



[5] In the outcome of this investigation, for the reasons that follow the Authority has determined;

- a) What Mr Harding does during a sleepover is “*work*” within the meaning of the MWA.
- b) To date, payment made to Mr Harding for his work complies with the MWA.

### **Requirement for sleepovers**

[6] There is little if any dispute about the facts that are relevant to this claim, the determination of which must turn on the meaning of “*work*” or “*his work*” as used at s 6 of the MWA.

[7] Mr Harding is permanently employed by Spectrum, which is a charitable trust providing services for people with disabilities. In the Auckland and Waikato areas the Trust has about 80 houses in which some 400 intellectually disabled people of all ages live. To deliver its services Spectrum employs about 850 staff including full-time, part-time and casual workers, most of who are employed as a Community Support Worker.

[8] Mr Harding has been employed in that position since June 1999. He is one of a team providing support to five men who are clients or service users of Spectrum and who live in one of the Trust’s suburban houses.

[9] Mr Harding works 8 hour shifts at that house. He is normally rostered to do his job for five days in a row and then have two days off. The shifts are worked between 7am and 3pm, and between 3pm and 11pm. For the time he works on each shift Mr Harding is currently paid \$16.98 per hour. This is above the currently prescribed minimum wage adult rate of \$12 per hour, required to be paid from 1 April 2008.

[10] His claim has been brought in relation to an overnight period of 8 hours falling between two shifts, when Mr Harding stays at the house with the clients on “*sleepover*.” This is a requirement that Spectrum may make of Mr Harding under his employment agreement. Recently sleepovers have been rostered at least once a

week, but they must be consented to by Mr Harding if rostered more than twice a week.

[11] The sleepover begins for Mr Harding at 11pm when his 8 hour shift of work ends, and it continues until his next work shift begins at 7am the following morning. During a sleepover Mr Harding may sleep if he wishes. He usually does and for that purpose there is a foldaway bed provided in the lounge of the house.

[12] There are nights when he is not interrupted at all during a sleepover but on many other nights his sleep may be disturbed by the clients residing in the house, if they leave their bedrooms for any reason including having needs that Mr Harding must attend to or assist with. He must check on any movement by them out of their bedrooms, which will activate an alarm next to where he sleeps.

[13] Mr Harding is not permitted to have people visit him while on sleepover and he cannot take alcohol during that time. When rostered for an 8 hour sleepover period he has his meals at the house and uses the same kitchen, bathroom and toilet facilities provided for the residents there. Mr Harding must remain in the house and be ready to handle anything that may happen, giving the clients the care and attention appropriate for the situation that arises.

[14] With a shift of 8 hours work on either side of a sleepover, Mr Harding can spend up to 24 hours with the residents of his house and away from his wife and son living in their family residence.

[15] Mr Harding said in his evidence that generally each fortnight he works 80 non-sleepover hours and 24 sleepover hours. His evidence about sleepovers and how he usually has experienced them, was given as follows:

19. *When I sleepover, I sleep in a fold-down in the lounge. I often need to ask someone who is still up to go to bed. Occasionally, a particular person who has aspergers syndrome will stay up while I am in bed. He can keep making noise during the night.*
20. *I try to settle down to sleep, after again checking all the doors are properly locked and alarmed.*
21. *The alarms monitors are right next to my fold-down bed.*
22. *When people get up during the night to go to the toilet, or open doors, the alarm sounds and the light flashes. This happens every night. I will wake up at least 5 to 10 times per*

*night by the alarm system. My role is to monitor what is going on and who is doing what, during the night. So the alarm system enables me to do much of this without leaving the lounge or the fold-down bed.*

23. *The service users get up around 6am to 6.30. I always let them into the lounge when they want to come in.*
24. *It is totally prohibited to leave the building during a sleepover or to have visitors.*
25. *We are allowed to use the telephone but this must be kept to a minimum.*

[16] Mr Harding also described the intensive daily domestic routine around which he supervises the five clients in his care when he is working, before or after the sleepover. That routine includes meals, clothing, personal care and hygiene, medication and domestic cleaning of the house. There are also activities away from the house that Mr Harding escorts the clients to.

[17] With regard to the individuality of the men he looks after, Mr Harding described their “*behavioural escalations*,” differences and strengths of their personalities, and the triggers that may lead to their mood changes, all of which he must deal with.

[18] Mr Harding understated his evidence in this regard, but the high importance he has in the lives of the disabled men in his care is obvious to the Authority. Undoubtedly his occupation is capable of being stressful, particularly during a work-sleepover-work shift cycle.

### **The Employment Agreement**

[19] Mr Harding is and was at material times a member of the Public Service Association which has from time to time negotiated a collective employment agreement covering community, residential and vocational workers in Auckland. There is no dispute that the 2006 agreement applies to the employment currently being performed by Mr Harding for Spectrum.

[20] In relation to hours of work, the agreement makes the following provision:

#### **5.2 Residential Staff Working Rostered Shifts**

*Spectrum Care’s residential services provide fully staffed houses for people with disabilities or other health needs. This is a 24-hour per day, seven days per week service. In these areas general patterns of*

*work shall be established based on the needs of individual clients and in consultation with staff and their employee organisation. Staff employed in these areas are generally expected to remain available for rostered shift work, including some evening and weekend work ...*

[21] At clause 6 in relation to rosters, it is provided that the ordinary hours of work will be 40 a week on average and not more than eight each day. No more than five consecutive shifts may be worked unless the employee agrees otherwise.

[22] The sleepover duty that is the subject of this claim is provided for at clause 9 as follows:

### **9 Sleepover Duties**

9.1 *Sleepover duties shall be voluntary in the first instance but where this is impracticable (ie the staffing needs of the houses cannot be met or the need of the client changes) then sleepover duty will be shared evenly.*

9.2 *Sleepover duties will be subject to the following:*

(a) *An employee will work a maximum of two rostered sleepovers in any one week unless the employee agrees to work more.*

(b) *Sleepovers shall be for 8 hours and may commence from 2300 hours and finish at 0700 hours.*

[23] It is not in dispute that sleepovers are undertaken by Mr Harding at the requirement of Spectrum and not his own request.

### **Remuneration**

[24] Community Support Workers are paid under the collective agreement according to a salary scale. The agreement is expressed to be a minimum rate document, at clause 3.4.1. Mr Harding is on Step 6, one from the top of the scale.

[25] There is no provision in the collective agreement expressing the period for which payment of the salary and other remuneration is to be calculated and made, but in practice Mr Harding and other Community Support Workers have been paid by Spectrum on a fortnightly basis, the period beginning on the Monday of the first week.

[26] The wage records produced by Spectrum show that he has been paid at an hourly rate applied to his “*ordinary hours*,” which vary from fortnight to fortnight.

The hourly rate has apparently been extracted from the salary figure in the collective agreement by applying 2086 as a divisor.

[27] Although an hourly rate converted from the salary has not been expressed in the agreement, the adoption of such rate is implied by reference to payments being made at “*T1.5 for all hours worked*” as an allowance in some circumstances. Clause 30 of the collective agreement in relation to allowances and penal payments refers to “*the normal hourly rate of pay,*” and it also refers to factors of ½ or a ¼ by which that rate may be increased according to the work conditions as they may occur.

[28] Other provisions in the agreement that refer to remuneration or to the rate of payment include, in Schedule 1, the definition of “*T1*” as meaning “*ordinary time,*” and “*overtime*” as meaning time “*worked in excess of 80 hours per fortnight.*”

### **Sleepover allowance**

[29] For the 8 hour period of a sleepover the collective agreement at clause 34 provides remuneration to be paid in the form of an allowance;

#### **34. *Sleepover allowance***

34.1 *When working a sleepover, the employees will be paid an allowance of \$42.50 for being available on call in quarters provided for this purpose, where there is no awake night staff. From the 1st of March 2007 the sleepover allowance shall increase to \$45.*

[30] That allowance has recently increased to \$46, which Mr Harding is receiving for every sleepover.

[31] For an interrupted sleepover the collective agreement provides a “*disturbance*” allowance as follows:

#### **35. *Disturbance Allowance***

35.1 *A disturbance allowance will be paid where the person on call in the premises has been required to become actively involved with the clients for therapeutic reasons and will be paid at T1.5 for all hours worked.*

35.2 *The minimum payment for employees in receipt of the sleepover allowance shall be 1 hour provided further that:*

- (a) *Call-outs commencing and finishing within the minimum period covered by an earlier call-out shall not attract any additional payment;*
- (b) *Where a subsequent call-out commences before and continues beyond the end of the minimum payment period for a previous call-out, payment shall be made as if the employee has worked continuously from the beginning of the previous call-out to the end of the later call-out;*

35.3 *The minimum payment shall be 1 hour except for between the hours of 0630 hours and 0700 hours when the minimum payment is half an hour.*

### **On call**

[32] The high importance to Spectrum of having employees “*on-call*,” is expressed at clause 36 of the agreement;

#### **36. On Call**

36.1 *On call is an essential part of the job and is to cover events that cannot be anticipated in the normal course of the nominated staff member’s duties.*

## **Minimum Wage Act 1983**

[33] Section 6 of the MWA under which Mr Harding has brought his claim provides as follows;

#### **6. Payment of minimum wages**

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

[34] The prescribed rate referred to in s 6 is set from time to time by Minimum Wage Orders made under the Act. The current Order came into force on 1 April 2008 and requires \$12 per hour to be the minimum rate paid to an adult worker. For an adult worker paid by the day the rate is \$96. In all other cases the rate is \$480 per week and \$12 per hour for each hour exceeding 40 worked in a week.

[35] There is no dispute that Mr Harding is a “*worker*” under the MWA and that his work is therefore subject to s 6 of the Act. That provision is expressed to apply

notwithstanding anything to the contrary in any collective agreement or contract of service.

[36] There is also no dispute that during the period of any sleepover Mr Harding is performing employment as required by his contract of service with Spectrum. The allowance and disruption pay due under the collective agreement are an acknowledgment of that.

[37] The question for the Authority is whether a sleepover and what Mr Harding does during that period, is “*work*” or “*his work*” within the meaning of s 6 of the MWA. If it is he must be paid the minimum wage for the time, even if the work and pay he receives comply with the collective agreement.

[38] The parties’ contentions in support of and opposition to the claim have been based on particular provisions of the collective agreement and on legal authorities, including some from overseas courts.

[39] There are limitations with placing reliance on the collective agreement and on legal authorities, particularly those that do not involve the particular occupation of Mr Harding as a caregiver.

[40] It is clear from some of the words of the collective agreement that the parties to it did not regard a sleepover as ordinary hours of work to be remunerated in the same way as the work performed by Mr Harding in other shifts.

[41] Clause 35.1 provides for the disturbance allowance to be paid “*where the person on call in the premises has been required to become actively involved with the clients.*” This is to be paid at T1.5 for all hours worked. Impliedly therefore from this provision, during an uninterrupted sleepover a caregiver is “*on call*” but not working.

[42] Clause 34.1 is a little less clear in this regard, as it uses both expressions “*working a sleepover*” and “*on call*” in respect of the same hours during a period of sleepover.

[43] Although this appears ambiguous, it seems to me that the expression “*working a sleepover*” simply refers to two 8 hour shifts separated by a sleepover, without

meaning that the sleepover period is a work period itself. Clause 34 is consistent with clause 35.1 to the extent it refers to this as an “*on call*” situation.

[44] But, as s 6 of the MWA is to have precedence over anything to the contrary in the collective agreement, the question for determination remains whether in relation to Mr Harding a sleepover is “*work*” or “*his work*” under the Act.

[45] As to the legal authorities the parties have referred to, they relate to workers in occupations dissimilar to that of Mr Harding, such as airline pilots, seamen, doctors, motel/hotel receptionists and night managers. The cases apply the MWA to specific fact situations in relation to particular employment. There seems to be no case in which a New Zealand Court has attempted to expressly define “*work*,” as that word has been used in the s 6 of the MWA.

### **Karelrybflot case**

[46] The High Court decision in *Udovenko v Karelrybflot* unreported, 24 April 1999, AD 90/98, a case under the MWA, is in my view ultimately distinguishable on its facts. When considering a claim brought under the MWA by a seaman who was on watch duty for 12 hours a day on his vessel, Young J found;

*.....the actual work Mr Udovenko was required to perform while on watch was comparatively limited .....In those circumstances, I do not think that Mr Udovenko can fairly say that he worked for all the hours on which he was on duty, most of which he undoubtedly would have spent in his cabin.*

[47] At best there is only an inference from “*actual work*” that the High Court interpreted “*work*” for the purposes of the MWA as connoting the physical and/or mental activity of an employee. On appeal, the Court of Appeal held that in terms of the relevant Minimum Wage Order under the MWA, workers had to be paid the minimum rate “*.....only for time actually worked.*” These words were used not as an attempt to define “*work*” but as part of a finding as to the minimum rate payable to hourly workers as distinct from daily workers; see *Karelrybflot v Udovenko* [2000] 2 NZLR 24, at paragraph [50].

[48] In my view the circumstances in which Mr Harding is required to perform sleepover duty are distinguishable to a significant degree from those of a seaman employed to keep watch over a ship, a place where he was also living even when not working. Mr Harding’s presence and state of readiness to immediately handle

disturbances to or in the sleep of the people in his care, is a distinguishing feature absent from the *Karelrybflot* case. That case turned on the Court's assessment of the evidence about the extent to which seamen worked while on duty, rather than the nature of "work" generally under the MWA.

[49] The High Court decision is an application of the MWA to specific facts. For that reason it contains no discussion about the legal question of the meaning of "work" under the Act or where to draw the line of demarcation between "work" and other phases in the performance of an employment agreement.

### **ALPA v Air New Zealand Limited**

[50] *New Zealand Air Line Pilots Association Inc. v Air New Zealand Limited* unreported, AC 4/08, 19 March 2008, is a recent decision in which the Employment Court considered whether airline pilot employees were working during a layover period.

[51] For the purposes of s 50 of the Holidays Act 2003 under which the case had been brought, the Court held;

*[32] From the dictionary definitions it would appear that "work" carries the connotation of actually being involved in physical or mental exertion in the performance of one's duties. That is likely to be the meaning to be ascribed to "works" in s 50(1).*

[52] The Court held that if during a layover pilots were not allocated any duties or directed to work, they would not appear to be working any more than a pilot who was rostered off duties. Layovers which did not involve the performance of duties for the employer were held not to be periods when a pilot works. This seems then to involve a different consideration from whether there is physical or mental activity present to indicate work.

[53] Of particular relevance is the Court's observation, at paragraph [36] of the judgment, that its decision that a layover was not a period of work may well have been different if there had been "restrictions" of any significance imposed on the pilots during the layover. That is precisely the situation of Mr Harding, who is considerably restrained by his employer's requirements as to what he can and cannot do during a sleepover.

[54] The decision of the Court, which was given under the Holidays Act and not the MWA, is some indication then that the test of work is not necessarily as black and white as the use of dictionary definitions might make it seem.

### **Overseas cases**

[55] Mr Cranney also referred the Authority to a number of cases from the UK, Europe, the USA and Canada, in which courts have considered the differences between work, rest and other routine phases occurring before, during and after performance of an employment contract.

[56] The usefulness of the decisions to the determination of Mr Harding's case under New Zealand law is primarily in showing contemporary attitudes towards the fundamental nature of work in an employment context. It is clear from the cases that these days a more enlightened view is being taken about the essence of work and the extent to which the requirements of employment may impinge on the ability of employees to periodically be free of their work, so as to have rest and generally enjoy life in whatever way they choose.

[57] Limitations on the usefulness of these overseas cases arise because of the very different statutory and regulatory regime existing in the various countries and economic community where the employment was performed. By contrast to the closely prescribed laws in those several overseas jurisdictions, New Zealand legislation has not provided a definition of work in the MWA and, until recently, has made no requirement for minimum periods for rest breaks in employment. There has been minimum wage legislation since 1945, but only now in 2008 is there about to be passed an Act requiring minimum rest breaks; the Employment Relations (Breaks and Infant Feeding) Bill.

[58] In some of the overseas cases, particularly from the UK and Europe, it has been held that employees who are on-call under the terms and conditions of their employment are to be regarded as working during that period even if permitted to sleep for any or all of it. The title of commentary written by a lawyer about two of the cases, "*Doing the job with your eyes closed,*" aptly describes the practical result of the courts' decisions from them.

[59] In one case the night manager employed by a hotel was required to sleep over at the hotel on a regular basis. He was only rarely required to work during the

sleepover but was held by the UK Employment Appeal Tribunal entitled nevertheless to be paid for all the hours he was at the hotel, including the periods of sleeping over.

[60] In a second case a period during which an employee was on-call was held to be “*working time*,” even although she was permitted to use that time as she wished, including sleeping, provided she remained available to handle any emergencies.

[61] The rationale of these decisions, especially those from the UK, is that even when asleep employees must be regarded as working if their employer requires them to be on-site as part of their contractual duties is the same requirement made of Mr Harding by Spectrum, whenever he is rostered for sleepover duty at the clients’ place of residence.

[62] The UK cases turn largely on the definition of “*working time*” which is contained in regulations applying to employment in that jurisdiction. The most instructive of the cases referred to the Authority is *MacCartney v Oversleys House Management* UKEAT/0500/05/MAA of 31 January 2006. But as Richardson J makes clear in the first paragraph of the judgment, the inquiry of the Tribunal as to whether the employee was working when on call was for the purposes of the UK Working Time Regulations (“WTR”) and the definitions given in them.

[63] In Mr Harding’s case, the Authority must inquire into whether a period of sleepover is “*work*” or “*his work*” for the purposes of the MWA, s 6 in particular, which provides no definition of those key words.

[64] The UK cases also hold that a period of time is to be regarded as “*working time*” if a rest period has not been provided as required under the WTR. That approach to the MWA is not available to be taken, as there was no statutory or regulatory requirement for Mr Harding to have a rest break in his particular occupation. Only his employment agreement made that requirement, but it is to be read as subservient to the Act for the purposes of applying s 6.

### **MacCartney v. Oversleys House Management (UK)**

[65] At the beginning of the judgment the question before the Tribunal was stated by Richardson J to be;

*If a worker who is provided with tied accommodation at her workplace is required to be available on site to answer calls*

*throughout a period of 24 hours, but otherwise can sleep during the night or take recreation in her own home, is she working for the whole 24 hours for the purposes of the **Working Time Regulations 1998** (“WTR”)?*

[66] The *tyed* accommodation was a rent free apartment Mrs MacCartney received under a term of her contract of employment.

[67] The Tribunal noted in its judgment that when Mrs MacCartney was on duty she was able to perform most of her work between 8am and 6pm but that she remained on call for the whole 24 hours:

*She was required to be on site or within a 3 minute radius – just far enough for her to take her dog for a walk. She could not socialise in the town, or visit her daughter or family. On the other hand, she could receive visitors, listen to music, eat, undertake other activities at home and, of course, sleep in her own bed.*

[68] The WTR in relation to “*working time*” provided the following;

“*Working time*” in relation to a worker, means –

(a) *Any period during which he is working, at his employer’s disposal and carrying out his activity or duties,*

...

*and “work” shall be construed accordingly.*

[69] In its judgment at paragraph 38 the Tribunal noted that “*is working*” was the first element of the definition of “*working time*,” and it found this problematic for two reasons:

*It is difficult to see what the words “carrying out his activity or duties” would add if this phrase has its normal meaning. Further, the phrase “is working” appears to render the definition as a whole tautologous, since its purpose is to define “working time”.*

[70] The Tribunal also addressed the question of whether the three elements or requirements of the definition were cumulative. It applied an earlier decision and held that they did not need to be met concurrently and that therefore under the definition a worker might be found not to be carrying out his activity yet still found to be within the definition of “*working time*.”

[71] The Tribunal referred to the decision of the European Court in *Landeshaupstadt Kiel v Jaeger* [2003] IRLR 804, a case where a doctor on call was required to stay over at the clinic where he worked. For this he was provided with a

room he could sleep in when his services were not required, and on average he would spend less than half his time “*actually working.*” Nevertheless, the Court held that the whole period on call was “*working time.*”

[72] The Tribunal held that;

63. *... a doctor who is required to keep himself available to his employer at the place determined by [his employer] for the whole duration of periods of on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required. Under those conditions, an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity*

[73] The UK cases turn on the relationship under the applicable legislation between what is defined as “*working time*” and “*rest period.*” Under the WTR a rest period is defined as a period which is not working time, and court’s focus therefore has been principally on the nature of rest rather than work. The Tribunal concluded in *MacCartney* that by application of the principles laid down in *Jaeger* and other decisions, the whole period when Mrs MacCartney was on call constituted working time.

[74] The Tribunal noted that what might amount to compensating rest periods were characterised by the fact that:

*... the worker is not subject to any obligation vis a vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health.*

[75] And the Tribunal also noted:

*In order to be able to rest effectively, the worker must be able to remove himself from his working environment for a specific number of hours which must not only be consecutive but must also directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties.*

[76] A similar approach being taken in New Zealand is suggested by the passage in the *Air New Zealand* case (above) at paragraph [36], with the Court’s comment about the relevance of “restrictions,” if any had been imposed on the pilots during a layover.

[77] While many of the observations by overseas courts in the above judgments are relevant to the situation of Mr Harding during a sleepover, overall the cases have to be considered in the light of the legislation under which they were presented and decided.

### **Is a sleepover work under the MWA?**

[78] In this case the approach taken by the Authority is to consider objectively whether a sleepover is “work” of or by Mr Harding within the meaning of the MWA. The subjective intentions of the parties in negotiating the collective agreement cannot be decisive of the answer.

[79] For Spectrum, counsel Mr White argued that the fundamental indicator of work is physical and/or intellectual activity to some degree present during the work. By contrast, a person asleep is not conscious and usually is inactive.

[80] I was referred to the Parliamentary debate that took place in December 1945 when the Minimum Wage Bill received its second reading. Because of that era and the passage of time since, interest in the speeches today may be more historical than legal. The Acting Minister of Labour, the Hon Mr O’Brien, in moving the second reading referred to what he said would be the natural definition of wages as “*a reward for labour,*” clearly associating work with physical activity. The Minister also observed;

*The worker is the man who produces. One cannot produce by looking at something or by writing figures in a book. To get production one has to work for it.*

[81] During an uninterrupted sleepover, while he is actually asleep no doubt Mr Harding does not labour or think consciously, but by being present in the house for a period of 8 hours he is in my view productive. For all that time he is the residents’ protector. Even without actually doing anything he discharges functions and responsibilities akin to those of a parent. By his presence he maintains the well-being physically and emotionally of the clients who live in the house, with regard to their safety and health and also the security of Spectrum’s house property. These things may not be tangible but they are real and valuable to the service-providing relationship between Spectrum and its clients. They are also valuable consideration for reward under an employment agreement.

[82] Given the particular occupation of Mr Harding as a caregiver of other persons living in the house who may require his ministrations from time to time, the presence alone of Mr Harding in the house even at times when he is asleep should not be underestimated in considering whether he is working ('with his eyes closed') during a sleepover.

[83] His presence, in my view, is consideration equally as valuable as labour involving physical and/or mental activity. While Mr Harding may produce no goods during the sleepover, he does maintain the safety, health and security of the residents of the house by being present. His evidence was that one effect of his presence is to give reassurance and comfort to the residents (although not necessarily all of them), in this way providing for some of their emotional needs by reducing fears and anxieties.

[84] In submissions Spectrum relied on the natural and ordinary meaning of work given by the Concise Oxford Dictionary as "*the application of mental or physical effort to a purpose.*" But work is also defined in the same dictionary as "*a person's employment or occupation., esp as a means of earning income.*" Undoubtedly a sleepover is part of Mr Harding's employment or occupation and in that sense is work. The MWA gives no express preference to either definition.

[85] Spectrum submitted that according to fundamental principles of statutory interpretation different wording would have been used if periods of rest were intended to be covered by s 6 for the purposes of minimum wages. I do not consider that a sleepover is truly a period of rest or on-call, given the restrictions imposed during that time on Mr Harding by his employer.

[86] The MWA is an enactment of general application to employed occupations across the board. Although the word "*work*" has been used in the statute since 1945, the principles of interpretation allow for words to be given different meanings as circumstances change over time. Section 6 of the Interpretation Act 1999 provides that; "*An enactment applies to circumstances as they arise.*" The predecessor of s 6 of the 1999 Act was s 5(d) of the Acts Interpretation Act 1924 which provided that; "*The law shall be considered as always speaking,....*"

[87] No doubt the job of the dormitory master or institutional guard, nurse or attendant of 60 years ago, is far removed from the role of caregiver as performed by

Mr Harding and thousands of others today. The work they do must be identified in its modern form.

[88] Mr Harding's case must turn on the meaning of the words "*work*" or "*his work*" under s 6 of the MWA. As a question of mixed fact and law, I am satisfied that what occurs when he is rostered to sleepover does amount to "*work*" under the Act.

[89] I do not consider there is any good reason for the Authority to write down the meaning of s 6 of the MWA so as to exclude a sleepover from being regarded as work in the context of Mr Harding's particular employment. Obviously the Authority has only been concerned in this case with the particular circumstances of Mr Harding's employment and his performance of it for Spectrum.

[90] I find that during a sleepover, by maintaining himself in a state of being physically present and ready to become mentally alert at any time to resume the work he performs when conscious, Mr Harding performs work within the meaning of the MWA and must be paid as required under the Act. Because of his restricted freedom during a sleepover, Mr Harding is not truly at rest or even on-call.

[91] It follows that each instance of a sleepover occurring during a pay cycle must be taken account of in assessing whether Mr Harding has been paid at least the rate he is entitled to under the MWA and relevant Orders made pursuant to it.

#### **Whether MWA and Order have been complied with - The period of pay**

[92] For Mr Harding it was contended that as his pay was at an hourly rate and as he was paid for each hour worked during shifts, he should also receive the minimum wage for any time during a sleepover that he has not been properly paid for.

[93] Spectrum argued that a fortnight is the appropriate period for assessing whether the relevant Order has been complied with because, at least by practice, that is the pay period in Mr Harding's employment. Calculations by Spectrum show that when the hours in each fortnight are taken into account, including 8 hours for each sleepover in that period, Mr Harding was paid above the minimum hourly rate.

[94] I consider Spectrum is correct in submitting that the period of pay is the relevant time for gauging compliance with s 6 of the MWA.

[95] This was the approach taken in *Sealord Group v NZ Fishing Industry Guild* [2005] ERNZ 535, where the Employment Court held that the sufficiency of payment for the purposes of the MWA and the relevant Order made under it, had to be determined according to the time at which wages were to be paid. That time, the Court held, was not a requirement of the MWA (or the Wages Protection Act 1983) but was;

*.....an issue to be determined in each case by reference to the employment agreement governing the employment relationship.*

[96] As to how an agreement may be made about the time for payment, the Court observed;

*In some cases, there will be express agreement when wages are to be paid. In other cases, the time of payment will be a matter of inference from the practice of the parties over time.*

[97] Although Mr Harding's pay has been calculated according to the number of hours worked and allowances payable for being on duty or on call, the pay period itself is a fortnightly one. This has become so by a practice, and one which is not inconsistent with any provision of the collective agreement. The expression of remuneration as a salary also suggests that the parties to the employment agreement contemplated that payment was dependent on a longer period than each hour worked.

[98] I accept the accuracy of Spectrum's calculations, which show that when averaged out each fortnight over the hours Mr Harding attends his place of work, including all sleepover hours, his pay has been at a rate that is not less than the rate required by the MWA and relevant Order.

[99] I find therefore that Spectrum has complied with s 6 of the MWA in paying Mr Harding for his work. The collective agreement, although providing only an allowance for each sleepover and a payment for any disturbance, is not a contract that is contrary to the MWA in this regard.

[100] As there has been no underpayment, no arrears are owing to Mr Harding.

[101] The MWA has application only to rates of pay and does not extend to the lengths of shifts or minimum breaks between shifts. They were matters for the parties to agree upon when negotiating their collective agreement. Although a sleepover is to be regarded as work for the purposes of the MWA, the parties were still able to

agree that under the employment agreement a sleepover is not work for other purposes such as minimum rest breaks.

### **Determination**

[102] In summary, the determination of the Authority is that;

- a) What Mr Harding does during a sleepover is “*work*” within the meaning of the Minimum Wage Act 1983, and
- b) Payment made to Mr Harding for his work complies with the Minimum Wage Act.

### **Costs**

[103] Costs are reserved, but as this has been apparently something of a test case expected by the parties to proceed further, they may wish to come to their own arrangement to resolve any question of costs arising.