IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 505
5514446

	BETWEEN	SEREEN SABANA BEGUM Applicant
	AND	SAIYAD ENTERPRISE LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Shazia Ali for the Respondent
Investigation Meeting:	5 November 2014
Determination:	8 December 2014

DETERMINATION OF THE AUTHORITY

A. Sereen Begum's application for an order for wages arrears for amounts said to be due for annual leave and overtime hours is declined.

B. Saiyad Enterprise Limited (SEL) must pay Ms Begum:

(i) $280 in refund of a car towing fee wrongfully deducted from her wages; and

(ii) A further two days' pay for sick leave taken in May 2014.

C. SEL must calculate and pay to Ms Begum amounts due to her for public holidays that fell on days of the week that she would otherwise have worked.

D. SEL is not entitled to deduct a $1300 training course fee from Ms Begum's wages.

E. SEL must also reimburse Ms Begum $71.56 for the Authority

application fee.

F. The payments found due to Ms Begum in this determination must be calculated and paid to her within 42 days of the date of this determination.

Employment relationship problem

[1] Sereen Begum has worked in a hairdressing business run by Saiyad Enterprise Limited (SEL) under the trading name of Hair Dot Com since November 2012. Through 2013 she developed a friendship as well as working relationship with the business co-owner and co-director Shazia Ali. This included the two women going shopping and to the gym together, attending a makeup course and Ms Begum sharing concerns about her family life with Ms Ali. However by May 2014 various issues resulted in a deterioration of their relationship as employee and employer. Ms Begum requested a meeting with Ms Ali and Ms Ali's husband and business partner Shahil Shiron about those work issues and then, when not satisfied with the outcome of that meeting, sought mediation assistance. Her concerns were not resolved to her satisfaction in mediation and Ms Begum lodged an application in the Authority. She sought orders relating to whether she was paid properly for overtime hours, her annual leave entitlement, pay for sick leave, deductions from her wages for amounts said to be loans from the company, and whether PAYE deductions from her wages had been paid to IRD.

[2] SEL, in reply, said some overtime was paid in cash but other hours were not owed, Ms Begum has traded some annual leave entitlements for cash payments, and other deductions from her wages were for agreed loans.

Investigation and issues

[3] In investigating the issues raised by Ms Begum's application the Authority received evidence from her, her partner Ritesh Prasad, Ms Ali, and Ms Ali's mother Shareen Ali. They each provided written witness statements and, under oath or affirmation at the investigation meeting, answered questions. The parties also provided various background documents about hours worked, wages paid, and their

communication. At my request an Authority administrator prepared an analysis of the information that the parties had provided about what they said were the hours worked and wages paid. That analysis was provided to the parties during the investigation meeting and the differences it showed were discussed with them.

[4] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[5] The following issues required determination:

(i) Whether Ms Begum was entitled to a wage arrears order for overtime hours and annual leave that she said were due to her but not paid; and

(ii) Whether Ms Begum was paid for all the sick leave to which she was entitled; and

(iii) Whether deductions could lawfully be made from her wages for a car towing fee and for the fees for a professional make-up course; and

(iv) Whether PAYE deducted from her wages was properly paid to IRD.

Overtime

[6] Ms Begum was provided with a written employment agreement around the time that she started work but she and Ms Ali disagreed in their evidence as to whether Ms Begum had signed a copy of the agreement then. Ms Ali agreed however that the terms offered were the basis on which Ms Begum was employed. The agreement stated ordinary hours of work for a range of hours from Monday to Saturday totalling 40.5 hours and a pay rate to be paid for hours "*actually worked*". From October 2013 Ms Ali decided not to open the business on Mondays so that was no longer a usual work day for Ms Begum.

[7] The written agreement did not provide for overtime hours but Ms Begum said she had offered to work additional hours and Ms Ali had verbally agreed to pay her in cash for that work. In her evidence Ms Ali agreed she had asked Ms Begum to work overtime on four occasions and paid her in cash for that work. Ms Begum accepted she was paid that cash (to a value of about $400) but said she was owed for a total of 1121 additional hours. However a comparison of the differing information from both

parties about the hours said to have been worked suggested the alleged shortfall amounted to around 658 hours between January 2013 and August 2014 – with a value of around $9000.

[8] I have concluded the evidence was not strong enough to establish Ms Begum's claim for additional pay for overtime hours. There were two difficulties with it. Firstly, there was conflicting evidence on whether Ms Ali had agreed to Ms Begum working extra hours on a paid basis. Secondly, Ms Begum's claim about the hours worked was based on material that she and Mr Prasad prepared recently rather than any record of her actual hours of work made at the time.

[9] Ms Ali agreed Ms Begum had stayed late at work on some occasions but said that was because Ms Begum said she wanted to get more experience and to avoid going home. The reasons related to confidences that Ms Begum shared with Ms Ali about her family life. I have accepted and preferred Ms Ali's evidence on that point. It disclosed no agreement that those extra hours spent at the salon were to be on a paid basis.

[10] Ms Begum's claim for overtime hours arose because – according to his evidence – her partner Mr Prasad noticed "*irregularities*" in her pay that he said led to "*tension and many arguments*" between him and Ms Begum. He wanted to know why she told him that she was working overtime but it did not show up in the wages paid to her by the company. He said he noticed this some time in the middle of 2013 and other evidence from him confirmed that was also around the time that he became unemployed for around a month. Ms Begum later brought home from work what she and Mr Prasad referred to as a 'log book'. It was the salon's booking diary for clients. Based on the listings of client appointment times Ms Begum and Mr Prasad drew up a table of what they said were her working hours over the months from January 2013 to August 2014. Ms Begum said she then returned the log book to the salon but Ms Ali said she had not been able to find it since.

[11] I concluded I could not rely on the account of hours compiled by Ms Begum and Mr Prasad as tipping the balance of probabilities on what was more likely than not to be true. It was not supported by any record Ms Begum made at the time. It was also based on an assumption that she always worked from the time of the first client appointment to the last one on each of the days on which she said she had

worked unpaid overtime. It also did not acknowledge any of the days for which she accepted Ms Ali had paid her cash for working extra hours.

Annual leave

[12] Ms Begum said she was not provided with her full annual leave entitlement. However Ms Ali said Ms Begum had asked for and been given cash payments for some of that entitlement. This occurred after Mr Prasad lost his job in the middle of July 2013 and Ms Begum had asked for her holiday pay to be paid out to help pay rent and living costs. Ms Ali agreed to the request. A copy of a Facebook message exchange between Ms Ali and Ms Begum in September 2013 confirmed the likelihood that those payments were made as Ms Ali suggested. In one message Ms Ali referred to having paid $1200 to Ms Begum by that time.

[13] Although the Holidays Act 2003 allows for a maximum of only one week of an employee's annual holidays to be paid out in cash each year, it was clear in Ms Begum's case that the payment of what amounted to more than that was made solely at her request (without any pressure or requirement from the employer) and was agreed to by Ms Ali as what she thought was a favour to a friend. In those circumstances I did not consider that the substantial merits of the case required a finding under s28B(2) of the Holidays Act that the payments made were incorrect (and which, if made, would have meant Ms Begum's entitlement to that portion of the holiday would remain in force as if no payments had been made).

[14] Ms Ali also said Ms Begum had agreed to have the cost of a $1300 fee for a professional make-up course (that they both attended at a central city training school in February 2014) credited against the value of her annual leave entitlement. Ms Begum denied agreeing to that arrangement. Although Ms Begum's claim initially suggested that amount (or hours to its equivalent) had already been deducted from her annual leave entitlement, pay slips issued to her since the parties attended mediation in June 2014 show the sum of $1300 as a separate amount owed to the company. Ms Ali confirmed that amount – while still claimed as a debt by SEL – had not been deducted from Ms Begum's annual leave entitlement.

[15] Ms Begum had since taken paid annual leave, most recently in August 2014, and her pay slips from July to October 2014 showed the usual accumulating entitlement recorded in hours (adjusted for days taken in August).

[16] Accordingly I concluded Ms Begum had not made out her claim that SEL failed to provide her holiday pay or that her annual leave entitlement was wrongfully reduced.

Sick leave

[17] The employment agreement offered to Ms Begum in November 2012 included a term stating that she was entitled to three days paid sick leave after six months service. An updated agreement offered to her after mediation in June 2014 included the same term.

[18] Neither provision complied with the statutory minimum required by sections 63 and 65(2) of the Holidays Act 2003 – that is five days a year for each 12-month period after the first six months of service. Under s 66 any unused annual entitlement also carries over into following years, to a maximum accumulation of 20 days.

[19] In Ms Begum's case that meant she was entitled to five days sick leave in the period from 12 May 2013 to 11 May 2014. Section 63(3) of the Holidays Act also allows for SEL to agree that she could take sick leave entitlement accumulating in the 2014-5 year in advance.

[20] Ms Ali's evidence confirmed that she had operated on the mistaken assumption Ms Begum was entitled to only three days sick leave. The result was that Ms Begum was not paid for two days that she was away from work on sick leave in May 2014. She was entitled to be paid for those two days from her 2013-4 entitlement that was wrongly assumed to be extinguished after only three days.

Wage deductions and discrepancies

[21] The analysis of the parties' pay information – that include the wage book kept by Ms Ali and the bank account statements of Ms Begum showing net wages paid by SEL – identified an apparent discrepancy of $686 between what was due to be paid according to SEL and the amounts actually transferred to Ms Begum's account.

[22] Ms Ali's explanation of the difference was that amounts were deducted for small cash advances Ms Begum had asked for and had agreed could be taken from wages owed to her. Ms Begum's evidence confirmed she had received money on that basis – such as a small amount to send to her mother in Fiji and another when her sister left New Zealand. The amounts were not recorded in the wage book until May 2014 but Ms Ali has done so since. Those records show amounts between $20 and $50 advanced in several weeks and then deducted from the amount transferred as wages to Ms Begum's bank account that week. Ms Begum had no objection about those small advances that she had asked for and had agreed could be deducted from her wages.

[23] However there were two items where Ms Begum denied she had agreed to have deductions made from her wages. One was for a car-towing fee of $280 she borrowed from Ms Ali in late May 2014. The other was for fees of $1300 for a professional make-up course that Ms Ali said she paid on Ms Begum's behalf in February 2014.

[24] In both cases Ms Begum's argument was valid. Ms Ali confirmed she had no written agreement with Ms Begum for the deduction of those amounts to be made from Ms Begum's wages. The combined effect of sections 4 and 5 of the Wages Protection Act 1983 is that no such deduction from Ms Begum's wages could be made without either her written request or her written consent.

[25] Further, I have concluded neither amount was a valid debt that SEL was entitled to reclaim from Ms Begum.

[26] Ms Begum incurred the car-towing fee on 25 May 2014 after she drove Ms Ali to a hairdressing course in the central city that day. Ms Ali had arranged for Ms Begum to be her 'colour model' at the course and had Ms Begum drive her to the city in Ms Begum's car. Ms Ali had said she would pay for the fuel. Ms Begum was also paid her usual wages for the day. However at the venue Ms Begum parked in a car park that she had previously used while attending the earlier make-up course. On those earlier occasions use of the car park was not restricted. On this particular day and time, however, it was a restricted use car park. As a result her car was towed away. Ms Begum borrowed the fee to have the car released from Ms Ali.

[27] Ms Ali had not seen where the car was parked because she had got out before Ms Begum drove it into the car parking area and said Ms Ali was not responsible for Ms Begum's mistake. Neither, I have concluded, was Ms Begum. She would not have been there or parking her car but for Ms Ali, as her employer, arranging for Ms Begum to be her model and to drive to her to the course. Ms Begum's parking choice was an error but not one that Ms Ali was entitled to demand be paid for from Ms Begum's wages. The amount was wrongfully deducted and I have ordered that it be repaid to Ms Begum.

[28] I reached a similar conclusion on the alleged debt for the professional make-up course. Ms Ali recommended Ms Begum do the course with her as part of Ms Begum's training in the industry. Ms Ali also proposed that Ms Begum fund the fee by foregoing $1300 of the value of her annual leave entitlement. Ms Begum said she wanted to think about it and discuss it with her partner. The two women disagreed in their evidence on whether or not Ms Begum had later said she agreed to the proposal and whether Ms Ali had gone ahead and paid the course fee (on Ms Begum's behalf) before she heard back from Ms Begum. Although Ms Begum did attend the course, and arguably then had the benefit of it in her work, there was no written confirmation of her agreement to an arrangement for SEL to recoup the cost from her wages. To do so without Ms Begum's written request or consent would be illegal under the Wages Protection Act. And the amount itself was more than a week's wages so offended against the Holiday Act provision allowing only one week to be 'cashed up' annually.[1] More fundamentally I concluded the evidence, viewed objectively, was that Ms Begum did the course at the behest of her employer and there was no agreement about a loan for the purpose. The cost rests with SEL and not as a debt for Ms Begum.

[29] A final item concerned public holidays. Analysis of SEL's wage book showed Ms Begum was not paid for a number of public holidays that fell on days that the company's records showed she usually worked in other weeks. Up until early October 2013 that included Mondays. From then on it did not. Ms Begum was entitled to be paid her normal wage for public holidays that fell on those normal days

[1] Section 28A.

of work. I have not listed those days but they are readily identified from the company's wage records and Ms Begum should be paid wage arrears for those days.

PAYE deductions and payments to IRD

[30] Ms Begum raised a concern over whether money deducted as PAYE from her wages had been transferred to IRD. Ms Ali's evidence was that an error on a handwritten form sent to IRD had since been corrected and there may have been a delay in the updating of IRD's information due SEL's use of manual returns. On the basis of her evidence I considered nothing further was required on that issue.

Ongoing employment relationship

[31] At the time of the Authority's investigation meeting Ms Begum remained an employee of SEL. While the dispute over the various issues dealt with in this determination had made their working relationship difficult, and meant Ms Begum and Ms Ali were unlikely to repair their former friendship, both appeared to understand their mutual, ongoing obligation of good faith under s4 of the Act. Section 4(1A) of the Act required them to be constructive and communicative in the employment relationship. They discussed, at the end of the investigation meeting, the need to work in a professional manner as employer and employee. They were also able to seek further mediation assistance for that purpose if necessary.

Costs

[32] As Ms Begum had some success in her application I also concluded SEL should reimburse her for the Authority application fee of $71.56.

Robin Arthur
Member of the Employment Relations Authority