

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 373/10  
5289192

BETWEEN                      JOY ADAMS  
   Applicant  
  
AND                                THE ESTATE OF GORDON  
   WATSON  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Applicant in person  
   Pravir Tesiram for Respondent  
  
Investigation Meeting:      19 August 2010  
  
Determination:               20 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Joy Adams began working as a caregiver for Gordon Watson in December 2007. Mr Watson was in his eighties and suffered from dementia. In April 2010 he moved to a rest home and died on 2 May 2010.

[2] Ms Adams' work involved providing support and assistance to Mr Watson in his own home in Hillsborough, Auckland and occasionally at his family holiday house on Waiheke Island. In the main 'round the clock' care was provided to Mr Watson by Ms Adams and another caregiver, Ruth Wetere. The two women worked initially on a four-days-on, four-days-off roster. By agreement, this was changed so Ms Adams worked three days a week. On those days Ms Adams was required to stay at Mr Watson's residence 24 hours a day.

[3] Ms Adams has lodged a claim against Mr Watson's estate over four issues:  
(i) was she was entitled to be paid the same rate as the other caregiver; and

- (ii) was she paid above the minimum wage for hours worked; and
- (iii) was she provided adequate opportunity for breaks; and
- (iv) was she paid all wages due to her (including public holidays)?

[4] A statement of reply was lodged by Mr Watson's property managers who had been appointed under the Protection of Personal and Property Rights Act 1988. It stated Ms Adams was paid according to the terms of her employment agreement and any difference in wages from Ms Wetere was a result of a difference in experience and duties. It stated Ms Adams was paid a daily rate which, on a 24-hour basis, was at or above the minimum wage. It said Ms Adams was paid for breaks.

### **The investigation**

[5] Written witness statements were provided by Ms Adams; Ms Wetere; the executors of Mr Watson's estate, Pravir Tesiram and David Appleby; and Mr Watson's daughter and court-appointed welfare guardian, Wenona Stephens. Each witness attended the investigation meeting and confirmed, under oath or affirmation, their written statement. Ms Adams, Mr Tesiram and Ms Wetere each answered questions from the Authority member. There was an opportunity for the parties to ask additional questions and to provide a closing submission.

### **Pay rates**

[6] For a significant period of her employment Ms Adams was paid at a lower daily rate than Ms Wetere. At the time Ms Adams began work they were each paid \$300 a day. Ms Wetere's daily rate was increased in August 2008 to \$325 and then again in August 2009 to \$335. Ms Adams was not given a pay rise in 2008 and in late 2009 her daily rate was increased to \$310.

[7] In October 2009 Ms Adams, through her solicitor, raised a personal grievance alleging an unjustified disadvantage over not being given a pay rise in 2008 and being paid less than Ms Wetere. Ms Adams says she and Ms Wetere had identical responsibilities and should have been paid the same. For the following reasons, I cannot agree with that proposition in the particular circumstances of her employment.

[8] Firstly, Ms Adams' employment agreement did not require her to be paid the same rate of pay as any other worker, even if they did exactly the same job. Neither did it require her to be provided with a pay rise at the same time or the same amount as any other worker.

[9] Her employment agreement included the following terms:

*6.1 The Employee will be paid at the rate of \$300.00 gross per day, for all days worked (including extra days), payable on a fortnightly basis by direct credit to the Employee's nominated bank account.*

*6.2 The Employee's rate of pay will be reviewed annually by the Employer. Any increase in the wage rate will be at the Employer's sole discretion.*

[10] Her pay rate was twice reviewed under the terms of this agreement with the employer's representatives exercising their discretion to provide an increase only on the occasion of the second review. That was not a breach of the terms of Ms Adams' employment and was not unlawful.

[11] Secondly, even if it was correct that Ms Adams and Ms Weterer had identical responsibilities, it was not illegal to pay them different amounts in accordance with their respective individual employment agreements, provided that there was no unlawful discriminatory reason for the difference.

[12] That is clear from the definition of discrimination given at s104 of the Employment Relations Act 2000, which includes where an employer:

*"refuses or omits to offer or afford to that employee the same terms of employment ... as are made available for other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances".*

[13] Such discrimination is unlawful only where the employer's action or omission is for one of the prohibited grounds given in s105 of the Act. This includes sex, marital status, religious or ethical belief, race, age, political opinion, family status or sexual orientation.

[14] Ms Adams confirmed in answer to questions from the Authority that she did not understand the difference in pay to her and Ms Wetere to be for any of those prohibited grounds.

[15] The point, put shortly, is that absent breach of an agreed term of employment or unlawful discrimination, there is no legal requirement of equal pay for equal work. An employer may choose to offer different rates of pay for the same work. Ms Adams considers this unfair and unjust. That may be so, but it is not, as things stand, illegal and therefore not an unjustified action of her former employer.

[16] Because of these conclusions, it is not necessary for me to address the evidence of whether Ms Adams and Ms Wetere had identical responsibilities. However if I had to, I would have accepted the evidence of Mr Tesiram and Mr Appleby that the employer considered Ms Wetere had additional responsibilities in managing arrangements for Mr Watson's care and how she carried out her work with him warranted a higher level of pay. The employer's appointed representatives were entitled to make that assessment. And while Ms Adams does not accept there was any real difference in responsibilities, she accepts Ms Wetere had a special rapport with Mr Watson such that he was more comfortable and co-operative in her care.

### **The minimum wage**

[17] The daily rate paid to Ms Adams covered the 24 hours of each day she was required to care for Mr Watson. The evidence confirmed and Ms Adams accepted she was paid at least the statutory minimum wage for each of those hours, as summarised in the following table:

<i>Effective dates</i>	<i>Statutory Minimum</i>	<i>Daily rate paid to Ms Adams</i>	<i>Her effective hourly rate</i>
<i>1 April 2007 – 31 March 2008</i>	<i>\$11.25</i>	<i>\$300</i>	<i>\$12.50</i>
<i>1 April 2008 – 31 March 2009</i>	<i>\$12.00</i>	<i>\$300</i>	<i>\$12.50</i>
<i>1 April 2009 – 31 March 2010</i>	<i>\$12.50</i>	<i>\$300/\$310</i>	<i>\$12.50/\$12.92</i>
<i>1 April 2010 – present</i>	<i>\$12.75</i>	<i>\$310</i>	<i>\$12.92</i>

## Breaks

[18] Ms Adams says she was not provided with adequate opportunity for breaks during each 24 hour shift when she was on duty.

[19] Her employment agreement made no reference to breaks but Ms Adams had a statutory right to rest and meal breaks from 1 April 2009.

[20] Because she was paid on a daily rate, Ms Adams' pay covered the times at which she was entitled to rest and meal breaks.

[21] Ms Wetere's evidence was that she always had the opportunity to take meal breaks, morning and afternoon tea breaks and what she called "*general quiet-time for oneself*". The caregivers had their own bedroom to sleep in during the night.

[22] Ms Wetere said time for breaks included periods when Mr Watson was having naps of between one and three hours in his chair or bedroom during the day, while he was writing and reading, watching television, or meeting with family members or former business colleagues visiting the house.

[23] Diary notes produced in evidence by Ms Adams provided examples of periods when Mr Watson was asleep during the day and which provided opportunities for breaks. He also appeared to go to bed relatively early in the evening.

[24] In the light of that evidence I accept Mr Tesiram's submission that the caregiver's role was an unsupervised position in which they had adequate opportunity and full discretion to arrange and take breaks from their duties.

[25] I do not accept Ms Adams submission that she did not get adequate breaks because she could not leave the premises. Ms Adams referred me to *Idea Services Limited v Dickson*<sup>1</sup> as supporting her position. While that decision, at [60], describes a "*break*" for the purposes of the legislation as "*allow[ing] the employee a measure of*

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<sup>1</sup> (unreported, EC Wellington, WC 17/09, 8 July 2009), currently under appeal [2010] NZCA 241.

*choice about what he or she does during that time*”, I do not accept that ‘measure’ extends to a requirement that the employee must be free to leave the premises. That might be so if a worker were unable to get refreshments at their workplace. However in this particular case, food and refreshments for all breaks and meals were provided on the premises at the expense of the employer.

### **Any other entitlements**

[26] Ms Adams’ evidence also raised questions as to whether she was paid her full entitlements for work on public holidays. However I am satisfied the evidence shows any shortfalls were identified and rectified prior to the Authority investigation.

### **Determination**

[27] For the reasons given, Ms Adams does not have a personal grievance for unjustified disadvantage and her application is dismissed.

### **Costs**

[28] Mr Tesiram sought an order for costs to Mr Watson’s estate in an amount to be determined at the Authority’s discretion.

[29] Exercising that discretion and applying the relevant legal principles,<sup>2</sup> I order Ms Adam to pay the amount of \$800 as a modest contribution to the estate’s costs for an investigation meeting lasting just under two hours. Ms Adams is presently in part-time employment and may pay the costs in four monthly instalments of \$200, starting on 30 September 2010.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.