

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 126
3014618

BETWEEN KIRSTY GALLAGHER
 Applicant

AND CAPITAL OSTEOPATHS
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person
 No appearance for Respondent

Investigation Meeting: 7 December 2017

Submissions Received: On the day from the Applicant

Determination: 7 December 2017

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Kirsty Gallagher was employed on a part-time basis by Capital Osteopaths Limited (Capital Osteopaths) for approximately 18 months before resigning her employment on the provision of two weeks' notice in writing on 2 June 2017. She seeks payment of holiday pay for the period of her employment.

[2] Ms Gallagher claims she has sought access to her employment agreement and pay records so that she can be assured the holiday pay is calculated accurately. She says she has received no response from her former employer.

[3] In addition to payment of her holiday pay, Ms Gallagher asks me to impose penalties on Capital Osteopaths for matters relating to its failure to communicate with

her over outstanding pay, or reply to her requests for wage and time and holiday records and for her holiday pay to be paid with her final pay.

[4] Capital Osteopaths has not lodged a statement in reply and nor has it applied for leave to respond to the application under Regulation 8(3).¹ Its sole director and shareholder, Matthew Cooper, did not attend a telephone conference with the Authority although he was informed of the date and time it would be held. Mr Cooper did not respond to communications from the Authority Officer managing the file until the day of the scheduled investigation meeting.

[5] Following the telephone conference a Notice of Investigation Meeting was sent to the parties on 16 October 2017 and a Notice of Direction was sent on 20 October. Included in the latter document was a direction to the respondent to provide to the applicant and the Authority copies of all wage and time and holiday records in respect of Ms Gallagher's employment from its commencement to its termination.

The Authority's investigation

[6] On the morning of the investigation meeting, Mr Cooper emailed the Authority Officer to inform her that he would not be attending the meeting due to an unforeseen personal situation, the nature of which was not specified. He requested a rescheduling. I considered his request and declined it in view of its lateness and the lack of information. Accordingly, I commenced the investigation meeting without the respondent in accordance with clause 12 of Schedule 2 to the Employment Relations Act 2000 (the Act).

Evidence

[7] Ms Gallagher provided evidence of all remuneration she received during her employment with Capital Osteopaths. In the absence of the payslips she requested from her employer, she has examined bank statements for the period of her employment and recorded all the payments she received. She has provided such evidence to the Authority and provided evidence of her hourly rate during her employment.

¹ Employment Relations Authority Regulations 2000.

[8] Ms Gallagher has provided evidence, and made best efforts to calculate the total, gross, amount of remuneration she received during her employment. She was hampered by the absence of the wage and time and holiday records she requested. However, using the information she provided I accept her total remuneration was \$12,510 gross and that, subsequent to her employment, she received three separate payments totalling \$337.03 nett.

[9] Ms Gallagher told me she took no annual holidays during her employment. I found her to be an honest and credible witness and, in the absence of any evidence to the contrary, I accept her evidence on that matter.

[10] I find she is owed holiday pay for the period of her employment from 14 September 2015 to 12 June 2017 in the sum of \$1000.80 gross.

[11] Ms Gallagher did not know the purpose of the three additional payments she received from her employer following the termination of her employment although she believed the first two may have been made by mistake, although she had no way of knowing this. Those two payments were for \$111.02 each and were made respectively on 22 and 29 June 2017. The third payment was for \$114.99 and was made on 8 August 2017.

[12] Ms Gallagher speculated that, as the respondent would have received her application to the Authority around that time, the third payment may have been an attempt to forestall her proceeding with her application in the Authority by paying a portion of the outstanding holiday pay owed to her. She asked that I subtract \$114.99 from any holiday pay owing to her. In the absence of any information from the employer I accept Ms Gallagher's suggestion.

Should a penalty be imposed?

[13] Capital Osteopaths failed to provide wage and time and holiday records when requested to do so by Ms Gallagher. It also failed to respond to her queries and requests for information regarding her holiday pay and her request that it be paid to her in her final pay.

[14] In not responding to Ms Gallagher's requests, Capital Osteopaths breached s. 82 of the Holidays Act 2003. In not paying holiday pay due to her in the pay that related to her final period of employment, the employer breached s. 27(2) of that Act.

Both breaches render Capital Osteopaths liable to a penalty or penalties under s.75 of the Holidays Act.

[15] Each breach exposes the employer to a potential penalty of \$20,000. Applying the guidelines set out by the Employment Court in *Preet*² I find it appropriate to impose one globalised penalty, the starting point for which is \$40,000. Taking into account aggravating and ameliorating factors, and proportionality of the outcome I find a global penalty of \$4,000 to be appropriate in the circumstances.

[16] Ms Gallagher has asked that one quarter to one half of the penalty be paid to her. I find her approach to be measured and reasonable. She has been put to considerable stress and inconvenience by her employer's failure to comply with its statutory obligations to her, and has also lost remuneration in having to take a day's unpaid leave to attend the investigation meeting. I find one half of the penalty should be paid to her.

Orders

[17] I order Capital Osteopaths Limited to pay Ms Gallagher within 14 days of the date of this determination holiday pay owing to her in the sum of \$885.81 gross.

[18] I further order Capital Osteopaths Limited to pay a penalty of \$4,000 within 28 days of the date of this determination. \$2,000.00 of the penalty is to be paid to Ms Gallagher and the remaining \$2,000.00 is to be paid to the Authority for payment to the Crown account.

Costs

[19] Ms Gallagher represented herself and therefore did not incur legal fees. She did, however, incur the cost of the Authority's filing fee and I order the respondent to reimburse her the sum of \$71.56.

Trish MacKinnon
Member of the Employment Relations Authority

² *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Tobacco Ltd* [2016] NZEmpC 143 at [139] to [151].