

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 168
3013554

BETWEEN MAX-NIKLAS ALLWARDT
 Applicant

A N D VICKI MCMILLAN
 Respondent

Member of Authority: David Appleton

Representatives: Parties self-represented

Investigation Meeting: Determined on the papers

Information Received: 23 June & 17 September 2017, from the Applicant
 27 August 2017, from the Respondent

Date of Determination: 2 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant is owed arrears of pay, holiday pay and statutory holiday pay in the sums set out in this determination.**
- B. There is no order as to costs, save in respect of the lodgement fee incurred by Mr Allwardt.**

Employment relationship problem

[1] Mr Allwardt claims that he is owed arrears of pay, holiday pay and statutory holiday pay, and that he has not been issued with wage and time records. Although she did not lodge a formal statement in reply, Ms McMillan denies that Mr Allwardt is owed arrears of pay but admits that he is owed holiday pay. She has not indicated whether or not she agrees that he is owed statutory holiday pay. Ms McMillan was given seven days within which to reply to Mr Allwardt's last set of information, but she did not do so. This determination is therefore based on the information at the Authority's disposal.

[2] Mr Allwardt worked between 25 February and 19 April 2017 at The Log Cabin, a café in Hanmer Springs. This business is owned by a company called Allmacs Hanmer Limited. However, Mr Allwardt did not cite this company as a respondent in his statement of problem and Ms McMillan did not argue that she was not the correct respondent. I shall therefore treat Ms McMillan as Mr Allwardt's employer, in the absence of evidence to the contrary.

[3] Mr Allwardt now resides in Germany, and I indicated to the parties that, once they had answered questions from the Authority, I would determine the matter on the papers. Both parties provided additional information to the Authority, although Ms McMillan was not completely responsive as referred to above.

[4] Having considered all the documents put forward by the parties, my conclusions are as follows.

Discussion

[5] There is no dispute that Mr Allwardt received the net total sum of \$2,676.20 during his employment, paid directly into his bank account. The net sums respectively recorded as received in Mr Allwardt's bank statement and the recorded as paid from Ms McMillan's bank statement match exactly.

[6] There is, however, a mismatch between the hours that Mr Allwardt says he worked and those recorded in payslips provided by Ms McMillan. However, neither of them state what hours he worked during his first nine days of employment, and Mr Allwardt does not know what hours he worked during his last week, but estimates 20 hours. In addition, the payslips produced by Ms McMillan suggest that Mr Allwardt worked during a period when he was actually on holiday according to him.

[7] These payslips produced by the respondent are therefore not reliable. However, Mr Allwardt's records are also not complete. When I add up the hours that Mr Allwardt says he worked (assuming he worked 20 hours during the last week, which is what the payslips indicate) he worked a total of 226.75 hours, whereas Ms McMillan's records show he worked a total of 218.25 hours. This is a difference of 8.5 hours.

[8] Mr Allwardt argues that he is owed pay for 103 hours. However, I cannot agree that that is correct. This is because the payslips that Ms McMillan produced show that Mr Allwardt was paid in respect of hours ostensibly worked while he was on leave. Even if Ms McMillan has made an error in respect of the dates when he worked, Mr Allwardt clearly did receive pay for those dates. My finding, therefore, is that Mr Allwardt is owed arrears of pay for 8.5 hours, which at \$15.75 an hour (the minimum wage from 1 April 2017) equates to \$133.88 gross.

[9] In addition, the payslips show that Mr Allwardt was not paid in accordance with the new minimum wage rate that was in effect from 1 April 2017. Mr Allwardt calculates that he worked 216 hours between 27 March and 19 April. Ms McMillan indicates that he worked 69 hours in that period.

[10] Ms McMillan has not produced compliant wages and time records in respect of Mr Allwardt's employment despite having been asked to do so. Section 132 of the Employment Relations Act 2000 (the Act) provides that, where an employer has failed to keep or produce a wages and time record in respect of that employee as required by the Act, and that failure has prejudiced the employee's ability to bring an accurate claim, then the Authority may, unless the employer proves that those claims are incorrect, accept as proved all claims made by the employee in respect of the wages actually paid to the employee and the hours, days, and time worked by the employee.

[11] Therefore, I am prepared to accept the hours stipulated by Mr Allwardt. However, the week commencing 27 March straddled the start of the minimum wage rate increase, and Mr Allwardt does not say how many hours he worked during 1 and 2 April. I shall therefore average out the 68 hours he says he worked in that week, and assume he worked 18 on 1 and 2 April. Adding up the hours worked from 1 April produces a total of 167 hours. That means that Mr Allwardt was underpaid by \$83.50 gross.

[12] In addition, I note that Mr Allwardt was under paid by \$100 net during the period 3 to 9 April by reference to the hours worked. This is because his payslip shows he was owed a net total of \$575.54, but he only received \$475.54. Grossing up the \$100 shortfall by 13% produces \$113.

[13] Further, I also note from the payslips that Mr Allwardt had KiwiSaver contributions deducted from his pay, even though he was not enrolled with KiwiSaver and did not give

consent for such deductions. These deductions need to be reimbursed. A total of \$93.20 was unlawfully deducted from Mr Allwardt's pay.

[14] Mr Allwardt believes he was not paid in accordance with the law for having worked on Good Friday and Easter Monday. Ms McMillan has not commented, and so I accept Mr Allwardt's claim. I understand that Mr Allwardt says that he was not paid the half day's pay owed for each statutory holiday¹, and was not given an alternative holiday for each². He estimates that the half days would have totalled 11.375 hours. The additional days I set at 8 hours each. This means that Mr Allwardt is owed a total of 27.375 hours. This equates to \$431.16.

[15] Finally, Mr Allwardt was not paid any holiday pay, which Ms McMillan admits. Section 23 of the Holidays Act 2003 provides that, where the employment of an employee comes to an end, and the employee is not entitled to annual holidays because he has worked for less than 12 months, the employer must pay the employee 8% of the employee's gross earnings since the commencement for the employment, less any holiday pay already paid to the employee. Mr Allwardt received the following gross amounts during his employment:

- a. \$900 in respect of the first nine days of employment;
- b. \$732 for the week ending on 12 March;
- c. \$579.50 for the week ending on 19 March;
- d. \$488 for the week ending on 26 March;
- e. \$594.75 for the week ending on 2 April;
- f. \$712.69 for the week ending on 9 April; and
- g. \$244 for the week ending on 23 April.

[16] These sums total \$4,250.94.

¹ In accordance with s 50 of the Holidays Act 2003

² In accordance with s 56 of the Holidays Act 2003

[17] In accordance with this determination, he is also due to be paid a total of \$854.74. Adding these together totals a gross sum of \$5,105.68 for the purposes of calculating holiday pay due. Eight percent of this sum produces a gross sum of \$408.45.

Orders

[18] I order Ms McMillan to pay to Mr Allwardt the following gross sums within 7 days of Mr Allwardt advising her of the bank account into which the sums are to be deposited:

- a. \$133.88 in respect of 8 hours worked but not paid for;
- b. \$83.50 in respect of the failure to increase Mr Allwardt's minimum wage rate from 1 April 2017;
- c. \$113 in respect of the discrepancy between the 12 April 2017 payslip and the net pay received;
- d. \$93.20 in respect of unauthorised KiwiSaver deductions.
- e. \$431.16 in respect of statutory holiday pay owed; and
- f. \$408.45 in respect of final holiday pay owed.

[19] Ms McMillan is also to reimburse to Mr Allwardt within the same timeframe the lodgement fee of \$71.56 which he incurred in lodging his claim in the Authority. I make no further orders as to costs.

David Appleton
Member of the Employment Relations Authority