WHEN SLEEPING IS WORKING – THE DEFINITION OF WORK IN A BOARDING SCHOOL

NIC HILL*

ABSTRACT

This paper reviews the legal definition of work as it applies to boarding supervisors in New Zealand State Boarding Schools. It reviews case law to make recommendations as to how schools should organise the work of boarding supervisors to meet legislative requirements. There is a well-established judicial test of work for the purposes of the Minimum Wages Act 1983. A significant level of constraint and responsibility on the employee and a significant benefit to the employer will result in an activity being work. This paper looks at how this test has been applied by the courts. Because the work of boarding supervisor does not align with the traditional Monday to Friday, 9:00 am to 5:00 pm work arrangement this paper also explores the use of relationships such as contractor or volunteer and finds that boarding supervisors are employees. This paper also determines that schools may not use salaries to avoid the implications of legislation including the Minimum Wage Act 1983.

I INTRODUCTION

This research paper provides a structure for the definition and organisation of work of boarding supervisors in New Zealand state schools. The research objective is to clarify the obligations and entitlements of employees (boarding supervisors) and employers (state schools) under the relevant employment legislation.[1] Recent case law shows that sound, current and reliable employment practices have not been a consistent feature of boarding schools.[2] This research provides schools with legal and practical means to define and design the roles of their staff so as to meet the entitlements and obligations under legislation.

A key issue facing boarding schools is the definition of "work". The responsibilities of boarding supervisors do not fit neatly with the standard employee–employer relationship. This research addresses how work in state boarding schools should be defined and organised to satisfy legislation. It identifies both factual and holistic matters that have been influential in the courts' assessment of whether an activity is work. It also evaluates whether arrangements other than employee–employer such as volunteers or contractors can be successfully used in state boarding schools instead of employment. This research concludes with guidance for schools as to how they should assess and structure the roles of their boarding supervisors.

This research is doctrinal in method. Schools with limited human resources and legal support need guidance that allows them to apply the law for the benefit of themselves

* Headmaster – Christchurch Boys' High School, Christchurch. Email: HillN@staff.cbhs.school.nz

[1] See especially *Minimum Wages Act 1983* (NZ) and *Wages Protection Act 1983* (NZ).

[2] *Victoria Law Board of Trustees of Woodford House* [2014] NZEMPC 25 is the leading case involving a school in this area. Other cases involving schools include *Lukitau-Ngaamo v Nelson College Board of Trustees* [2019] NZERA 484; *Kidd v Epsom Girls Grammar School Board of Trustees* [2019] NZERA 183; *Leaupepetele v Wesley College Board of Trustees* [2019] NZERA 400.

and their employees. The development of employment guidance for state boarding schools, who despite being crown entities, work largely independently and with unique arrangements is a beneficial outcome of this research.

II BACKGROUND

The Ministry of Education licences 108 school hostels. 40 of these hostels are state or state integrated hostels operated by a school board of trustees; 36 are state or state integrated hostels operated by a board of proprietors or a trust; 21 are private school hostels operated by a board of proprietors or a trust and 11 are operated by organisations other than schools, for example health camps.[3] The state has not built a boarding school facility or provided capital for improvements since upgrading an existing facility in Christchurch in 2000.[4] Boarding exists in long established schools with largely dated facilities, including staff accommodation, and often long-standing historical arrangements for the employment of staff.

The definition of work has historically been vague in boarding schools. This is due to perceptions over the nature of the boarding supervisor role and its alignment with both leisure time, including sleeping, and voluntary community service.[5] Boarding schools have 24-hour, seven-day-a-week pastoral care responsibilities for students and it is the staff who carry out these responsibilities (matrons, boarding supervisors, housemasters, house-parents) for whom the definition of work has implications in terms of their employment and remuneration. Traditionally boarding supervisors have received free accommodation (and other non-cash benefits) in return for meeting the extensive health, safety and wellbeing obligations on behalf of the school. These obligations are set out in the *Education (Hostels) Regulations 2005*.[6] This traditional arrangement does not meet the requirement of the *Wages Protection Act 1983* which requires that wages be paid in money only.[7] Boarding supervisors are often teachers at the boarding school and employed on the Secondary Teachers Collective Agreement. This agreement fails to precisely define hours of work and amongst other provisions states that hours of work are influenced by "the counselling and pastoral needs of students".[8] Staff other than teachers are also employed to provide pastoral care services and there is a wide range of practices across schools in terms of the precise nature of these roles and how they are

[3] Report to Minister of Education: '*Law & Colbert & Others v Board of Trustees of Woodford House & Others:* briefing on likely implications of recent Employment Court "sleepovers" decision' (24 March 2014) (obtained under *Official Information Act 1982* request to the Ministry of Education) 2 ('*Report to Minister of Education*').
[4] Jim Tully (ed), *Boys: Stories and memories of 125 years of Christchurch Boys' High School* (Caxton Press, 2006).
[5] John O'Brien, 'Australian Boarding School Supervisors: A Voluntary Position?' (2013) 18(2) *International Journal of Law & Education* 43, 51.
[6] *Education (Hostels) Regulations 2005* (NZ). It can be argued that these pastoral responsibilities are broader than in a day school and that boarding schools are trusted to play a very large part in the holistic development of a child into a young man or woman. See O'Brien (n 5) 43.
[7] *Wages Protection Act 1983* (NZ) s 7.
[8] PPTA National Office, *Secondary Teachers' Collective Agreement* (July 2019) 59.

remunerated. State schools can only employ staff on a collective agreement approved by the Ministry of Education,[9] yet no specific agreement exists for boarding.

The definition of work for the purposes of the *Minimum Wage Act 1983*, within the context of sleeping over, received attention in the Employment Court in *Idea Services Ltd v Dickson* ('*Idea Services*').[10] This case progressed to, and was endorsed by, the Court of Appeal ('*Idea Services CA*').[11] In this case, Mr Dickson, a community service worker, who cared for people with disabilities living in community homes had responsibilities when sleeping for which he received an overnight allowance instead of an hourly wage. As the *Minimum Wages Act 1983* fails to define "work", the Employment Court was asked to determine whether Mr Dickson was "working" during sleepovers. The Employment Court determined that 'what is required by an employer of an employee and whether that constitutes "work" for the purposes of s 6 of the Act depends on a fact specific enquiry of each individual case'.[12]

In assessing the specific facts of Mr Dickson's situation, the court applied three factors:

1. The extent to which the employer imposes constraints on the freedom the employee would otherwise have to do as he or she pleases.
2. The nature and extent of the responsibility on the employee.
3. The benefit to the employer of having the employee assume the role in question.

In its application of these factors the Employment Court found that Mr Dickson was working during sleepovers.[13] The Court of Appeal agreed with this finding and the three factors that had been used.[14]

When assessing work, the specific fact-based nature of arrangements is of high consequence. Soon after *Idea Services CA*, the Employment Court rejected an argument that rostered on–call hours for firefighters constituted work. The Employment Court distinguished the sleepover situation from a person who is at home and on call and who usually has no tasks to perform.[15]

The first case relating to boarding schools involved two neighbouring schools, Woodford House and Iona College. In this case, *Law v Board of Trustees of Woodford House* ('*Law*'), the school boards failed to distinguish their matrons' situations from that of the community service worker in *Idea Services.*[16] The court applied the same factors as in *Idea Services,* and despite the provision of accommodation as part of the employment agreements and the presence on site of senior managers, found that the sleepovers did amount to work. In subsequent cases, the level of lifestyle constraint,

[9] *State Sector Act 1988* (NZ), s 75.
[10] *Idea Services Ltd v Dickson (No 2); Dickson v Idea Services Ltd* (2009) 6 NZELR 666, 668 [1] ('*Idea Services*').
[11] *Idea Services Ltd v Dickson* [2011] 2 NZLR 522, 527 [10] ('*Idea Services CA*').
[12] *Idea Services* (n 10) 680 [63].
[13] Ibid 681 [71].
[14] *Idea Services CA* (n 11) 527 [9]–[10].
[15] *New Zealand Professional Firefighter Union v New Zealand Fire Service Commission* [2011] NZEmpC 149, [35] ('*NZPFU*').
[16] *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [194] ('*Law*').

nature of onsite dwelling and the level of vulnerability of overnight clients[17] as well as the required state of readiness of the employee[18] have been influential on the outcomes.

In assessing work, the three factors from *Idea Services* should not be applied slavishly. What the court in *Idea Services* did do, was offer guidance as to what will ordinarily be relevant for deciding whether a person is working.[19] In *Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd* ('*Smiths City*'),[20] it was pointed out that merely confining the inquiry to the factors used in *Idea Services* could produce an anomalous outcome and a nuanced analysis is required that assesses whether the activity is part of the principal activity of the employer. This approach was influential in the Employment Court finding that meat processors 'donning and doffing' (putting on and taking off) protective equipment and following hygiene practices at the beginning and end of shifts, is work.[21]

III WHAT ARE THE REQUIREMENTS THAT SCHOOLS NEED OF THEIR BOARDING SUPERVISORS TO MEET THE NEEDS OF THE EDUCATION (HOSTELS) REGULATIONS?

The *Education (Hostels) Regulations 2005* are set out in accordance with Section 643 of the *Education and Training Act 2020* to ensure the safety of students who board at hostels. The regulations establish that no student may board at an unlicensed hostel. Licences for hostels are granted based on information regarding facilities and management and Part 4 of the regulations sets out the code of practice for management of hostels, including regulation 54 which ensures that boarders:

> have ready access to people they can trust and confide in, and are supported in raising problems and issues that are of concern to them. [22]

and regulation 61, which provides that:

> (2) The owner of a hostel must ensure that
>
> …
>
> (e) staff and boarders are encouraged to maintain positive relationships with each other
>
> (f) security measures are used to prevent unauthorised access to the hostel's premises

[17] *Hill v Shand* [2014] NZERA 66 [22] ('*Hill*').
[18] *Sanderson v South Canterbury District Health Board* [2017] NZERA 37, [91] ('*Sanderson*').
[19] *Idea Services CA* (n 11).
[20] *Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd* [2018] NZEmpC 43, [57] ('*Smiths City*').
[21] *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 151, [273] ('*Ovation*').
[22] *Education (Hostels) Regulations 2005* (NZ), regs 7, 15, 54.

> (3) The owner of a hostel must ensure that the hostel is at all times staffed with a ratio of staff to boarders present at the hostel that ensures the safety of those boarders having regard to –
>
> (a) the number of them and their ages and needs; and
>
> (b) the nature (including the locations and times of day) of their activities; and
>
> (c) the training and qualifications of the staff or other adults concerned
>
> (4) People must not be counted as staff for the purposes of sub clause (3) if they-
>
> (a) have no duties beyond administration, cleaning, food preparation and serving, or maintenance; or
>
> (b) are having meal breaks or periods during which they are not in contact with, or accessible to, the boarders. [23]

Hostels are reviewed by the Education Review Office (ERO). ERO undertake these reviews to evaluate if students accommodated in the hostel are living in a safe emotional and physical environment. The ERO Self Audit Checklist requires school boards of trustees to attest that they have met the *Education (Hostels) Regulations*.[24] The requirements upon boarding schools for pastoral care and compliance with regulation are significant. It is therefore important that schools are clear about who is working, both for remuneration purposes and for the purposes of determining and ensuring responsibility for the safety of students and thus the continued operation of boarding at the school.

IV HOW DO SCHOOLS CURRENTLY EMPLOY THEIR BOARDING SUPERVISORS TO MEET THE EDUCATION (HOSTELS) REGULATIONS?

There are as many arrangements for the employment of boarding supervisors as there are boarding schools. These arrangements are dictated by factors including the size of the hostels and the physical layout of student and staff accommodation. Since the *Idea Services* and *Law* cases, several hostels have changed their arrangements and, for example, employed security guards or started charging rent and paying staff instead of providing free board in return for duties. As stated above in Part II of this paper, the free board approach is in breach of the *Wages Protection Act 1983* which in s 7 states 'that an employer shall pay the wages of every worker in money only'.[25] Some schools have moved to "wake over" duties and these staff, as well as being on call for students overnight, perform tasks such as the laundry (this arrangement may not align with regulation 61(4) of the *Education (Hostels) Regulations 2005*). A number of schools

[23] Ibid reg 61.
[24] Education Review Office, 'Guidelines for Hostel Assurance Statement and Self Audit Checklists', *Education Review Office Te Tari Arotake Mātauranga* (webpage, August 2020) <www.ero.govt.nz/sites/default/files/media-documents/2021-04/Hostel%20Assurance%20Statement%20August%202020.pdf >.
[25] *Wages Protection Act 1983* (NZ) s 7.

have not changed their historical arrangements and have continued to provide free board on the premise that their staff will not make a claim, a belief at times generated by statements of loyalty, such as staff being former students of the school. This approach has had mixed results.

As will be demonstrated in the following parts, boarding school supervisors are employees. They significantly meet the *Idea Services* factors of constraint, responsibility, and benefit.[26] For many boarding supervisors, whether they are teachers in the school or engaged in other employment or study, their boarding work is secondary to their main occupation. For these staff with other roles the identification of work is important to ensure clarity of responsibility and so that a volunteer type arrangement is not assumed. It is important that when working, boarding supervisors treat the role as work. Volunteer arrangements are inappropriate due to the professionalism and responsibility required of the role.

V SPECIFIC FACTUAL MATTERS INFLUENTIAL IN THE COURTS' ASSESSMENT FOR THE THREE FACTORS ESTABLISHED IN *IDEA SERVICES*

A *The Overall Application of the Factors of Constraint, Responsibility, and Benefit*

The three factors established in *Idea Services* of constraint, responsibility, and benefit[27] have been affirmed and applied in numerous subsequent cases involving boarding school staff, as has the specific fact-based approach to assessing these factors.[28] The application of these factors is specific to each set of circumstances. The application of these factors was described by the Court of Appeal in *Idea Services*:

> The greater the degree or extent to which each factor is applied (that is the greater the constraints, the greater the responsibilities, the greater the benefit to the employer) the more likely it was that the activity in question ought to be regarded as work.[29]

This approach matches the 'intensely practical'[30] approach adopted by the Court of Appeal for the question of rosters and statutory holidays in *New Zealand Fire Services Commission v New Zealand Professional Firefighters Union*.

The application of the factors from *Idea Services* does involve a subjective factual assessment. The factors are not necessarily discrete and, in some scenarios, overlap. It is not a yes or no question as to whether a factor is determinative of work or not. In *Idea Services* the Employment Court found all three factors applied to a "significant"

[26] *Idea Services* (n 10) 68 [64].
[27] Ibid.
[28] See, eg, *Law* (n 16); *Lukitau-Ngaamo v Nelson College Board of Trustees* [2019] NZERA 484; *Kidd v Epsom Girls Grammar School Board of Trustees* [2019] NZERA 183; *Leaupepetele v Wesley College Board of Trustees* [2019] NZERA 400.
[29] *Idea Services CA* (n 11) 527 [8].
[30] *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356, 357 [12].

degree and took the view (endorsed by the Court of Appeal) that it should not be prescriptive in its definition so that the legislation can be applied to circumstances as they arise.[31]

To support school leaders a description and collation of the factual matters used in a selection of cases is provided in the following three sections to determine what guidance schools can take from previous decisions. These factual matters are not definitive on their own and do not provide a checklist. The assessment as to whether the activity is work is a matter of summation and common-sense as was shown in *Smiths City.*[32] The *Smiths City* approach does need to be considered when schools determine whether staff are working.

B *The Extent to Which the Employer Imposes Constraints on the Freedom the Employee Would Otherwise Have to do as He or She Pleases.*

In *Idea Services* the Employment Court found that there were significant constraints on the Community Service Worker, Mr Dickson, during sleepovers while he stayed in community homes. The constraints included having to remain in the residence, not being allowed to consume alcohol or drugs, not being allowed visitors without prior permission and being interrupted by residents who may have felt unwell or wanting to talk.[33] In *Law,* the court accepted similar constraints as contributing to matrons being at work. The court also cited the disturbed nature of the matrons' sleep as well as their having to be in a constant state of readiness as significant. Also significant were the restraints on their lifestyle such as having to take care with noise (for example from their television or while talking on the telephone), restrictions on their internet use and their having to act as role models around the boarders.[34] Constraints of this nature have been held to be significant in assessing that activities amounted to work in further cases involving boarding schools[35] and in the case of a hotel employee.[36] In *Hill v Shand (Hill),* however, a camp ground manager was found not to have the same extent of constraints on his freedom as applied in *Idea Services* or *Law.* The Manager, Mr Hill, could to a large degree carry on normal family life, including socialising with friends, even though he did have to remain reasonably quiet, due to permanently living in a separate, though on site, dwelling.[37]

The fact-based analysis of the level of constraint and the extent that it determines whether an employee is working, includes an assessment of living quarters and the degree to which they place a constraint on the employee's freedoms. In *Idea Services*, Mr Dickson was not staying in his own home while on duty. Shortly after *Idea Services*, the Employment Court in *New Zealand Professional Firefighters Union v New Zealand Fire Services Commission* ('*NZPFU*') rejected the argument that a fire risk management

[31] *Idea Services* (n 10) 675 [37]. In its ruling the Employment Court referred to s 6 of the *Interpretation Act 1999* (NZ) which states that 'an enactment applies to circumstances as they arise'.
[32] *Smith City* (n 20) [57].
[33] *Idea Services* (n 10) 670 [17].
[34] *Law* (n 16) [87].
[35] *Lukitau-Ngaamo v Nelson College Board of Trustees* [2019] NZERA 484, [34]*; Kidd v Epsom Girls Grammar School Board of Trustees* [2019] NZERA 183, [33] *Leaupepetele v Wesley College Board of Trustees* [2019] NZERA 400, [19].
[36] *Christall v KLJ Ltd* [2019] NZERA 674, [24] ('*Christall*').
[37] *Hill v Shand* [2014] NZERA 66, [20].

officer's rostered on call hours constituted work in the same way as sleepovers in the community home.[38] The Fire Officer's role was distinguished because it was not continuous and the defence in this case cited the Employment Court's judgment in *Idea Services,* which stated that 'Mr Dickson's situation is readily distinguishable from a person who is at home or in the community on call'.[39]

A ten-minute reporting time, despite the provision of accommodation, has been determined as a significant constraint. In *Sanderson v South Canterbury District Health Board* ('*Sanderson*') anaesthetic technicians were rostered on call and were expected to report to the hospital within 10 minutes of receiving a call. All of the anaesthetic technician applicants lived more than ten minutes away and accordingly stayed in free accommodation provided by the hospital, even though there was no obligation for them to do so. Though there were very few things that the applicants were restricted from doing while on call the key factor, which was a significant constraint, was the ten-minute reporting time. It was accepted that the anaesthetic technicians had far more freedom than Mr Dickson in *Idea Services,* however, the constraints on their freedom to do as they please were regarded by the Authority as 'substantial and significant'.[40] In this case the Authority stated that there was 'clear evidence that the applicants felt considerably less comfortable and more restrained in the provided accommodation than in their home'.[41]

Analysis of *NZPFU, Hill* and *Sanderson* is suggestive that constraints may not be seen to be significant if the employee is able to be in their own home during a sleepover. Commentary on *Sanderson* has claimed that it does not interrupt the view that employees at home are distinguishable from employees in a situation analogous to Mr Dickson's.[42] This does not always hold. This interpretation is subject to the intense fact based analysis used in individual cases. In *Law,* some of the housemistresses used their accommodation (rooms or small bed-sitting rooms) as their homes and the court described this as meaning that there were constraints placed upon the freedoms of these staff even when not rostered on duty.[43] In *Lukitau-Ngaamo v Nelson College Board of Trustees* ('*Lukitau-Ngaamo*') the requirement to live on site in the same building as the boarders, albeit with family, was seen as a constraint;[44] the judgment specifically distinguished the accommodation provided to Ms Lukitau-Ngaamo from a separate family home.[45] Living permanently in a hotel room was also seen as a constraint with regard to hosting guests and constant interruptions in *Christall v KJL Ltd* ('*Christall*').[46]

[38] *NZPFU* (n 15) [35].
[39] *Idea Services* (n 10) 681 [68].
[40] *Sanderson* (n 18) [85].
[41] Ibid [83].
[42] June Hardacre and Natalie Healey 'What it Means to Work – Developments Since Idea Services v Dickson' (2017, June) *Employment Law Bulletin* 45.
[43] *Law* (n 16) [86].
[44] *Lukitau-Ngaamo v Nelson College Board of Trustees* [2019] NZERA 484, [28] ('*Lukitau-Ngaamo*').
[45] Ibid [33].
[46] *Christall* (n 36) [24].

C *The Nature and Extent of the Responsibility on the Employee*

The courts have been more likely to determine that a responsibility is at a significant level when a worker has been on call in a sector that involves the care of vulnerable people. In these sectors the availability of the employee is an essential rather than a "nice to have."[47] In *Idea Services*, the Employment Court found that Mr Dickson had important responsibilities including care for and support of service users and security and safety of the premises. These responsibilities meant that he must act quickly and appropriately on every occasion and the fact that these responsibilities were continuous was important.[48] In contrast in *Hill,* Mr Hill's campground responsibilities after 11:00 pm were described by the Authority as occasional and important. His constant vigilance while asleep was necessary to care adequately for the camp and its campers and these responsibilities were viewed as considerable. The Authority, however, directly distinguished these responsibilities from Mr Dickson's in *Idea Services,* and the matrons' in *Law,* because the campers were not vulnerable people and Mr Hill was not *in loco parentis.*[49]

Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc ('*Ovation*'), though it does not involve sleepovers, provides a helpful summary of how the courts consider responsibilities and their significance to an employee. In assessing donning protective equipment and following hygiene practices the court saw as significant the way that employees were "duty bound" to discharge their responsibilities and that the responsibilities had to be done "properly" as they were a health and safety matter;[50] as is looking after vulnerable people.

Responsibility is not necessarily diminished by having other staff on site. In *Law*, the fact that other senior management staff also lived on site not did not, in the court's opinion, reduce the responsibility of the matrons.[51] Similarly in *Lukitau-Ngaamo*, the ultimate responsibility of the headmaster who lived on site and could be woken did not detract from the housemaster's responsibility which included knowing the whereabouts of each student, ensuring evacuation plans were in place and having responsibility for each student's pastoral and academic support, discipline and general health and wellbeing.[52] Despite the presence of night supervisors who would check on girls and deal with any illness and also a charge supervisor to support the night supervisors, the responsibilities of a house manager were seen to be significant in *Kidd.* This was due to the vulnerability of the girls, the expectation to protect their emotional and physical safety and occasions of sole responsibility including taking girls to hospital.[53]

In establishing who is working, boarding schools need to be clear as to the level of responsibility and with whom it rests. In *Leaupetelele v Wesley College Board of Trustees* (*'Leaupetelele*'), the decision of Wesley College that house parents would no longer be responsible for welfare after 10:30 pm at night and the installation of alarm buttons and the employment of security guards from this time in the evening led to the

[47] Hardacre and Healey (n 42) 48.
[48] *Idea Services* (n 10) 681 [66]–[68].
[49] *Hill* (n 37) [21]–[22].
[50] *Ovation* (n 21) [270].
[51] *Law* (n 16) [173].
[52] *Lukitau-Ngaamo* (n 44) [37]–[40].
[53] *Kidd v Epsom Girls Grammar School Board of Trustees* [2019] NZERA 183, [37]–[40] ('*Kidd*').

Authority ruling that house parents were not working from 10:30 pm. This ruling was made despite evidence that house parents were still disturbed and that they still reacted to issues. The Authority Member stated they were not required to respond and when they did, they did so as volunteers and that to find otherwise would have exposed the College to both the cost of security guards and minimum wage for sleepovers that were no longer required.[54] The Authority in this case appears to not have considered Regulation 61(4)b of the *Education (Hostels) Regulations 2005* which, as stated above in Part II, implies that supervisory staff have a pastoral role. It is questionable whether a security guard fulfils this role requirement. A boarding school's responsibility for pastoral care does not cease at 10:30 pm.

D *The Benefit to the Employer of Having the Employee Assume the Role in Question*

The third important factor identified in *Idea Services* is the benefit to the employer of having the employee assume the role in question:

> The greater the importance to the employer and the more critical the role is to the employer, the more likely it is that the period in question ought to be regarded as "work". [55]

The Employment Court described Mr Dickson's role as critical to the business of Idea Services. Without the presence of a community service worker the company would be in breach of its obligations. Mr Dickson, the court said, fulfilled a beneficial role regardless of whether he was awake or asleep; his mere presence helped to maintain the physical and emotional wellbeing of the service users in the home.[56]

The inability of the enterprise to run and the importance of the actions of the employees during sleepovers are determining factors in whether a significant benefit has accrued to an employer from an employee's sleepover. In *Law*, the court pointed out that parents trusted the defendant schools with the security, wellbeing and happiness of their daughters and stated that it would be difficult to underestimate the importance of this pastoral care which the plaintiffs undertook for the defendants and that

> [i]t 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 long standing and important boarding opportunities that they offered.[57]

A benefit to an employer is significant when the role is essential to the operation of an enterprise. In *Lukitau-Ngaamo,* Nelson College's ability to maintain its lawful obligations of sufficient and safe student to staff ratios was a clear benefit to the College from the work of housemasters.[58] In *Kidd*, the Authority cited Epsom College as

[54] *Leaupepetele v Wesley College Board of Trustees* [2019] NZERA 400, [22]–[23], [28]–[31] ('*Leaupepetele*').
[55] *Idea Services* (n 10) 681 [68].
[56] Ibid 681 [70].
[57] *Law* (n 16) [163].
[58] *Lukitau-Ngaamo* (n 44) [42].

engaging night supervisors for the purpose of fulfilling their statutory licencing requirements (student to staff ratios) and that Ms Kidd's role of covering for these supervisors, for example, by taking a student to hospital was a clear benefit to the school accruing from her role.[59] In *Sanderson* and in *Christall*, the availability of staff allowed for 24/7 operation and therefore a significant benefit to the employer.[60] In *Ovation*, staff putting on protective equipment and following hygiene practices was also seen as a significant benefit to the employer. This activity enabled them to operate a meat processing plant in line with mandatory regulations and as such was 'plainly part and parcel of the plaintiff's processing operations'.[61]

It is likely that the period in question will be considered work when having the employee present is of obvious benefit to the employer and critical to the employer's operations.[62] With this threshold in mind, the Authority in *Hill* considered that the benefit of the camping ground manager being present overnight was a bonus and not an essential.[63] In *Smiths City*, however, the Authority identified a 'clear' benefit from employees attending team meetings and the Employment Court supported this due to the benefit being exclusively for Smiths City.[64]

The apparent lowering of the threshold in *Smiths City* is aligned with the comments by the Court of Appeal in *Idea Services*. The Court of Appeal stated that the Employment Court had not attempted to be more prescriptive than Parliament intended and that the three factors amount to guidance that will 'ordinarily be relevant'[65] when deciding whether an activity constitutes work. *Smiths City* is a helpful case for defining and organising work as both the plaintiffs and the defendants used the three factors from *Idea Services* to justify their position that pre-shift team meetings did / did not amount to work. The Employment Court held that in arguing that the meetings in question did not amount to work Smith City, through its counsel, focussed too narrowly on the three factors to the detriment of a fuller consideration of the facts. The narrow consideration, the court pointed out, raised the risk of producing an anomalous outcome and the court considered it more helpful to undertake the factual enquiry by assessing the factors through a nuanced lens of whether the activity was an integral part of the employees' role.[66] The implications of this approach are evident in the consideration of the three factors in *Ovation* and the finding that donning and doffing are essential aspects of the employees' roles.[67]

[59] *Kidd* (n 53) [43].
[60] *Sanderson* (n 18) [95]; *Christall* (n 35) [28].
[61] *Ovation* (n 21) [271]–[273].
[62] *Idea Services* (n 10) 681 [69].
[63] *Hill* (n 17) [24].
[64] *Smiths City Group Ltd v A Labour Inspector of the Ministry of Business Innovation and Employment* [2016] NZERA 200, [50]; *Smiths City* (n 20) [68].
[65] *Idea Services CA* (n 11) 527 [9].
[66] *Smiths City* (n 20) [57].
[67] *Ovation* (n 21) [273].

VI ARE THERE ALTERNATIVES TO AN EMPLOYMENT RELATIONSHIP WITH WAGES?

A *Complexities of Employment*

The work of boarding supervisors contains levels of flexibility that reflects the increasing trend away from Monday to Friday, 9:00am to 5:00pm, employment. The current legislative framework retains a strong resemblance to its 1945 origins and does not neatly align with "non-standard" work arrangements.[68] In 2015 the Ministry of Business, Innovation and Employment admitted that the *Minimum Wage Act 1983* has not kept pace with modern employment practice and that the *Law* decision, in particular, drew attention to this disconnect.[69]

There have been complications for boarding schools in moving to formalised employment and tenancy arrangements from the system of providing free accommodation in return for duty. In the author's own school, the move from nominal volunteers to employees has added a significant cost in PAYE taxation. A desired intention to keep boarding supervisors in a cost neutral position, where income equals rent and board, means that the school must pay a wage greater than its rental income to cover the taxation costs of housemasters. Different tax rates, including student loan repayments complicate the more formalised arrangements.

The non-standard nature of boarding supervision also creates complications for employment. The varying commitments of boarding supervisors and the variety in a boarding school calendar makes standard rosters difficult. This creates difficulty in stating hours of work which, as required by section 67C of the *Employment Relations Act*, means identifying:[70]

> (a) The number of guaranteed hours of work;
> (b) The days of the week on which work is to be performed;
> (c) The start and finish times of work;
> (d) Any flexibility in the matters referred to in paragraph (b) or (c).

An employment relationship with boarding supervisors raises the issue of rest and meal breaks.[71] This issue presents an apparent absurdity that was addressed in *Idea Services*: that being the suggestion that a person sleeping while working must be woken up to have a "break". The Employment Court acknowledged that this part of the *Employment Relations Act 2000* is not helpful in interpreting the *Minimum Wage Act 1983*. A break is to allow an employee a measure of choice as to what he or she does during that time and it is sufficient that an employee knows they do not have to work.[72] This analysis by the Employment Court may prove to be unsatisfactory. It highlights, however, the

[68] Hardacre and Healey (n 42) 48.
[69] Report to Minister of Education: 'Hostel sleepovers: proposed next steps' (22 April 2015) (obtained under *Official Information Act 1982* request to the Ministry of Education) [7].
[70] *Employment Relations Act 2000* (NZ) s 67C.
[71] *Employment Relations Act 2000* (NZ) s 6D.
[72] *Idea Services* (n 10) 679 [59]–[60].

challenges in creating modern, non-standard employment arrangements that comply with relevant legislation.[73]

Employment of boarding supervisors does bring administrative difficulties. Despite difficulties, boarding supervisors must be paid at least the minimum wage in money for every hour worked and this is regardless or not of whether their remuneration is stated as a salary. They must also be afforded all other protections owed to employees.

B *The Use of Salaries to Avoid the Obligations of the Minimum Wage Act 1983*

Many schools use salaries as a mechanism to work around the swings and roundabouts of a hostel roster through implied averaging of hours on duty. Salaries are problematic and they do not avoid the implications of the *Minimum Wage Act 1983*. In *Law*, the defence as well as the Ministry of Education, as an intervener, made extensive submissions that the *Minimum Wage Act 1983* should not apply to salaried positions. The Court ruled that 'the words salary and wages are different descriptions of essentially the same thing, that is, remuneration paid to employees for work performed'[74] and that 'salaried employees are not excluded from coverage by the *Minimum Wage Act 1983* because of the description of their remuneration as being on an annual basis'.[75]

Salaries cannot be used to avoid the obligation to pay at least the minimum wage for every hour worked. Averaging wage payments is not a viable means of avoiding *Minimum Wage Act 1983* obligations. This well-established principle has been made clear by the Court of Appeal.[76] It was applied in *Law,* where the understanding was clearly asserted that for every hour of work performed a worker is entitled to the minimum wage for that hour regardless of whether he/she had received more than the minimum wage for other hours worked.[77] Therefore in *Sheehan v Board of Trustees of Nelson College*, the Authority determined that, in weeks in which a school domestic worker worked up to 40 hours, she should be paid her entire weekly wage, and in weeks in which she worked over 40 hours she should receive an additional hours wage for each hour worked.[78] Similarly in *Leaupepetele*, the Authority set out a wage calculation which established the number of hours worked each week or fortnight. It calculated the applicable *Minimum Wage Order Rate* for each hour and compared this with the actual salary paid each week or fortnight. Where actual salaries are less that the amount payable under the applicable *Minimum Wage Order Rate* this difference should be paid.[79]

[73] As well as the *Minimum Wages Act 1983* (NZ) and the *Wages Protection Act 1983* (NZ), relevant legislation includes the *Employment Relations Amendment Act 2018* (NZ): s 43 covers rest and meal breaks.
[74] *NZPFU* (n 15) [71].
[75] Ibid [72].
[76] *Idea Services CA* (n 11) 532 [30].
[77] *Law* (n 16) [209].
[78] *Sheehan v Board of Trustees of Nelson College* [2017] NZERA 190, [26].
[79] *Leaupepetele v Wesley College Board of Trustees* [2020] NZERA 258, [31].

C *Boarding Supervisors as 'Independent Contractors'*

Boarding supervisors are not independent contractors. For schools in an historical non-employment situation the option of boarding supervisors becoming independent contractors may appear attractive as a means of maintaining the status quo. A contract arrangement will not comply with the *Employment Relations Act 2000* which defines employees and sets out that this definition is not determined by any statement describing the nature of the relationship.[80] Regardless of the written text of an agreement whether a boarding supervisor is an employee or contractor will be determined by the real nature of their role including tests of:

a) the level of control the employer has
b) the level to which the employee is integrated into the business
c) the level to which the employee can be seen to be in business of their own account
d) the totality of the relationship.[81]

The application of these tests results in boarding supervisors being employees. This is regardless of the nominal description of the relationship and is because of the importance of the role and the schools' need to have control over how it is undertaken.[82]

D *Boarding Supervisors as 'Volunteers'*

Schools may consider maintaining the status quo of the relationship through identifying boarding supervisors as volunteers who receive free board. This may be attractive from a cultural element as hostels describe themselves as having a 'family atmosphere' or being a 'home away from home'.[83] A volunteer relationship shows the absence of an intention to create a legal relationship and its ensuing obligations. This type of relationship is not appropriate for boarding supervisors for several reasons:

a) An agreement to perform services in order to gain a place to live is a serious matter that does indicate an intention to create a legal relationship
b) There is an ongoing expectation on both parties to provide services which cannot be easily opted out of
c) It is doubtful that boarding supervisors would perform the work if there was not some sort of reward
d) It implies a lack of professionalism and responsibility in the role of boarding supervisor which does not align with their health, safety, and wellbeing responsibilities.[84]

Despite its complexities, employment is the only practical approach to the hiring of boarding supervisors. It is also the most appropriate. As described in the Australian High Court case of *Hollis v Vabu Pty Ltd*, making an employer liable through its

[80] *Employment Relations Amendment Act 2018* (NZ), s 6.
[81] Gordon Anderson, John Hughes and Dawn Duncan, *Employment Law in New Zealand* (Lexis Nexis, 2nd ed, 2017) 97.
[82] An Australian research paper has shown that when case law is applied to a typical boarding situation the contract should be one of employment. See, O'Brien (n 5) 48.
[83] 'Welcome to Adams House – the Boarding Hostel for Christchurch Boys' High School', *Christchurch Boys' High School* (webpage, 2020) <https://www.cbhs.school.nz/life-at-cbhs/boarding>.
[84] O'Brien (n 5) 55–7.

employment responsibilities results in better organisation and supervision from the employer.[85] As employment is the only suitable method of hiring boarding supervisors, boarding schools need clear guidance on when their staff are working and how the arrangement should be constructed. This guidance is provided in the following section.

VII GUIDANCE FOR SCHOOLS

When considering the employment of boarding supervisors, schools need to establish whether and when these staff are working. This has an impact on the level and means of remuneration as set out by the *Minimum Wage Act 1983* and the *Wages Protection Act 1983*. It also, as discussed in the previous section, sets expectations for the professionalism and responsibility of staff.

The preliminary consideration for boarding schools is that a hostel must always be staffed with suitably trained personnel to meet the safety needs of boarders.[86] Given the level of responsibility of the staff undertaking this care, these staff, when on duty, are working and will need to be paid the minimum wage in money for this time. It is important that schools get this right and schools need to be cognisant of the risk of incurring six years of back pay regardless of the nominal arrangements that staff may have agreed to. Lawful minimum entitlements cannot be compromised even by agreement with staff. This is made clear in the *Employment Relations Act 2000* which prevents a settlement that forgoes any entitlement under the *Minimum Wage Act 1983*.[87] In *Cleverley v Selwyn House School Trust Board*, a boarding supervisor was given permission to pursue a minimum wage claim arising from sleepovers despite previously signing a record of settlement.[88]

It is recommended that staff are employed and remunerated in a way that reflects the legislative requirements of an employment relationship. Despite the complexity of establishing an employment relationship staff should not be engaged as contractors or volunteers. These nominal descriptions of the employment relationship are unlikely to be accurate and potentially diminish a school's pastoral (and thus legal) responsibilities. Staff should also be paid a wage, instead of a salary, to ensure that they receive remuneration equivalent to at least the minimum wage, for every hour worked. Staff renting accommodation at the boarding school should also have correctly structured tenancy agreements and pay market value rent.[89]

To determine when staff are working boarding schools need to make an assessment of:

a) the levels of constraint that are imposed on the freedom of the employee;
b) the nature and extent of the level of responsibility placed on the employee; and
c) the benefit to the employer of having the employee assume the role in question.

[85] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 43 [53].
[86] *Education (Hostels) Regulations 2005* (NZ) reg 61(3).
[87] *Employment Relations Act 2000* (NZ) s 148A.
[88] *Cleverley v Selwyn House School Trust Board* [2016] NZERA 43, [58]
[89] Advice on school accommodation can be found at https://www.education.govt.nz/school/property-and-transport/school-facilities/teacher-caretaker-housing/#types.

As has been stated by the courts, and in this research, this is an intensely fact-based assessment that will consider the degree to which each factor is applied.[90] There must also be a holistic assessment that considers whether an activity is "part and parcel" of the boarding supervisor's role.[91]

A *The levels of Constraint That are Imposed on the Freedom of the Employee*

When assessing the level of constraint imposed on a boarding supervisor consideration will need to be given to the constraint on the freedom of the boarding supervisor to do as they please. A 'substantial and significant'[92] constraint is indicative of work. Boarding supervisors who are required to stay, while on call or on duty, in accommodation which is not their normal place of residence are likely to be working, even when asleep. Boarding supervisors in their own accommodation, for example that they rent from the school, may still be working when off duty and in terms of constraint this will depend on the level of interruption they receive from students and the limits on their own freedoms, for example not being able to consume alcohol, entertain visitors, make noise or act as they would otherwise choose. The nature of the residence and its restriction on freedoms can determine the level of constraint. A continuous level of constraint is likely to see the time spent in an activity assessed as work and interrupted sleep is also likely to be determinative of work. It is recommended that accommodation for staff allows them freedom, privacy and uninterrupted sleep when they are not on duty.

B *The Nature and Extent of the Level of Responsibility Placed on the Employee*

The responsibility of boarding supervisors for students in boarding is high and the courts have made it clear that care for vulnerable people such as children will be considered work because the care and responsibility provided is essential. Having another person on site, such as a manager or principal senior to the boarding supervisor does not automatically extinguish responsibilities even if the more senior person has greater responsibility. If a boarding school wishes to remove responsibility for boarding supervisors when they are not on duty, it is recommended that they make it substantively clear that a boarding supervisor does not have any accountabilities or responsibility for care during this time.

C *The Benefit to the Employer of Having the Employee Assume the Role in Question*.

The greater the importance to the boarding school, the more likely the activity of a boarding supervisor will be considered work. The role of community support workers and of boarding supervisors has been seen by the courts as essential to care facilities

[90] *Idea Services CA* (n 11) 527 [8].
[91] *Smiths City* (n 20) [57].
[92] *Sanderson* (n 40) [85].

and boarding schools when it has been shown that they would be unable to operate without them. The assessment for schools is firstly the question of whether the boarding school could operate without this boarding supervisor being on call? Secondly, if the facility could operate, then what is the nature of the boarding supervisor's activities? If the boarding supervisor, regardless of them being awake or asleep, is required for the boarding school to operate they are working. If the boarding school could operate without the supervisor, it becomes an assessment of their activity and how essential that activity is. An example of an activity being considered essential has been having to take students to hospital.[93] The more critical the activity, the more likely it is to be of sufficient benefit to be considered work. Alternatively, the incidental benefit of a boarding supervisor being on site when not required is unlikely to meet the work threshold. It is important that boarding schools can operate their essential roles with the staff that they are requiring and paying to work. It is also recommended that schools take care with their marketing materials. They should not for example promote the accessibility of a boarding supervisor's accommodation if that supervisor is not working 24/7.

D *The Holistic Assessment*

The holistic assessment first mentioned in *Idea Services*[94] and formalised in *Smith City*[95] is beneficial for assessing whether a boarding supervisor is working when not formally on call or duty. Whether, for example, interacting socially with boarders in their own time or simply being a role model while on site is "part and parcel" of the boarding supervisor's role will be determined by the school's expectations that are to be found in documentation such as position descriptions and operations manuals. It is recommended that schools are very clear in their expectations in these documents.

VIII CONCLUSION

This research provides a means for boarding schools to define and arrange the work of boarding supervisors. Their terms of work must align with relevant legislation. If a boarding supervisor is working, they must be paid at least the minimum wage in money. The failure of schools to define the activities of their staff as work has been costly when reviewed by the authority and the courts. Time considered on call, including time sleeping, has been determined to be work.

This research has found that there is a well-established test for whether time spent in an activity is work. An activity is more likely to be work where the following factors significantly apply: there is a high level of constraint on the freedoms of the employee, the employee has a high level of responsibility and there is a high level of benefit to the employer. The higher the level of each of these factors the more likely it is that the activity is work. This assessment is highly fact specific and includes an overall consideration of whether the activity in question is integral to the employee's role. For

[93] *Kidd* (n 53) [38].
[94] *Idea Services* (n 10) 669 [9].
[95] *Smiths City* (n 20) [57].

boarding supervisors, given their care of vulnerable people, it is highly likely that their level of responsibility, unless expressly removed, means they are working when on duty. They may also be working outside of formal duty hours due to the level of constraint on them and the benefit they provide to the boarding school.

It is recommended that boarding schools assess the roles of their boarding supervisors using the factors outlined above. They must ensure that their boarding supervisors are paid at least the minimum wage in money for every hour worked. The role of boarding supervisors carries a high role of responsibility and thus a work arrangement, as opposed to contracting or volunteering also ensures boarding supervisors have a framework that enables clear accountabilities and supervision to exist.

This research has potentially wider implications for schools. As the Minister of Education was advised in 2014, the court's findings in *Law* on averaging has implications for schools where salaried teaching staff attend school camps, student overseas trips and sporting events or have any "peaks and troughs" through an uneven annual workload.[96] Though a definition of work brings obligations and costs on schools, it also brings responsibilities and accountability to those engaged in the work.

Keywords:
work, sleeping, boarding, benefit, constraint, responsibility.

[96] *Report to Minister of Education* (n 3) 2, 8.