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Barzegari v Little Turkish Café Limited [2011] NZERA 227; [2011] NZERA Auckland 174 (29 April 2011)

Last Updated: 6 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 174 5308303

BETWEEN ZAHRA BARZEGARI

Applicant

AND LITTLE TURKISH CAFE

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions:

Rachel Larmer

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

On the papers

28 February 2011 Applicant's submissions 2 March 2011 Respondent's submissions 14 April 2011 Joint memorandum of counsel 14 April 2011 Applicant's submissions 27 April 2011 Respondent's submissions

Determination:

29 April 2011

DETERMINATION OF THE AUTHORITY

[1] In *Barzegari v Little Turkish Cafe Limited*^[1] liability was established but quantum was not fixed. The applicant succeeded on her wage arrears claims but the Authority did not have sufficient evidence to be able to determine remedies. This determination deals with the quantum of the applicant's claim.

[2] The parties were directed to attempt to resolve remedies by agreement. Agreement has been reached on some aspects of the applicant's claim but not on others. The parties were \$1,314.20 apart in their calculations.

[3] It now falls to the Authority to fix remedies. The applicant's entitlements are to be calculated in accordance with the provisions of the [Holidays Act 2003](#) ("HA03"), which applied at the time her entitlements arose.

[4] The difference between the applicant's calculations and the respondent's calculations is that the applicant has used the formula set out in [section 9\(3\)](#) HA03 to calculate her Relevant Daily Pay ("RDP") rate. The applicant then applied this RDP rate to her various wage arrears claims which HA03 specified were to be calculated using RDP.

[5] The respondent calculated the applicant's RDP rate by taking the applicant's total gross earnings over the whole period of her employment and then dividing that by the number of days she was employed. The respondent was invited to identify the relevant section in the HA03 which it considered allowed RDP to be calculated in this way, but it did not do so.

[6] Clearly the respondent did not calculate RDP in accordance with the [section 9\(3\)](#) formula in the HA03. Despite being invited to explain why it did not consider the [s9\(3\)](#) formula applied, the respondent did not do so.

[7] The respondent's liability to the applicant is for the period 21 March 2009 to 23 February 2010. I find the average daily pay calculation in [section 9A\(2\)](#) HA03, which is what the respondent appears to have adopted, does not apply because this amendment to HA03 did not come into force until 1 April 2011.

[8] I find the formula in [s9\(3\)](#) HA03 applies. The applicant's days and hours of work varied from week to week so it was not possible to determine what she would have received had she worked on any particular day. This meant her RDP could not be calculated in accordance with [s9\(1\)](#) HA03, so it fell to be determined under the [s9\(3\)](#) formula.

[9] The days and hours of work are to be taken from the applicant's Appendix B and these are to be used for these calculations.^[2] I find the applicant was entitled to be paid:

- i. \$424 gross being \$12.00 gross per hour for the hours worked from 21 - 31 March 2009;
- ii. \$28,775 gross being \$12.50 gross per hour for the hours worked from 1 April 2009 until 21 February 2010, but

excluding public holidays and 17 - 19 January 2010 (which is to be calculated as sick leave).

- iii. \$114.34 gross as paid sick leave on 17 January 2010 in accordance with [s9\(3\)](#) formula of RDP;
- iv. \$111.42 gross as paid sick leave on 18 January 2010 in accordance with [s9\(3\)](#) formula of RDP;
- v. \$111.70 gross as paid sick leave on 19 January 2010 in accordance with [s9\(3\)](#) formula of RDP;
- vi. \$1,340.60 gross for each day of the following nine public holidays she worked; 13 April 2009; 25 April 2009; 1 June 2009; 26 October 2009; 25 December 2009; 26 December 2009; 1 January 2010; 1 February 2010 and 6 February 2010.
- vii. \$894.99 gross for the nine alternative day holidays she earned as a result of working on the nine public holidays identified in subparagraph vi above.
- viii. \$60.24 gross for 10 April 2009 being a public holiday she did not work;
- ix. \$115.53 gross for 2 January 2010 being a public holiday she did not work;
- x. \$89.50 gross for 22 February 2010 being a day the respondent told the applicant to remain away from work;
- xi. \$93.31 gross for 23 February 2010 being a day the respondent told the applicant to remain away from work.
- xii. \$2,776 as annual holiday pay upon termination being 8% of her total gross earnings of \$34,906.63.

[10] I find the applicant should have been paid a total of \$34,906.63 gross during her employment with the respondent, being the total of the amount due to her in accordance with paragraph 9.

[11] The applicant has already received a total of \$23,537.50 net being \$15,172 in cash and \$8,365.50 in cheques.

[12] The respondent has paid PAYE of \$1,384.50 on the applicant's total gross earnings during her employment with it.

[13] The respondent has therefore paid the applicant \$24,922 gross which means the applicant has been underpaid wages of \$9,984.63 gross.

[14] The Authority has the discretion under clause 11 of Schedule 2 of the [Employment Relations Act 2000](#) ("the [Act](#)") to award interest at the rate set by the [Judicature \(Prescribed Rate of Interest\) Order 2008](#), which is the means of setting the rate authorised by the [Judicature Act 1908](#).^[3]

[15] The respondent submitted interest should not be awarded on the wage arrears. It submitted that because interest had not been awarded in the liability determination, the Authority did not have jurisdiction to award it in its quantum determination. I do not accept that because the [Act](#) does not restrict the Authority's discretion in that way.

[16] The respondent also submitted that because the applicant did not claim interest in her Statement of Problem or submissions, the respondent had not been put on notice of a claim for interest so it would be a breach of the rules of natural justice to award it.

[17] I do not accept that. The applicant is a young woman who arrived in New Zealand with very limited English language skills. She filed her Statement of Problem herself and subsequent to that received some assistance from an employment advocate who was not legally qualified.

[18] The Authority put the parties on notice it was considering an award of interest, and it sought submissions on that, so the respondent had an opportunity to be heard on that issue. To award interest in those circumstances is not a breach of natural justice.

[19] I consider it is appropriate to exercise the Authority's discretion to award the applicant interest. The respondent has had the benefit of the applicant's money since she was first employed on 21 March 2009. More than two years later she has still not received what she should have been paid by the respondent.

[20] I order the respondent to pay interest at the rate of 8.4% [\[4\]](#) per annum from 23 February 2010 (which was her last day of work) on the gross amount owing of \$9,984.63 up until the date on which that amount has been paid in full.

[21] This award means the applicant will not get the benefit of interest on the amounts she was owed from 21 March 2009 to 23 February 2010, which I consider is fair given the high interest rate [\[5\]](#) which applies from 23 February 2010 until the amount owing has been paid in full.

Rachel Larmer

Member of the Employment Relations Authority

[\[1\]](#) [2011] NZERA Auckland 32

[\[2\]](#) Ibid 1

[\[3\]](#) [s.87\(3\) Judicature Act 1908](#)

[\[4\]](#) As set by the [Judicature \(Prescribed Rate of Interest\) Order 2008](#)

[\[5\]](#) The Authority is bound by the [Judicature \(Prescribed Rate of Interest\) Order 2008](#) and cannot adjust the rate of interest awarded, so the current rate of 8.4% per annum must be applied.

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