the role that she performed. That is not to say that the defendants' witnesses were dishonest or sought to mislead the Court. They were not and did not. However, their lack of what might be called coal-face experience, their significant reliance on the presence or absence and the contents of written records, and their understandable defensiveness of the schools as institutions which they perceived, albeit erroneously, as being under attack in the litigation, means that I prefer and accept generally the evidence of the plaintiffs about what actually occurred during sleepovers.

[108] That is not to say that all plaintiffs experienced incidents requiring their attention on all sleepovers. As the defendants say, correctly, many of the incidents related by the plaintiffs probably involved the same group of students and sometimes on the same occasions. But I conclude that it was the proactive preventative routine activities of the matrons and housemistresses on sleepovers that meant that, despite being able to sleep lightly for parts of those sleepovers, the plaintiffs must nevertheless be considered in law to have been working during those times. They were primarily responsible for substantial numbers of teenage girls in a hostel environment. Their personal activities were significantly constrained during the relevant sleepovers. It was probably inevitable that one of the schools (Woodford House) has recently changed its supervision arrangements for boarding houses overnight and now engages night supervisors who are required to remain awake and undertake duties actively for hourly-based wages. The evidence of this change does not, of course, influence the decision to be made in this case about the historical events but it has, no doubt among other things, limited that school's liability in proceedings such as this.

[109] Although not on every night, I accept that boarding hostel matrons undertaking sleepovers were generally not able to enjoy either an uninterrupted period of sleep or to pursue any recreational activities they may have wished to during these periods. That was because of a combination of building inspections, responses to door/window alarm activations, dealing with immediate pastoral care needs of the boarders, as well as the less frequent and more dramatic events (of which their employers did become aware) including dealing with false fire alarms, conveying girls to medical centres, and the like.

[110] Common sense, also, confirms that the evidence of the plaintiffs is more likely to be accurate in the circumstances of significant numbers of teenage girls (12 to 18 years) living away from their homes in a structured environment. In the case of Iona College, the boarders numbered 165, the vast majority of whom lived in a single hostel and, in the case of Woodford, boarders lived with others in their age groups in five separate hostels (or "houses"), each containing up to about 50 boarders.

Restrictions on the plaintiffs during sleepovers

[111] There were a number of both formal and informal constraints imposed on the plaintiffs when undertaking sleepovers between the hours of approximately 11 pm and 6.30 am on the following day. The formal constraints were those imposed expressly by their employment agreements and the schools' own rules. What I have described as the "informal constraints" reflected the particular circumstances of a boarding house, the placement of the plaintiffs' sleeping accommodation within it, the proximity of the boarders, and the like. Examples of these informal (but nevertheless real) constraints included not flushing lavatories, speaking in a hushed voice on the telephone, and having the volume of a television programme so low as to be almost inaudible. Those were practices developed and adhered to necessarily by some of the plaintiffs in some of their accommodations to ensure that they did not disturb adjacent boarders.

[112] Express restrictions on all plaintiffs included:

- being unable to leave the boarding house during the period of the sleepover (I imagine at least without ensuring that a suitably qualified and approved substitute replace them if there was a need to leave to take a boarder for medical attention for example);

- not consuming or being under the influence of alcohol or drugs;

- complying with the school's internet use protocols for boarders; and

- not having visitors during sleepover periods and, in one case, in respect of work visitors, at all.

The defendants' "team" approach to sleepovers

[113] The defendants' cases emphasised that the matrons or housemistresses were members of teams of staff at the schools which dealt with issues that arose in boarding hostels in a way that engaged the appropriate expertise and resource for any particular issue. This was connected to a submission that the appropriate roles of the matrons/housemistresses were preliminary or in the nature of an initial triager in most cases including at nights when they were, in effect, only the first responders to issues that arose.

[114] It appeared that there was a belief by the defendants' witnesses, at least in the case of Woodford, that a matron's involvement in any issue that arose (including during sleepovers) would not need to exceed 30 minutes. That was in the sense that the issue would either be sufficiently minor to be able to be resolved by the matron/housemistress within that period or, if it required attention beyond that initial 30 minutes, then another or others should be called in including, in a hierarchy, boarding house management, the principal or the deputy principal.

[115] That expectation and the 30 minute time limit was not, however, either one that was shared by the plaintiffs or, in many cases, had been communicated to them, whether in writing or otherwise. It was not, for example, contained in the plaintiffs' job descriptions or other written detail of how they were to perform their work. I

find it did not occur, at least commonly, in practice. That is not to say that some incidents and other callouts were not able to be dealt with within that period. Some were, and others were not, but those in the latter category rarely required the immediate attention of the managers.

[116] This expectation by the employers was also associated with their employment agreements to pay flat fees for callouts during sleepovers. This was that any particular callout during a sleepover would probably not occupy much more than 30 minutes, at least of the matron's or housemistress's time, although allowing for the possibility of longer attendances as the evidence establishes did occur from time to time.

[117] Whatever may have been the employers' expectation of matrons' or housemistresses' attendances to incidents during sleepovers as their witnesses asserted in evidence, I find the reality was often otherwise. The plaintiffs turned out to incidents, both serious and minor. Although the result of these in some serious cases was a referral on to further expertise such as counselling on the following day, it was relatively rare that boarding hostel management and even rarer that the schools' principals or deputy principals would be called out to other than a very serious incident during a sleepover period. Many attendances by the plaintiffs during sleepover periods exceeded 30 minutes' duration and multiple attendances sometimes occurred on some sleepovers, often to follow up on an initial incident. Again, the reality of the workplace differed in practice from what the defendants said were their expectations.

The applicable employment or collective agreements

[118] There are many different employment arrangements at issue in this case, not only as between the two schools but as between individual employees and even as between the successive individual employment agreements of each employee. There are, however, a number of factors common to all of the plaintiffs which are relevant to this proceeding:

- Except in a few cases of early individual agreements and where there has recently been coverage under a collective agreement (with which I will deal separately), each plaintiff's remuneration was expressed an annual salary.

- Each plaintiff's agreement included a term allowing for board, food and other consumables that was identified but was not a part of her annual salary.

- Each plaintiff's remuneration was paid monthly or fortnightly in arrears, being calculated as one-twelfth or one-twenty-sixth of her annual salary before deductions.

- Each plaintiff's hours of work were specified either precisely or by allowing the employer to determine more or fewer hours of work on any particular occasion in circumstances that varied unpredictably.

- Each plaintiff could be expected to be called on to provide ad hoc services such as examination supervision duties for additional remuneration calculated by reference to the employee's annual salary.

The Iona College plaintiffs' contractual provisions

[119] Four of the plaintiffs worked at Iona: Ms Maree, Ms Exeter, Ms Colbert and Ms Hocking. With one or two minor exceptions, decision of their claims will turn on the contents of a materially identical form of individual employment agreement the example of which, for the purpose of this judgment, is Ms Maree's 27 April 2009 agreement. Its material provisions included the following.

[120] What were said to be the employee's "minimum hours of work" were set out in sch A to the agreement. These were also labelled "the ordinary hours". Schedule A also referred to hours of work labelled "the additional hours". These were said to be hours of work in addition to the ordinary hours which needed to be performed at busy times and to otherwise complete the matron's work where this could not be

completed within those ordinary hours. Schedule A, by reference to "the current Boarding House Roster" defined when the ordinary hours of work would be performed. This roster was a school term-long document published in advance which set out, over the days of each week, the hours to be worked on each day, when sleepovers were to be worked and, on those days when no work was allocated, indicated the employee's days off. It follows that sleepovers were not "additional hours" referred to in these agreements. They were what might be called rostered attendance periods although not considered by the defendant to be either "ordinary" or "additional" hours of work.

[121] Ms Maree's 2009 individual employment agreement provided that her annual leave would be the minimum statutory entitlements under the Holidays Act 2003 and that these were to be taken during the school's holidays. Annual leave was to be paid at ordinary rates of pay.

[122] Ms Maree's 2009 individual employment agreement required her to sleep in the school's boarding house except when she had an "official" night off when she could choose to sleep off campus. Although there was neither definition of what was an "official" night off, nor any other provision that might have assisted in defining this, I infer that these were nights, according to the relevant boarding house roster, when Ms Maree was not scheduled to work either until 11 pm as part of her ordinary hours, or on a sleepover. Accordingly, Ms Maree was required to be present in the boarding house for her rostered sleepovers. There was also a provision requiring Ms Maree to perform additional sleepovers to ensure that there was a sufficient minimum number of matrons on the boarding house premises at night.

[123] The evidence establishes that at the relevant times there would always be at least one matron on a sleepover in the school's main boarding house and one at its separate and smaller gatehouse hostel for Year 13 pupils. The boarding house rosters scheduled three sleepover matrons for both boarding houses on week nights and two sleepover matrons at weekends. The number of boarders in the Iona boarding houses was about 150 in the main boarding house and up to 50 in the Year 13 gatehouse hostel.

[124] Any payments for the rostered sleepovers (numbering between about five and seven per fortnight) were considered by Iona to be included within the annual salary paid to the matrons. There was, however, an informal (and perhaps later, formalised) practice of paying a matron a flat payment of $25 per sleepover for any non-rostered extra sleepover performed.

[125] Matrons' meals were provided by the school at times when the hostel kitchen was open and matrons were on duty including supervising pupils in the dining room. At other times, the matrons were expected to provide their own meals and, in some cases, an allowance towards the costs of these was provided.

[126] The following are applicable to the individual circumstances of the Iona plaintiffs.

[127] As in the cases of the other Iona employees who were employed after 30 January 2012, Ms Exeter has no claim in respect of sleepovers because revised individual employment agreements executed by those staff in late 2011 ceased the practice of sleepovers being performed by matrons.

[128] Ms Colbert's relevant terms and conditions were the same as those of Ms Maree and Ms Exeter.

[129] Ms Hocking was covered by two relevant individual employment agreements with Iona College, her third (dated 11 November 2011) having discontinued the practice of sleepovers. Ms Hocking's first individual employment agreement was dated 18 October 2006. This provided that she was to be paid an hourly rate of remuneration of $13 and a flat rate of $25 per sleepover for working non-rostered (ie additional) sleepovers. The evidence indicates that Ms Hocking performed up to seven sleepovers per fortnight, generally three in one week and four in the other week. This meant that Ms Hocking worked up to 127 hours per fortnight, although she was paid for only 80 of those hours. Ms Hocking's second individual employment agreement dated 7 February 2007 was materially identical to Ms Maree's.

The Woodford House plaintiffs' contractual provisions

[130] As in the case of Ms Maree and Iona, I propose to use Ms Needham's terms and conditions of employment which were common with those of a number of the others of the Woodford House plaintiffs, to illustrate the relevant terms and conditions. Ms Needham's first individual employment agreement provided for her "part-time salaried" employment commencing on 12 December 2006. Her hours of work were "for the duration of each Woodford school term as set out in the Woodford House Term Events Card". Ms Needham was permitted to leave the school during term breaks and "Exeat periods" after her duties were completed to the satisfaction of the boarding manager. Her hours of work when on duty were set out in the agreement's attached job description. Clause 7.3 provided:

> At night, outside the hours specified in Clause 7.2 …, the Housemistress may be required to attend to the needs of students or requests from the Boarding Manager or Principal when required.

[131] The "salary package" set out in the agreement included remuneration, the value of accommodation, meals and electricity when on duty, and was said to properly remunerate Ms Needham for the specified hours of work and additional attendances under cl 7.3 "as may occur from time to time".

[132] The attached job description provided that the employee was to be "available to the girls at all times and hence, is resident in the House when on duty". Days off were to be negotiated annually in advance between Ms Needham and her employer: the latter undertook to always endeavour to meet individual preferences although could not commit to satisfying these.

[133] Ms Needham's job description's hours of work were specified as being:

> Rise by 6.30am. Retire after House is settled and has been checked (between 10.30pm and 11pm).
>
> Opportunities to leave school premises on duty days are between 8.35am and 2.45pm on week days. A half day off duty will be given to those working during weekends, subject to the availability of three Housemistresses being on duty and the number of boarders present being less than 60. Alternatively, a minimum one hour off duty will be rostered on each of those

> days. Full time staff to have their day off on the long weekend as per usual. The Relieving House Mistress to lock up and see the girls off.

[134] Ms Needham's hours of work for which she was remunerated by her salary included the required sleepovers.

[135] This first agreement covered Ms Needham's employment at Woodford House from 19 July 2006 until mid-March 2012 when she resigned to take up employment elsewhere. However, as from 1 February 2009 it was modified necessarily by the relevant provisions of the Woodford House Collective Agreement between the Trust Board and the Service and Food Workers Union Nga Ringa Tota Inc (the SFWU). Under that collective agreement, employee remuneration was defined in its third schedule, being made up of a specified annual salary "and the value of PAYE on the assessed value of accommodation, and/or food and electricity as determined from time to time". Clause 14.1(a) relating to remuneration continued:

> … For the purposes of payroll administration, the value of these assessed benefits and the PAYE thereon is shown on the employee payslips as an allowance provided by the employer. The assessed benefit is shown as a deduction to the employer and the PAYE on the assessed benefit is included in PAYE deductions which the employer pays to IRD. The specified salary is not affected by these transactions.

[136] Clause 14.1(b) provided: "The remuneration shall be deemed to fully compensate the employee for all time worked and services rendered pursuant to this collective agreement."

[137] Clause 14.1(c)-(f) provided:

> (c) Employees shall be paid the amount set out in Schedule Three based on an assumed 40 working week school year. This 40 weeks includes bed making days at the commencement of each term, professional development days and attendance at final assembly and prize giving. In addition employees will be paid for 4 weeks annual leave paid on the basis of the amount earned over the 40 weeks worked i.e 8%. This equates to 44 paid weeks per year. In addition employees will be paid any extra for working statutory holidays during school terms plus days in lieu for having worked on statutory holidays.
>
> (d) Payment of the above remuneration will be annualised and paid over 52 weeks. The employer will calculate each week's pay on the basis of the anticipated average weekly pay over the 40 weeks actually worked and will make any necessary adjustments at the end of each

school term or as in the employer's discretion is required for accurate calculation.

(e) The school year is divided into 4 terms. One week's annual holiday pay will be paid at the end of each school term as per paragraph 20.1 of this agreement.

(f) For the avoidance of doubt 8 weeks of each year (52 – 44 paid weeks) shall be regarded as leave taken without pay.

[138] Clause 14.3 ("Call Out" Allowance) provided:

> Where an employee covered by this Agreement is required to attend to a student between 11pm and 6.30am in the course of her employment she will be paid the sum of $15 for each said "call out" on the understanding that each "call out" shall be no more than one hour. In the event that the "call out" lasts for more than one hour the employee will be paid a further $15 for each hour or part thereof worked by the employee.

[139] From this provision it is possible to discern that sleepovers (which cover the same period as the call-outs) were not paid for separately but were incorporated in the hours worked and Ms Needham's annual salary. There was no specific provision in the collective agreement for sleepovers.

[140] In contrast to the position at Iona, the Woodford House Collective Agreement provided that employees were not entitled to remain in their school accommodation on days off or during school holidays, and that they were only entitled to such accommodation or meals if those were "necessarily incidental to the discharge of the employee's duties (cl 16.4).

[141] The generic job description for the Woodford House plaintiffs covered by the collective agreement affecting hours of work is the same as that which was set out in Ms Needham's earlier individual employment agreement. So too were the weekday daily routines requiring staff to be on duty from 6.30 am until 8.30 am and again from 2.45 pm until (approximately) 11 pm.

[142] The collective agreement's third schedule "Employee Particulars" provided, generically, for an "Hourly rate [of] $12.75 per hour for week days and $13.40 per hour for weekends [and] … $20.00 (gross) per night for every night the employee stays overnight in the course of her employment and as a requirement of the employer". The third schedule also provided that the employees' hours of work were

to be provided in the job description appended to the collective agreement, the House staff routine sheet appended to the collective agreement, and "Any roster posted from time to time".

[143] I again deal with the provisions for Woodford House employees other than Ms Needham. Mrs Law worked as a house matron at Woodford House from 22 April 2010 until the date of her resignation on 25 January 2012. She was employed there for seven school terms as a full-time house matron working five nights per week during term times. She was on duty from 4 pm on a Sunday until 8.30 pm on the following Friday morning. This period included five sleepovers from 11 pm until 6.30 am the following morning. Actual duty times were from 2.30 pm or 3 pm until 11 pm, sleepover from 11 pm until 6.30 am the following morning, and then from 6.30 am until 8.30 am on that following morning.

[144] Mrs Law was initially engaged on a brief form of individual employment agreement on a salary of $29,828 per annum based on a 40 week working year but payments under which were made over 12 months and paid monthly in arrears. The salary included "an allowance for working weekends" and provided that "Accommodation and meals are provided for your days on duty". Mrs Law subsequently became a member of the SFWU and it was the terms and conditions of the collective agreement which have been summarised in relation to Ms Needham, that applied to her employment thereafter.

[145] The Woodford House plaintiff Ms Thomsen was engaged under two forms of employment agreement. The first was an individual employment agreement under which she held the role of a relieving part-time waged housemistress. Her gross rate of pay was "$13 per hour, including holiday pay" with her hours of work being "on an as required basis during the Woodford school term as set out in the Woodford House Term Events Card". Clause 7.2 of this agreement provided that, when on duty, Ms Thomsen's hours of work were 6.30 am until 8.30 am and from 2.45 pm until 11 pm daily but "not necessarily the full extent of those hours each day worked". Clause 7.3 of her employment agreement provided:

> At night, when sleeping in a boarding house, outside the hours specified in Clause 7.2 above, the Housemistress may be required to attend to the needs of students or requests from the Board Manager or Principal when required.

[146] As to remuneration, cl 8 of Ms Thomsen's agreement provided that her hourly rate of pay for each hour of work performed would be paid weekly in arrears. Except for additional attendances on boarders at night which were to be paid at the same hourly rate, the $13 per hour remuneration rate was "deemed to fully compensate the Employee for all time worked and services rendered".

[147] On 1 February 2009 Ms Thomsen was engaged on the collective employment agreement, the relevant provisions of which have been set out in relation to Ms Needham.

[148] Woodford House plaintiff Ms Jones was employed on an individual employment agreement that was materially identical to that of Ms Thomsen, from 27 July 2007. From 1 February 2009 she, too, was employed under the collective agreement already summarised.

[149] Ms Simpson commenced employment with Woodford House on 2 February 2007 on the same form of individual employment agreement as in Ms Thomsen's case and she, too, moved to coverage under the collective agreement as from 1 February 2009.

[150] Ms Finlay was employed by Woodford House from 4 October 2004 on materially identical terms and conditions as have been summarised for Ms Needham. On 24 May 2006 Ms Finlay entered into a further form of individual agreement. This was materially identical to that of Ms Thomsen and which has been summarised earlier in this judgment. Ms Finlay also became covered by the Woodford House Collective Agreement from 1 February 2009.

[151] Ms Hocking, who also worked at Iona College at other times, was first subject to an individual employment agreement with Woodford House for the period from 27 May 2005 until a date that is unclear but was no later than 18 October 2006. Ms Hocking's first employment agreement provided, in respect of her hours:

> As this is a salaried position, the Housemistress job functions cover 24 hours a day when on duty, if this is required. Notwithstanding that, in normal circumstances the Housemistress may leave the premises, between 8.35am and 3.00pm.

[152] As to remuneration, Ms Hocking's salary was set at $22,000 paid monthly in arrears and "[a]ccommodation and meals are provided and Woodford House pays PAYE to Inland Revenue on the assessed value of those benefits".

[153] Ms Hocking was required to reside in a staff flat in the boarding house when on duty and was required to take her annual holidays in accordance with the Holidays Act 2003 during school breaks. In addition to the details just set out contained in her letter of appointment, the full version of Ms Hocking's 2005 individual employment agreement also provided that she would be allowed two days off each week, such days to be negotiated annually in advance with the boarding manager. As to hours of work, cl 2(4) provided particularly:

> The Housemistress job functions are performed as rostered but generally between 6.00am and 8.35am and 3.00pm and 11.00pm when working Monday to Friday and up to 16 hours each day when working on a Saturday and Sunday, although subject to the availability of three Housemistresses being on duty and the number of boarders present being less than 60, the Boarding Manager will roster for each Housemistress to have half a day off on a Saturday or Sunday, or alternatively, 1 hour off on each of those days.

[154] Outside the hours just specified, Ms Hocking could be required to attend to the needs of students, or requests from the boarding manager or principal when required. As to remuneration, cl 2(8) of the agreement provided:

> The value of the total salary package specified in this Agreement including remuneration and the value of accommodation, meals and electricity is intended to properly remunerate the Housemistress for the hours of work in clause 2.4 and such additional attendances arising from clauses 2.5 and 2.6 as may occur from time to time.

[155] As from 2006, Ms Hocking's annual remuneration was $24,886 "made up of salary at $22,000, accommodation valued for Inland Revenue purposes at $1,443, and meals and electricity at $1,443". Her remuneration was to be paid monthly in arrears, spread over 12 equal months.

[156] Finally, in the case of Woodford House, the plaintiff Ms Laking entered into individual employment agreements on 1 March 2005 and 7 June 2006 both of which provided for work during each school term and permitted her to leave the school during term breaks and exeat periods after her duties had been completed to the satisfaction of the boarding manager. Ms Laking's hours of work were to be on Mondays from 3 pm until 11 pm, on Tuesdays from 6 am until 8.30 am and from 3 pm until 11 pm, and on Wednesdays from 6 am until 8.30 am. Clause 2(3) provided:

> On Monday and Tuesday nights, outside the hours specified in Clause 2.2 above, the Housemistress may be required to attend to the needs of students or requests from the Boarding manager or Principal when required.

[157] The salary package specified in the employment agreement included remuneration for both specified attendances under cl 2(2) (hours of work) and additional attendances in cl 2(3), that is sleepovers. Ms Laking's remuneration was $9,017.50 made up of salary of $8,140, accommodation valued for Inland Revenue purposes at $585, and meals and electricity at $292.50.

[158] Ms Laking's second (7 June 2006) individual employment agreement was in materially identical terms to that of Ms Thomsen already summarised above. It changed her hours of work (when on duty) to be from 6.30 am until 8.30 am and from 2.45 pm until 11 pm although the agreement confirmed that Ms Laking remained as a part-time salaried employee. The previous requirements to attend at night remained unchanged. Ms Laking's annual remuneration increased to $10,218 made up of salary of $9,064, accommodation valued at $577, and meals and electricity valued at $577. This also was to compensate her for all time worked and services rendered. The agreement also provided that if Ms Laking used the accommodation or took meals other than when she was on duty, she would incur charges for these to be deducted from her salary including $15 per night for accommodation, $3 for breakfasts, $5 for lunches and $6 for dinners.

[159] Ms Laking subsequently became subject to the Woodford House Collective Agreement as from early 2009, the relevant provisions of which have already been summarised in relation to other Woodford House employees.

Statutory obligations affecting sleepovers

[160] These are relevant to the question whether matrons or housemistresses on sleepovers were working. The Education (Hostels) Regulations 2005 made under the Education Act 1989 govern school boarding hostels, including the defendants'. Minimum legislative requirements relevant to this case (with emphasis italicised) include that:

- all hostel staff are trained in fire and earthquake drills and other emergency procedures;[34]

- regular evacuation drills are carried out;[35]

- hostels must be managed in accordance with written policies and written operating procedures maintained by the owner, the general purposes of which must include *helping to ensure that boarders are supported in a positive learning environment*, given the opportunity to develop positively within reasonable boundaries, *feel secure and valued, have ready access to people they can trust and confide in, are supported in raising problems and issues that are of concern to them, and have ready access to, and a degree of choice about, health and other personal services they may require*;[36]

- *at all times whilst boarders are present at the hostel, those boarders or staff members who supervise those boarders are supervised by a responsible person*;[37]

- *hostel owners must ensure that security measures are used to prevent unauthorised access to the hostel's premises*;[38] and

[34] Regulation 48(c).
[35] Regulation 48(d).
[36] Regulation 54(2).
[37] Regulation 61(1).
[38] Regulation 61(2)(f).

- the owner of a hostel must ensure that it is *at all times staffed with a ratio of staff to boarders present that ensures the safety of those boarders having regard to the numbers of them and their ages and needs, and the nature (including the locations and times of day) of their activities* and the training and qualifications of staff or other adults concerned.[39]

[161] Regulation 66 requires that a boarder's parent can have contact with, or access, to the boarder whenever the boarder is present at the hostel and no good reason exists to deny that contact or access. Good reasons are defined, among other things, as including, materially that, in the opinion of a responsible person, a parental visitor is exhibiting behaviour that is or is likely to be disruptive to the hostel's effective operation. Regulation 66 does not constrain visits by reference to the time of day or night.

[162] There are other similar and rigorous requirements for school boarding hostels, their management and staffing which underpin statutorily both the operational rules of the defendants' hostels and the activities undertaken by the plaintiffs in the course of their duties including at the sleepover times. These statutory requirements require, in practice, at least the immediate availability of hostel staff at all times when boarders are present, if not their constant presence in a state of awakedness.

Benefits accruing to the employers

[163] Having the plaintiffs available to deal with a wide range of unpredictable occurrences at short notice had advantages for the defendants, in addition to being matters of regulatory obligation upon them. Parents of teenaged boarders entrusted the security, wellbeing, and even happiness of their daughters to the defendant schools. The schools take those responsibilities seriously and delegate them in the first instance to the plaintiffs and, more especially, during sleepover hours between about 11 pm and 6.30 am on the following day. It would be difficult to underestimate the importance of this pastoral care which the plaintiffs undertook for

[39] Regulation 61(3).

the defendants in addition to the schools' educational obligations to the pupils and their families. It is probably no exaggeration to say that without the presence in the boarding houses and the immediate availability of the housemistresses at all material times, the defendants could not have continued with the longstanding and important boarding opportunities that they offered. It is a particular feature of both schools which are located in a semi-rural environment adjacent to Havelock North, that they are able to attract boarders as students from the wider Hawke's Bay region, from other parts of New Zealand and, in smaller numbers, from other countries. The plaintiffs' role was, in short, vital not only to the success of the schools but to their continued existence. Having staff on sleepovers was very important to the defendants.

Is *Idea Services Ltd v Dickson* distinguishable?

[164] The present cases invoke the same principles as were discussed and adjudicated on several years ago in proceedings involving overnight caregivers in residential homes operated by Idea Services Ltd, an IHC subsidiary. That litigation produced determinations of the Employment Relations Authority, judgments of the full Court of the Employment Court and of the Court of Appeal before those proceedings were settled on the eve of a hearing in the Supreme Court and legislation was subsequently enacted dealing with remedies.[40] These cases are the leading, persuasive and binding authorities on the same questions raised by this case. The facts, as always, of different cases may distinguish them.

[165] The defendants say that these cases are distinguishable on their facts from the *Idea Services* case. In respect of those plaintiffs employed by the Woodford House Trust Board (Woodford House), it says that, with one exception, the plaintiffs employed by it were engaged initially on individual employment agreements for an annual salary and provided with accommodation as terms and conditions of their employment. Woodford House says that from 1 February 2009 its housemistresses were the subject of a collective agreement with the SFWU which altered their

[40]See *Dickson v Idea Services Ltd* ERA Wellington WA117/08, 5 September 2008; *Idea Services Ltd v Dickson* [2009] ERNZ 116 [First Employment Court *Idea Services* judgment]; *Idea Services Ltd v Dickson* [2009] ERNZ 372 [Second Employment Court *Idea Services* judgment]; *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 [Court of Appeal *Idea Services* judgment].

remuneration structure but retained the accommodation entitlement. Also, from 1 February 2009, Woodford House says that the affected plaintiffs received additional "call out payments" for work performed between the hours of 11 pm and 6.30 am the following day while on sleepovers.

[166] Woodford's claim is that the plaintiffs' work, including staying in their self-contained accommodations in the boarding hostels on sleepovers, was covered in the plaintiffs' annual salaries and no question of a failure to pay minimum rates of remuneration arises.

[167] In the case of Iona College, this defendant says, likewise, that the plaintiffs employed by it were on individual employment agreements on an annual salary and received accommodation as terms or conditions of their employment.

[168] Mr Harrison said all that could reasonably and possibly be said in legal argument to distinguish the facts of this case from those in the *Idea Services* litigation which, as the judgment of the full Employment Court noted, required an intensely factual analysis for the determination of its outcome.[41] Although I have not been persuaded that the distinctions between the two cases are sufficient to bring about a different result in this from *Idea Services*, I should nevertheless address briefly Mr Harrison's respectable arguments in this regard.

[169] The first of these distinctions asserted by Mr Harrison was the "live-in" or "home" aspect of the plaintiffs' employment. This emphasised that not only were they entitled to, but indeed a number of the plaintiffs and their colleagues did, use their boarding house rooms as their residences other than when they were on duty and sleeping over. That was said to contrast with the *Idea Services* situation where the accommodation provided for sleepovers was otherwise used as office or storeroom space and the staff sleeping over all had their own home accommodations off site.

[170] Although that is a distinction, it is not as significant as the defendants contend. That is because the plaintiffs in this case had a choice to either use the

[41] First Employment Court *Idea Services* judgment, above n 40, at [63].

rooms provided solely for sleepovers or to stay in them for longer periods including, at the extreme, making them their homes, albeit in the form of a bed-sitting room.

[171] Further, each school reserved the option to use the accommodation to house someone else during sleepovers if she did not have other sleepover accommodation at the school and the substantial majority of the plaintiffs elected to maintain their own homes off site and to use the hostel accommodation either for sleepovers alone or otherwise when they were on duty generally at the school. The plaintiffs were not required by the defendants to live on site at all times. It is significant, also, that even although the plaintiffs were entitled to use their rooms at any or all times, meals were only provided to them when the boarding house kitchens were operating and, in most cases, when the plaintiffs were on duty. They may be said to have had board but not full lodging at the hostels.

[172] I also find against the defendants' associated distinction argument that the constraints, restrictions, and disturbances became part of the employees' living arrangements because of that ability to use their rooms as their homes. Some of those constraints did indeed arise from that broader accommodation entitlement (for example, the need to keep very quiet at night) but other constraints on the plaintiffs' activities came about independently as a result of the sleepover arrangements. These constraints or restrictions or disturbances included the need to be able to attend promptly to any incidents or other events which did not impact upon the plaintiffs unless they were rostered on sleepovers.

[173] The next distinction with the circumstances in *Idea Services* identified by Mr Harrison was said to be that the schools in this case had a range of other support services on site which were absent in the Idea Services community homes cases. It is correct that the schools' senior management personnel lived on site, that there were regular clinics conducted by medical and associated professionals, and that senior students also played in a role in the supervision and assistance of boarders. Although external resources were available to the IHC residents and their carers sleeping over, I accept that there was not the same hierarchical structure as for the boarders in this case. This is a valid distinction but does not detract substantially

from the nature of the plaintiffs' role during sleepovers and the responsibilities expected of them.

[174] Mr Harrison submitted that such activity as was undertaken by the plaintiffs during the sleepover periods was not at the same level of responsibility or seriousness as in the *Idea Services* case. I agree that it was different, but consider that in essence it was no less important or time consuming. In the *Idea Services* case, the residents were small numbers of adults with disabilities living in the community as far as possible. In this case, the care and responsibility of the plaintiffs was exercised in respect of large numbers of teenaged girls living in a school community. It is notable that in *Idea Services* the full Court wrote:[42]

> We accept … that some service users frequently come in and out of the community service workers' sleeping area if they are feeling unwell or want to talk. Many service users consider immediate access to community service workers during sleepovers to be a matter of course. This was likened in evidence to the innocent access that young children have to their parents' bedrooms.

[175] In many instances this is not dissimilar to the roles played by the plaintiffs in this case. Indeed, if there is a difference between this and *Idea Services*, my conclusion is that the plaintiffs were more proactive during sleepover periods than the caregivers in IHC who were largely reactive to incidents as they arose although that, of course, is a feature of the housemistresses' role in this case too.

[176] The other relevant factor which I think is common ground is that housemistress attendances during sleepovers were to a small number of boarders with disproportionately high needs or behaviours that needed monitoring. That was really the same situation in the *Idea Services* sleepover situation, although the numbers of boarders supervised by the plaintiffs greatly exceeded the numbers of residents in Idea Services' homes.

[177] Nor do I accept the final difference between this case and *Idea Services* as Mr Harrison submitted. Counsel said that the very structured framework of the school environment distinguishes it from the community living arrangements in *Idea Services*. With some minor differences to take account of the ages of the residents in

[42] At [17].

both cases, I do not consider that there are significant distinguishing factors between the two cases. That is not to say that the facts in *Idea Services* are important to the decision of this case which must be decided on its own facts. I have made these comparisons only to deal with the 'distinguishing' arguments and because counsel addressed the comparisons to the extent they did.

Case law from other jurisdictions

[178] Mr Cranney referred to a number of cases and although many of these were considered and relied on by this Court and the Court of Appeal in the *Idea Services* litigation which will not be revisited, I will refer briefly to some which indicate a broadly similar international approach to similar circumstances to those in this case.

[179] A useful summary of the relevant law in the United Kingdom is contained in *MacCartney v Oversley House Management.*[43] There the UK Employment Appeal Tribunal stated:[44]

> … A manager or warden of sheltered accommodation who is required by her employer to remain on call to residents and for that purpose to remain on or close to her place of work is "working" while on call even if her employer provides her with a home at her place of work.

[180] A similar conclusion was reached in *Anderson v Jarvis Hotels Plc.*[45] There a manager slept over in a hotel to be on hand to deal with emergencies such as fire or flood. On appeal, it was held by the Employment Appeal Tribunal that he was required to be at the hotel and available, and was therefore working.

[181] Finally, in *Burrow Down Support Services Ltd v Rossiter*[46] the UK Employment Appeal Tribunal dealt with a case of a disability sleepover worker who was held to be working during the whole of his shift.

[182] The approach adopted in this case following the judgments in the *Idea Services* litigation is also broadly in accordance with comparable issues in the United

---

[43] [2006] IRLR 514 (EAT).
[44] At [60].
[45] [2006] UKEAT 0062_05_3005.
[46] [2008] ICR 1172 (EAT).

States of America.[47] Current federal regulations under the Fair Labor Standards Act of 1938 reflect case law since *Armour & Co v Wantock*[48] and *Skidmore v Swift & Co*[49] which stipulate that a worker required to remain on call on the employer's premises (or so close to them that he or she cannot use the time effectively for his or her own purposes) is working and must be compensated for that time.

[183] The New Zealand case law is now also broadly in accordance with that in Australia. See, for example, the decision of the Full Court of the Federal Court of Australia in *Warramunda Village Inc v Pryde.*[50] The relevant European Court of Justice cases were referred to in the judgment of the Court of Appeal in *Idea Services.*[51] See, for example, *SIMAP v Consellaria de Sanidad y Consumo de la Generalidad Valenciana* [52] defining the phrase "working time". For a subsequent judgment of the European Court of Justice in a sleepover case, see *Landeshauptstadt Kiel v Jaeger.*[53] This approach has been described subsequently by the European Court of Justice as "settled law" in *Dellas v Premier Ministre*.[54]

Decision – Were "sleepovers" work?

[184] I apply the same three fundamental considerations to the decision of this issue as were upheld by the Court of Appeal in *Idea Services*.[55]

[185] First, sleeping over necessarily placed significant constraints on the plaintiffs' freedoms, even in the cases of those plaintiffs who lived in their accommodations in the boarding hostels when they were not undertaking sleepovers.

[186] Second, the plaintiffs on sleepovers had significant and extensive responsibilities. They were responsible for the safety and wellbeing of substantial

---

[47] See, for example, *Central Mo Telephone Co v Conwell* 170 F. 2d 641 (CA 8 1948) at [30].
[48] 323 US 126 (1944).
[49] 136 F 2d 112 (5th Cir 1943).
[50] [2002] FCAFC 58, (2002) 116 FCR 58.
[51] See Court of Appeal *Idea Services* judgment, above n 40, at [18]-[20].
[52] [2001] All ER (EC) 609 (ECJ).
[53] [2004] All ER (EC) 604 (ECJ).
[54] [2006] IRLR 225 (ECJ) at [46]-[47].
[55] Court of Appeal *Idea Services* judgment, above n 40, at [7]-[10].

numbers of teenaged girls. The schools' expectations of the matrons or housemistresses were high and onerous, as were those of the girls' families.

[187] Third, not only was the sleepover role beneficial to the schools but it is not an exaggeration to say that without the immediate availability of a responsible adult in the hostels at night, they could not have maintained those boarding establishments lawfully or practicably. In the particular circumstances of the two schools, their continued existence was very closely tied to the maintenance of the boarding facilities and their high standards.

[188] The Court of Appeal in *Idea Services* said that the greater the degree or extent of each of these factors above, the greater would be the likelihood of sleepovers being work.[56] Although comparison of these factors between the *Idea Services* case and this cannot be taken too far, I can say confidently that their degree and extent in this case are at least as great as, if not greater than, the comparable roles in *Idea Services*.

[189] Although having made this assessment on the facts of these cases, applying the law determined by this Court and the Court of Appeal in the *Idea Services* case, the outcome is remarkably similar to that earlier case. There are clearly differences in the particular work undertaken by school boarding housemistresses or matrons, but there is, nevertheless, a substantial degree of material identity with the sleepovers that were in issue in *Idea Services*. Indeed, in some respects the conclusion that the plaintiffs must be regarded as working during sleepovers in this case is stronger than it was in *Idea Services*. In these cases, the plaintiffs were required to participate, albeit occasionally, in fire evacuation drills during the sleepover periods and, unlike the staff in the homes in *Idea Services*, undertook periodic checks of much larger and more secure premises (boarding houses).

[190] So, too, were some of the constraints imposed on the plaintiffs' personal lives during those sleepover periods more restrictive than in the *Idea Services* case. Examples included the desirability of absolute quietness, a stricter prohibition upon visitors (especially male visitors), and the requirements on the plaintiffs,

[56] At [10].

commensurate with the ages and circumstances of the boarders, to care for their charges positively and actively. Another significant difference was the number of persons for whom the plaintiffs in this case were responsible: whereas in the *Idea Services* case the residents of each house numbered five or six at most, the evidence establishes that the plaintiffs in this case were responsible for many times those numbers of charges including, in the case of the single boarding establishment at Iona College, as many as 150 boarders.

[191] Although unconvincingly for reasons that I have already set out, the defendants' case focused on actual incidents requiring intervention by the plaintiffs. The more serious of these, which were recorded, may have been relatively infrequent. However, that approach ignores both what I conclude would be the more minor and frequent, but nevertheless necessary, activities that the plaintiffs undertook and, as importantly, what I would describe as the proactive monitoring of their charges in which the plaintiffs engaged. So activities such as regular and random checks of the boarding houses by the plaintiffs both minimised the occurrence of more serious incidents but were no less elements of "work" performed by them during those periods.

[192] In addition, and not to be minimised, was the level of readiness that the plaintiffs had to be in to react swiftly and appropriately to any incident, minor or major, that may have occurred. So, as in the *Idea Services* case, the plaintiffs may have slept but, metaphorically, with one ear and/or one eye open. In addition to being, in practice, unable to sleep deeply or otherwise in a manner that others off duty and truly resting can, the hours within which sleep could be taken were dictated strictly by the necessity to work until a specified period each night and then to be available at a specified time early on the following morning.

[193] In all of these circumstances I have no doubt that the plaintiffs are to be regarded as having been at work or working for the purposes of the MW Act when undertaking sleepovers as part of a roster of duties in the boarding houses. Although not to decide this aspect of the case in a single pithy formula, Mr Cranney's statement that the plaintiffs were "engaged to be available rather than available to be

engaged" captures the essence of this decision. Indeed, they were not only available to work but did work in significant ways during the so-called "sleepovers".

[194] In the circumstances set out above about what the plaintiffs did during their rostered sleepover periods, I conclude surely that they were working or at work during those times. In terms of s 6 of the MW Act, the plaintiffs were workers belonging to a class of workers in respect of whom a minimum rate of wages was, at the relevant times, prescribed under the MW Act. They were "… entitled to receive from [their] employer payment for [their] work at not less than that minimum rate" for those sleepover periods.

Compliance with the Minimum Wage Act 1983 - The 'averaging issue'

[195] Mr Harrison submitted that for those plaintiffs covered by salaried individual employment agreements at both schools, if the sleepovers periods are classed as "work" under the MW Act then the so-called averaging issue arises. This is despite the Court of Appeal's judgment in *Idea Services* and requires the defendants to persuade the Court that the instant case is distinguishable.

[196] The argument for the defendants is that when one compares the total number of hours or days or weeks worked by the employee with the remuneration received by her over that whole period, the average remuneration per unit (hour, day or week) exceeds the statutory minimum for that period or those periods.

[197] Such an "averaging" approach was also an issue dealt with in the *Idea Services* case, first by a majority judgment in the Employment Court and then by a unanimous judgment of the Court of Appeal which rejected the averaging argument in that case of an hourly paid worker.[57]

[198] Mr Harrison sought to distinguish what he accepted would otherwise be the binding authority of the judgment of the Court of Appeal in *Idea Services* on this issue. In *Idea Services* the plaintiff was an hourly rate employee. In this case, Mr Harrison submitted that the plaintiffs are not able to be so categorised as a result of

[57] See Court of Appeal *Idea Services* judgment, above n 40, at [26]-[52].

their annual salary remuneration and the other terms and conditions of their employment, including under the Woodford House Collective Agreement.

[199] I agree that the plaintiffs cannot be said to have been either hourly or daily rate paid employees under the applicable determinations in force at the times with which this case is concerned. As I have already concluded, the plaintiffs were "in all other cases" employees under cl 4(c) of the relevant Minimum Wage Orders. The plaintiffs were not "paid by the hour" or "by the day" under cl 4(a) or (b) respectively, so that their minimum rates of remuneration were calculable by a combination of the relevant sum "per week" and the additional relevant sum "per hour for each hour exceeding 40 hours worked by [the] worker in a week".

[200] Counsel for the defendants posed several options for the Court to determine the basis for the rate of payment to the plaintiffs. I address these in more detail later, but, for the purposes of considering another precedent identified by Mr Harrison, I will summarise them here. They included:

- the timing of payment was to be an annual cycle consistent with a salary paid over the course of a year; or

- the assessment was to be made at the end of each school term (particularly in the case of the Woodford House Collective Agreement); or

- on the pay cycle; or

- treated as an "all other cases" under cl 4(c) of the relevant Minimum Wage Order.

[201] Mr Harrison submitted that of these four options, the Court should prefer that compliance with the minimum wage legislation is to be assessed over the course of each year. This was said to be consistent with the approach of the full Court of the Employment Court in *Sealord Group Ltd v New Zealand Fishing Industry Guild*

Inc[58] although, for those plaintiffs under the Woodford House Collective Agreement, the period should be the end of each school term rather than the end of the year.

[202] It is appropriate to deal with the applicability of the *Sealord* judgment at this point. It is, in my view, distinguishable in several important respects and does not affect the question whether this case is an exception to the Court of Appeal's prohibition on "averaging" under the *Idea Services* judgment.

[203] *Sealord* was a case about when remuneration was payable. Although there are references in the judgment to the MW Act, it turned principally on the interpretation and application of the Wages Protection Act. It was an industry-specific case based on a unique regime[59] including a determination of earnings based solely on productivity and the sale price of the product of the employees' labour.

[204] In contrast, this is a case about how much employees are paid, irrespective of the quantity or quality of the output of their labours and the variable value of them to the employer.

[205] So, any "averaging" that may be inherent in the Court's approval of a unique remuneration arrangement in *Sealord* is not relevant to this case. In any event, this Court is bound by a relevant exposition of legal principle from the Court of Appeal in the *Idea Services* case and not by one of its earlier judgments if those may conflict, although I do not consider they do.

[206] Although the Court of Appeal ultimately rejected the possibility that, in respect of Mr Dickson's sleepovers, he may have fallen within the cl 4(c) ("in all other cases") category of the Minimum Wage Orders, it nevertheless considered the consequence of such a finding. The Court held that:[60]

> The suggestion was that this might throw him into the "all other cases" category, in which event it was arguable his entitlements would be tested effectively on a weekly basis. This would not lead to "averaging" as [counsel for the employer] espouses, but it might nonetheless have led to a "halfway house" whereby Mr Dickson's entitlements would be tested neither by the

[58] [2005] ERNZ 535.
[59] Payment of employees on ocean-going fishing vessels.
[60] Court of Appeal *Idea Services* judgment, above n 40, at [28].

> hour [as his counsel contended] nor by the fortnight [as the employer's counsel contended] but rather effectively by the week.

[207] That is the position for the plaintiffs in this case.

[208] Having determined that Mr Dickson was a cl 4(a) worker, the judgment continued:[61]

> … we are not convinced the Executive intended there to be a rigid demarcation between the categories listed in para 4. The essential feature of each of the categories seems to be that workers, no matter how they are paid, must receive $12.50 for each hour worked.[62] The drafter of the order has assumed, for instance, that a worker "paid by the day" will be working at least eight hours a day, for which he or she will receive $12.50 an hour. So too the drafter has assumed that those in category (c) will be working at least a 40 hour week, in respect of which the worker must receive $12.50 an hour.

[209] Upholding the respondent's position in that case that, for every hour of work, he was entitled to the minimum wage, regardless of whether he received more than the minimum wage for other hours worked, the Court of Appeal concluded that "rate" meant "amount per unit of time". The Court of Appeal confirmed that Minimum Wage Orders have always prescribed minimum rates of wages as units of time, an hour, a day, or a week. Indeed, as it noted, the MW Act 1945, which itself set out minimum rates of pay, adopted the same style which has been followed consistently to this time.[63]

[210] The judgment of the Court of Appeal in *Idea Services* is not distinguishable. An "averaging" approach to determining whether the defendants complied with the MW Act is therefore wrong. To the extent that any sleepovers worked fell within the first 40 hours of a plaintiff's working week, the defendants were obliged to pay the plaintiffs at least the minimum weekly rate under cl 4(c)(i) of the relevant Minimum Wage Order. To the extent that any of the sleepover hours worked meant that these exceeded 40 in any one week, the defendants were obliged to pay the plaintiffs at least the hourly rate specified in cl 4(c)(ii) of the relevant Minimum Wage Order for such hours.

---

[61] At [31].
[62] This was the hourly rate under the applicable Minimum Wage Order 2009.
[63] Court of Appeal *Idea Services* judgment, above n 40, at [33].

[211] Addressing the question of whether any flat rate payments as were made by the defendants to the plaintiffs could be said to be payments for the sleepovers (in which case Mr Cranney submitted they cannot be recovered by the defendants), this requires consideration of the employment agreements of each employee and of the payments made to them. Counsel for the plaintiffs submitted that while some payments may have been made to the plaintiffs in respect of the sleepovers, none were made on the basis that the sleepovers constituted "work" so that such payments were, at best, a form of "on call" allowance.

[212] Relevant documents in determining these questions include the boarding house rosters which set out both the hours of work of the plaintiffs and identified the days on which they were expected to "sleep over".

[213] Mr Cranney submitted that the phrase used "hours of work" in those agreements does not include the sleepover period. That was said to be for two reasons. The first was that the employers did not regard the sleepovers as "work" as evidenced by their strenuous resistance to that contention. Second, counsel submitted that by using the phrase "ordinary hours not to exceed 40 per week" in the contracts, the parties to them made it clear that sleepovers were not included in the hours of work which were described as the "ordinary hours" or the "minimum hours of work". So, Mr Cranney submitted using the example of Ms Maree at Iona, the contracts provided that the plaintiffs would be paid as set out in sch A, the "ordinary pay rate" being the plaintiffs' "annual salary" of $28,000 paid fortnightly in equal sums.

[214] There is another potentially complicating factor in the particular circumstances of this case. That arises because of the less than full-time nature of the plaintiffs' positions despite being remunerated as if they were full-time employees.

[215] This case is also complicated by the defendants' election, in many cases and for substantial periods, to express the plaintiffs' remuneration as an annual salary although in practice only requiring them to work for part of the year (excluding annual holidays).

[216] The defendants' decisions in most cases to pay the plaintiffs by annual salaries in equal fortnightly payments, including during periods of about 10 weeks each year when their services were not generally required, adds a complication to the question of compliance with the MW Act. Although not, or at least not strongly, argued for the defendants, it might be said that this would raise the most convincing case for an averaging argument. That might be along the lines that the annual salary should be divided only by the number of those weeks in which work was actually performed by the plaintiffs to gauge whether the MW Act had been complied with. I do not, however, consider that this is the correct approach in principle for the following reasons.

[217] For those plaintiffs and for those periods when they were so remunerated, their annual salary was paid in equal tranches not to reflect any equality of work performed throughout the year but, rather, as a matter of convenience for the employees whose lives were structured around regular cycles of receiving incomes and paying outgoings. In essence, the 10 weeks or so per year (i.e. the balance of a 52 week working year after 38 weeks of work and three or four weeks of annual leave) were in the nature of additional, albeit generous, leave. In this sense, they were analogous to the seasonal nature of employment in the meat slaughtering and processing field but without the seasonal lay-offs and re-engagements which complicate employment in that industry. The plaintiffs remained employed by the defendants for each whole year and could be and, in theory and occasionally in practice, were called upon to perform some work when the boarders were away from the schools during school holiday periods and outside the plaintiffs' periods of annual leave.

[218] Given the strength of the Court of Appeal's rejection of the averaging argument in the *Idea Services* case, I do not think that the circumstances of this case allow its adoption because remuneration was calculated on an annual salary basis. The MW Act and the relevant Minimum Wage Orders require the Court to gauge whether there was compliance by considering a combination of a working week of up to 40 hours and any hours worked in the same week beyond 40, and to determine whether the remuneration received for those weekly periods equated with or exceeded the statutory minima.

[219] Addressing the question of the implications for the case of working for part of the year, Mr Cranney used the example of Ms Maree. She was on leave for that part of the year when boarders were not at the school, although counsel submitted that on a strict interpretation of the relevant agreements, the employer may have been able to require Ms Maree's attendance for the whole year except for minimum annual leave entitlements.

[220] Counsel for the plaintiffs submitted that the defendants cannot now bring to account payments made to the plaintiffs for their periods of paid leave and satisfy any sleepover payments therefrom. Mr Cranney submitted that to do so would alter the terms of the agreement which is not possible under the Employment Relations Act.

Provision of accommodation – Could the value of perquisites be offset against minimum remuneration not paid?

[221] The plaintiffs' employment agreements produced at the hearing did not follow the scheme of the Wages Protection Act for board and lodging. In the case of Iona College, the accommodation, meal and associated perquisites provided to matrons was at no (or, at most, very little) cost to them. Again using Ms Maree's case as an example, she was paid a fortnightly taxable allowance of $51.15 ($1,330 per year) from which it appears that PAYE was deducted. The same figure of $51.15 was, however, deducted in full from Ms Maree's tax paid income and, I assume, paid as tax to the Inland Revenue Department. So, while the provision of free accommodation, some meals and other perquisites were clearly terms and conditions of the matron's employment, they were not regarded as a part of her salary or quantified and deducted from that salary as contemplated by s 7 of the Wages Protection Act.

[222] Although it is, in these circumstances, unnecessary to analyse the parties' arrangements in terms of s 7 of the Wages Protection Act, I consider that what the plaintiffs were provided with by the schools was more "board" than the all-inclusive "lodgings".

[223] Using the example of Ms Maree when she was employed at Iona in school term 3 of 2010, her remuneration was calculated in the following way. First, her annual salary (then $28,850) was divided by 26 to produce a fortnightly gross amount of $1,109.62. This was then divided by 80 representing 80 work hours in the fortnight. This produced an hourly rate of pay of $13.87019. No separate provision was made for any payment for sleepovers. During the same fortnight used for the purpose of this example, however, Ms Maree is recorded as having worked for 66 ordinary hours and as having undertaken five sleepovers. For other fortnights, employees performed six sleepovers. Each sleepover being for the period of eight hours, the five sleepovers referred to amounted to an additional 40 hours of work for Ms Maree and on those occasions when six sleepovers were undertaken in a fortnight, this would have added 48 hours of work to that fortnight's total.

[224] So, following the conclusion in this case that sleepovers were work, Ms Maree worked for the period of 106 hours in the relevant fortnight but was paid only for the equivalent of 80 hours' work although, on the employer's analysis, for 66 actual hours of work.

[225] To complete the remuneration makeup for Ms Maree, the employer added to the gross figure for the fortnight's remuneration what was described as "Tax Diff Accommodation" of $51.15. Deducted from this amount of $1,160.67 was PAYE tax of $201.20, giving a net pay of $959.57 for the fortnight. Added to that was a non-taxable meal allowance of $14.60 for the fortnight but then the "Tax Diff Accom Allow" was subsequently deducted from that net figure as were amounts for KiwiSaver and union fees.

Minimum Wage Act 1983 compliance methodology

[226] The defendants' submission in the event that the plaintiffs were covered by the MW Act (as I have concluded they were), was to propose the four possible options mentioned already at [200], several at least of which raised the "averaging" issue that was addressed by this Court and the Court of Appeal in *Idea Services*.

[227] The defendants' first option (which they submitted should be applied to the plaintiffs on salary under individual employment agreements) was to average their remuneration received on an annual cycle, that is to ascertain whether the total period worked in each year calculated by anniversary dates was, by reference to the specified annual salary, more than the minimum prescribed.

[228] The second option advanced by the defendants (which they submitted was appropriate to the claims governed by the Woodford House collective agreement) was a school term by school term assessment but otherwise on the same basis as the first option.

[229] The defendants' third alternative was similar to the first two but was to be made on a pay cycle basis, that is by making the comparison between the period worked, the annual specified salary, and the statutory minimum.

[230] Finally, the defendants submitted that the Court might apply the statutory formula under cl 4(c) of each of the relevant Minimum Wage Orders. These provided that if the workers were not paid by the hour, paid by piece work, or paid for the day, then they were included in the cl 4(c) category of "all other cases".

[231] Whilst the judgment of the majority of the Employment Court and the unanimity of the Court of Appeal in *Idea Services* was that averaging was not applicable in that case, the employee there was paid by the hour. That is not, however, a sufficient distinction with the circumstances of this case to permit the Court to accept a broad averaging approach in this case. The principles underlying the rejection of an averaging approach in the *Idea Services* case apply universally and not simply to the circumstances of that case. They are that there should be payment made for, and identified with, each period of work and that an averaging approach should not be permitted to reduce below the relevant minimum rate, remuneration for any particular identified period of work.

[232] For those reasons I do not accept the defendants' case that an averaging approach should be applied, whether on an annual or a term by term (or even pay cycle) assessment. The statutory instruments (the relevant Minimum Wage Orders)

made pursuant to the Act define how they are to be complied with and so, in those circumstances, I adopt the cl 4(c) approach to assessing compliance with the MW Act.

[233] In practical terms, this will require the parties to now undertake a number of assessments on a plaintiff by plaintiff, Minimum Wage Order by Minimum Wage Order basis, starting in each case with the first working day after the date six years before the plaintiffs' claims were filed in the Authority.

[234] Where the plaintiffs' remuneration was expressed as an hourly rate, the plaintiffs were paid by the hour so that cl 4(a) of the relevant Minimum Wage Order will apply. For each hour of each sleepover worked in such circumstances, the hourly paid plaintiffs will have to be compensated at the appropriate rate but less any payments made by the defendants in respect of such sleepovers.

[235] The only other contractual basis of the plaintiffs' remuneration was by annual salary and a different methodology for ascertaining compliance will have to be applied in respect of each plaintiff to the extent that she was paid by annual salary as follows.

[236] First, the parties will have to establish each week of work performed by each plaintiff by reference to the boarding house roster or other relevant working records.

[237] Second, the parties will have to calculate the number of hours worked (including sleepovers) during each of those weeks plus any additional unrostered work performed by the plaintiffs during those weeks.

[238] Third, to the extent that each plaintiff worked 40 or fewer hours (including sleepovers) in those weeks, the parties will then have to ensure that the weekly minimum payment under cl 4(c)(i) of the relevant Minimum Wage Order has been met in practice. So, to use the example taken elsewhere in this judgment, for those weeks covered by the Minimum Wage Order 2007, there will have to have been a minimum payment for the first 40 or fewer hours of each week, of $450.

[239] Next, if these analyses of the hours worked in each week reveal that there were more than 40 (including sleepovers), the parties will need to ensure that payment for each extra hour over 40 is for a sum not less than the minimum hourly rate under cl 4(c)(ii) of the relevant Minimum Wage Order. So, again using the Minimum Wage Order 2007 as an example, this hourly rate will be $11.25.

[240] Any flat rate or other like payments for sleepovers made to any of the plaintiffs will need to be deducted or otherwise offset against any shortfall in payment for which the defendants may be liable.

[241] Finally, in the particular circumstances of this case, the parties will need to ascertain that, for any weeks in which the plaintiffs were remunerated but did not perform any work at all, they received no less than the cl 4(c)(i) minimum payment which, using the Minimum Wage Order 2007 example, was $450 per week. This allows for the situation where the plaintiffs' annual salaries remunerated them for a whole year but of which a number of weeks more than were annual holidays were weeks when they were not called on to perform work. As a consequence of structuring their remuneration as an annual salary paid periodically (weekly or fortnightly), these weeks must also be remunerated by the defendants at the minimum rate.

[242] As noted earlier in this judgment, the parties sought an opportunity to resolve the amount of any entitlements to which the plaintiffs may be due, and leave is reserved for any party to apply for any further orders that may required from the Court.

Costs

[243] In these circumstances, also, I reserve questions of costs between the parties in the hope that these, too, can be resolved without further need to trouble the Court. Reflecting what I assess to be the generally positive and respectful relationships between the plaintiffs and the defendants, I remind them that the Mediation Service of the Ministry of Business, Innovation and Employment may be used to assist in the

resolution of these issues if these cannot be achieved with the assistance of their experienced and respected legal advisers.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Monday 17 February 2014