

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 73
3020375

BETWEEN CLEMENT BRIAN
 LIVINGSTONE
 Applicant

A N D DOWNER NZ LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
 M Gaylard, Advocate for the Respondent

Investigation Meeting: 28 February 2018 at Auckland

Submissions received: 28 February 2018 from both parties

Date of Oral
Determination: 28 February 2018

Date of Written
Determination: 1 March 2018

ORAL DETERMINATION OF THE AUTHORITY

A. I order Downer New Zealand Limited to pay Clement Brian Livingstone the sum of \$252.97 wages arrears within 7 days of this determination.

B. There are no costs because both parties have represented themselves.

Relevant Facts

[1] Clement Brian Livingstone was employed as a Programme Works Manager by Downer NZ Limited (Downer). He received a base annual salary of \$90,000 per annum plus a car valued at \$17,000. He signed an employment agreement on or about 10 August 2015.

[2] His employment agreement provided for his salary to be paid in regular monthly payments. The monthly payment prior to termination was \$7,589 per month. His employment ended on 19 September 2017.

[3] When he received his final month's salary it was \$4,553.50. Downer had calculated the final payment on the basis of a 40 hour week or 2,080 hours per year. It calculated an hourly rate of \$43.78 with the daily rate of \$350.27. Using those figures Downer then paid Mr Livingstone the sum of \$4,553.50.

[4] Mr Livingstone submits that calculation is wrong. He says his final pay ought to have been calculated on a calendar month basis. He believed he was available to work and should be paid for 19 out of 30 days of September 2017. He believes he is owed a proportion of his monthly salary of \$7,589 being \$4,806.

Issues

[5] By consent there is only a single issue for determination today. That is whether Mr Livingstone's final pay has been correctly calculated.

Fast Track

[6] Both parties have agreed to have this matter dealt with on what is called the Fast Track system in the Authority. What that means is that I do not require parties to file any briefs of evidence, although they may wish to give me documentation either at hearing or prior to. Parties are then able to accept an earlier hearing date than what would normally be offered. These parties were able to accept a hearing date within 21 days of the telephone conference.

What was Mr Livingstone's final pay?

[7] By definition, a 'salary' is an agreement to pay a particular sum on an annual basis. That that payment may, in practice or by further agreement, be paid in weekly, fortnightly or monthly instalments does not change the essential nature of a 'salary'.¹

[8] Mr Livingstone's employment agreement set out payment of his salary as follows:

¹ *Ian Wayne Eriksen v J E & I M Lockley t/as John LockleyTransport AA* 382/08 at [8].

You will be paid on a monthly basis an annual salary of \$90,000 Gross per annum

[9] His salary increased in October 2016 to approximately \$91,070.04 based on the monthly payments of \$7,589 he received during 2017.

[10] From the evidence his monthly payments of salary were never affected by the actual numbers of days he worked in any month. The payment for January, for example, was \$7,589.17. The same payment was received in February, despite there being nearly one week's less work time than there would have been in January or any other month.

[11] Monthly payments also did not appear to be tied to any hourly rate. Nor were they affected by the fact he worked weekends or did overtime in excess of 40 hours. His last timesheet showed that he worked approximately six hours overtime but this did not affect his remuneration claimed or paid.

[12] The employment agreement has no express term for his final pay to be prorated on the basis of hourly rates, 40 hour weeks excluding weekends or working 2,080 hours per year. Although I accept the method which Downer has used to calculate the final pay is an industry practice, and it has been approved by other external bodies, it is unfortunately not what these parties have agreed would be paid.

[13] The parties agreed Mr Livingstone would receive an annual salary of \$91,070.04 up until the date of termination. Using some of the tables that have been provided to me, quite helpfully, by a respondent witness it is clear Mr Livingstone has in fact been underpaid his salary up to and until August 2017. The total of column 3 headed "Actual salary" up to August 2017 totals to \$60,713.36. Based upon the method that Downer used to calculate the final salary, that is in column 5 headed "Average salary based on week days in a month" he should have received up to August 2017 a total of \$60,946.82. Mr Livingstone therefore should have received an additional \$233.46 in his pay if that same calculation had been used throughout the year. But he did not.

[14] That exemplifies why Downer cannot change the basis on which it has been paying Mr Livingstone's salary up until the date of termination. If it paid a set amount of salary each month and an employee leaves, it must prorate that same amount over the working days in the final month.

[15] There is an issue over what would be considered the working days in the final month. Mr Livingstone, according to his timesheet, worked 13 days including one weekend. His employment agreement does not specify his working days are only Monday to Friday, although he does accept he worked Mondays to Fridays generally. He is not paid any overtime for work done on weekends but, especially in his last week of work, he is still expected to be available to work on weekends if required without expectation of extra remuneration. Therefore he should expect his salary to be prorated over the entire 19 days without deduction of weekends.

[16] In those circumstances, Mr Livingstone's final pay calculated over 19 days dividing the monthly payment of \$7,589.17 by 30 days results in a daily rate of \$252.97233 or \$4,806.47. Mr Livingstone has received \$4,553.50. He is owed \$252.97.

[17] Therefore I order Downer New Zealand Limited to pay Clement Brian Livingstone the sum of \$252.97 wages arrears within 7 days of this determination.

[18] There are no costs because both parties have represented themselves.

T G Tetitaha
Member of the Employment Relations Authority