

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 377
5433831

BETWEEN NARY GUNSON
Applicant

AND GASTRONOMIC VENTURES
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: M Gunson, advocate for applicant
M J-P Huang, advocate for respondent

Investigation meeting: 14 July and 3 September 2014

Determination Date: 10 September 2014

DETERMINATION OF THE AUTHORITY

- A. Gastronomic Ventures Limited is ordered to pay to Nary Gunson:**
- a. \$1,023.18 as holiday pay.**
- B. Interest is to be paid on the above amount, calculated as 5% pa from the date of termination of Mrs Gunson's employment to the date of payment.**
- C. Costs are reserved.**

Employment relationship problem

[1] Nary Gunson was employed as a waitress at a café operated by Gastronomic Ventures Limited (GVL). Her normal rostered hours of work were 8 am – 5 pm on week days and 7 am to 3 or 4 pm on Saturdays. Her rate of pay was the minimum hourly rate of pay in force at relevant times under the Minimum Wage Act 1983.

[2] Mrs Gunson says she worked for more hours than she was paid for, and seeks orders for the payment of:

- (i) wages underpaid; and
- (ii) holiday pay underpaid

Wages underpaid

1. Background

[3] Mrs Gunson estimated that she worked an average of 58 - 60 hours per week, and said elsewhere in her evidence that she believed she was being underpaid by approximately 10 hours per week. She said she would start work an hour early about once a week, and often worked past her rostered finish times. Her claim covers 32 weeks from 2 July 2012 to 25 February 2013, excluding a 2-week Christmas break.

[4] It was common ground that Mrs Gunson's wages were paid partly by a declared amount of \$270 gross per week for 20 hours' work, with the remainder by undeclared payments 'under the table'. These were paid at a rate of \$11 per hour, which GVL said was the nett equivalent of the minimum hourly rate and was paid on that basis. GVL has since accounted to the IRD for the 'under the table' payments.

[5] The calculation provided in support of Mrs Gunson's claim contained a mixture of gross and nett figures. I cannot consider an order based on such a calculation so have adjusted the nett figure to a gross figure on the assumption that the applicable gross figure is the relevant minimum hourly rate.

[6] Mrs Gunson seeks a payment calculated as:

29 weeks x 60 hours x \$13.50 ph	\$23,490.00
3 weeks x 60 hours x \$13.75 ph	\$ 2,475.00
	\$25,965.00
Less	
32 weeks x \$270 (gross)	\$ 8,640.00
29 weeks x \$325 (nett), adjusted to	
29 weeks x \$399.00	\$11,571.00
3 weeks x \$406.25	\$ 1,218.75
Total adjusted amount	\$12,789.75
	\$21,429.75
Total	\$ 4,535.25

[7] GVL is fortunate that it is not facing claims for penalties in respect of: the absence of a written employment agreement;¹ the absence of a wage and time record complying with s 130 of the Employment Relations Act 2000;² and the failure to produce a compliant wage and time record when asked to do so.³

[8] One of GVL's two directors, Mel Jean-Pierre Huang, said the absence of a compliant wage and time record was the result of actions taken by another employee, Leakhana Heng, and I return to that matter shortly. The point for present purposes is that, in September 2013, Mr Huang prepared a spreadsheet of payments made to Mrs Gunson. Although Mrs Gunson's claim is based on regular weekly 'under the table' payments of \$325 nett (indicating she was paid for an additional 29.5 hours per week, or for a total of 49.5 hours per week), Mr Huang's spreadsheet shows the cash amounts differed every week. According to the spreadsheet, the payments reflected the varying number of additional hours Mrs Gunson worked each week.

[9] If the spreadsheet is correct then, for the most part, the hours for which Mrs Gunson was paid varied between 52 and 58 per week. Mr Huang said the payments were for all hours worked, and Mrs Gunson is not owed anything more.

2. Conclusion

[10] Inevitably GVL's failure to keep or produce a compliant wage and time record prejudiced Mrs Gunson's ability to bring an accurate claim. In these circumstances, s 132(2) of the Employment Relations Act permits the Authority to accept as proved all claims made by the employee in respect of wages actually paid, and time worked - unless the claims are proved to be incorrect.

[11] Mrs Gunson kept a note of her hours in a diary and in a calendar. She acknowledged that the diary entries were not made every day, sometimes being made after periods of weeks. The entries covering the period of her claim showed the most frequent number of hours worked in a day was 9.5, with up to 10.5 or 11 hours per day being worked relatively frequently in August and September 2012.

¹ s 65 Employment Relations Act 2000

² s 130(1) and (4)

³ s 130(2) and (4)

[12] Mr Huang produced the source material on which his spreadsheet was based a few days before the first investigation meeting. The material comprised: rosters; some handwritten, weekly records of hours Mrs Gunson worked in March, April and June 2012; and handwritten calculations of payments to be made to Mrs Gunson.

[13] Mr Huang's evidence was that he found the handwritten records of Mrs Gunson's hours of work by chance, and that the remainder of the records had been removed by an unknown person although he suggested it was Ms Heng. Ms Heng worked as the barista at the café, and carried out some administrative duties. She provided a statement of evidence in support of Mrs Gunson. Ms Heng denied removing the records, but even Mrs Gunson acknowledged at least that Ms Heng would tear records out of the book where they were kept.

[14] Mrs Gunson and Ms Heng accepted variously that the handwriting on the records was theirs. When I pointed out that the hours recorded did not correspond with Mrs Gunson's diary entries, Ms Heng said she had simply copied the hours from the rosters. When I drew her attention to the corresponding rosters showing that was not the case, she said she had used a different roster. Mr Huang, who prepared the rosters, said any roster changes were added to the original document so that there was only one roster document for any one week.

[15] Mr Huang's evidence was also that he would tabulate the hours of work, and make up the additional cash payments, together with Ms Heng. Indeed he said Ms Heng was the person who suggested that 'under the table payments' be made. He said the cash would be prepared and handed to Ms Heng to give to the employees. Ms Heng's evidence was that Mr Huang would do this while she was on the premises, but she distanced herself from any direct involvement in the calculations.

[16] The handwritten calculations noted the 20 hours per week paid as taxable income. They also included additional handwritten notations of hours worked in excess of 20, with that number multiplied by 11 to give the amount to be paid in cash. This was the information Mr Huang transferred to his spreadsheet.

[17] Inconsistencies between Mr Huang's material and Mrs Gunson's, discussed during questioning, led me to adjourn the investigation meeting to allow the parties to consider and address all of the material more fully. The outcome was the calculation set out at [6] above and presented at the resumed meeting.

[18] The calculation assumed Mrs Gunson's material was correct and accurate. However I prefer Mr Huang's material for the following reasons:

- I accept the source records he produced are genuine, not least because Ms Heng and Mrs Gunson were involved in aspects of their preparation;
- I did not find credible Ms Heng's efforts variously to question the accuracy of the records or to distance herself from them; and
- Mr Huang's source records were made contemporaneously, while on her evidence Mrs Gunson's diary entries were at times created weeks after the event.

[19] Mr Huang's material also supports Mrs Gunson's evidence that she would work beyond her rostered hours, but not to the extent she alleged. While I acknowledge several statements were provided in support of Mrs Gunson in this respect, they were too vague to be of assistance. As for Ms Heng, she said in her written statement that Mrs Gunson '*usually worked past her rostered finish times on weekdays until 5.30 – 6.30*'. The source documents available support the proposition that, when this happened, the hours were recorded and paid for.

[20] Accordingly I am satisfied that Mrs Gunson was paid for the hours she worked. There will be no further order for payment.

Holiday pay underpaid

[21] Holiday pay was paid on the declared payments. Holiday pay was not paid, and is payable, on the 'under the table' payments. GVL may also have obligations in respect of Kiwisaver on those payments, but that matter is not before the Authority.

[22] The amount of holiday pay owed is: $8\% \times \$12,789.75 = \$1,023.18$ (gross).

[23] GVL is ordered to pay to Mrs Gunson the sum of \$1,023.18 (gross) in unpaid holiday pay.

[24] Interest is to be paid on that amount, calculated as 5% pa⁴ from the date of termination of Mrs Gunson's employment to the date of payment.

Return of tax payments made on behalf of Mrs Gunson

[25] Mr Huang asserted that Mrs Gunson must repay to GVL the income tax payments made to the IRD in respect of the 'under the table' payments. I do not regard this matter as properly before the Authority by way of counterclaim, but in any event I have no hesitation in saying no such order for payment would be made. The effect of the order would be that Mrs Gunson was paid at less than the minimum hourly rate. The law does not allow that.

Costs

[26] Costs are reserved.

[27] If an order for costs is sought, the party seeking the order shall have 28 days from the date of this determination in which to provide the Authority with a written account of what amount is sought and why. The other party shall have 7 days from the date of receipt of that account in which to provide the Authority with a written reply.

[28] For the parties' information, it is likely that Mrs Gunson would be awarded the reimbursement of her filing fee of \$71.56. On the material available to me it is unlikely that any further order would be made, but I will consider any additional and relevant information if it is provided.

R A Monaghan

Member of the Employment Relations Authority

⁴ Clause 11, Schedule 2 of the Employment Relations Act; cl 4 of the Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177).