IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 127
EMPC 82/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SOUTH CANTERBURY DISTRICT HEALTH BOARD Plaintiff
AND	STUART SANDERSON First Defendant
AND	SARAH SANDERSON Second Defendant
AND	DIANE BEACH Third Defendant
AND	MAUREEN CHAMBERLAIN Fourth Defendant
AND	JOHN SNUGGS Fifth Defendant
AND	BETHAN WILLIAMS Sixth Defendant

Hearing:	8 and 9 August 2017 (heard at Christchurch)
Appearances:	S Hornsby-Geluk, counsel for the plaintiff P Cranney and C Mayston, counsel for the defendants
Judgment:	20 October 2017

JUDGMENT OF JUDGE B A CORKILL

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Introduction

[1] The first issue for resolution in this case is whether six anaesthetic technicians (ATs), who work for the South Canterbury District Health Board (the DHB) at Timaru Hospital, are correctly described for the purposes of s 6 of the Minimum Wage Act 1983 (the MW Act) as being at work when on call. If so, the second issue for resolution is whether they should be paid for that work for each hour when they are on call.

[2] The ATs have regular on-call commitments because Timaru Hospital delivers theatre services during normal business hours; and at other times only if there is a particular need to do so. By these means, theatre services are potentially available for 24 hours in each day, described by the parties as a "24/7 operation". The DHB achieves its objective by maintaining a call-back roster for theatre staff outside of business hours. Accordingly, each of the ATs are rostered on call for one night in each week, Monday to Friday, and for a weekend (Saturday morning to Monday morning) each six to eight weeks.

[3] Each AT resides well outside the boundaries of Timaru city. Since the DHB's expectation is that when on call they must attend the hospital within 10 minutes of being called back for theatre duties, it provides free accommodation in which the ATs can stay. For the period of the claim, which runs from May 2010, that accommodation was at or adjacent to the hospital.

[4] These issues were explored by the Employment Relations Authority (the Authority), which concluded that time spent by each AT on call should be regarded as work. The DHB has brought a de novo challenge to that determination, contending that the Authority's conclusion went too far.[1] For their part, the ATs say the Authority reached a correct conclusion.

[5] It is worth referring to the applicable legal principles at the outset. The AT's circumstances must be assessed in light of the so-called sleepover principles, as confirmed by the Court of Appeal in *Idea Services v Dickson*.[2] In explaining the appropriate approach, the Court said it is helpful to consider the following three factors when making the necessary assessment:[3]

a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;

b) the nature and extent of responsibilities placed on the employee; and

c) the benefit to the employer of having the employee perform the role.

[6] The Court emphasised that the greater the degree or extent to which each factor applied, the more likely it was that the activity in question ought to be regarded as work. The Court also said that the assessment has to be undertaken in an intensely practical way.

[7] It is relevant to note for the purposes of this case that in the course of its judgment, the Court said there were considerable differences between the typical on-call doctor who would be under relatively few constraints, and someone like a community worker who is on a sleepover.[4]

[8] The case for the DHB is that a proper analysis of the three factors outlined in *Idea Services* does not lead to the conclusion that ATs are at work when on call. It is argued that such a finding would be a significant departure from the current state of

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1 *Sanderson v South Canterbury District Health Board* [2017] NZERA Christchurch 37.
2 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] NZLR 522.
3 At [7] and [10].
4 At [12].

the law in New Zealand since it would have ramifications for any employee required to undertake on-call duties; nor, if analysed correctly, do overseas cases support such a conclusion.

[9] The case for the ATs is that their on-call circumstances, if analysed correctly with reference to the three factors, confirm that they were indeed at work when on call. It is argued that this conclusion is supported by overseas judgments, particularly that of *Truslove v Scottish Ambulance Service*, a decision of the United Kingdom Employment Appeal Tribunal (EAT).[5] In that case, the Tribunal concluded that ambulance officers who were required to be on call very near a particular satellite location were working and were not at rest.

The Authority's determination

[10] After outlining the background to the matter, and summarising the relevant evidence as given to the Authority by each applicant, it referred to the relevant New Zealand case law as well as some overseas judgments.

[11] Reference was made to two particular cases which had been referred to by the Court of Appeal in *Idea Services.* Those decisions were *Sindicato de Médicos de Asistencia Pública [Simap] v Consellaria de Sanidad y Consumo de la Generalidad Valenciana*,[6] and *Landeshauptstadt Kiel v Jaeger.*[7] It was noted that in *Idea Services*, the Court of Appeal had stated that the approach which it considered to be correct was consistent with the findings made in these overseas' authorities. Then the Authority referred to the subsequent decision of the EAT, *Truslove*,[8] which had relied on *Simap* and *Jaeger* when reaching its conclusion as to how time spent on call should be characterised.

[12] In light of that discussion, the Authority considered the extent to which constraints were placed on the freedom which an AT would otherwise have because of the requirement to report for duty within 10 minutes of receiving a telephone call.

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5 *Truslove v Scottish Ambulance Service* [2014] ICR 1232 (EAT).

6 *Sindicato de Médicos de Asistencia Pública [Simap] v Consellaria de Sanidad y Consumo de la Generalidad Valenciana* [2000] IRLR 845 (ECJ).

7 *Landeshauptstadt Kiel v Jaeger* [2003] IRLR 840 (ECJ).

8 *Truslove v Scottish Ambulance Service,* above n 5.

After summarising the evidence and submissions, the Authority found that the time spent on call was "much less the [applicant's] own" than would otherwise be the case. It was considered that those constraints were substantial and significant in the circumstances.[9]

[13] Next, the Authority considered the nature and extent of responsibilities placed on an AT when on call. It concluded that these factors had to be measured against the rationale for the 10-minute report time outside of normal hours, which was clinical in nature. There could be life-saving acute situations, for instance when an emergency caesarean section has to be undertaken because there was a risk to the life of mother or baby.

[14] The Authority found that the limited report time reflected the potential seriousness of situations that could arise outside of normal hours, when treatment was necessitated. ATs have to remain alert and vigilant so as to be able to meet the limited timeframes involved. Not to do so could be serious and even life-threatening. Accordingly, meeting the required report time of 10 minutes ready to work was a very important responsibility in the context of the DHB's hospital operation. The obligation required a state of readiness for response during the time spent on call that a longer period of time could not accommodate. That is because the timing of callouts is unpredictable.[10] It was concluded that the nature and extent of responsibilities were significant in the circumstances.[11]

[15] Finally, the Authority considered the benefit to the employer of having the ATs assume the role in question. The Authority found that there was a benefit to the DHB, because the callout provisions meant it could provide the necessary services for 24 hours in each day. This was found to be a considerable benefit.[12]

[16] The Authority's conclusions were as follows:

> [97] *Truslove* reinforces the principle from *Jaeger* and *Simap* which has been considered by the New Zealand Court of Appeal in *Idea Services*. The

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9 *Sanderson v South Canterbury District Health Board*, above n 1, at [84] and [85].
10 At [87] and [89].
11 At [91].
12 At [95].

> principle focusses upon whether the place where the employee happened to be was one required by the employer. [The DHB] requires a 10 minute report time when on call if called on. To meet that the applicants rostered on call stay at accommodation away from their home. The applicants' time on call is less their own and they are more under the control of the [DHB] when on call because of the limited report time.
>
> [98] When I assess the factors approved by the Court of Appeal in *Idea Services* I find all three apply to a significant degree and I find in the circumstances of this case the time spent by the applicants on call should be regarded as work.
>
> (footnotes omitted)

[17] Finally, the Authority stated that the parties would now attempt to calculate the quantum of any monies which were owing to the applicants. Leave was reserved for either party to return to the Authority if this caused difficulties. Costs were reserved.[13]

The hearing

[18] As already mentioned, the primary issue related to the question of whether the ATs, when on call, were at work for the purposes s 6 of the MW Act. The parties were agreed that although the challenge was brought by the DHB, the case for the ATs should be presented first.

[19] The Court was advised that once this substantive issue had been resolved, the parties would attempt to quantify any remedies if necessary, but sought leave to return to the Court if agreement could not be reached. They said, however, that there were some factual and legal issues of principle with regard to the quantification of remedies on which they sought the Court's assistance.

[20] In this judgment, I deal first with the liability issues, and then the discreet issues as to remedies.

Overview of each party's case as to s 6 of the Minimum Wage Act 1983

[21] Mr Cranney, counsel for the ATs, submitted that the threefold test identified by the Court of Appeal in *Idea Services* was correctly applied by the Authority. But Mr Cranney also placed particular reliance on what he described as the "*Truslove*

13 At [99] and [100].

doctrine". He said that viewed in light of the findings in that case, there were indeed significant constraints. Each AT was required to go to the hospital, or be near to it, and to standby for call-back purposes. The evidence from the ATs about the impact of this constraint naturally depended on each AT's personal circumstances and interests, but these were significant and similar to those of the employees in the *Idea Services* and in *Truslove*.

[22] He submitted that the nature of the responsibilities which fell on the ATs when on call were weighty. Were those responsibilities to be breached, the consequences could be very serious and could even endanger life.

[23] Mr Cranney also said that it was clear that the benefit to the DHB of having the ATs perform their role was critical and fundamental to it being able to deliver after-hours theatre services.

[24] Finally, it was submitted that the combined effect of the factual analysis of these factors was that the ATs were working for the purposes of s 6 of the MW Act when on call, a conclusion which was consistent with findings made in overseas cases.

[25] For the DHB, Ms Hornsby-Geluk submitted that the defendants were not working when they were on call. She said that none of the three factors outlined in *Idea Services* could be established.

[26] First, there were no constraints on the ATs when they were on call other than having to remain within 10 minutes drive of the hospital.

[27] Second, there were no ongoing continuous responsibilities when on call, unlike the position in the sleepover cases; the ATs were not responsible for the wellbeing of vulnerable people during that period, and were not required to undertake any duties other than call-back.

[28] It was acknowledged there was a benefit to the DHB in the ATs being on call. However, that benefit only crystallised when an AT was called in; his or her

responsibility was not ongoing in the same manner as had been the case in *Idea Services,* or in the later decision of *Law v Board of Trustees of Woodford House*.[14]

[29] Counsel submitted that in *Idea Services*, the Court of Appeal had specifically considered the situation of on-call medical professionals, and had concluded that those persons were under relatively few constraints.

[30] Ms Hornsby-Geluk argued that a conclusion the ATs when on call were working would be very significant. It would open up the floodgates to claims of this nature by thousands of employees across industries in New Zealand whose work includes an on-call component.

[31] It was submitted that the law recognises the concept of on-call as being distinct from work, as is evident in statutory provisions such as s 59 of the Holidays Act 2003; and more recently in the introduced availability provisions which are described in s 67D of the Employment Relations Act 2000 (the Act). Parliament had thereby recognised that being available for work was different from being at work.

The evidence

Core facts

[32] There were many aspects of the evidence which were common ground between the parties. I first summarise these. There were, however, other matters on which the parties were not agreed. This included, somewhat surprisingly, the nature of the obligation to attend the hospital when on call; and the extent of constraints for an AT when on call.

[33] As the plaintiff is a small DHB it conducts its theatre services during usual working hours, that is, 7.00 am – 8.30 pm, Monday to Friday; ATs are rostered accordingly.

[34] The DHB has determined that theatre services need to be available for 24 hours in each day. Shifts are rostered for normal business hours. For the purposes of

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14 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

a genuine acute emergency outside of working hours the DHB utilises an on-call/call-back system which ensures theatre services are able to operate. The evidence is that this has been the case since the 1980s. There are also occasions when more routine theatre work may be booked to take place during a weekend.

[35] The on-call roster operates outside normal working hours, during which staff are rostered on shifts, as follows:

a) 8.30 pm until 7.00 am, Monday to Thursday;

b) 8.30 pm until 8.00 am, Friday; and

c) Across the weekend from 8.00 am, Saturday until 7.00 am, Monday.

[36] On average, an AT is rostered on call one night in each week, and is placed on a weekend roster each six to eight weeks. An AT who is on call over a night will work a preceding 12.00 pm to 8.30 pm shift thereafter, with on-call starting immediately.

[37] Weekend on-call shifts are usually rostered in six-month blocks, so ATs can have advance notice as to which weekends they may expect to be on call. The weeknight on-call shifts are rostered four weeks in advance.

[38] A request book enables ATs to note shift preferences, inclusive of on-call shifts. The use of the book is variable between ATs. Requests are accommodated where possible, there being few circumstances where a request cannot be fulfilled. ATs are also permitted to swap shifts.

[39] At all material times the DHB maintained, and it continues to maintain, accommodation for call-back purposes. The location and nature of this accommodation has varied over the period of the AT's claim.

[40] The evidence establishes first that a flat in the DHB's Gardens Block was utilised. It contained two bedrooms, a lounge and kitchen unit and a bathroom, which was shared with nursing staff.

[41] Then rooms were made available in the student nurses' quarters in the relevant Gardens Block, where there were shared kitchen and bathroom facilities with student nurses, radiographers, and any other staff who may require such accommodation.

[42] After the February 2011 earthquake which affected the Gardens Block, a rental property was provided at 19 Queen Street, Timaru, which was a two-bedroom house with shared bathroom, kitchen and lounge facilities. It was utilised by the ATs, nurses and radiographers. If this accommodation was insufficient, ATs could be sent to the Timaru Motor Lodge for their on-call period.

[43] At a later stage another rental property was provided at 13 Queen Street, Timaru, containing three bedrooms, and shared bathroom, kitchen and lounge facilities. This too was shared with other staff when on call. The property was contained in a block of four flats, with the other units being occupied mainly by junior doctors.

[44] Earlier this year, the refurbished Gardens Block became available again to those on-call staff who wished to use it. It contains nine single rooms with shared lounge, kitchen and bathroom facilities.

On-call obligations

[45] Some aspects of the on-call obligations are referred to expressly in the relevant District Health Board/PSA Allied, Public Health and Technical Multi-Employer Collective Agreement (the MECA).

[46] That MECA provides for allowances when on call and for call-back. It also states:

> An employee who is required to be on call and report on duty within 20 minutes shall have access to an appropriate locator or a cell phone.

[47] It does not describe, however, what the DHB's expectations for on-call staff are with regard to response times. Until recently, there was what was described as an

"unwritten rule" as to those expectations. Unfortunately the scope of that rule became controversial prior to and during the present litigation.

[48] In the course of 2014, there was an exchange of correspondence between representatives of the parties as to callout practices. In that context, Mr Zwart, acting as advocate for the DHB, said that the requirement was that ATs were to be "available to work within a limited timeframe". Ms Mayston, of the PSA, subsequently asked for clarification. She said:

> ... We would like to know exactly how long after receiving this cell phone/pager call the employees are required to report for duty.

[49] In response to this request, Mr Zwart stated in a letter of 11 December 2014 that:

> … The expected time for all staff to report to hospital when on call-back is 10 minutes. My client records that this time limit is an expectation that is not pedantically scrutinised. It has been met without incident.

[50] Moving forward to the investigation meeting, the Authority recorded that each AT who gave evidence had said that their understanding was that there was a reporting time of 10 minutes, when on call.[15]

[51] The evidence placed before the Authority for the DHB was less uniform. Ms Dore, elective services manager, said there was an expectation that "staff would be available to work within 10 minutes when on call"; and that they should "respond to a call-out in 10 minutes fit for duty". Mr Hale, theatre manager, said that staff needed to be available if required, and capable of working. That meant "living or staying within 10-minute response times". He said that the undertaking of any activities which enabled staff "to be at the hospital within 10 minutes was fine". Ms Moginie, director – organisational capability and safety, responsible for HR matters, said that there was "a 10-minute expectation".

[52] Mr Zwart, appearing for the DHB at the investigation meeting, was recorded by it as having referred in submissions to the "10-minute requirement to report if called on".[16]

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15 *Sanderson v South Canterbury District Health Board*, above n 1, at [33] – [38].

[53] Ms Hornsby-Geluk submitted that Mr Zwart, in his letter of 11 December 2014, had simply parroted the language used in the PSA letter of 2 December 2014. However, he made a very similar statement in his submissions. In the absence of any evidence to the contrary, I assume both his statements were made on instructions.

[54] Given the evidence and submission to which I have just referred, it is unsurprising that the Authority found that the ATs were "expected to report within 10 minutes";[17] and that there was a "required report time of 10 minutes ready to work".[18]

[55] The issue evolved further, after the issuing of the Authority's determination.

[56] When filing its challenge, the DHB's original statement of claim dated 12 April 2017 pleaded that the expectation was that ATs were to be "at Timaru Hospital 10 minutes after receiving a call, and … are in a fit state to perform their position".

[57] On 23 June 2017, Dr Earnshaw, director clinical services and chief medical officer, issued a memorandum to relevant staff, including the ATs, under the heading "the unwritten '10 minute rule'". It stated:

> It has been clear following concerns raised by some Theatre staff, that there is confusion about our expectations of on-call staff in terms of how quickly they need to report for work while on call.
>
> The intent of the current unwritten "rule" has always been that there is an expectation that people in anaesthesia, theatre nursing and anaesthetic technicians need to be resident within a 10 minute driving radius of the hospital whilst on call (either in their own accommodation or in hospital provided on-call accommodation).
>
> There has never been an expectation either written or verbal, that they would be available to work in theatre in that timeframe, but rather they should be available to start work in a clinically appropriate timeframe (recognising that even in the most urgent of cases this is generally 20 to 30 minutes from the time of call-out).

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16 At [79].
17 At [13].
18 At [89].

[58] Then an amended statement of claim was filed on 10 July 2017. It altered the description of the expectation, stating that at all material times ATs were to "remain within 10 minutes driving time of Timaru Hospital in a fit state to perform their position".

[59] Those who had given evidence for the DHB at the investigation meeting, as described earlier, also gave evidence to the Court. They adopted the formulation contained in Dr Earnshaw's memorandum essentially contending that it reflected what had been the DHB's expectation over many years. Ms Dore, for example, said that on reflection the rule, when correctly expressed, required ATs "to live within 10 minutes drive time of the hospital". She said that ATs were "not actually expected to be at the hospital ready to work within that timeframe". Evidence given to the Court by other DHB witnesses was to similar effect.

[60] By contrast, the evidence given by the ATs to the Court was in the same terms as that which they had previously given to the Authority.

[61] It is of course the DHB's prerogative to stipulate its requirements in writing, which it has now done in the memorandum of 23 June 2017. But the formulation which the DHB has now adopted uses different language from that which had been used previously, and it differed from the AT's understanding of the expectation.

[62] Ms Hornsby-Geluk submitted that confusion had been created by the Authority's determination and that this had led the DHB to clarify the issue first in the memorandum, and then in the DHB's amended statement of claim, as well as its evidence. She said that the memorandum reflected both the DHB's expectation, and actual practice.

[63] This submission requires, first, a consideration of the practice as understood and carried out by the AT's from the inception of their employment:

a) Mr Snuggs commenced work as an AT in 2008. He said that he initially worked for six weeks in Timaru, and then shifted to Pleasant Point, knowing that by doing so he would have to stay in hospital

accommodation so as to meet the DHB's expectations. He understood that he would be required to report for duty in 10 minutes.

b) Ms Chamberlain, who has resided at all material times at Waimate, explained that she was told at her interview when applying for an AT role in 1994 that the reporting time would be 10 minutes; and that for some 23 years, it had been expected that the ATs would be at work within 10 minutes ready to work.

c) Ms Williams, who resides at Rosewell Valley which is outside the boundaries of Timaru city, understood when being interviewed for the job in 2007 that when on call she would need to be within 10 minutes of the hospital. She explained her understanding of the expectation with reference to what happened when night calls were received. She said that these night calls were always emergencies; she would "literally jump out of bed and run into work".

d) Mrs Sanderson, who resided at Moeraki when she commenced an AT role in 2012, said that there was a 10-minute reporting time for the on call work, and that there were times when the telephone instruction which was given was: "come now".

e) Ms Beach who worked initially on a casual basis from 2014, and then became a permanent employee, stated that she had understood that she definitely had to be in the hospital within 10 minutes.

f) Mr Sanderson, husband of Mrs Sanderson, worked for the DHB for eight and a half years as an AT before commencing such work at Mercy Hospital in Dunedin. He resided at Waimate when working for the DHB. He said that after he started that role, he was told by colleagues that because he did not live within 10 minutes reporting time of the hospital, he would have to stay in the DHB-provided accommodation whilst on call.

[64] On the basis of their evidence, I find that the AT's each believed from the outset of their employment that they were required to report for work within

10 minutes of receiving a call. When there was an emergency they believed they should report even more promptly: they were to come immediately.

[65] There is no evidence that prior to the inception of this proceeding, the ATs were ever told that their understanding of the DHB's expectations was incorrect.

[66] However, as both counsel accepted, this particular controversy is to some extent irrelevant as far as the ATs are concerned. Each of them resides well outside the boundaries of Timaru city. Even on the basis of the formulation contained in Dr Earnshaw's recent memorandum, none of them could have driven to the hospital from their homes within 10 minutes.

[67] The fact that other employees on call may have resided on the extremities of a 10-minute driving radius, so that they could not reach the hospital within 10 minutes if driving within the speed limit, is not the point. This Court is not required to decide whether those particular staff understood the expectation correctly, or complied with it.

[68] It was pointed out that three of the ATs said they were usually the first to arrive at theatre after a call out, the implication being that it must have been obvious to them that they were exceeding expectations. However, given the proximity of the hospital accommodation, relative to the residences of staff who lived beyond the hospital precincts, that they arrived first in theatre could not be regarded as surprising. They had the shortest distance to traverse and report.

[69] I find that there is no evidence that the understanding held by the ATs as to the DHB's expectations was influenced by, or should have been influenced by, the practices of other health practitioners who resided on the outskirts of the city and who obviously took longer to attend the hospital when called back. The Court's focus for present purposes must be on the AT's circumstances and their reasonable understanding of the expectation.

[70] That all said, the DHB's expectations from 23 June 2017 are as described in Dr Earnshaw's memorandum of that date.

Frequency and urgency of call-back

[71] Ms Moginie, who as mentioned earlier, is a director responsible for human resources, collated on-call/call-back data for each of the ATs for the period 1 October 2015 to 31 October 2016. This indicated that an average of approximately 11 per cent of total on-call time was required for call-back in that period. Average call-backs occurred once in every four weeknight on-call period, and once during each weekend on-call period. It was acknowledged that these figures were indicative only, and obviously varied from employee to employee. Moreover, because of the completely unpredictable nature of call outs, some call-back periods are likely to be busier than others.

[72] No accurate data was presented as to the proportion of emergency cases which require staff to be called back. However, witnesses assisted the Court on this issue by providing their impressions as to the extent of urgent cases. There was a broad consensus in that evidence. Approximately 10 to 15 per cent of call-backs involve emergency obstetrical procedures, particularly caesarean sections, but also, occasionally, leaking aneurisms. Trauma incidents could occur which would also require an immediate response, with witnesses generally being in agreement that 10 to 15 per cent of call-backs are in this category.

[73] It was also common ground that some weekend orthopaedic surgery would not be the subject of a 10-minute call-back, but would be scheduled in advance to occur at a specified time. In such a case for example, two hours' notice might be given to theatre staff.

[74] It is, of course, the case that truly urgent call-backs are always unexpected, and staff have to be ready to respond to that possibility at all times. Mr Sanderson said "You're always waiting for the phone … you're 100% prepared 100% of the time". This statement should not be construed as meaning that ATs when on call have to be in such a full state of readiness at all times so that they could not, for example, sleep overnight, but the evidence establishes that they need to be able to respond very promptly, especially when there is an emergency.

Analysis of the three factors

The constraints placed on the freedom the employee would otherwise have to do as he or she pleases

[75] When presenting the case for the DHB, Ms Hornsby-Geluk emphasised the fact that the ATs had made a deliberate choice to live outside the community within which they worked knowing that part of their job required them to be on call. She argued that four of them had moved to their current addresses and accepted an offer of employment when they were well aware of the on-call obligations. She said that the other two accepted employment whilst at their current addresses which were at a distance from Timaru, but both had previous experience working in the relevant team and accepted the role knowing what it would entail.

[76] It was submitted they were not put in this position by the DHB. In the circumstances it could not be said that the DHB required them to reside away from their family and home when on call; rather each had made their own choice to live outside the community within which they worked.

[77] In my view, the issue of choice is more complex. All parties made choices.

[78] It is of course the case that each of the ATs in question decided to live in particular locations well outside the boundaries of Timaru city, which would mean they would have to travel more significant distances to and from work. No doubt their decision to reside at a distance has given rise to significant travel costs; and significant personal time will have been devoted to travelling to and from work so as to be present in the workplace when required.

[79] But the DHB has also made choices. It decided to operate its theatre in a particular way so as to maintain a 24/7 service; to achieve this, it chose to establish on-call arrangements for certain periods.

[80] The DHB also chose not to employ only those persons who reside within the boundaries of Timaru city. In making that choice it went further: it decided to

provide free accommodation for on-call staff. It must be inferred that it did so because it considered this was necessary so as to maintain the 24/7 service.

[81] In considering the extent to which that expectation constituted a constraint on the employees, the fact that individual staff members have chosen to live at a distance is not in my view a particularly significant factor. The DHB recognised that individual employees would choose where they live; but it also concluded that in order to maintain its 24/7 operation, it would offer free accommodation so that those persons could meet its call-back requirements. The issue of constraints must be assessed in that context.

[82] Mr Cranney submitted on behalf of the defendants that there was an obvious and direct constraint on all ATs by reason of the obligation to leave their home, or not return to it if being on call followed an ordinary shift, and to stay near the hospital for DHB purposes. The reality was that the reporting time for ATs was short, and they were required to be constantly ready to respond to a call out. That obligation meant that they were inhibited from engaging in ordinary everyday activities based at their homes. Mr Cranney acknowledged that the impact differed for each AT, depending as it did on the personal circumstances and interests of each affected person.

[83] To evaluate this submission, it is necessary to consider the effects of being on call, as described by each employee:

a) Mr Snuggs said the obligation greatly restricted what he could do whilst on call. He would often not see his family for a period of 50 plus hours. He was confined to a limited radius of the hospital. He said that even everyday things like having a shower, taking a walk or going to the supermarket were stressful because of the prospect of being contacted to work immediately. He commented on the fact that he would have to share accommodation whilst on call. At times he preferred to use hospital facilities for showering and toileting rather than the shared bathroom/toilet of the provided accommodation. He

described the pressures that were placed on his family life, which he said had been so significant as to affect his health.

b) Ms Chamberlain said that she had no option but to stay in the employer-provided accommodation, which at times had to be shared with other DHB staff, including bathroom and toilet facilities. She considered the contents of the accommodation to be basic. When on call, she said that she slept poorly whilst waiting for calls to come at any time and so as to ensure she can get to the hospital quickly. She could not relax in the hospital-provided accommodation or undertake household chores or gardening as she would when at home. She could not enjoy a social drink, spend time with her family, or plan social outings during the on-call period. Family members could not stay with her at the shared accommodation. She is a show-jumping judge and runs a pony club. These activities are curtailed when she is on call. She had found the obligation to be available at the weekends particularly difficult, as it was an important family time. It was unsettling in that she could not be at home or available to attend family or social occasions during this time. A further matter on which she commented was that she has to prepare provisions for the on-call period. She could be away from home and family for up to four days, if on call over a weekend with contiguous shifts.

c) Ms Williams also referred to the issue of having to share the hospital-provided accommodation. She said that when on call she slept badly. She found the beds old and uncomfortable, and felt that there was no real privacy or ability to relax. In weekends, she would remain at the hospital-provided accommodation if not at work; she did not consider she could realistically go elsewhere and still be in a position to meet the obligation to report. She was not able to drink alcohol while on call. She could not visit her family during the on-call period, or attend family and social gatherings. She said she missed her son's sport and hobbies regularly, which made life difficult. She said that whilst

her family could come to visit her at the weekend, this was not fair on others who were staying there, so this occurred rarely.

d) Mrs Sanderson referred to the issue of having to share accommodation with others, and considered there was little privacy given a shared lounge and shared kitchen and bathroom facilities. She said that whilst on call her sleep would be affected as the accommodation could also be noisy with staff coming and going at different times of the day and night. When staying in hospital-provided accommodation, passing traffic could be heard during the day. During the on-call period she would simply wait for a telephone call to attend; she felt that given the time restrictions, there was little alternative. The fact of having to share accommodation affected her ability to relax while on call. She felt she was in permanent standby mode.

e) Ms Beach referred to the effect of having to share accommodation with others. She said that when on call she slept poorly, given the standard of the beds provided. She was also aware of traffic noise, and was distracted by passing members of the public. If on call during the day she would stay at the accommodation. She felt that obtaining a car park close to any particular destination within Timaru was difficult, and potentially impacted on her ability to be available at the hospital on time if called back. She referred to the restriction of not seeing her husband for up to three days at a time, or being able to undertake other domestic activities. She said that she takes her job very seriously, and felt that the ATs are a very important part of the call-back team.

f) Mr Sanderson referred to the fact of having to share accommodation with persons whom he did not know particularly well. He described traffic noise which impacted on sleep, as well as the disturbance of other staff on call when attending their particular call outs. He said the maintaining of provisions for the on-call period required some organising. He said that the most difficult aspect of the arrangement was that he was unable to spend the periods involved with members of his family, could not attend family events or arrange social functions

with friends. He said, for example, that he had missed important family events and times with his daughter when she was growing up, which also restricted his parenting role. Because the provided accommodation was shared, it was difficult for family members to visit. He also referred to the fact that he could not consume alcohol during on-call periods.

[84] As a matter of causation, I find that each of these consequences are directly related to the fact that the ATs stayed in the hospital-provided accommodation; and that was necessary because of the DHB's expectation that ATs would need to respond promptly when on call.

[85] I turn next to the assessment of the significance of those effects. Mr Cranney said they were very significant.

[86] Ms Hornsby-Geluk did not agree. She said the effects should be contrasted to those which had been evaluated in other cases; she said that in those instances the constraints were vastly different. For instance, in *Idea Services* these included not leaving a group home during the period of a sleepover without the prior permission of a supervisor and a relief worker being available and present; if asleep, being readily available to be woken to respond to any incident in or around the home requiring their attention, which meant such a person could not sleep behind a locked door; not consuming or being affected by alcohol or other drugs; not having visitors without the permission of a manager and it being acceptable to the service-users in the home; and any activity they engaged in could not disturb the service-users during the night. It was argued that similar and more significant constraints were also evident in *Law*.

[87] Ms Hornsby-Geluk submitted that these cases involved a range of constraints on the activities and conduct of the relevant employees, who were subject to rules and regulations. This was to be contrasted with the present case where the employees were free to come and go as they pleased, associate with any person of their choice, engage in such activities as they wished to, and spend their time in any

way they chose, including having people to stay with them in the provided accommodation if they wished.

[88] Whilst reference to other cases can be of assistance, such comparisons cannot be determinative. As already mentioned the Court of Appeal in *Idea Services* emphasised that the assessment has to be approached in an "intensely practical" way.[19] Moreover, the three factors which were found helpful in that case, and which are also helpful in this one, recognise that work is undertaken in a wide variety of circumstances.

[89] Accordingly, it is not necessarily helpful to evaluate the constraints on an anaesthetic technician who is to be available for call-back by way of a direct comparison with the obligations of a care worker who is on duty overnight in a community home, or a matron who is on duty in a boarding school at night.

[90] The key feature of the present case is that the ATs had to be ready at any time during the on-call period to respond within 10 minutes and to exercise their work obligations as registered health professionals. That significant requirement impacted on each of them directly.

[91] The most important factor which affected all of them was this DHB-imposed obligation that meant they had to reside away from their homes, which each of them has reasonably said impacted on the quality of their family life in significant respects.

[92] That also meant that each of them had no realistic alternative but to stay in the DHB-provided accommodation. The Court received evidence that, at times, there were various problems with the nature of that accommodation. It is unnecessary to detail the specifics. It is obviously the case that the accommodation which was provided involved sharing basic facilities with other employees at times, both male and female; and the ATs slept in facilities which they considered to be less comfortable than would have been the case had they been staying in their own homes. However, the issue is less to do with the quality of the accommodation

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19 *Idea Services Ltd v Dickson,* above n 2, at [8] and [10].

which was provided, and more to do with the fact that the employees had to reside away from their own homes and families. Also relevant, is the quality of their rest or sleep, because of the possibility which could never be ruled out of being called back to an emergency.

[93] There was much discussion in the evidence as to the extent to which they were free to engage in other activities within Timaru, with reference being made to concerns held by some employees as to their ability to respond to a call out properly if there were difficulties over car parking; or whether their cell phones would operate in a particular location where reception was poor. These are more subjective factors, to which I ascribe less weight. I accept that they were genuinely held concerns, but these factors could also apply to any local staff member who was on call.

[94] It is at this point that the debate between the parties as to the scope of the requirement to respond promptly becomes relevant. Dr Earnshaw said that in emergencies, ATs would be expected to respond as soon as possible, and that surgery would start within 30 to 45 minutes; generally this would mean being ready to start work within 20 to 30 minutes of being called.

[95] As I have found, this was not the understanding which the ATs held, until the recently issued memorandum which expressed the DHB's expectation differently.

[96] It is clear from the evidence that the ATs have responded very quickly where a given call-back involves a medical emergency. Many referred to the predictable necessity of making themselves available in theatre immediately for emergency caesarean sections. I find that this was an accepted practice, which, in emergencies, has contributed to the understanding of ATs that there was a limited ability to engage in activities beyond their temporary accommodation because from time to time they understood they might be called back on a very urgent basis.

[97] I conclude that the constraints which were imposed by having to live away from their homes and families in shared accommodation where they were unable to undertake their normal range of activities were significant. Their time was not their own as would otherwise have been the case.

The nature and extent of responsibilities placed on the employees

[98] Mr Cranney submitted that responsibilities on each AT while on call were weighty. He said there was a potential to be disturbed at any time, and they had to be ready to respond quickly and appropriately on every single occasion. Call-backs were unpredictable in frequency and timing, and they had to be ready to respond at all times. A failure to comply with the obligation could be very serious and even endanger life.

[99] Ms Hornsby-Geluk submitted that it was instructive to contrast the nature of the responsibilities held by employees in *Idea Services*[20] and *Law*.[21] In both of these cases, she said the Court had emphasised the ongoing nature of responsibilities imposed throughout the period of the sleepover.

[100] It was submitted that unlike the employees in those cases, the ATs were not required to perform any minor unrecorded proactive, preventative or unremunerated duties during on-call periods; nor did they have ongoing responsibility for the wellbeing of groups of vulnerable people during the periods of time that they were on call.

[101] I return to the point which I made earlier, to the effect that a practical assessment is required, which is, inevitably, case-specific.

[102] In this case, the nature and extent of the responsibilities during periods of call-back was unsurprisingly different from those considered in *Idea Services* and *Law*. Each employee when on call must be ready to respond promptly at any time during that period to assist in the delivery of surgical services, a not insignificant proportion of which are on an emergency basis, with regard to circumstances which could potentially impact on the life of a patient.

[103] Standing back, I find that the nature and extent of the AT's responsibilities was significant, and at times very significant.

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20 *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC) at [3], [15](b) and [16].

21 *Law v Board of Trustees of Woodford House,* above n 14, at [92] and [95].

The benefit to the employer of having the employee perform the role

[104] Mr Cranney submitted that it is clear that the benefit of having the ATs perform their role was critical and fundamental to the delivery of surgical services outside of normal hours. The obligation, as reasonably understood by the ATs, was a longstanding and historic requirement, which had operated since at least the 1980s. This obligation ensured that the DHB could provide the required 24/7 care in theatre. Mr Cranney submitted that the delivery of acute, lifesaving theatre care should be regarded as critical to the operation of the hospital.

[105] Ms Hornsby-Geluk accepted that there was a benefit to the DHB in having its employees undertake on-call work, since it enabled the performance of surgeries which needed to be performed outside of the theatre's usual operating hours. She submitted, however, that the benefit was not as significant, or of the same nature or scale, as the benefit to the employers whose circumstances were considered in the previous sleepover cases. She said the presence of ATs on call did not meet any regulatory or statutory requirements of the employer; the provision of emergency surgeries was not fundamental to the operation of the hospital. In short, she said the benefit to the DHB was not of the same nature or scale as in the sleepover cases.

[106] In *Idea Services*, this Court found that without the presence of community service workers performing a sleepover in each group home every night, the company would be in breach of its obligations to operate the group homes in an appropriate manner and potentially jeopardise its funding.[22]

[107] In *Law*, a factor which the Court considered were the rigorous requirements for school boarding hostels, as well as their management and staffing. The Court held, in the circumstances of that case, that these underpinned statutorily both the operational rules of the school hostels, and the activities undertaken by the staff involved, in the course of their duties including at sleepover times.[23]

[108] Turning to the present circumstances, DHBs are constituted by Part 3 of the New Zealand Public Health and Disability Act 2000 (the NZPHD Act). A DHB must

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[22] *Idea Services Ltd v Dickson* [2009] ERNZ 116 at [69].

[23] *Law v Board of Trustees of Woodford House,* above n 14, at [162].

operate within the context of the significant objectives described in s 3 of that Act, and in light of the further descriptions of specific objectives and functions which apply to DHBs, as described in ss 22 and 23 of that Act. It is clear from these and other statutory obligations[24] that each DHB must pursue its objectives in light of complex operational and funding obligations so as to ensure that the health services which the DHB is to provide are met appropriately. DHB's are required to meet detailed performance and financial targets following agreement with the Minister of Health, which are regularly monitored by the Ministry of Health.

[109] It is obvious that the DHB operates in a highly prescriptive and regulated environment. Given that environment, it is inherently unlikely that the DHB would operate its theatre services unless those were considered essential. And having determined that such a service would be provided, the effect of the statutory provisions is that the DHB is monitored to ensure the service is provided according to agreed terms. No doubt there are consequences for a DHB that does not do so. Factors such as these are not dissimilar to the rigorous requirements which applied, albeit in very different contexts, in *Idea Services* and in *Law*.

[110] I accept the submission that the benefit to the employer of having ATs on call so that these particular health services can be properly maintained is significant. Whilst it may be the case that alternatives, such as flying patients who need emergency care by helicopter to another hospital, might be an alternative option, that is not the choice which the DHB has made according to the evidence before the Court. I am satisfied that the ability to call back appropriate staff such as ATs, enabling the DHB to deliver emergency health care must be regarded as being of significant benefit to the DHB in complying with its obligations under the statutes with which it must comply, particularly the NZPHD Act.

Other factors

[111] Before drawing these threads together, it is necessary to consider other points which were addressed by counsel in their submissions.

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[24] For example, Crown Entities Act 2004, Health Act 1956, Health and Disability Services (Safety) Act 2001.

[112] The first relates to the application of overseas cases. As already noted, Mr Cranney argued that the present case was analogous to the circumstances which were considered in *Truslove*.

[113] He referred to the following passage from the Court of Appeal in *Idea Services*, when it considered the relevance of the approach of overseas courts:[25]

> We acknowledge immediately that the statutory frameworks are different, but the cases are nonetheless illustrative of what the concept of "work" entails in the minimum wage area. The fact that the Employment Court's and our view is consistent with overseas authority does, at least to an extent, give the lie to the submission that the Employment Court's approach was radical and that it would be unworkable in practice.

[114] In that instance, the Court of Appeal went on to consider the cases of *Simap* and *Jaeger*, which dealt with the meaning of "working time" and "rest periods", finding that these concepts were not very different from what was implicit in s 6 of the MW Act. In *Simap*, doctors had to stay at their particular medical facilities whilst on call. The European Court held that time spent by doctors on call at the hospital amounted to "work".[26]

[115] That conclusion was relied on in *Jaeger*, where doctors were provided with a room and a bed and could sleep when not called out.[27] The Court, applying *Simap*, decided that such time on call was working time.

[116] Mr Cranney submitted that the EAT in *Truslove* applied and considered both these judgments in circumstances which are analogous to the present case. That case involved ambulance paramedics who sometimes worked on-call nightshift duty away from their home base station.[28] On such occasions, they were required to take accommodation within a three-mile radius of the distant ambulance station, at which they were to park the ambulance. They were to meet a target time of three minutes within which to respond to a call.

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[25] *Idea Services Ltd v Dickson,* above n 2, at [17].

[26] *Sindicato de Médicos de Asistencia Pública [Simap] v Consellaria de Sanidad y Consumo de la Generalidad Valenciana,* above n 6, at [52].

[27] *Landeshauptstadt Kiel v Jaeger,* above n 7, at [71].

[28] *Truslove v Scottish Ambulance Service,* above n 5, at [3].

[117] The EAT found that it was not only the specifying of a location which was important – whether that was within a mile, or 50 miles, or even 100 miles from the workplace – but also the lack of freedom to be anywhere else that created the relevant distinction. The short point was that the employee had to be where he was, and could not be at home. The EAT found that the time of the employee could not therefore be said to be his or her "own time".[29]

[118] Mr Cranney argued that the present case was the same, and illustrated similar significant constraints on the affected employees.

[119] Ms Hornsby-Geluk submitted that the approach adopted in *Truslove* was an "absolute" approach, which was inconsistent with that adopted either in *Simap* or *Jaeger*, or for that matter in *Idea Services*, which required an assessment of fact and degree. She also referred to the statement made by the Court of Appeal in *Idea Services*, where it was observed that a "typical on-call doctor" would be under relatively few constraints. She said that *Truslove* involved an extreme interpretation of *Simap* and *Jaeger*.

[120] I do not consider that the conclusions in *Truslove* involve an absolute or unduly rigid approach. The Tribunal recognised, on the case before it, that the question was whether "… as a matter of fact … an individual is at work or conversely at rest in the particular circumstances". It recognised that "on-call working" was a particular example. It was held that such a concept imposed some constraints, but also permitted considerable liberty. The applicable authorities emphasised that the question was whether the individual was obliged to be present and remain available at the place determined by the employer. Then the Tribunal said that:[30]

> … There may be many circumstances in which a designated place of work is so permissibly defined that it amounts to no particular exercise of the employer's entitlement to control the employee in the way he provides his services. An obvious example would be that of being forbidden from going abroad during the time of on-call duty. There may be other examples far less extreme. But it seems … that in order to determine what principle should

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[29] At [34].

[30] *Truslove v Scottish Ambulance Service,* above n 5, at [29].

> apply regard must be had … even if broadly, to the purpose of the provisions.

[121] It is clear that the Tribunal recognised that there needed to be an evaluation of particular circumstances. The requirements of the employer were assessed as a matter of fact and degree, and not on an absolute basis.

[122] Secondly, I do not regard the finding made by the EAT as being "extreme". The conclusions were of course reached in a very different statutory context from that which applies in the present case – a point to which I shall return shortly – but it appears that the factual findings that were made were available on the basis of the summarised evidence.

[123] The real question, however, is whether decisions such as this are of assistance in the New Zealand context. As already mentioned, in *Idea Services* such cases are illustrative as to what the concept of "work" might entail for minimum wage purposes. Reference to such cases has allowed courts to conclude that their views are consistent with overseas authority.[31] I have referred to *Truslove* only for that purpose. I am satisfied that the findings I have made are consistent with those made by the EAT. But my conclusions do not depend on the conclusions which were reached in *Truslove*.

[124] Ms Hornsby-Geluk also relied on dicta of the Court of Appeal in *Idea Services*, which discussed whether doctors on call could be said to be at work. That obiter statement was made in response to a submission of counsel to that Court; the example appears to have related to a doctor who was on call at his or her own residence.

[125] The circumstances of the ATs in the present case are very different. So as to meet the employer's expectations, the employees accepted the offer of DHB accommodation which was located at or very near the hospital, and away from their own homes. The reality was that they had to take that step. The Court of Appeal did not contemplate such an example.

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[31] *Idea Services Ltd v Dickson,* above n 2, at [17]; *Law v Board of Trustees of Woodford House,* above n 14, at [183].

[126] As outlined earlier, it was also argued that to allow the present claim would open up the floodgates. There is no evidence before the Court which would allow such a conclusion to be drawn. As I have explained, whether particular arrangements constitute work for the purposes of s 6 of the MW Act is a question of fact and degree. It is not useful to speculate as to how other case-specific evaluations might result, given "… the wide variety of work that can be undertaken in the circumstances in which it may take place".[32]

[127] I also consider that the Court must focus on the application of the relevant statutory provision to the case in hand. That the Court's decision may have consequences in other circumstances is, in this instance, not a relevant factor in the application of s 6 according to the well understood factors which it is appropriate to consider. This is not a case where a concern about floodgates should be determinative of the issue before the Court.

[128] I now turn to several other statutory provisions to which reference was made by counsel.

[129] Mr Cranney referred to cases that considered on-call duties on public holidays under the holidays' legislation.[33] Those authorities also involved assessments of fact and degree in respect of circumstances which differ significantly from the present case. However, as the Court of Appeal said in *Idea Services*, those cases are of limited assistance because they were concerned with quite different legislation.[34]

[130] Ms Hornsby-Geluk referred to s 56 of the Holidays Act 2003, which stipulates that employees should be provided with an alternative holiday where they work on a public holiday which would otherwise be a working day for them; she said that s 59 provides for employees who are on call to receive a public holiday even when not called in to work. She said that this implied that the freedom of action of such restricted employees was such that they are deemed not to be on holiday; nor

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32 *Idea Services Ltd v Dickson,* above n 2, at [9].

33 *New Zealand Airline Pilots Assoc Inc v Air New Zealand Ltd (No 2)* [2008] ERNZ 62; *O'Brien (Labour Inspector) v Guardian Alarms (Auckland) Ltd* [1995] 2 ERNZ 170.

34 *Idea Services Ltd v Dickson,* above n 2, at [16].

would they be "working". She said that if such an employee was to be regarded as being at "work", there would be no requirement for the section.

[131] I do not accept this submission. The particular provisions relied on are designed to provide statutory remedies which are to apply when particular employees are on call during a public holiday. The MW Act contains no such provision because in that statute, which is of long standing, a broad approach has been adopted. It was obviously intended that minimum wage provisions would apply to a wide range of "workers". It is well established that the term is of broad compass.[35] I do not consider that the provisions of the Holidays Act, enacted many years after the enactment of the MW Act, were intended to impact on the interpretation or application of s 6 of the MW Act; or that those provisions are in fact of assistance in construing the section.

[132] Similarly, with regard to the submission which was made as to the availability provisions, as contained in s 67D of the Act. Ms Hornsby-Geluk said that the recently enacted section contemplated that employees might be subject to restrictions as a result of being required to be available for work, in consideration for which they are entitled to reasonable compensation. She argued that it was clear from the context of those provisions that remaining available and being subject to restrictions did not amount to work, and that the level of compensation provided for in that provision was to be negotiated by the parties taking into account the level of restriction.

[133] Amongst the statutory descriptors of an availability provision, are those found in s 67D(2) of the Act, which provides that an availability provision may only be included in an employment agreement that specifies agreed hours of work, and that includes guaranteed hours of work within those agreed hours; and which relates to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

[134] Ms Hornsby-Geluk did not contend that there is an availability provision in the MECA; that is plainly not the case. It was her point that at the time these

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35 *Law v Board of Trustees of Woodford House,* above n 14, at [44].

provisions were introduced, the *Idea Services* sleepover principles had become well understood; had the legislature intended that on-call situations would constitute work, there would have been an exclusion of this category from the availability provisions. She said the fact that s 67D of the Act does not do so reflects an intent to include such work, and thereby to maintain a distinction between on-call and sleepover scenarios.

[135] I was referred to no extrinsic materials which would support the contention that Parliament addressed and/or intended such a distinction. Nor has any relevant amendment been made to the MW Act, a possibility which might well have required consideration were it the case that a distinction of this kind was to apply. I leave for another day the question of how s 67D might be utilised for workers who are on call, and in particular, whether the provisions of the MW Act should apply to any compensation which is payable under such a provision.

Conclusion as to work

[136] I return to the factual assessment which I conducted earlier. I am satisfied that the three factors I have assessed are sufficiently significant as to lead to the conclusion that when on call, the ATs ought to be regarded as undertaking work for the purposes of s 6 of the MW Act.

Issues as to remedies

[137] The parties agreed that there were certain factual and legal issues relevant to the appropriate method for quantification of any remedies, which I will now consider.

Application of Minimum Wage Orders

[138] The MW Act provides that the prescribed minimum rate of pay shall be as determined by Order in Council.[36]

[36] Minimum Wage Act 1983, s 4.

[139] Each year, Minimum Wage Orders (MWOs) are issued. Clause 4 of those MWOs provide for minimum adult rates. Because the clause altered in 2014, it is necessary to set out two examples.

[140] The first example is provided by the MWO rates which were prescribed in 2010. Clause 4 provides for the following minimum rates of wages payable to an adult worker:

> …
>
> (a) for an adult worker paid by the hour or by piecework, $12.75 per hour:
>
> (b) for an adult worker paid by the day, —
>
> (i) $102 per day; and
>
> (ii) $12.75 per hour for each hour exceeding 8 hours worked by a worker on a day:
>
> (c) in all other cases, —
>
> (i) $510 per week; and
>
> (ii) $12.75 per hour for each hour exceeding 40 hours worked by a worker in a week.

[141] A new fortnightly category (d) was included in MWOs with effect from 26 June 2014.[37] An example of the formulation which followed thereafter is found in cl 4 of the MWO 2017, which provides for the following rates to be paid to an adult worker:

> (a) for an adult worker paid by the hour or by piecework, $15.75 per hour:
>
> (b) for an adult worker paid by the day, —
>
> (i) $126 per day; and
>
> (ii) $15.75 per hour for each hour exceeding 8 hours worked by a worker on a day:
>
> (c) for an adult worker paid by the week, —
>
> (i) $630 per week; and
>
> (ii) $15.75 per hour for each hour exceeding 40 hours worked by a worker in a week:
>
> (d) in all other cases, —
>
> (i) $1,260 per fortnight; and

[37] The Minimum Wage Amendment Order 2014 took effect 28 days after its notification in the *Gazette*, which occurred on 29 May 2014.

(ii) $15.75 per hour for each hour exceeding 80 hours worked by a worker in a fortnight.

Summary of submissions

[142] Mr Cranney submitted that for both ordinary work and call-out work, the ATs were paid by the hour, so that sub-clause (a) applied.

[143] Ms Hornsby-Geluk submitted that the category of "all other cases" applied, since the ATs were salaried employees. She argued that the dicta of the Court in *Law* should be followed in the present case, since it considered the position of salaried employees. She said that the applicable methodology, as adopted in that case, required the parties first to calculate the number of hours worked (including sleepovers) during each week of work performed. Referring to category (c) of the relevant MWOs (all other cases), to the extent that each employee worked 40 or fewer hours, the parties would have to ensure that the weekly minimum payment under category (c) had been met in practice; and if the analysis of hours worked in each week revealed that there were more than 40 (including sleepovers) the parties would need to ensure that payment for each extra hour over 40 was for a sum not less than the minimum hourly rate provided by category (c).[38]

[144] Ms Hornsby-Geluk submitted, in reliance on these conclusions, that the Court should find that the ATs were salaried, and that they therefore fell into the "all other cases" category of the applicable orders. This meant that prior to 26 June 2014, cl 4(c) would apply so that the assessment should be made on a per week basis, and following that date cl 4(d) would apply so that the assessment would be made on a per fortnight basis.

The applicable case law

[145] These submissions must be tested by considering the statements of principle articulated by the Court of Appeal with regard to the applicable provisions of the MW Act and the allied MWO's, and secondly, by considering the circumstances which arose for consideration in *Law*.

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[38] *Law v Board of Trustees of Woodford House*, above n 14, at [238] – [239].

[146] In *Idea Services*, the Court of Appeal considered how an MWO was intended to operate. It made the following points:

a) The Executive did not intend there to be a rigid demarcation between the categories listed in cl 4 of each MWO.[39]

b) The essential feature of each category seemed to be that workers, no matter how they were paid, would receive the prescribed hourly rate for each hour worked.[40]

c) The employee in that case was entitled to the minimum wage, for each hour he worked, regardless of whether he received more than the minimum wage for other hours worked. "Rate" meant amount per unit of time.[41] The alternative averaging approach would result in much turning on the chosen pay period if an averaging approach were to be adopted; such an outcome could not have been intended.

d) Furthermore, if averaging was intended, the omission of any express reference to it was remarkable.[42]

[147] In *Law*, Chief Judge Colgan was required to consider a number of issues relating to the MW Act and the MWOs prescribed under it. He concluded the words "wages" and "salary" were essentially different descriptions of the same thing, that is, remuneration paid to employees for work performed. That an employee was in receipt of a salary, or of remuneration so expressed, did not mean that the employee would be excluded from coverage under a MWO.[43]

[148] At issue in that instance were the circumstances of matrons and house mistresses who worked primarily during term times, which were between 38 and 40 weeks of the calendar year. Their remuneration was annualised over a period of 52 weeks, the effect of which was there were about eight weeks per year when each

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39 *Idea Services Ltd v Dickson,* above n 2, at [31].
40 At [31] – [33].
41 At [32] and [33].
42 At [35].
43 *Law v Board of Trustees of Woodford House,* above n 14, at [70] and [71].

employee was not working but during which that person was paid.[44] The Court was accordingly required to consider whether in those particular circumstances, averaging was appropriate, contrary to the approach adopted in *Idea Services*.[45]

[149] The Court observed that the strong rejection of an averaging approach by the Court of Appeal in *Idea Services* apply universally, and were not restricted to the circumstances of that case.[46]

[150] Accordingly, Chief Judge Colgan found that those particular plaintiffs whose remuneration was expressed as an hourly rate were paid by the hour with the result that cl 4(a) of the relevant MWO would apply;[47] but in those cases where particular plaintiffs were paid a salary over 52 weeks, the cl 4(c) approach should be adopted, because neither of the preceding categories could apply, any other approach would have involved averaging.[48]

[151] These cases clearly demonstrate that a fact-specific analysis is required.

The AT's basis of remuneration

[152] I turn now to consider the terms of the employment arrangements in this case. First, it is necessary to consider the letters of offer which were given to each AT at the time of their employment. In each case, the ATs were told that they would be paid an "annual salary", based on the applicable step of the MECA. In two instances, the letter of offer made reference to what was described as an "hourly pay rate".

[153] Secondly, reference should be made to the MECA. At cl 5.1.1, it is stated that salaries were "… expressed in full-time 40-hour per week rates. Where an employee's normal hours of work are less than 40 per week the appropriate salary for those hours shall be calculated as a proportion of the 40-hour rate". At cl 5.8, technical "salary scales" were set out on a stepped basis; these described the relevant

44 At [28].
45 At [216] – [218].
46 At [218] and [231].
47 At [234].
48 At [227] – [232]; the case was heard in 2013 so that three categories of minimum rates fall for consideration under the applicable MWOs.

annual remuneration. But it is clear that remuneration was determined with reference to an hourly rate.

[154] Clause 2.2 described overtime. The ordinary hourly rate of pay was calculated with reference to the “yearly rate of salary payable for a full-time 40-hour week”; the overtime rates were either one and a half times the ordinary hourly rate of pay, or double the ordinary hourly rate of pay. Again, overtime was calculated with regard to an hourly rate of pay.

[155] Under cl 3, call-backs were to be paid at the appropriate over-time rate for a minimum of three hours, or for actual working and travelling time whichever was the greater, except where call-backs commenced and finished within the minimum period covered by an earlier call-back. Thus, hourly rates also applied to the calculation of call-back remuneration.

[156] Finally, I refer to cl 4.1.2 which stated that an employee, who was instructed to be on call during normal off duty hours, would be paid an on-call allowance of $4.04 per hour, except on public holidays when the rate would be $6.06 per hour. The on-call allowance was to be payable for all hours the employee was rostered on call, including time covering an actual call out. Again, it is significant that the “allowance” was to be calculated with reference to an hourly rate.

[157] A sample of payslips was provided to the Court. The ATs were paid fortnightly with each payslip describing a breakdown for each of the two weeks to which it related. The hours worked for each day were calculated with regard to the applicable base hourly rate. The payslip also showed an hourly breakdown in respect of on-call periods, according to the provisions of the MECA which I have just described.[49]

What is the correct methodology in this case?

[158] Ms Hornsby-Geluk submitted, relying on *Law*, that the correct approach was to set off the entire payment made to an employee for the payment period (whether that was weekly or fortnightly, depending on which MWO applied) against the

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[49] At [156].

amount the relevant MWO required the employer to pay in respect of that period. That meant for the period up to 26 June 2014, each employee's total pay for each week would be considered and offset against any amounts due under the MW Act. And for the period thereafter, each employee's total pay for each fortnight was to be considered and offset against any amounts due under the MW Act.

[159] Ms Hornsby-Geluk also submitted that the alternative, which was to take an hour by hour approach to payment for salaried employees, would have the effect that employees who worked more than 40 hours per week could claim the minimum wage for all such additional hours worked. It was submitted this would create an absurdity because it would be inconsistent with the nature of salaried employment.

[160] A number of illustrations were provided with regard to the payslips which were before the Court. The first example was as follows:[50]

<table>
<tr><th colspan="3">Minimum Wage Order 2010
Commenced: 1 April 2010
Revoked: 1 April 2011</th></tr>
<tr><th>Rates</th><th>Calculation</th><th>Example</th></tr>
<tr><td>• Hour: $12.75
• Day: $102/day; and $12.75/hour over 8 in day
• All other: $510/week; and $12.75/hour over 40 in week</td><td>Pay for week will be:
• $510; plus
• $12.75 multiplied by the number of hours on call and worked in excess of 40.</td><td>[Named employee]

Week 1 – total hours 51.5 – pay due $656.63
• $510;
• $146.63 (11.5 X $12.75)
Pay received: $1342.16

Week 2 …</td></tr>
</table>

[161] The payslip on which this analysis was based showed 40 weekday hours were worked for the week in question, and that 11.5 hours were spent on call, providing a total hourly figure for the week of 51.5. In the illustration, the "all other" rate of $510 was applied to the 40-hour period; each hour on call was valued at $12.75, producing the total of $146.63. The combined total was $656.63.

[162] This weekly (or subsequently fortnightly) figure was then compared to the employee's actual remuneration; in this example, the figure was $1,342.16.

[50] There were several post 2014 illustrations which proceed on a fortnightly rather than weekly basis.

[163] However, it should be noted that the relevant payslip reveals that this particular employee was paid at a rate of $32.2915 for a 40-hour period (based on eight hours from Monday to Friday), and during the on-call period at a rate of $4.0400. The DHB's table does not record this breakdown when referring to "pay received". The record of payment establishes that for the week in question, $1,291.66 was received for weekday hours; and $46.46 for on-call hours.[51]

[164] In my view, the DHB's analysis has a number of problems.

[165] First, the figure calculated under the MWO is compared with a figure (pay received) which totals or averages the amount received for weekday hours and on-call hours. That comparison is inappropriate; the correct comparison for the on-call period should be between the MWO calculation for that period ($146.13), and the amount actually received for that period ($46.46).

[166] The DHB approach does not recognise that each AT is entitled to the minimum wage for each on-call hour, notwithstanding that they receive more than the minimum wage for other hours worked;[52] and it involves an impermissible process of averaging.[53]

[167] Furthermore, it is not appropriate to resort to the category of "all other cases" when it is clear that the employees were effectively paid by the hour. The hourly rate is central to the concept of remuneration in the relevant clauses of the MECA; and all calculations for remuneration in the payslips were referable to an hourly rate.

[168] I also observe that given the conclusion of the Court of Appeal in *Idea Services* that a rigid demarcation between the cl 4 categories was not intended, the result should be the same whichever category is adopted. It would be surprising if an entitlement could arise under one category but not another.

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51 $4.04 was also paid as a penal allowance for (weekly) afternoon and night duties.

52 *Idea Services Ltd v Dickson*, above n 2, at [32] – [33].

53 *Idea Services Ltd v Dickson,* above n 2, at [35] – [37] and *Law v Board of Trustees of Woodford House,* above n 14, at [218] and [231].

[169] Having regard to these factors I am satisfied that the correct category for compliance is in this case cl 4(a) of each MWO.

[170] There is, however, a further submission which was advanced for the DHB. Ms Hornsby-Geluk suggested that the approach adopted by the Court of Appeal in *Idea Services* was distinguishable, because that case focused on circumstances where an employee was paid in fact by the hour and not otherwise.

[171] She pointed out that the Court of Appeal had alluded to another situation which it ultimately concluded was not before it: she referred to a passage in *Idea Services* where the Court of Appeal referred to the fact that whilst the worker in that case had been paid by the hour for his principal work, he had been paid "by the session" for his sleepover work.[54] The Court had therefore invited supplementary submissions from counsel as to whether these circumstances might mean that such a worker would be placed in the "all other cases" category since the previous categories did not describe remuneration on a sessional basis.

[172] After receiving additional submissions, the Court of Appeal analysed this possibility, finding for the purposes of that case that although payment for the sleepover period had not been expressed on an hourly basis, that was because the parties had operated under a mutual mistake that it did not constitute work so that it constituted only an allowance.[55] Consequently, it did not need to consider further what the position would be if an employee was to be paid on a per session basis.

[173] I do not consider that this argument could apply to the present circumstances. As I have already summarised, the MECA provided at cl 4.1.2 for an on-call allowance, but it was one which was payable on an hourly basis: $4.04 per hour, except on public holidays when the rate was $6.06. The rates specified in the collective agreement were expressed as being payable on an hourly basis. The scenario which was possibly left open by the Court of Appeal in respect of a period for which session allowance was payable could not fall for consideration here, given

[54] *Idea Services Ltd v Dickson,* above n 2, at [28].
[55] At [30].

the specific agreement that payment during the on-call period would be on an hourly basis.

Summary as to the applicable category

[174] I conclude that the prescribed rate under cl 4(a) of each MWO will apply to each hour when the employee is on call, apart from those hours when they are called back, during which time the provisions of the MECA relating to call-back (cl 3.1.2) and the payment of the on-call allowance during that period (cl 4.1.3) will apply.

[175] The hours of call-back will need to be determined for each period on call; there appears to be no dispute that call-back entitlements have been correctly paid. The minimum adult rate will apply to the balance of hours of each on-call period. The DHB is entitled to a credit, however, for the on-call allowance it has paid for that balance.

Conclusion

[176] When on call, ATs ought to be regarded as undertaking work for the purposes of s 6 of the MW Act.

[177] They fall under cl 4(a) of each applicable MWO.

[178] Each employee is entitled to the prescribed rate for each hour in the on-call period, less hours of call-back. A credit is to be given for the payment made for the on-call allowance in respect of the balance of those hours.

[179] I reserve leave to the parties to apply for any necessary directions or applications. Counsel are asked to file a joint memorandum as to whether this will be necessary by 18 December 2017.

[180] This judgment replaces the determination of the Authority.

[181] The defendants are entitled to an order for costs. The parties should discuss this issue directly. If agreement cannot be reached, the ATs may make the necessary application within 21 days of the date of this judgment; the DHB may respond

within 21 days thereafter. My provisional view is that Category 2, Band B of the Court's Cost-Guidelines should apply.

B A Corkill
Judge

Judgment signed at 12.10 pm on 20 October 2017