

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 32
5308303

BETWEEN ZAHRA BARZEGARI
 Applicant

AND LITTLE TURKISH CAFÉ
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: David Flaws, Advocate for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: 26 & 27 October 2010 at Auckland

Determination: 24 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a wage arrears claim. Zahra Barzegari alleges her former employer, Little Turkish Café Limited (“LTC”), did not pay her:

- i. the minimum wage for the hours that she worked during her employment;
- ii. three days paid sick leave;
- iii. for the Good Friday public holiday on 10 April 2009;
- iv. for the public holiday on 2 January 2010;
- v. statutory entitlements for the 9 public holidays she worked;
- vi. annual holiday pay;
- vii. for her last week of work.

[2] Ms Barzegari alleges her employment with LTC started on 21 March 2009. She says she worked very long days six or seven days a week, with varying start and

finish times. Ms Barzegari produced a schedule of what she says were her days and hours of work.

[3] Ms Barzegari says that from 21 March to 17 May 2009 she was paid \$9.00 per hour in cash, which was given to her in an envelope each Wednesday by either Eddie Almay (the owner of LTC) or Majid Soleymanyfard (the Duty Manager).

[4] From 18 May 2009 to 14 February 2010 Ms Barzegari says that she received her wages each week in an envelope containing a cheque for the same weekly amount of \$214.50 plus cash for the extra hours she worked over and above 20 hours per week. The extra cash payment was calculated at \$9.50 per hour for the hours worked from 18 May to 08 November 2009, then \$10 an hour for the hours worked from 9 November 2009 until 14 February 2010.

[5] She was not paid at all for the hours she worked during the week 15 – 21 February 2010. Nor was she paid 22 and 23 February 2010 which were the last two days of her notice period.

[6] LTC admits not paying Ms Barzegari:

- i. for her last week of work;
- ii. her statutory entitlements for the public holidays which it had recorded her as working;
- iii. her unused and accrued annual holiday entitlements upon termination.

[7] LTC says that Ms Barzegari started work on 20 May 2010 and that she was employed for 20 hours per week to be worked from 10.30am until 2.30pm Mondays to Fridays. LTC referred the Authority to what it describes as its “wage and time record” as being the true record of her days and hours of work. LTC says it has paid Ms Barzegari the minimum wage for the hours it has recorded her as working.

Issues

[8] The following matters need to be determined:

- i. What date did Ms Barzegari start work?

- ii. What days and hours did Ms Barzegari work?
- iii. Has Ms Barzegari been paid the minimum wage for the hours she worked?
- iv. Has Ms Barzegari been paid her Holiday Act 2003 entitlements?
- v. What is Ms Barzegari owed?

What date did Ms Barzegari start work?

[9] Ms Barzegari says she started work with LTC on 21 March 2009 but LTC says she started on 30 May 2009.

[10] Ms Barzegari was introduced to Mr Almac by Mehdi Abhari, who was one of his friends. Mr Adhari said he made the introduction in May 2009. Mr Almac thought it happened later in June, but accepts that his recollection conflicts with the LTC monthly employer schedule which records Ms Barzegari's start date as 30 May 2009.

[11] Jung-ok Baek (who is Mr Almac's wife) also works at the LTC and she is responsible for the record keeping. After Ms Barzegari provided evidence that she had received a cheque on 27 May 2009, for work from 18-24 May 2009, Ms Baek said the date in the monthly employer schedule was wrong and Ms Barzegari started work a week before then (i.e. on Sunday 23 May 2009). Ms Barzegari says her first cheque dated 27 May 2009 for \$214.50 covered the period 18 – 24 May 2009. The pay week ran from Monday to Sunday the preceding week and staff were paid on Wednesdays.

[12] Mr Soleymanyfard, the TLC Duty Manager, was not sure what date Ms Barzegari started work, but thought it was around May/June 2009.

[13] Ms Barzegari says she first discussed working at LTC with Mr Almac on 20 March 2009, and was told to come in the next day for training, which she did. She says she worked on an unpaid basis from 16.30pm to 22.00 pm on 21 March 2009 and from 11.30am to 16.30pm on 22 March 2009. Ms Barzegari says her paid work then started on 23 March 2009.

[14] I prefer Ms Barzegari's recollection of her start date as it was more specific than the evidence of other witnesses and it was also supported by other circumstantial evidence. For example, on 30 March 2009 Ms Barzegari's husband Hossein Derakhshan cancelled a Christchurch rental car booking from 5-16 April 2009 "due to an unprecedented event for my wife". They say that they cancelled their planned holiday because Ms Barzegari obtained employment with LTC. This was supported by an invoice dated 1 April 2009 which cancelled her flight from Auckland to Christchurch and which had been booked on 7 March 2009.

[15] There is also an email dated 7 April 2009 from Mr Derakhshan to their landlord saying his wife needed proof of their address, which he says was required to enable Ms Barzegari to obtain Ms Barzegari's IRD number.

[16] There is a record of a text sent by Ms Barzegari to Mr Almac's mobile phone on 12 April 2009 and of two calls being made via internet VOIP under Ms Barzegari's user name to LTC's phone number on 17 May 2009. There is also a record of an internet chat between Mr Derakhshan and a friend at 16.28pm on 23 May 2009 which refers to her being at work.

[17] Ms Barzegari also produced a CV and job applications, which were created in November 2009 – well before this dispute over wages occurred, which stated she had started work at LTC in March 2009.

What days and hours did Ms Barzegari work?

[18] Ms Barzegari said each worker had to write down their hours of work each week, and she would submit these records to Mr Almac on Monday, for the preceding pay week which ran Monday to Sunday. The other witnesses denied any record of their hours was kept. Mr Almac said all employees had set days and hours of work, so there was no need for a record to be kept.

[19] I prefer Ms Barzegari's evidence that a record was kept because that is a more likely scenario. All of the witnesses agreed that start and finish times and even days of work would sometimes vary, so their set hours would not necessarily accurately

reflect their work hours in any given week. Mr Almacny was not at the LTC all of the time so he would have had no way of knowing about variations to employees' working hours unless a record was kept. These records were not produced.

[20] Ms Barzegari says that in parallel to the hours she submitted to Mr Almacny she also kept an excel spreadsheet of her days and hours of work which she updated every day or every second day.

[21] Ms Barzegari's record show she worked every day of the week with her start times ranging from 9.00am to 11.30am and finish times ranging from 14.30pm to 23.00pm. Of the 338 days Ms Barzegari says she was employed she has recorded only 20 days on which she says she did not attend work.

[22] Mr Almacny's record shows that Ms Barzegari worked from 11am- 4pm from 30 May to 2 June 2009, then from 10.30am to 2.30pm from 3 June 2009 until 23 February 2010, unless specifically marked as a day off. This record shows that Ms Barzegari never worked on Saturdays or Sundays and that she was on leave for 15 of her normal working days.

[23] There was no written employment agreement, and no written record of what days and hours the parties had agreed Ms Barzegari would work. Ms Barzegari says she worked full time every day of the week. TLC says she worked part time for 20 hours per week form Monday to Fridays only.

[24] There is obviously a critical conflict in the evidence. After carefully considering all of the evidence I have concluded on the balance of probabilities, that Ms Barzegari's record of her days and hours of work is more likely to be correct.

[25] I was not satisfied with the quality of the evidence I heard from current and former LTC employees. I did not consider existing employees of TLC and relatives of Mr Almacny to be impartial witnesses. I also consider that the evidence from three former TLC employees was unsatisfactory.

[26] The main factors which lead me to prefer Ms Barzegari's record include:

- i. She made a contemporaneous record of her days and hours of work;
- ii. The LTC record was generic in that it had the same start and finish times each day, regardless of what times she did actually start and finish;
- iii. LTC witnesses agreed that Ms Barzegari's start and finish times sometimes varied from those recorded, so that its record was not accurate;
- iv. She was able to tell me what staff were on duty and when they started and finished work during periods when she was working. She was also able to describe their main tasks. It is unlikely that she would have been able to do so if she had only worked the limited hours LTC said she did;
- v. Bank records show deposits which correspond to the cash payments she says she received for the additional hours she worked. There was no other likely explanation for these funds;
- vi. There is a record of an internet chat session between her husband and his friend on 23 May 2009 in which her husband says her job starts at 10-11am until evening. This is well before an issue arose, and I consider it unlikely that her husband would have made that comment if she always finished at 2.30pm;
- vii. In an internet chat on 22 July 2009 her husband told his friend that his wife normally comes home from work at 5-6pm;
- viii. On 29 May 2009 Ms Barzegari and her husband (who was at that time in Iran) exchanged emails in which she told him she had worked until 7.30pm that night, which is reflected in her record of work hours;
- ix. At 21.14pm on 30 May 2009 she emailed her husband that she had just got home from work, which is consistent with her work records;
- x. On 21 October 2009 her husband had an internet chat with a friend who was trying to arrange a holiday together. The friend asked when Ms Barzegari was off work, and her husband responded "*nobody knows [...] this week she was not off at all*".

This is consistent with her record and inconsistent with LTC's evidence that she never worked weekends;

- xi. A text message from Mr Al Macy to Ms Barzegari on 28 December 2009 asked her to start work at 10am the following day;
- xii. Her husband texted her at 16.11pm on 6 January 2010 asking when she would finish work. He was unlikely to have sent that if she was not working. Her records show she finished at 5pm that day;
- xiii. There is an email from her former colleague Masud Niya telling her to open the cafe door (i.e. open the cafe for the day) the next day, which is contrary to evidence from TLC's witnesses that she never opened the cafe;
- xiv. Masud Niya texted her at 9.55am the next day to make sure she was at work and had opened the door;
- xv. She claimed ACC for a back injury she said she sustained at work on 16 January 2010, which was a Saturday. Her ACC form stated that the accident had occurred whilst she was cleaning the kitchen and carrying heavy buckets;
- xvi. Her husband texted Mr Al Macy on 20 March 2010 asking for her final week's pay, which had been withheld, to be paid to her. The text referred to the fact that she had worked 51 hours in her last week at work. Mr Al Macy never disputed that. If it was untrue I would have expected him to have immediately said she worked 20 not 51 hours.

[27] Other factors which influenced my assessment of which version of events was more likely to be correct included;

- i. LTC's monthly employer schedules were demonstratively inaccurate. Employment start and finish times were missing or incorrect;
- ii. Some employees (such as Masud Niya and Sunny Yung Keong) have not been recorded as working at LTC, despite doing so;

- iii. Ms Barzegari's unchallenged evidence was that LTC was open for about 136 hours per week. That meant that for the 31 week period from 27 May to 31 December 2009 LTC opening hours would have been around 4216. The IRD records show LTC paid a total of 3215 hours to employees over that period. This discrepancy could be accounted for by Ms Barzegari's evidence that staff were paid extra hours in cash which did not go through the books;
- iv. Upon termination, LTC did not pay Ms Barzegari and other former employees their annual holiday pay entitlements;
- v. LTC admitted not paying employees their full public holiday entitlements;
- vi. When Ms Barzegari and another former employer gave notice, LTC ended their employment immediately and did not pay them in lieu of notice;
- vii. LTC admitted owing Ms Barzegari wages for her last week of work but has still not paid it to her;
- viii. The record kept by LTC did not properly comply with the requirements of section 130 of the Employment Relations Act 2000;
- ix. LTC did not comply section 65 of the Act because it failed to give employees written employment agreements;
- x. It did not have an accident register for reporting work related accidents.

[28] These other factors indicated LTC was an employer that was not fully or properly complying with its employment related statutory obligations, which lead me to conclude that its record of Ms Barzegari's days and hours of work was probably not as accurate as her record.

[29] Ms Barzegari has satisfied me, on the balance of probabilities, that she worked the hours set out in her record which was produced as Appendix B.

Has Ms Barzegari been paid the minimum wage for the hours worked?

[30] Ms Barzegari was entitled to be paid \$12.00 gross per hour up until 31 March 2009 and \$12.50 gross per hour from 1 April 2009 until her employment ended.

[31] Ms Barzegari received \$9.00 per hour for the hours she worked from 21-31 March 2010. There is a shortfall of \$3.00 per hour for that period.

[32] From 1 April until 17 May 2009 Ms Barzegari was paid \$9.00 per hour, when she should have been paid \$12.50 per hour. There is a shortfall of \$3.50 per hour for the hours worked over this period.

[33] From 18 May to 08 November 2009 Ms Barzegari was paid \$9.50 per hour, when she should have been paid \$12.50 per hour. There is a shortfall of \$3.00 per hour for the hours she worked over this period.

[34] From 09 November 2009 to 17 February 2010 Ms Barzegari was paid \$10 per hour for the hours worked when she should have been paid \$12.50 per hour. There is a shortfall of \$2.50 per hour over this period.

[35] Ms Barzegari was not paid for the hours she worked from 15 to 21 February 2010 when she should have been paid \$12.50 per hour. Although LTC did not pay Ms Barzegari for 22 and 23 February 2010 which were the last two days of her notice period it should have done so, despite her not working those two days because LTC told her to remain away from work.

[36] Ms Barzegari has not been paid the minimum wage for all the hours she worked. I find that she was paid by cheque for the first 20 hours she worked and that she was paid cash, which was not taxed, for additional hours she worked over and above 20 per week. I find that the net amount paid to Ms Barzegari by LTC (in a combination of cheque and cash) is less than what she would have been paid had she been paid the minimum wage and her full Holidays Act 2003 statutory entitlements.

[37] In her Statement of Problem, Ms Barzegari claims she should have been paid extra for working weekends. There is no statutory entitlement to higher pay for

weekend work and I find that there was no agreement between the parties to pay her at a higher rate on Saturdays and Sundays. Accordingly, that element of her claim is not upheld.

Has Ms Barzegari been paid her Holidays Act 2003 entitlements?

Annual holidays

[38] LTC recorded 15 days that it says Ms Barzegari did not work. I do not accept that is an accurate record of her annual leave, because on two of those days (22 and 23 February 2010) she was effectively suspended because Mr Almacy told her not to come to work.

[39] I prefer Ms Barzegari's evidence that she did not take any annual leave. She was therefore entitled to be paid 8% of her total gross earnings as holiday pay upon termination. She has not been paid anything.

Sick leave

[40] Ms Barzegari says she was on sick leave for her work related back injury for 17, 18, and 19 January 2010. She had qualified for paid sick leave and these would have been normal work days for her, so she was entitled to be paid for this sick leave. LTC has only paid her \$10 per hour for 4 hours a day for each of these days, so there is a shortfall.

[41] Ms Barzegari's sick leave for 17-19 January 2010 should have been calculated based on her relevant daily pay, which is the amount she would have received had she worked on those days.¹

Public holidays

[42] I do not accept LTC's evidence that Ms Barzegari only worked three public holidays (1 June 2009; 26 October 2009; and 28 December 2009).

¹ Sections 9 & 71 of the Holidays Act 2003

[43] I prefer her evidence that she worked the following public holidays;

- i. Easter Monday 13 April 2009;
- ii. Anzac Day 25 April 2009;
- iii. Queens Birthday 1 June 2009;
- iv. Labour Day 26 October 2009;
- v. Christmas Day 25 December 2009;
- vi. Boxing Day 26 December 2009;
- vii. New Year's Day 1 January 2010;
- viii. Auckland Anniversary 1 February 2010;
- ix. Waitangi Day 6 February 2010.

[44] She should have been paid time and a half for the hours she worked on the nine public holidays² above and she should have received an alternative day's holiday for each of the nine public holidays she worked.³ Instead she only received pay for 4 hours at \$9.50 per hour for 1 June 2009 and 4 hours at \$10 per hour for 26 October 2009 and 28 December 2009. There is clearly a shortfall in what she was paid.

[45] Ms Barzegari did not work on Good Friday (10 April 2009) or the day after New Year's Day (2 January 2010). These two public holidays fell on what would otherwise have been working days for her. She was therefore entitled to be paid not less than her relevant daily pay⁴ for these two public holidays she did not work. That did not occur.

What is Ms Barzegari owed?

[46] It is clear LTC owes money to Ms Barzegari. However, the exact amount owed was not calculated by the parties in their evidence. It is now a matter for the parties to calculate the amount she was owed based on my findings, and then to deduct from that the amount (cash and cheques) she has already been paid, in order to determine what amount is she is still owed.

[47] I accept Ms Barzegari's evidence that she has received \$15,172 in cash and

² Section 50 Holidays Act 2003

³ Section 56 Holidays Act 2003

⁴ Sections 49 & 9 Holidays Act 2003

\$8,365.50 in cheques and that LTC has paid PAYE of \$1,384.50 on her earnings. LTC is entitled to deduct these amounts which have already been paid from the total amount due to Ms Barzegari. The balance after this deduction has been made is the amount due and owing to her, from which LTC must deduct tax at the appropriate tax rate in the normal way before paying Ms Barzegari the net amount of her unpaid wages.

[48] I make the following findings upon which the parties' calculations should now be based. The days and hours of work are to be taken from Ms Barzegari's Appendix B and these are to be used for these calculations. She is to be paid:

- i. \$12.00 gross per hour for the hours worked from 21 – 31 March 2009, less the amount of cash and cheques already paid to her over that period;
- ii. \$12.50 gross per hour for the hours worked from 1 April 2009 until 21 February 2010, but excluding;
 1. All public holidays (which are to be calculated separately); and
 2. 17, 18, 19 January 2010 (which is to be calculated separately as sick leave).
- iii. The amount LTC has already paid to her by way of cash and cheque is to be deducted from the amount owed under (ii) above;
- iv. Relevant daily pay, as calculated in section 9(3) of the Holidays Act 2003, for 17, 18 and 19 January 2010 which are to be treated as paid sick leave, less the amount already paid for those days;
- v. Relevant daily pay plus half that amount again, as per section 50 of the Holidays Act 2003, for the hours she worked on the public holidays set out in paragraph 43. Any amount already

paid for each of these public holidays is to be separately identified, and may then be deducted from the amount owing.

- vi. Relevant daily pay for the alternative holidays which she earned for working on the public holidays set out in paragraph 43 above, but which she had not used as at the termination of her employment. She did not take any alternative days whilst employed and was not paid for any alternative days' holiday upon termination, so no deduction is to be made from this amount;
- vii. Relevant daily pay for 10 April 2009 and 02 January 2010 which were public holidays which would otherwise have been working days, which she did not work on and which I find she was not paid for;
- viii. Annual holiday pay of 8% of her total gross earnings. This is her total gross earnings after the correct calculations have been applied to the various amounts I have found that she is owed. I have found that she did not take any annual holidays, so no deduction is to be made from this amount;
- ix. She is entitled to be paid for 22 and 23 February 2010 because she would have attended work these days if Mr Almay had not told her not to come to work. Because there is no roster to determine what hours she would have worked on these two days, I consider it appropriate for her to be paid the equivalent of her relevant daily pay for these two days, which is to be calculated in accordance with section 9(3) of the Holidays Act 2003, which will enable the parties to calculate her average daily rate of pay based on her previous 4 weeks' work.

Orders

[49] The parties are ordered, within 14 days from the date of this determination to calculate and, if possible, agree on the total amount owed to Ms Barzegari.

[50] If agreement is not reached, then each party may file a memorandum which identifies the amount that party believes Ms Barzegari is owed, and why. It must also clearly set out what amounts should be paid in accordance with each entitlement identified in paragraph 48, and in particular;

- i. the amount that should have been paid under each of the headings in paragraph 48 above,
- ii. the amount that was actually paid, and
- iii. the amount that is now owed.
- iv. The net and gross amounts of all amounts calculated
- v. the rate of tax to be deducted and the amount of tax to be deducted for each of the amounts above.

[51] The above memorandum must be filed within 21 days of the date of this determination. No late filing will be acceptable without the prior leave of the Authority.

Costs

[52] Ms Barzegari has been successful and is entitled to a contribution to her costs.

[53] The parties are encouraged to agree costs. In that is not possible, then the applicant has 21 days from the date of this determination within which to submit a costs memorandum and the respondent has 14 days within which to respond. Prior leave is required for departure from this timetable.

[54] Proof of the applicant's actual costs will be required in support of a costs application. I can indicate that, subject to any submissions, I am likely to adopt the Authority's usual tariff based approach to costs.

Rachel Larmer
Member of the Employment Relations Authority