

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 297
3000178

BETWEEN HELEN LOUISE
PALFREYMAN
Applicant

AND KCL ENGINEERING
SERVICES LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
E J Butcher, Counsel for Respondent

Investigation Meeting: 26 September 2017

Submissions received: 26 September 2017 from Respondent

Date of Oral
Determination: 26 September 2017

Date of Record of
Determination 27 September 2017

**RECORD OF ORAL DETERMINATION
OF THE EMPLOYMENT RELATIONS AUTHORITY**

A. KCL Engineering Services Limited defaulted in payment to Ms Palfreyman of wages and other money payable to her under the Individual Employment Agreement.

B. KCL Engineering Services Limited is ordered to pay to Ms Palfreyman the following amounts within 14 days of the date of this determination:

a. The sum of \$15,392.80 gross under s131 of the Employment Relations Act 2000;

b. Interest on the sum of \$15,392.80 from 23 December 2016 at the applicable rate of 5% per annum continuing until payment.

Employment Relationship Problem

[1] Ms Palfreyman was employed by KCL Engineering Limited as an office administrator. She was employed from 5 August 2015 until 22 December 2016.

[2] Prior to the commencement of her employment, the parties signed an Individual Employment Agreement (IEA). This recorded that Ms Palfreyman would be paid a salary of “\$40,000.00 *pa pro-rated on an hourly rate*”. It further provided that her normal hours of work were 30 hours per week from 9 am to 4 pm, Monday to Friday.

[3] For the duration of Ms Palfreyman’s employment, KCL Engineering calculated Ms Palfreyman’s hourly rate by taking her salary, subtracting KiwiSaver, then dividing her salary by the 26 fortnightly pay days in a year, and then dividing this sum by an 80 hour fortnight. This gave KCL Engineering an hourly rate which it paid to Ms Palfreyman for each hour she worked.

[4] Ms Palfreyman claims this calculation was incorrect and breached the terms agreed by the parties in the IEA. She says her salary should have been pro-rated based on her normal hours of work of 30 hours per week or 60 hours per fortnight. She says KCL Engineering’s breach resulted in her being underpaid throughout her employment. She claims reimbursement of the underpayment of her wages together with holiday pay and interest.

[5] KCL denies it breached the IEA.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from the applicant and respondent but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues:

[7] The issues to be determined are:

- a) Issue One: Has there been a default in payment of wages payable to Ms Palfreyman under the IEA?
- b) Issue Two: If so, what monies are payable by KCL Engineering to Ms Palfreyman?

Issue One: Has there been a default in payment of wages payable to Ms Palfreyman under the IEA?

[8] The starting point when interpreting a clause in an IEA is to consider the natural and ordinary meaning of the language used by the parties. Even if the words are plain and unambiguous, this does not preclude a consideration of the surrounding circumstances¹. This acts as a cross-check as to whether some other or modified meaning was intended.

[9] An objective approach is required. Evidence of facts and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual inquiry. This includes the circumstances in which the agreement was entered into. Evidence of post contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear. Evidence of what a party subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time, is irrelevant.²

[10] The relevant terms of the IEA, dated 30 July 2015, included:

a) Hours of Work

- 4.1 Your normal hours of work are specified in Schedule A...Your remuneration has been set in anticipation that additional hours may be required.
- Schedule A: Normal days and hours of work:
30 hours per week Monday to Friday
9am – 4 pm (hour for lunch)

¹ *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789; *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169

² *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149

b) Pay

- 5.1 Your rate of pay is specified in Schedule A and will be paid by equal instalments directly into your nominated bank account fortnightly. Your pay is full compensation for all the work and hours that you may be required to perform.

Schedule A:Salary:

\$40,000 pa pro-rated on an hourly rate as per work load. Hours indicative.

c) Completeness

- 32.1 This employment agreement represents a full record of the agreement entered into by you and us and supersedes any existing agreements, written or oral, or customary practices being observed between the parties. Any changes or additions to this agreement, or waivers of our rights or your obligations under this agreement, will not be binding unless mutually agreed and recorded in writing.

[11] The disputed wording in the present circumstances is the meaning of:

Salary \$40,000 pa pro-rated on an hourly rate as per work load. Hours indicative...

[12] KCL Engineering submits the natural and ordinary meaning of *\$40,000 pa pro-rated on an hourly rate as per work load. Hours indicative...* is that the \$40,000.00 was to be pro-rated based on a full time week of 40 hours. I disagree. I find the natural and ordinary meaning of these words is that the \$40,000.00 was to be pro-rated based on the hours indicated and agreed in the IEA i.e. 30 hours.

[13] Notwithstanding my finding, it is an important part of my interpretation process to “cross check” my view of what the words mean against the contractual context. The relevant contractual context is this:

- a) Ms Palfreyman was 21 when she interviewed for the position with KCL Engineering. Whilst she had been previously employed by other entities, she says she was paid a standard hourly rate. She was unfamiliar with the term “pro-rata”. She undertook a google search to ascertain its meaning which meaning is consistent with her claim.
- b) Ms Palfreyman attended job interviews on 28 and 29 July 2015. She was interviewed by Ms Nicholson who was KCL Engineering’s office

administrator. Ms Nicholson was responsible for setting the hours of work and salary. At the meeting on 28 July 2015 Ms Palfreyman was told the hours of work were 30 hours to be worked between the hours of 9 am to 4 pm Monday to Friday. At the meeting on 29 July 2015 she was told she would be paid \$40,000.00 per annum. There was no mention that the salary would be pro-rated based on a 40 hour week.

- c) Following Ms Palfreyman starting work she was given fortnightly payslips that showed how her hourly rate was calculated. These records showed KCL Engineering was calculating her hourly rate based on an 80 hour fortnight. Ms Palfreyman accepts she checked these records to make sure the hours she worked were correct as her hours fluctuated weekly. She also checked the amount she was to be paid. She said she didn't take any notice of how her hourly rate had been reached and particularly that 80 hours were being used instead of 60. She said she trusted that KCL was paying her correctly. It was not until employment issues arose in late September 2016 that she had reason to check these figures and discover the underpayments. KCL accepts the calculations were not discussed with Ms Palfreyman. I do not consider the payslips demonstrate what meaning the parties intended the words in the IEA to mean.

[14] Having considered the factual context, I am satisfied the meaning which the contractual words would convey to a reasonable person, with all the background knowledge available to the parties, would be that which I have reached.

[15] Ms Palfreyman's salary was to be pro-rated based on the hours indicated and agreed in the IEA i.e. 30 hours. By KCL Engineering failing to pay Ms Palfreyman in accordance with this agreement it has breached the IEA and defaulted in the payment of wages and other monies payable to Ms Palfreyman.

Issue Two: What monies are payable by KCL Engineering to Ms Palfreyman?

[16] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee. This applies despite the acceptance by an employee of any payment at a lower rate.³

³ Section 131 Employment Relations Act 2000

[17] A summary of Ms Palfreyman's pay over the period of her employment was provided by KCL Engineering. Ms Palfreyman accepts this record accurately shows the hours she worked.

Fortnights ended 9/08/15 to 20/03/16

[18] Between the fortnights ended 9/08/15 and 20/03/16 Ms Palfreyman was paid an annual salary of \$40,000.00 per annum gross. This sum was inclusive of KCL Engineering's 3% Kiwisaver contributions as agreed by the parties at clause 5.2 of the IEA.

[19] After deduction of the Kiwisaver contributions of \$1,165.00 from the annual salary a sum of \$38,835.00 gross was payable by KCL Engineering to Ms Palfreyman. This equated to \$24.89 gross per hour.

[20] Ms Palfreyman was paid a sum of \$18.67 gross per hour during this period. A shortfall of \$6.22 per hour. Between the fortnights ended 9/08/15 and 20/03/16 she worked 1102.99 hours. Multiplying the number of hours worked by the shortfall of \$6.22 per hour results in an underpayment to Ms Palfreyman of \$6,860.59.

[21] KCL Engineering is ordered to pay to Ms Palfreyman the sum of \$6,860.59 gross for wage arrears, together with the sum of \$548.85 gross for holiday pay. In addition, interest is payable on these sums at the applicable rate of 5% per annum⁴ from 23 December 2016 continuing until payment. Payment of these sums must be made within 14 days of the date of this determination.

Fortnights ended 03/04/16 to 25/12/16

[22] Between the fortnights ended 03/04/16 and 25/12/16 Ms Palfreyman was paid an annual salary of \$45,000.00 per annum gross. This sum was inclusive of KCL Engineering's 3% Kiwisaver contributions as agreed by the parties at clause 5.2 of the IEA.

[23] After deduction of the Kiwisaver contributions of \$1,311.00 from the annual salary a sum of \$43,689.00 gross was payable by KCL Engineering to Ms Palfreyman. This equated to \$28.00 gross per hour.

⁴ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4

[24] Ms Palfreyman was paid a sum of \$21.00 gross per hour during this period. A shortfall of \$7.00 per hour. Between the fortnights ended 03/04/16 and 25/12/16 she worked 1056 hours. Multiplying the number of hours worked by the shortfall of \$7.00 per hour results in an underpayment to Ms Palfreyman of \$7,392.00.

[25] KCL Engineering is ordered to pay to Ms Palfreyman the sum of \$7,392.00 gross for wage arrears, together with the sum of \$591.36 gross for holiday pay. In addition, interest is payable on these sums at the applicable rate of 5% per annum from 23 December 2016 continuing until payment. Payment of these sums must be made within 14 days of the date of this determination.

Costs

[26] Ms Palfreyman was not represented at the Investigation meeting. However, I understand she may have received legal representation at some point to assist her with her claim.

[27] The parties are encouraged to resolve costs by agreement. If that is not possible, then Ms Palfreyman has ten working days to file a costs memorandum. KCL Engineering has a further ten working days to file its costs memorandum. Ms Palfreyman then has three working days to file and serve a reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

[28] All submissions must include a breakdown of how and when costs were incurred and be accompanied by supporting evidence.

Jenni-Maree Trotman
Member of the Employment Relations Authority