

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 167
5375551

BETWEEN MICHELLE ANGELA CASEY
Applicant

AND ANNE PARINGATAI
TRADING AS PHYSIO PLUS
Respondent

Member of Authority: M B Loftus

Representatives: Vivienne Gillan, Counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 7 August 2012 at Dunedin

Submissions Received: At the investigation meeting

Determination: 13 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Casey's application comes in two parts. There is a claim for unpaid monies which concerns wages, statutory holidays and the employer's contribution to KiwiSaver.

[2] Ms Casey's second claim is for an order Ms Paringatai comply with an agreement she pay one weeks' wages in lieu of notice.

[3] Ms Paringatai's position is, with one exception which will be discussed later, unknown. She did not reply to a letter from Ms Gillan and failed to provide a statement in reply.

Non appearance on behalf of the respondent

[4] Ms Paringatai was neither present nor represented at the investigation meeting. That raises the question of whether or not it was appropriate to proceed in her absence.

[5] The application was filed on 26 March 2012 and a copy was, in accordance with the Authority's normal processes, forwarded to Ms Paringatai along with advice a statement in reply had to be lodged within 14 days. As already said, the statement in reply has not been provided.

[6] The Authority's normal procedure sees the scheduling of a telephone conference at which the parties discuss the forthcoming investigation meeting, its timetabling and conduct. After some difficulty contacting Ms Paringatai the telephone conference occurred on 16 May 2012. She participated.

[7] Today's meeting was scheduled during the telephone conference. Indeed, the date was picked to suit Ms Paringatai and her availability. Written confirmation was subsequently emailed to an address provided by Ms Paringatai and hardcopy was couriered. There has been no further contact between her and the Authority.

[8] Given these facts I conclude Ms Paringatai is aware of the investigation meeting, yet her absence was neither advised nor explained. In the circumstances I know of no reason why I should not proceed. I choose to do so - Ms Casey is entitled to have her claim determined.

Background

[9] Ms Casey was employed by Ms Paringatai in March 2011. She was initially employed part time but changed to full time in early October 2011.

[10] On 13 February 2012 Ms Casey resigned in circumstances which, according to the evidence I have heard, may well have given rise to a claim of constructive dismissal. Having said that, no such claim has been made and the circumstances leading to her resignation will be discussed no further.

[11] Ms Casey asked that her resignation take effect forthwith and Ms Paringatai accepted. Such an arrangement was in accordance with Ms Casey's employment

agreement, which provided for one month's notice unless the parties agreed a lesser period.

[12] Ms Casey then thought about the position in which she found herself and sought representation. That led to a meeting three days later. At the meeting Ms Paringatai agreed to pay all outstanding monies and add a week's wages in lieu of notice.

[13] Those monies have never been received, hence this application.

Determination

[14] As said earlier Ms Casey's claim comes in two parts. The first relates to unpaid earnings. The second concerns a failure to make the agreed payment in lieu of notice.

[15] The arrears claim comes in three parts: unpaid wages, unpaid statutory holidays and a failure to pay an employer contribution to KiwiSaver.

[16] Ms Casey states that while she sometimes received pay slips this did not always occur. She says she therefore quantified her claim by reconciling her bank statements with a record she kept of hours worked. She adds that in doing so she discovered a couple of instances in which it appears she was overpaid and she has reduced the amount sought accordingly.

[17] Ms Casey claims the residual amount owing is \$2,305.76.

[18] In opening I commented Ms Paringatai's position was, with one exception, unknown. The exception relates to the wage claim. During the telephone conference Ms Paringatai accepted she had withheld wages. She suggested she was justified in doing so as Ms Casey owed her for services provided as a client and the employment agreement contained a provision, indeed two provisions, allowing for the deduction of any monies owing from wages and/or final pay.

[19] Ms Casey expresses bemusement at this claim and denies it has any validity. Ms Paringatai, by failing to attend the investigation, is incapable of supporting it.

[20] In the circumstances, and having had the opportunity to question Ms Casey, I accept her claim. The amount sought for outstanding wages will be awarded in full.

[21] The claim regarding statutory holidays relates to Christmas Day 2011, Boxing Day 2011, New Years Day 2012, January 2nd 2012 and Waitangi Day 2012. Those days all fell after Ms Casey became a full time employee and she is entitled to payment for them. I have no reason to doubt her claim she was not paid, especially given the description of how the Waitangi Day failure occurred.

[22] Ms Casey states that when she was interviewed for the position the parties agreed an hourly rate of \$16.40. Notwithstanding that agreement she says she was actually paid \$16 per hour and this is the amount reflected in her employment agreement. While not overly happy about the situation, Ms Casey accepts it is appropriate to use \$16 per hour as the applicable hourly rate as she did when calculating her wage arrears.

[23] Using \$16 per hour the amount owing for the public holidays is \$640.00. I conclude she is also owed that amount.

[24] The third claim relates to the employer contribution to KiwiSaver. Ms Casey had KiwiSaver contributions deducted from her pay. Her pay slips indicate an employer contribution was also made but a *summary of transactions* form from the Inland Revenue Department indicates this money was never forwarded and shows a zero balance for employer contributions.

[25] Ms Casey's contribution during her period of employment was \$320.31. The employer contribution should have been identical and, in the circumstance, I conclude that amount is also owing.

[26] The second part of Ms Casey's claim is that I order Ms Paringatai to comply with her agreement to pay a week's wages in lieu of notice. That undertaking was said to be in the form of a settlement entered into at the meeting three days after Ms Casey resigned.

[27] The settlement did not involve a mediator and was not entered into under the provisions of s.149 of the Employment Relations Act 2000. I am therefore precluded from granting the order sought by virtue of the Court's recent decision in *Wade v. Hume Pack-N-Cool Limited* [2012] NZEmpC 64 and this was conceded by Ms Gillan.

Orders

[28] For reasons outlined above, I conclude that Ms Casey is owed various sums in respect to unpaid wages, holiday pay and KiwiSaver contributions.

[29] Ms Paringatai is therefore ordered to pay to Ms Casey the following sums:

- (a) \$2,305.76 in respect of unpaid wages; and
- (b) \$640.00 in respect of unpaid public holidays; and
- (c) \$320.31 in respect of the employer contribution to Ms Casey's KiwiSaver account.

Costs

[30] Ms Casey has been successful in her claim. She is therefore entitled to a contribution towards the costs she incurred in pursuing it. Those costs are, however, limited to the Authority's filing fee of \$71.56.

[31] I believe it appropriate Ms Casey be recompensed for that expenditure and order Ms Paringatai to pay, in addition to the amounts specified in 29 above, a further \$71.56 as a contribution towards Ms Casey's costs.

M B Loftus
Member of the Employment Relations Authority