

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 407
5298508

BETWEEN ADRIANA OZIERANSKA
 Applicant

AND CINTRA QUAD GROUP
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: A Taylor, advocate for applicant
 No appearance for respondent

Investigation Meeting: 11 July 2011

Determination: 19 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Adriana Ozieranska says her former employer Cintra Quad Group Limited (CQGL) owes her:

- (i) unpaid wages for the last 2 days of her employment;
- (ii) an unpaid bonus;
- (iii) wages underpaid under the Minimum Wage Act 1983 in respect of on-call work;
- (iv) holiday pay for outstanding annual leave owed at the termination of employment; and
- (v) holiday pay in respect of untaken time off in lieu when statutory holidays were worked.

[2] Ms Ozieranska also says she has a personal grievance in that CQGL affected her employment to her disadvantage by unjustified actions.

Preliminary matters

1. Failure of respondent to appear or be represented

[3] CQGL did not appear and was not represented at the investigation meeting. It had received the original statement of problem and its then-representative lodged a statement in reply. On being advised the representative was no longer acting the Authority's support officer contacted Mark Calvert, identified on the documents as the managing director. Mr Calvert informed the support officer that the company was insolvent and would not take any further steps in the matter.

[4] Mr Taylor was advised of this and confirmed that Ms Ozieranska wished to proceed.

[5] I am satisfied CQGL had notice of the detail of the claim - incorporating both the original and the amended statement of problem - and of Authority's investigation meeting. I therefore proceed to hear and determine this matter under clause 12, Schedule 2 of the Employment Relations Act 2000 as if CQGL had attended or been represented.

2. Order for examination of financial records by independent and qualified party

[6] Mr Taylor sought a preliminary order for the examination of CQGL's financial records by an independently qualified party, to 'confirm the wages and commission owed to Ms Ozieranska'.

[7] Mr Taylor was entitled to ask CQGL to produce its wage and time records and to ask the Authority to order the production of records relevant to the calculation of the commission (or bonus) in the event that the company was unwilling to provide them. He did not take any of these steps. While the Authority can and does require the production of such information in appropriate cases there are difficulties when a respondent is uncommunicative.

[8] Beyond that the request amounted to a request that the third party be brought in to identify and detail a substantial part of Ms Ozieranska's claim on the basis of otherwise unsupported allegations.

[9] For those reasons, and after considering the remainder of the evidence and the issues arising, I decline to make the order sought. I have proceeded determine this matter on the basis of the information available.

Background

[10] Ms Ozieranska commenced her employment with CQGL in May 2006. According to a written employment agreement signed by the parties on 1 May 2006, her job title was franchise manager although it was described elsewhere as general manager. The agreement referred to a position description which was not attached to it, but Ms Ozieranska said her duties were to manage the Quest on Cintra Lane - a serviced apartment business operated by CQGL.

[11] In late 2009 the business of the Quest on Cintra Lane was sold. The settlement date was 1 November 2009. Mr Calvert advised Ms Ozieranska of this by email message dated 22 October 2009. The message also advised that the purchaser wished to operate the business, so that Ms Ozieranska's position would become redundant. However CQGL would continue to manage the business on a transitional basis until 28 February 2010. The proposal was that Ms Ozieranska remain employed by CQGL until that date, and she agreed to do so.

[12] Accordingly Ms Ozieranska's employment ended in February 2010.

Unpaid wages for last two days of employment

[13] Ms Ozieranska says she was not paid for the last two days of her employment, being days on which she performed work. The relevant dates were 24 and 25 February 2010.

[14] Ms Ozieranska's final payslip was for the period ending 23 February 2010. In the absence of any information to the contrary I accept Ms Ozieranska's account and find the payment is owed.

[15] CQGL is ordered to pay to Ms Ozieranska two days' pay calculated with reference to her annual salary of \$57,500, that is $2/5 \times [\$57,500/52] = \442.30 .

The bonus payment

1. The facts

[16] Ms Ozieranska's remuneration originally included a profit share payment of 5% of the operating profit, calculated quarterly and paid by the 15th day of the month following the close of the relevant quarterly period. In March 2008 she received an increase to \$57,500 in her salary, while her bonus increased to 10% of the operating profit, to be paid monthly in arrears. According to the statement in reply, this was intended as an incentive because of the poor profitability of the business.

[17] In or about July or August 2009 the parties discussed the fact that the profitability of the business had resulted in no bonus payments for Ms Ozieranska for a lengthy period. Mr Calvert offered to replace the bonus arrangement with a payment of 50% of the letting fees for new lets. Ms Ozieranska said in evidence that she did not agree to the proposal. Despite this she was responsible for making payments to herself of \$400 per week, which she described as a letting fee commission.

[18] No further bonuses were paid. However certain financial records came to Ms Ozieranska's attention during the due diligence process undertaken by the purchaser of the business later in 2009. She says those records show CQGL was making a profit and she should have been paid a bonus. The records she produced to the Authority in support of her claim were trial balances for the year ending March 2009. At the same time she alleged that CQGL was attempting to make the company's finances appear better than they were in order to achieve the sale of the business, and she produced communications from Mr Calvert recording concerns about the company's financial position.

2. The amount sought

[19] Ms Ozieranska seeks a bonus calculated as 10% of an operating profit of \$130,000, being \$13,000.

3. Conclusion

[20] Nothing in the March 2009 balance sheets supported Ms Ozieranska's claim.

[21] Secondly, although Ms Ozieranska denied agreeing to the replacement of the provision for a bonus with a commission arrangement based on a share of letting fees, I found the denial unconvincing and I do not accept it. I consider it more likely that, in the face of a long-standing inability to qualify Ms Ozieranska for a bonus, Mr Calvert proposed an alternative. In such circumstances it is inherently unlikely that Ms Ozieranska would reject the proposal. Moreover she began making payments to herself of \$400 per week in reliance on her view of the entitlement it created.

[22] For these reasons the claim for payment is declined.

The claim for wages under the Minimum Wage Act

1. The facts

[23] Clause 6 of the employment agreement required Ms Ozieranska to be available 'as and when required', adding that hours of work would 'typically' be up to 40 hours per week. The clause obliged Ms Ozieranska to be available during periods of high activity, such as during daily check in and check out, holidays, or when special events were scheduled. The clause also obliged her to ensure that either she or another staff member was available on call at the business from 9 pm to 7 am every day to assist after hours guests and address residents' enquiries.

[24] In September 2006 the on-site building superintendent was made redundant. Ms Ozieranska took over his duties and occupied a rent-free room on-site. She said she attended night call outs on a daily basis, and continued to attend the call outs even after a call centre was engaged as the initial point of contact for after-hours enquiries.

[25] In February 2007 CQGL entered into a contract with the building's body corporate under which CQGL was engaged as the caretaker for the building. The contracted services included many of the tasks Ms Ozieranska said she performed when attending night call outs. These were: dealing with people creating a nuisance or an annoyance on-site; providing after-hours access for guests; and dealing with urgent maintenance or cleaning requirements including difficulties caused by the building's status as a leaky building. There was a fee for the services, which CQGL seemed to suggest could have been made available by a suitable means to Ms Ozieranska.

[26] For her part Ms Ozieranska said no such payments were made to her until payments of \$50 per night began on dates she identified variously as being between March and April 2009. A payslip she provided indicated that she received such a payment in the period ending 3 March 2009, so I find that was the latest date on which the payment began.

[27] Ms Ozieranska said that from about April 2009 she was on call at night for 2 nights a week, namely Fridays and Saturdays.

[28] Also in April 2009 Ms Ozieranska became aware of the existence of legal proceedings concerning the calculation of payments under the Minimum Wage Act 1983 for overnight duties attracting an allowance which did not appear to meet the statutory minimum. At the time the matter was about to be heard in the Employment Court. It has since been determined by the Court of Appeal in *Idea Services Limited v Dickson*¹. Ms Ozieranska drew the issue to CQGL's attention but said she did not receive an immediate response.

[29] Discussions during a management meeting in July 2009 were summarised in a message from Mr Calvert to Ms Ozieranska dated 7 July 2009. On the matter of Ms Ozieranska's after hours on call duties:

- . Ms Ozieranska and another employee were to share the two days Ms Ozieranska had been covering;
- . the person carrying out the on call duty would be provided with on-site

¹ [2011] NZCA 14

accommodation for the nights on duty, and was required to remain within a 15 minute response time;

- . Ms Ozieranska was to be paid \$12.50² per hour for the hours she worked, but this was not to be construed as a variation to her employment agreement and was to continue only until the first weekend in August; and
- . thereafter Ms Ozieranska would receive payment at \$60 per night on duty.

[30] The information about precisely what Ms Ozieranska was paid, when, and why, was not consistent and was on occasion inaccurate.

[31] For example, according to Ms Ozieranska's final payslip by February 2010 she was being paid an on call rate of \$60 per night for two nights a week. In one of the statements provided to the Authority Ms Ozieranska asserted there was an agreement that she received payment at the hourly rate of \$12.50 from April 2009, which is not consistent with the record of the discussions in July 2009 or the payslip.

[32] There were also a number of references to events in January 2010. That appears to be when Mr Calver became aware of the payments of \$400 per week which Ms Ozieranska was receiving, queried and then stopped them, although there was an allegation that Mr Calver's actions concerned the on call payment of \$12.50 per hour.

[33] An emailed exchange that month suggests that was unlikely. The exchange comprised a discussion between Ms Ozieranska and Mr Calvert about the way in which certain payments were described for the purposes of her bank's requirements, and Ms Ozieranska's wish for her salary not to appear to have been reduced. I found the explanations of that matter inconsistent, and consider it likely the concern was with the payment of \$400 per week. I proceed on the basis that payments of \$60 per night were made in accordance with the July 2009 discussions.

2. The amount sought

[34] Ms Ozieranska seeks payment of \$38,000.

² Being the prescribed minimum rate of pay per hour at the time

[35] The amount was quantified on the basis that Ms Ozieranska was on call at night for 12 hours at a time on every Friday and Saturday from August 2006, with a significant increase in on call hours in January and February 2010. The prescribed minimum hourly rates applicable over the period were applied to those hours, giving a total in excess of \$38,000.

3. Conclusion

[36] I turn first to the judgment in *Idea Services Limited v Dickson*. Mr Dickson was paid at an ordinary hourly rate, plus an allowance payable when he slept overnight at the community house where he worked, plus a payment at his ordinary hourly rate when he carried out duties during the night. He sought a payment at the minimum hourly rate for every hour he was rostered on a sleepover.

[37] For present purposes the relevant question was whether time spent on sleepovers was 'work' under the Minimum Wage Act. In that regard the Employment Court³ identified three factors: the constraints on the freedom the employee would otherwise have to do as he pleased; the nature and extent of the responsibilities; and the benefit to the employer of having the employee perform the role.

[38] The Court of Appeal agreed the factors were appropriate, and with their application to Mr Dickson's circumstances. Although Mr Dickson's time was his own unless he was required to deal with an incident, he was subject to other constraints. These included: the inability to leave the community home without prior permission; an obligation to be readily available to respond to an incident; an obligation to refrain from consuming or being affected by alcohol or other drugs; restrictions on having visitors without permission; and an obligation not to disturb service users by his activities. There were also several other obligations in respect of ensuring the safety and security of the service users. The Court of Appeal found Mr Dickson was at his employer's disposal throughout out the period of the sleepover.

[39] At various periods during her employment Ms Ozieranska occupied an apartment on-site so was immediately available if an issue arose, and in any event an obligation to remain within a 15-minute response time of the property was specified at

³ *Idea Services Limited v Dickson (No 1)* [2009] ERNZ 116

the July 2009 meeting. As a result there was a requirement of constant availability suggesting the on call time was work time. Also, although the constraints on Ms Ozieranska's ability to see friends and family during this time (for example) were not as tight as those applying to Mr Dickson, Ms Ozieranska was unable to go very far from the workplace. I find her circumstances were similar in kind to those discussed in the overseas authorities noted by the Court of Appeal as they applied to the extent to which the employee was at the disposal of the employer, and therefore at 'work'.

[40] For these reasons I find Ms Ozieranska's on call night duties were 'work' for the purposes of the Minimum Wage Act.

[41] Unlike Mr Dickson, Ms Ozieranska was salaried and her hours of work were flexible. It may not necessarily follow from the above finding that she was entitled to a further payment at the prescribed minimum hourly rate for her on call night duties. However neither party raised the issue and I turn to Ms Ozieranska's calculation of the amount she is owed.

[42] I do not accept the calculation because it does not address the payments Ms Ozieranska accepts were made in respect of the on call duties. As I have indicated, the further evidence on the point was imprecise and occasionally conflicting. I resolve the matter by reducing by one half the amount Ms Ozieranska calculated.

[43] CQGL is ordered to pay to Ms Ozieranska the sum of $\$38,000/2 = \$17,000$.

Annual leave owed at termination of employment

[44] Ms Ozieranska says that at the date of termination of her employment she was owed payment for unused annual leave of 16.85 days.

[45] Her final payslip supports the number of days' leave cited. The amount owing would be $16.85 \times \$221.15 = \$3,726.38$. However the payment was not made.

[46] The reason for the failure to pay was CQGL's view that Ms Ozieranska had made herself payments to which she was not entitled. In that respect it set out a counterclaim in the statement in reply. However no further details of its calculation,

or material in support, were provided. CQGL ceased to participate in this employment relationship problem shortly afterwards.

[47] Accordingly I am unable to address the counterclaim. Ms Ozieranska is entitled to payment for unused annual leave in the sum of \$3,726.38. Payment is ordered accordingly.

Time off in lieu of public holidays worked

[48] Ms Ozieranska says that, at the date of termination of her employment she was owed payment for unused time off in lieu of public holidays worked (or alternative holidays) of 9 days.

[49] Her final payslip supports this. The amount owed was $9 \times \$221.15^4 = \$1,990.35$. However the payment was not made.

[50] The reason for the failure to pay is the same as the reason for the failure to pay the entitlement to unused annual leave. The outcome is also the same. CQGL is ordered to pay to Ms Ozieranska the sum of \$1,990.35

Personal grievance – unjustified disadvantage

The amended statement of problem listed a number of conditions of Ms Ozieranska's employment said to have been affected to her disadvantage by unjustified actions of the employer's. Since several had occurred years earlier, I asked when these matters were raised as grievances with the employer. Mr Taylor took instructions, and withdrew the personal grievances.

Summary of orders

[51] CQGL is ordered to pay to Ms Ozieranska:

- i. \$442.30 for days worked but not paid;
- ii. \$17,000 under the Minimum Wage Act;

⁴ Ref s 60 Holidays Act 2003

- iii. \$3,726.38 for unused entitlement to annual leave;
- iv. \$1,990.35 for time off in lieu not taken in respect of work done on a public holiday

[52] I further order that interest be paid on the above sums calculated as 5% from the date of this determination to the date of payment.

Costs

[53] NQGL is ordered to reimburse Ms Ozieranska for the filing fee of \$71.50.

[54] If any additional amount is sought by way of costs Mr Taylor may file and serve a memorandum on the matter by the close of business 28 days from the date of this determination. If no memorandum is filed there will be no further order for costs.

R A Monaghan

Member of the Employment Relations Authority