

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 37
5458403

BETWEEN STUART SANDERSON
First Applicant
SARAH SANDERSON
Second Applicant
DIANE BEACH
Third Applicant
MAUREEN CHAMBERLAIN
Fourth Applicant
JOHN SNUGGS
Fifth Applicant
BETHAN WILLIAMS
Sixth Applicant

A N D SOUTH CANTERBURY
DISTRICT HEALTH BOARD
Respondent

Member of Authority: Helen Doyle

Representatives: Caroline Mayston and Fleur Fitzsimons, Counsel for
Applicants
Peter Zwart, Advocate for Respondent

Investigation Meeting: 6 and 7 December 2016 at Timaru

Submissions Received: 7 December and 23 December 2016, from the Applicant
7 December 2016 and 15 December 2016, from the
Respondent

Date of Determination: 20 March 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A The applicants are working when rostered on call and required if called on to report within 10 minutes.**
- B This finding will require some assessment of whether the applicants are entitled to additional payments under the Minimum Wage Act 1983. By agreement the representatives are to see if they can resolve the issue of quantum. If they cannot then leave is reserved for either party to return to the Authority.**
- C Costs are reserved.**

Employment relationship problem

[1] The applicants are members of the New Zealand Public Service Association Incorporated (PSA) and are, with the exception of the first applicant who resigned after 8 and a half years' service in or about March 2016, anaesthetic technicians employed by South Canterbury District Health Board (SCDHB).

[2] Two of the applicants, Sarah Sanderson and Diane Beach did not give evidence. It was agreed with the representatives that whilst Ms Sanderson and Ms Beach are still applicants in this matter no weight is to be placed on the statements of evidence provided on their behalf.

[3] The PSA is party with SCDHB to the District Health Boards/PSA Allied Public Health & Technical Multi Employer Collective Agreement (the MECA) which expires 31 October 2017. The MECA covers the work of the applicants and requires all anaesthetic technicians to participate as rostered on call pursuant to clause 4.1 of the collective agreement which provides:

4.1 On Call

4.1.1 In the interests of healthy rostering practices, the parties agree that the allocation of on-call time should be spread as evenly as practicable amongst those required to participate in an on-call roster.

4.1.2 An employee who is instructed to be on call during normal off duty hours shall be paid an on call allowance of \$4.04 per hour except on Public holidays when the rate shall be \$6.06.

4.1.3 The on call allowance is payable for all hours the employee is rostered on call including time covering an actual call out.

4.1.4 Unless by mutual agreement or in emergencies, no employee shall be required to remain on call for more than 40% of the employee's off duty time in any three-weekly period.

4.1.5 In services where the employer's operational requirements and staffing levels permit, employees working seven day rosters should not be rostered on call on their rostered days off.

4.1.6 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.

[4] SCDHB is the fourth smallest DHB in New Zealand. It serves a population of 45,000 from Timaru and rural areas of South Canterbury. The volume of demand for services does not warrant having the operating theatre at SCDHB rostered 24/7 and for the most part the patient needs can be met within the normal working hours. The hospital does however operate on a 24/7 basis and where there is an acute emergency, treatment is provided with on call staff outside of the normal working hours.

[5] The normal working hours at SCDHB are between 7am to 8.30pm Monday to Friday. During normal working hours an anaesthetic technician can be rostered on to work one of the following five shifts; 7.00am to 3.30pm, 7.30am to 4pm, 8.30 am to 5pm, 9.30am to 6pm and 12pm to 8.30pm.

[6] The on call roster covers the time outside the normal working hours of 7am to 8.30pm Monday to Friday at SCDHB. The applicants are each required to participate in the on call roster one weekday night, from 8.30pm until 7am. On Fridays and public holidays on call during the week finishes at 8.00am. The weekday on call shift usually follows a shift worked from 12.00pm to 8.30pm.

[7] Each anaesthetic technician must also participate in the on call roster at the weekend, approximately six to eight times per year, from 8.00am Saturday until 7.00 am Monday.

[8] Anaesthetic technicians on call at SCDHB are required to report for duty within 10 minutes of receiving a telephone call. That means they have to live or stay within 10 minutes reporting time of the hospital at all times they are on call. That expectation applies to all staff within the theatre on call team at SCDHB, the anaesthetic technicians, theatre nurses, obstetricians and anaesthetists.

[9] Belinda Dore is the Elective Services Manager and responsible amongst other matters for the operating theatre. Ms Dore explained that the 10 minute report time is historical and has run in this way to her knowledge since the 1980's. She noted that as a small DHB, SCDHB does not have more senior doctors such as registrars available after hours, only interns and senior medical officers.

[10] The applicants all live outside of a 10 minute report of the hospital. SCDHB provides accommodation free of charge which is close to the hospital and enables the report time to be met. At the time of the investigation meeting there is a furnished three bedroom unit available which is across the road from the hospital.

[11] SCDHB says that the applicants are not obliged to use the accommodation and that there is no contractual obligation for the hospital to provide it. The director of Organisational Capability and Safety at SCDHB, Roberta Moginie, said there are options for on call employees. If employees live in Timaru they can stay at home when on call because urban Timaru and some of the bordering rural areas are within the 10 minute report time. If employees live outside the 10 minute report time then Ms Moginie says employees can stay in the provided accommodation, rent accommodation in Timaru or stay with family members or friends.

[12] There is approximately six months advance notice of the roster for the weekends on call and four weeks for the weekly on call roster. Rostered shifts may be swapped and there is a request book for advance rostering in which the applicants can enter their preferences for weekend on-call.

[13] A call out is made as follows to an on call anaesthetic technician. The surgeon contacts the co-ordinating registered nurse. The registered nurse then disseminates the information to the rest of the on call team including the anaesthetic technician by phone. Frequently there will be an indication of what the situation is at the hospital although sometimes, particularly in the evening, the message is simply to come "now". The applicants are then expected to report within 10 minutes. For the applicants that is a matter of walking from the provided accommodation.

[14] Once the anaesthetic technician arrives at the hospital he or she signs out the keys for theatre and goes to the fourth floor theatre. Once inside the department, the anaesthetic technician changes into scrubs, opens the theatre and ensures that the theatre and equipment, including drugs and other specialised equipment, are ready.

[15] When theatre is prepared there is a wait for other team members if they have not arrived and then for the surgeon and anaesthetist to arrive before sending for the patient. The anaesthetic technician checks details with the patient and takes them through to theatre where they are prepared for anaesthesia. The applicants then stay at the hospital throughout the operational procedure and may be responsible for waking the patient up after the surgery and, if necessary, transferring them to the intensive care unit, cleaning the theatre for the next case or leaving it ready to be used again.

[16] A timesheet is then completed and the anaesthetic technician returns to the provided accommodation. Mr Sanderson set out in his written evidence the work if called back can be visually challenging and physically and emotionally draining.

[17] The applicants say that the requirement on call to report to work within 10 minutes of receiving a phone call constitutes work within the meaning of s 6 of the Minimum Wage Act 1983. If on call is found to be work then the applicants say that it should be paid at a rate no less than that required by the Minimum Wage Act 1983 and its regulations at the relevant periods.

[18] SCDHB do not accept that on call is capable of amounting to work.

[19] The representatives agreed that for the purposes of the investigation, if the Authority makes findings that require consideration of remedies, then the Authority will give the parties an opportunity to see if this matter can be resolved, failing which a further investigation meeting will be held.

The issue for determination

[20] The sole issue to be determined is whether the applicants are working when on call within the meaning of s 6 of the Minimum Wage Act 1983.

[21] Section 6 of the Minimum Wage Act 1983 Act provides:

6. Payment of Minimum wages

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

The terms of the MECA and payments for being on call and when there is a call out

[22] The representatives agree that the provisions in the MECA cannot be inconsistent with the provisions of the Minimum Wage Act 1983.

[23] Clause 4.1.2 of the MECA provides that an employee who is instructed to be on call is paid an allowance of \$4.04 per hour except on public holidays when the rate is \$6.06.

[24] When there is a call out the applicants are paid overtime for any time which they are called back for a minimum of 3 hours per call out – clause 3.1.2 of the MECA.

[25] The on call allowance is payable for all hours the employee is rostered on call including time covering an actual call out.

[26] Salaries in clause 5.1.1 of the MECA are expressed in full time forty hour per week rates and where an employee's normal hours of work are less than forty per week the appropriate salary for the hours is a proportion of the forty hour rate. The on call allowance is paid separately to and in addition to salary.

[27] SCDHB says that the remuneration received by anaesthetic technicians compensates them for the overall job including salary and payments for being on call, over time and call outs.

[28] There is no definition as to what the expectation of being on call is within the MECA. Ms Moginie says this makes sense because what would work in one geographical and health context would be impracticable or unnecessary in another.

[29] Clause 4.1.6 of the MECA provides that an employee who is required to be on call and report on duty within 20 minutes shall have access to an appropriate locator or cell phone.

[30] The Authority heard from Kevin McFadgen who is a specialist employee relations adviser within the Strategic Workforce Services team at DHB Shared Services. DHB Shared Services is the representative under the Employment Relations Act 2000 in relation to bargaining for MECA's for all DHB's and negotiated the MECA.

[31] Mr McFadgen was not involved in the negotiations for the MECA but said he had maintained a close overview of the negotiations since 2007. He referred in his written evidence to the introduction of the 20 minute limit clause into the first national MECA in 2007. His evidence was that the clause was focussed entirely on ensuring employees are provided with the tools needed to perform on-call effectively.

[32] Mr McFadgen in his oral evidence said that he could not recall any other DHB having a 10 minute report time for staff. Ms Dore said that one of the smaller DHB's initially had a 10 minute report but it was now 20 minutes.

Knowledge of the requirement to work on call and the 10 minute report time before appointment

Maureen Chamberlain

[33] Mrs Chamberlain confirmed that she understood the requirement for work on call and the reporting time of 10 minutes when interviewed for the role at SCDHB. Mrs Chamberlain lived in Waimate when she was employed in the role and was advised there was accommodation provided when on call.

Bethan Williams

[34] Ms Williams was on holiday in New Zealand from the United Kingdom when she was interviewed for the job. She said that it was clear that if on call there was a requirement to be within 10 minutes of the hospital and there was hospital accommodation provided. Ms William initially lived in Timaru but moved out to Kings Road which is outside of the Timaru residential area about five years ago.

John Snuggs

[35] Mr Snuggs came to the role with his family from the United Kingdom. He recalled a discussion about on call work and the 10 minute report time when interviewed. Mr Snuggs and his family lived in Timaru for six weeks before moving to Pleasant Point.

Stuart and Sarah Sanderson

[36] Mr Sanderson is married to Sarah Sanderson. The Sanderson's decided to move their family to New Zealand from the United Kingdom. Mr Sanderson said in

his oral evidence that he had little recollection of an on call component when interviewed for the role at Timaru hospital but that it must have been discussed at some time. When the Sanderson's arrived in New Zealand the hospital arranged some rental accommodation for them and after five weeks they purchased a property in Waimate. Mr Sanderson could not recall if he knew about the 10 minute reporting time before purchasing a property in Waimate but said that knowledge was possible. Mrs Sanderson started her role after Mr Sanderson when the family was in Waimate and I accept it is a reasonable inference to draw that she was aware therefore of the on call requirements. The Sanderson's now live in Moeraki which is over an hour away from SCDHB.

Diana Beach

[37] I did not hear from Ms Beach but note with respect to any knowledge that she was a casual employee with the team before she was employed on a permanent basis.

[38] In conclusion I am satisfied in all likelihood that the applicants had knowledge of the on call requirement to report within 10 minutes if called on before they accepted the role and/or before decisions were made to live outside of the 10 minute reporting time.

What constitutes work under section 6 of the Minimum Wage Act 1983

[39] The factors to be considered when assessing what constitutes "work" were stated by the Employment Court in *Idea Services Ltd v. Dixon*¹ and confirmed by the Court of Appeal in *Idea Services Ltd v. Philip William Dixon*.² The three factors are:

- (a) The constraints placed on the freedom the employee would otherwise have to do as she or he pleases;
- (b) The nature and extent of the responsibilities placed on the employee; and
- (c) The benefit to the employer of having the employee perform the role.

[40] The Court of Appeal stated:³

¹ (2009) 6 NZELR 666

² [2011] NZCA 14 at [7]

³ At [8]

The greater the degree or extent to which each factor applied (ie the greater the constraints, the greater the responsibility, the greater the benefit to the employer), the more likely it was that the activity in question ought to be regarded as work....

[41] The Court of Appeal in *Idea Services* was given an example by counsel for the appellant of whether the Employment Court's approach and criteria used would allow any employee who was on call (like a doctor) to claim the minimum wage and stated:⁴

...that there are considerable differences between a typical on-call doctor, who is under relatively few constraints, and someone like Mr Dixon while on a sleepover. For instance, Mr Dixon, unlike an on-call doctor, is prevented from leaving his workplace and from seeing friends or family without his employer's permission. He must be constantly available to anyone who might want to see him in his (compulsorily unlocked) room. The Employment Court's approach is certainly more flexible and nuanced than Mr Toogood's proposed interpretation, but, as we explain below, we consider that is to its advantage.

[42] Ms Mayston, Ms Fitzsimons, and Mr Zwart referred to two international cases that were considered by the Court of Appeal in *Idea Services*. The Court of Appeal acknowledged that the statutory frameworks in the cases are different but found the cases were “*nonetheless illustrative of what the concept of “work” entails in the minimum wage area.*”⁵

[43] The European Court of Justice judgment in *Landeshauptstadt Kiel v. Jaeger*⁶ approved and applied an earlier decision in *Sindicato de Medicos de Asistencis Pública [Simap] v Consellaria de Sanidad y Consumo de la Generalidad Valenciana*.⁷ Both cases concerned doctors on call where their presence at a hospital was required. In *Simap* a distinction was drawn between time spent on call by doctors in primary care teams where their presence at the health centre is required and those who are on call by being contactable at all times without having to be at the health centre. It was concluded by the Court that the entire time spent by those on call in primary health care teams must be regarded as working time but if merely contactable at all times when on call only time linked to actual provision of primary care service must be regarded as working time.⁸

⁴ At [12]

⁵ Above n 2 at [17]

⁶ [2003] IRLR 102 (ECJ)

⁷ [2000] ECR I-7963

⁸ At [48] to [52]

[44] In *Jaeger* the doctor who was on call was permitted to sleep in a rest room in the hospital when not attending patients. The Court of Appeal in *Idea Services* stated about *Jaeger*:⁹

...The distinguishing factor was that a doctor who is required to be at the hospital 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*” ...

[45] Ms Mayston and Ms Fitzsimons submit that while there has not been New Zealand authority that on call time constitutes work, the possibility has been left open in two cases considering entitlement to payment for public holidays.

[46] The first is a case where an employee was on-call on a public holiday - *O'Brien (Labour Inspector) v. Guardian Alarms (Auckland) Ltd.*¹⁰ The Employment Court held in *O'Brien* that it is possible to envisage situations in which the restrictions on the employee's freedom of action will be so great that it can be said, for all practical purposes, that the employee has not had a whole holiday. The employee had a car, was provided with payment of the telephone rental and had a portable pager with good capability over an extensive area. In addition, the expectation was that on receiving a message the employee was not required to attend at once but within 2 hours. He was also only called on rarely, although the possibility of being called on was real. When on call he had to carry a pager and remain within the pager coverage area in the Auckland region which was about an hour's drive each side of Auckland city. It was concluded in that matter that when he was not called out he had had a holiday on pay.

[47] Mr Zwart referred to the codification of the obiter by Chief Judge Goddard in *O'Brien* in s 59(3) of the Holidays Act 2003. He submits that the statutory reference in s 59(3) of the Holidays Act implies that an employee who is on call is not working; otherwise they would have been entitled to a public holiday. The same consideration of restriction or constraint on an employee's freedom is now one of the factors approved by the Court of Appeal in *Idea Services* in considering whether what an employee is doing constitutes work under the Minimum Wage Act 1983.

⁹ Above n 2 at [20]

¹⁰ [1995] 2 ERNZ 170 at pg 175

[48] The second case, *New Zealand Airline Pilots Association v. Air New Zealand Ltd*¹¹ concerned whether a rest period, a layover, undertaken by a pilot in the course of a “tour of duty” overseas coinciding with a public holiday in New Zealand, attracts an obligation to pay time and a half. That involved some consideration of s 50(1) of the Holidays Act 1983 and whether a pilot works on any part of the public holiday. It was found that layovers which do not involve the performance of any duties on behalf of the company are not periods where the pilot works but the Court stated that the situation may have been different if significant restrictions were imposed on the pilots during the layovers, *analogous perhaps to standby duties*.¹²

[49] Ms Mayston and Ms Fitzsimons referred the Authority to an Employment Appeal Tribunal of Scotland judgment in *Truslove v Scottish Ambulance Service*.¹³

[50] In *Truslove* ambulance paramedics who normally worked from a base station manned 24 hours a day were from time to time required to provide cover at the station during the night when on call. They could not live at home and were contractually obliged to stay at accommodation of their choice within a three-mile radius of the station with a mobilisation target of three minutes. The paramedics were not permitted, unless approval was obtained, to take the ambulance out of the three mile radius. There was a controlled drug, morphine, in the ambulance and while the three minute period was a target, the response time of each paramedic is monitored.

[51] There was reference in *Truslove*¹⁴ to two overseas cases referred to by the Court of Appeal in *Idea Services; Jaeger and Simap* requiring, as a matter of principle, that there be a focus upon whether the place at which the employee happened to be was one required by the employer. It was held in *Truslove* that the ambulance paramedics were working and not at rest when on call and that the Employment Judge, in requiring a form of near confinement to one specific location as the distinguishing feature, had failed to apply the correct approach. The answer it was held did not “*depend whether within narrow limits the employee was free to move a few hundred yards or even a couple of miles from the base*”. It was the requirement to be away from home and to be at a particular location, within three miles of the ambulance station, and the lack of freedom to be anywhere else that was seen as the

¹¹ [2008] 5 NZELR 367 at [36]

¹² At [36]

¹³ (EAT(Sc)) [2014] ICR 1232.

¹⁴ At pg 1241 (C)

distinguishing feature.¹⁵ There was reference in *Truslove* to the response time, if not immediately, at least within three minutes and that the paramedic had to do all they could to achieve that.

[52] I note as the Court of Appeal did in *Idea Services* that the statutory framework is different. The framework in *Truslove* is the Working Time Regulations 1998 although Ms Mayston and Ms Fitzsimons submit these are based on the European Working Time Directive which is a similar concept to the Minimum Wage Act 1983.

[53] Case law in New Zealand about what constitutes work under s 6 of the Minimum Wage Act has developed by what is known as the “sleepover cases”. These are cases where the employee stays overnight on the employer’s premises and remains available and responsible for residents.

[54] Mr Zwart referred to one case in which it was held being “on call” is not work – *New Zealand Professional Firefighters Union v NZ Fire Service*¹⁶ although that did not appear from a reading of the judgment to have been the focus of that judgment so as to assist in the present matter.

[55] *Law v Board of Trustees of Woodford House*¹⁷ is another Employment Court judgment about undertaking sleepovers as part of a roster of duties in a school boarding house. Counsel for the plaintiff made a submission in that case that the plaintiffs were “*engaged to be available rather than available to be engaged*”. Chief Judge Colgan found that submission captured the essence of the decision and stated “*Indeed, they were not only available to work but did work in significant ways during the so-called “sleepovers”*”. Mr Zwart submits that the applicants in this case fall into the category of employees who are ‘available to be engaged’.

[56] In order to determine the issue the Authority needs to undertake a careful factual assessment. This is a case where the applicants cannot remain at home when on call because of the requirement to report within 10 minutes but neither are they required to be at the workplace when on call. The requirement to report is unpredictable in frequency and timing. Sometimes the applicants will remain on call and not be called out but at other times will be called out more than once and/or for extended periods. The applicants are all contactable by cell phone either provided by

¹⁵ Above n 13 at para [32]

¹⁶ [2011] NZEmpC 149 at [37]

¹⁷ [2014] NZEmpC 25 at [193]

SCDHB or their own if they choose when they are on call. The contact number is always made available to SCDHB at the start of the on call period.

[57] The starting point is the MECA and then a factual assessment in line with the three factors approved by the Court of Appeal in *Idea Services*.

The MECA

[58] An anaesthetic technician who is a member of the PSA and whose work is covered by the MECA is contractually obliged to be on call at SCDHB when rostered. There is some ability to indicate some preference for the on call duty by way of the advance rosters. SCDHB provide accommodation for those who are unable to live at home when on call because of the 10 minute report time frame. SCDHB provided evidence that when issues with the accommodation were raised the concerns were attended to although it appeared there were additional concerns from the evidence that may need addressing.

[59] When on call and not called back an allowance is received by each of the applicants of \$4.04 per hour except on public holidays when it is \$6.06 per hour. Payments are subject to taxation. The allowance continues to be paid when called out alongside the payment in clause 3.1.2.

[60] The only reference to any report time in the MECA, is found in clause 4.1.6 that an employee who is required to be on call and report on duty within 20 minutes shall have access to a cell phone or locator. Mr Zwart submits that the wording of clause 4.1.6 of the MECA enables a requirement to be on call and report within 10 minutes because that is a time frame within 20 minutes.

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

[61] Mr Zwart submits that the constraints on the applicants are “much less significant” than those in *Idea Services*. In *Idea Services* Mr Dickson could not leave the group home without permission and provision of a relief worker and was not able to sleep behind a locked door. There were clear rules that alcohol was not to be consumed. Visitors were not permitted without prior permission and only if acceptable to the other residents of the home. Any activity undertaken was not to be disruptive of the residents. In short he submits there are no restrictions placed on the

anaesthetic technicians in this matter and the only expectation is that they are able to report to work within 10 minutes and be capable of working.

[62] The applicants' evidence was that constraints placed on their freedom because of the 10 minute reporting time are substantial and significant. There were common themes in the evidence about the constraints.

[63] Ms Williams lives about 17 minutes' drive away from the hospital so she stays in the provided accommodation that she described as clean but basic. Sometimes the accommodation is shared with up to two on call employees who may be male or female. Ms Williams described her sleep in the accommodation as poor because of the noise level from traffic and uncomfortable beds.

[64] She explained that she has found, if called on, 10 minutes is not enough time to comfortably catch up with family in Timaru. She has had to leave behind an ordered meal when called back.

[65] Ms Williams said that when on call she could not drink alcohol. SCDHB did believe there was a policy, direction or instruction about alcohol consumption when on call at least of a moderate amount. The four applicants who gave evidence said they did not drink even a moderate amount whilst on call. They felt it would be unprofessional and inappropriate to attend a call out and interact with a patient smelling of alcohol.

[66] Ms Williams said that she could not visit her family or attend family and social gatherings. She was unable to watch her son participate in sports or other activities when on call. Although her family could visit her at the provided accommodation she said that did not often happen. Ms Williams felt that was not fair on others who were staying there and that her son was distressed if she was called out. She referred to the need to remain clean and hygienic in order to meet the reporting time and said that would impact if she remained at home on the ability to garden for example. Ms Williams said that she does go for walks occasionally in the botanical gardens when on call but she did not relax and could not get involved in activities in the normal way. She said that she takes her job seriously and is very conscious of the need to meet the 10 minute reporting time.

[67] Mrs Chamberlain works 32 hours per week for SCDHB as an anaesthetic technician and an enrolled nurse. Most of her work is as an anaesthetic technician

with just the odd nursing duty. As she resides 30 minutes' drive from the hospital in Waimate Mrs Chamberlain lives in the provided accommodation and does not accept that there is any other option for her because of the 10 minute report time. Mrs Chamberlain said in response to Mr Zwart that if the accommodation was not offered she would have to resign.

[68] Mrs Chamberlain spoke of the difficulties with having her young grandchildren visit in the provided accommodation as it has stairs. She was also concerned not to invade the privacy of the other people who share the accommodation. She said that she did not sleep well and does not relax whilst on call as she is on edge. She finds the accommodation noisy and is not used to the traffic.

[69] Mrs Chamberlain is a show jumping judge and runs a Pony Club. She cannot do those activities or undertake other social activities that would mean she was not able to get to the hospital within 10 minutes. She prepares all her meals to take with her as unless called on meals are not provided. Her activities whilst on call are mainly watching television and using her iPad. Whilst Mrs Chamberlain agreed with Mr Zwart that she self-imposed restrictions, her evidence was clear that she took her responsibilities to report within the required time very seriously.

[70] Mr Snuggs lives in Pleasant Point some 17 to 18 minutes driving time away from the hospital. He finds it difficult to see his family when on call and more than 50 hours can pass in doing so when he is on call on the weekend. Mr Snuggs feels confined to a limited radius. He gave as an example an attendance at the Rose Carnival at Caroline Bay when on call. On arrival he said that he changed his mind because of the distance away he would have to park and the crowds of people attending. These aspects impacted on his level of comfort that he could report if called on within 10 minutes.

[71] Mr Snuggs said he could undertake some limited grocery shopping. There was agreement between the applicants that a full grocery/supermarket shop would have run the risk that the groceries could not have been checked out in time if there was a call out. The applicants if shopping did not buy more than a few items at any one time. Mr Snuggs said that he could get a takeaway and a DVD and he would read books or watch a DVD at the accommodation. The applicants did not feel watching a movie at a theatre would have been possible when on call. Mr Snuggs said that as they have no family in New Zealand his wife has to shoulder the responsibility when

he is on call for his four children who are heavily involved with sports. His evidence was that with tax and being required to provide six meals he often ends up losing money at the end of a weekend on call. Privacy and comfort issues arose for him with the provided accommodation if shared and he preferred to use the hospital facilities for his ablutions if on call if sharing the provided accommodation with female staff.

[72] Mr Sanderson's evidence reflected that of the other applicants in that he had to remain within 10 minutes of the hospital and respond immediately to the cell phone when called. He said he was limited in what activities he could undertake and what could be taken to the provided accommodation as he would not want to leave too many items behind. He described sometimes sharing accommodation with people he had never met before and explained in his written evidence the different types of accommodation provided from the time he started at SCDHB.

[73] At one point the accommodation provided was student nurses quarters in Garden Block. The nurses' quarters were deemed unsuitable after the earthquake and/or in need of repair. A smaller property was rented and then the current rental property obtained. Mr Sanderson described the current accommodation in a block of four flats with the other flats occupied mainly by junior doctors. There is a larger bedroom with a double bed and two smaller bedrooms with a single bed in each. There is one bathroom and a lounge with couches, a coffee table and a television. The kitchen facilities are shared. The accommodation Mr Sanderson and the other applicants stay in is close to the road with traffic noise they say interfering with sleep and there is disturbance when other occupants of the flat which include radiographers and theatre staff are on call. Mr Sanderson found having family visits difficult as he wanted to respect the privacy of others staying the accommodation.

[74] Ms Moginie collated a table that showed the number of people staying the provided accommodation together for the period July to November 2016. Over this period there were 20 weekends (40 weekend nights) and 100 week nights. For 5 weekends and 38 week nights staff were on their own. For 7 weekends and 34 week nights staff shared with one other person and for 2 weekends and 15 week nights there were three people on the house. I also record that staff have managed to obtain televisions for each of the bedrooms in the accommodation. A concern from the evidence that the bedrooms did not have locks has now been addressed. Ms Moginie

said there was no record that this had been raised earlier or that there has been any issue raised about the noise.

[75] The Authority heard evidence from Glenn Hale. Mr Hale is currently Theatre Manager at Timaru Hospital but was initially employed at SCDHB as a senior anaesthetic technician. He worked in that role from 2001 until 2010 and was for that period on the on call roster. He said the only restrictions on staff when on call were to be available if needed and be capable of working. This meant staying or living within 10 minutes of the hospital. He said that he made a conscious decision about where he lived because of the on call requirement. He can return to work within 10 minutes from his home but said that he was right on the boundary of being able to report within 10 minutes as he lives 7km from the hospital.

[76] Mr Hale remained physically within the Timaru area when on call so as to be within 10 minutes reporting time. He could still meet friends, socialise within reason within the Timaru boundary, attend his children's sporting events and study, read and watch television. He said that he would shop but within reason. He accepted that he was required to be organised because of where he lived and had slept when on call in clothing that made it easier to get ready. He said that he did not always make the 10 minute report time.

[77] Mr Hale explained that of the 25 staff working within theatre who perform on call, 17 staff live locally within the 10 minute reporting time of the hospital. His view, and this was a view shared by other respondent witnesses, was that staff who live further out make an informed choice to do so and it was a conscious trade off.

[78] There was no evidence of anyone being disciplined for not reporting within 10 minutes. The applicants always complied with the reporting framework because they recognised the importance in often truly emergency and sometimes life and death situations of doing so.

[79] Mr Zwart submits that SCDHB do not require the applicants to stay at the provided accommodation but the applicants cannot, because of the 10 minute requirement to report if called on, remain at home. They have to stay within 10 minutes reporting time and remain within the reporting time for the whole on call period whether a weekday night or a weekend. They cannot go home until the on call period has ended. Although theoretically the applicants could stay in other than the

employer provided accommodation they do not see any practical alternative to doing so. They are therefore away from home comforts and resources and need to be considerate if sharing the provided accommodation with other employees on call.

[80] Mr Zwart says that the applicants, with the exception of Mrs Chamberlain, chose to live outside of the 10 minute report time knowing about it when appointed to the role and that given the size of Timaru the report time is reasonable because it incorporates the town and a significant rural district. He submits that SCDHB should not be held accountable for their decisions to live at a distance from the workplace and that it would be unfair for them to be advantaged over other staff living within the 10 minute report time.

[81] The issue for the Authority though is not one of fairness because the parties cannot contract out of the statutory requirements in the Minimum Wage Act. The issue for the Authority is whether time on call constitutes work for the applicants in their circumstances.

[82] The reporting time requires the applicants to be away from family for extended periods although family and friends can visit the applicants without restrictions being imposed by SCDHB. The applicants do not drink alcohol when on call as they conclude that would not be professional and they need to remain ready for work. The evidence supports that the applicants assess each activity they undertake against their ability to respond within 10 minutes and remain in a state of readiness to respond and do not really relax. I accept that they cannot carry on their normal family activities or socialise in the normal way. The activities they did undertake most often were of a limited range such as watching a DVD, television, reading or use of technology.

[83] I accept that the applicants can come and go from the accommodation with more freedom than Mr Dickson in *Idea Services* but when they leave the accommodation and undertake any activity they need to be able to report if called on within 10 minutes. There was no evidence that the activities in the house were controlled or monitored by SCDHB but my impression of the applicants was that they would be considerate of others in the provided accommodation and activities undertaken would reflect that. There was clear evidence that the applicants felt considerably less comfortable and more restrained in the provided accommodation than at their home.

[84] I find that there are restraints placed on the freedom the applicants would otherwise have to do as they please when on call because of the requirement they report within 10 minutes of being called on. Time on call is much less the applicants own in those circumstances.

[85] I regard the constraints on the applicants' freedom to do as they please on call substantial and significant in the circumstances.

The nature and extent of responsibilities placed on the employee

[86] Mr Zwart contrasted the responsibilities for Mr Dickson in *Idea Services* with the responsibilities of the applicants. He submits that the employee in *Idea Services* was subject to a number of significant ongoing responsibilities that applied continuously throughout the period of the sleepover. These included the safety and well-being of residents, ensuring medication is taken and locked away, remaining available to the residents, remaining alert, property security and being able to respond to any incident. He submits that the applicants are not required to do anything at all on call except if they are called back for which time they are then remunerated. He submits that the only responsibility is to be available on call.

[87] The nature and extent of the responsibilities for anaesthetic technicians has to be measured, I find, against the rationale for the 10 minute report time outside of normal hours. The rationale is clinical. If there is, as Ms Dore said in her evidence, an acute presentation to theatre outside of normal hours then there is a need for an on call theatre team to respond. The 10 minute report time reflects there can be lifesaving acute situations. One of the most common situations that can arise is for emergency caesarean sections where there is a risk to the life of mother or baby. The theatre is not rostered 24/7 as it is in larger DHB's so is staffed on an on call basis with a very limited report time. That limited report time reflects, I find, the potential seriousness of the situations that can arise outside of normal hours and necessitate treatment.

[88] If there is a call back then there is no dispute that the anaesthetic technicians are paid for time worked. The issue is the nature and extent of the responsibilities when the applicants are waiting for the call.

[89] I accept Mr Zwart's submission that the facts of this matter are different to that in *Idea Services* with Mr Dickson. What is similar, I find, is the responsibility for the

anaesthetic technicians to be alert and remain vigilant so as to be able to report within a very limited time frame if called on. I accept that the consequences of the applicants not responding at all or with delay, both scenarios the applicants when questioned found unthinkable, could be serious and even life threatening. Meeting the required report time of 10 minutes ready to work is, I find, a very important responsibility in the context of the 24/7 operation of the hospital. It limits what the applicants can do during the day and if awoken from sleep then they are responsible for getting themselves ready for reporting to work, dressing and attending to ablutions within that time. 10 minutes is not an immediate response but it requires a state of readiness for response during the time spent on call that a longer period of time would not. The call outs are unpredictable and not able to be controlled or limited.

[90] The Court of Appeal in *Idea Services*¹⁸ rejected a proposed physical and mental exertion interpretation of work noting that many workers will experience long periods where no mental or physical exertion is required of them. It was concluded unlikely Parliament intended the minimum wage legislation would not apply to a shop assistant waiting for a customer or a call centre operator waiting for a call or fruit picker waiting for the rain to stop. Mr Dickson slept for periods however he was found to be working throughout his entire sleepover.

[91] The nature and extent of responsibilities placed on the applicants on call to be ready for work and to report to work within 10 minutes are, I find, significant in the circumstances.

Benefit to the employer of having the employee assume the role in question

[92] Mr Zwart submits that there is no benefit to SCDHB from staff being available on call in the hospital provided accommodation. He submits that their presence does not meet regulatory or statutory requirements for the employer and the respondent could continue to provide services without them staying in the accommodation. Arguably he submits there is a detriment related to the cost of the provision of accommodation. He contrasted the situation with that in *Idea Services*¹⁹ and *Law*²⁰ where a presence in the home of an employee sleeping over provided a benefit to the residents and their wellbeing and therefore a significant benefit to the employer.

¹⁸ Above n 2 at [13]

¹⁹ Above n 2

²⁰ Above n 15

[93] I find that there is a benefit to SCDHB where volume does not warrant having the theatre rostered 24/7 to have the anaesthetic technicians on call and available to report within 10 minutes outside of normal hours. This enables an acute emergency situation for those in the community or visitors to be dealt with outside of normal hours.

[94] The accommodation provided free of charge facilitates that in enabling those who cannot report within 10 minute from their homes to be able to do so. Mr Sanderson in his evidence said that he had at times been called directly by the Anaesthetist to assist in the emergency department or ICU or that he had been asked by the Duty Nurse Manager to obtain something from the operating theatre and that being close was a benefit. I accept Mr Zwart's submission however that having an anaesthetic technician in the provided accommodation is generally not seen by SCDHB as more beneficial to having them at home or elsewhere in the community when on call.

[95] I find that the report time of 10 minutes is clearly important to SCDHB and critical to SCDHB being able to provide a 24/7 service in the event of an acute emergency situation in circumstances where the theatre is not rostered 24/7. There is a considerable benefit in having the anaesthetic technicians assume the on call role on that basis.

Determination

[96] A significant factor in this matter is the requirement that the applicants if called on report within 10 minutes. They are as a result subject to greater constraints because in order to meet the report time they have to stay away from their families. They do not have the familiar comforts of home around them and are required to deal with issues of privacy and a level of discomfort that can come with living with others. They have less ability and freedom to manage their time when they are not called back and a greater responsibility to be ready for work and report. There is a significant benefit to SCDHB in having anaesthetic technicians reporting on call within 10 minutes as theatre is not rostered outside normal hours but acute emergency situations arise outside of normal hours and require urgent attention.

[97] *Truslove*²¹ reinforces the principle from *Jaeger* and *Simap*²² which has been considered by the New Zealand Court of Appeal in *Idea Services*. The principle focusses upon whether the place where the employee happened to be was one required by the employer. SCDHB 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 SCDHB 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.

[99] It was agreed if the Authority got to this point that the representatives would see if agreement could be reached about the requirements of the Minimum Wage Act 1983 and the quantum of any money owing to the applicants. I reserve leave for either party to return to the Authority if there are difficulties with calculating the amounts due to the applicants.

Costs

[100] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority

²¹ Above n 13 at para [29] C

²² Above n 6 and 7