IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 109
5466021

	BETWEEN	HELLEN SMITH-HUGHES Applicant
	A N D	TE WHANAU O HATO PETERA TRUST Respondent

Member of Authority:	T G Tetitaha
Representatives:	D Flaws, Advocate for Applicant D Takitimu, Counsel for Respondent
Investigation Meeting:	23 February 2015 at Auckland
Submissions Received:	27 February 2015 from the Applicant 2 March 2015 from the Respondent
Date of Determination:	14 April 2015

DETERMINATION OF THE AUTHORITY

A. **The application for personal grievance is dismissed.**

B. **The application for payment of wage arrears for alleged overtime is dismissed.**

C. **Te Whanau o Hato Petera Trust is ordered to pay Hellen Smith-Hughes wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling $523.66.**

D. **Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] At the start of the hearing the applicant, Hellen Smith-Hughes, withdrew part of her personal grievance of unjustified disadvantage. At the completion of her evidence, she withdrew the remainder of her personal grievance of constructive and unjustified dismissal. The application for personal grievance is dismissed.

[2] The only remaining cause of action is payment of wage arrears for overtime and holiday pay.

Facts leading to dispute

[3] On 15 January 2014 the applicant attended an interview with her manager, Shanan Halbert and two other employees. There is a dispute about what was said at the meeting regarding overtime.

[4] On 21 January 2014, the applicant signed an employment contract and was given a job description for the position of kaiarataki-programme leader.

[5] Between 26 January and 18 February 2014, the applicant worked varying hours. There is dispute about the number and necessity of hours claimed.

[6] On 10 February 2014, the applicant met with Mr Halbert and other employees about her allegedly excessive workload. An employee was assigned to assist her.

[7] On 18 February 2014, due to an earlier shoulder injury, the applicant was unable to continue working.

[8] On or about 3 March 2014 the applicant was deemed unfit to return to work and received accident compensation.

[9] On 14 August 2014, the applicant resigned.

[10] The applicant seeks payment of wages she alleges are owed for overtime, statutory holidays and final holiday pay.

Issues

[11] There is a single issue namely whether the applicant is owed wage arrears pursuant to s131 of the Employment Relations Act 2000. The wage arrears are for

alleged overtime worked during the period 26 January to 18 February 2014 and under payment for work on two public holidays, Waitangi Day and Auckland Anniversary, and outstanding holiday pay.

Overtime

[12] The applicant alleges she is owed overtime for the period 26 January and 18 February 2014 of 71.1 hours at the rate of $25 per hour totalling $1,777.50. The relevant work period is just over two weeks in duration[1]. She alleges she was told on 15 January 2014 at the job interview that there may be overtime which she accepted and therefore was 'required' by the Respondent to undertake overtime.

The Law

[13] This dispute is about interpretation and application of the parties employment agreement. The necessary inquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. To be properly informed the Authority must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.[2]

[14] It is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.[3]

[15] The Courts have long held the traditional tests for implication of terms are necessity to lend business efficacy, so obvious as to go without saying, capable of clear expression, compatible with the express terms of the contracts and would the contracts be reasonably understood, when read in context, to have that meaning.[4]

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1 Amended statement of problem para.5.17.4, joint bundle of documents at p.23

2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

3 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [23]

4 *White v Reserve Bank of New Zealand* [2013] NZCA 663 at [35] citing *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 282-283; *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2013] NZCA 506 at [42]-[45] *Dysart Timbers Ltd v*

Employment Agreement

[16] The parties entered into an employment agreement on or about 21 January 2014. Clause 6 of the agreement set out the hours of work as follows:

> *6.* ***Hours of work***
>
> *6.1* *Full time hours with an obligation to perform overtime as necessary with an entitlement to extra pay.*
>
> *The Employee's normal hours of work shall be* ***36*** *hours per week, between the hours of* ***2.30-7.30pm*** *on* ***Sunday-Friday****. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. Where extra hours are performed the Employee shall be entitled to an overtime payment as set out in the wages clause below.*

[17] There does not appear to be any other clause that defines how the employee may be required to do overtime or what the rate of pay was. There is no express term for payment of overtime at the rate of $25 per hour.

[18] Ms Smith-Hughes, evidence was she had been told overtime may be required and believed this gave her authority to determine when and how much overtime would be done, and how much would be paid. This view is inconsistent with clause 6 of the agreement. Clause 6 provides the respondent employer may reasonably require overtime to be performed by the employee. There is no basis to imply a term of the nature contended by Ms Smith-Hughes.

[19] A plain reading of clause 6 is that the performance of overtime is reasonably required by the Employer. The remainder of the clause indicates a reasonable requirement will be in order for the employee to properly perform their duties.

Was the overtime reasonably required by the respondent employer?

[20] Ms Smith-Hughes submitted that she was 'required' by the respondent to do overtime because of a discussion on 15 January 2014 at her job interview. She says *"I was asked if I would work overtime and I agreed … we discussed overtime and both parties acknowledged that some overtime would be necessary to get the*

Nielsen [2009] NZSC 43, [2009] 3 NZLR 160 at [25] and *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [25] [27].

programme up and running." [5] This cannot evidence requirement by the respondent under clause 6 because she had not at that stage been offered any job. The job offer was made on 20 January and accepted the following day. At best any discussion on 15 January can only indicate overtime may be required. It would not be until the job had started that any assessment of the reasonable requirements for overtime can be made.

[21] Ms Smith-Hughes refers to a subsequent discussion with Mr Halbert on 21 January 2014. She believes *"we agreed that overtime hours would be submitted and taken as "days in lieu".*[6] Mr Halbert's evidence was he expected her to undertake all tasks required to do the job within her hours of work. He recalled telling her she required pre-approval in writing for overtime. He was not concerned if there was an hour here or there but he disputes the extent of overtime now claimed. He believes Ms Smith-Hughes struggled in the pressured environment and lacked skills in dealing with the students. This cannot evidence any requirement by the respondent to do overtime.

[22] Although Mr Halbert may have been peripherally aware of her presence at the school, I accept he would not have been aware of the overtime claimed until he received the 9 February email detailing this.[7] He was not present in the kitchen at all times when Ms Smith-Hughes was working. He had a separate office and his own workload to undertake. He accepts he saw her working and there may have been 'an hour here or there' but not the amount she now seeks. It is more probable he did not fully turn his mind to Ms Smith-Hughes' overtime until he received her 9 February email. This cannot evidence any requirement to do overtime.

Was the overtime required for the proper performance of the applicant's duties?

[23] I have doubts about the necessity of the overtime for the proper performance of her duties. There were no or very few students at school until 2 February 2014. Despite the lack of students and therefore necessity to supervise preparation and cooking, Ms Smith-Hughes claims to have worked 46.5 hours between 26 January and 1 February 2014 or 10.5 overtime hours. Between 2 to 8 February 2014 she claims to have worked 68.5 hours or 32.5 hours overtime. From 11 to 17 February

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5 Sworn brief of evidence H.R. Smith-Hughes para 13 and 31.
6 See above para 32.
7 Joint Bundle of Documents Applicant Document 8

2014 she claims to have worked 46.45 hours or 10.45 hours overtime. She also claims payment for 6.5 overtime hours on 18 February 2014.[8] The total overtime sought is 59.95 hours not the 71.1 hours claimed.

[24] There was little evidence to explain why the proper performance of her duties required overtime.

[25] The time claimed on 18 February appears excessive given she was unwell and her evidence states she went to the doctor regarding her shoulder injury.[9] It may be she seeks payment of sick leave. I accept the respondent submission she was not entitled to sick leave until after 6 months continuous employment under clause 8.3 of the agreement.[10] She had been employed two weeks. She had no entitlement to receive payment for sick leave on 18 February 2014.

[26] Ms Smith-Hughes evidence was inaccurate and prevaricated at times. The overtime hours claimed in the amended statement of problem did not accord with her oral and written evidence summarised in a timeline[11]. For example on 29 January 2014 in the amended statement of problem she claimed to have worked 9.5 hours. In her written timeline she claimed to have worked 7.5 hours. Again on 16 February 2014 in the amended statement of problem she claimed to have worked 12.5 hours. In her timeline she claimed to have worked 11 hours.

[27] On 30 and 31 January 2014 in the amended statement of problem she claimed to have worked 4 hours. In her timeline she claimed to have worked 11.5 hours each day including attendance at an induction meeting between 8.45 am to 3.30 pm both days in addition to the 4 hours of work. Mr Halbert's accepted there was induction training on 28 January but not the 30 and 31 January 2014 as claimed.

[28] When asked about the inaccuracies between her amended statement of problem and her timeline, Ms Smith-Hughes told me to prefer the evidence set out in her timeline. However this did not assist her on 15 February 2014 where no evidence of the time spent on those tasks is set out in the timeline. On 15 February 2014 the timeline records her dealing with run sheets and having to take frozen foods out to defrost. In her amended statement of problem she claims to have worked 1.45 hours

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8 Amended Statement of Problem para 2.7.1
9 Sworn brief of evidence H R Smith-Hughes para 52.
10 Joint Bundle of Documents Applicant Document 4 p89
11 Joint Bundle of Documents Applicant Document 7

but this is not in her timeline or other evidence filed. Given the below amount of time spent on administrative tasks including menus I am surprised at the need to work on run sheets on a 'day off'. I was also left in doubt about why she did not arrange for another staff member to remove the frozen foods to defrost.

[29] Mr Halbert recalled telling her on 31 January 2014 not to work Saturdays. In her employment agreement the hours of work did not include Saturdays.[12] Despite the agreement and Mr Halbert's uncontested evidence he instructed her to stop working Saturdays, Ms Smith Hughes continued to do so. She now claims overtime for 1, 8 and 15 February 2014.

[30] Most of the overtime claimed appeared to be shopping. Ms Smith-Hughes alleged suppliers did not deliver and she needed to collect the supplies herself. She also referred to the need to 'tweak' menus dependent upon what the supplier had in season.

[31] Mr Halbert denied this was the case. There were set menus which did not require change. He believed the ordering should have been well in hand, given they were using the same menus and run sheets used in previous years for catering for the students. All suppliers delivered to the school. From his observations Ms Smith-Hughes underestimated quantities needed or omitted to place orders in a timely manner to ensure delivery. This resulted in her having to take extra time to go to the supplier to collect the items required.

[32] From my analysis of her timeline, Ms Smith-Hughes was shopping and ordering on 3 of the 7 days from 26 January to 1 February, shopping or buying in stores 4 of the 7 days from 2 to 9 February and ordering food two weeks in advance on 4 of the 7 days from 11 to 17 February. This appears to be an excessive amount of time shopping or ordering food.

[33] Similarly even if they required 'tweaking' working on the set menus every day of the week from 26 January to 1 February and 4 out of 7 days from 11 to 17 February appears excessive.

[34] Ms Smith-Hughes was not responsible for placing orders with suppliers. She provided the list to another employee who contacted the suppliers. Her ordering

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12 Joint Bundle of Documents Applicant Document 4 Clause 6.1

duties would have been limited to estimating quantities. This would not have required the amount of time now claimed.

[35] Ms Smith-Hughes claimed work in preparing and cooking food also seems excessive. I accept Mr Halbert's evidence she was responsible for overseeing or supervising the work not cooking or preparation of food. I accept Mr Halbert's uncontested evidence the preparation and cooking of lunch and dinner was undertaken by students and adult assistants not Ms Smith-Hughes. The menu was generally a BBQ dinner cooked by other people than Ms Smith-Hughes. Lunch consisted of a filled roll, chips and a piece of fruit which was prepared by others and not Ms Smith-Hughes. She was only expected to organise and facilitate with the "odd piece" of cooking. Mr Halbert knew this because he was present during that period of time and assisted with the preparation and cooking himself. I doubt the necessity for Ms Smith-Hughes to start work earlier than her 2.30pm start time in the agreement given her role. Dinner finished around 5.30 pm. There was ample time to oversee preparation of the lunches prior to her finish time of 7.30 pm.

[36] Mr Halbert's evidence is also consistent with Ms Smith-Hughes timeline evidence. Six meals between 3 to 8 February 2014 were offsite BBQ's or takeaways.[13] These would have required little or no preparation by Ms Smith-Hughes. Her claimed time for preparation of meals appears excessive during this period.

[37] I doubt the necessity for Ms Smith-Hughes to attend work on 8 February 2014 for half an hour to open the kitchen for others. Mr Halbert gave uncontested evidence there was an onsite kaumatua who could have opened the kitchen if she had made arrangements.

[38] By 3 February 2014 Mr Halbert noticed she was struggling. He arranged for another employee to become involved who has never claimed for overtime. He also gave uncontested evidence on 7 February 2014 Ms Smith-Hughes was not working in the kitchen because she was attending and participating in a powhiri. No food preparation was required because the luncheon involved cold meats, rolls and salads which he and others prepared.

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[13] Joint Bundle Applicants Timeline p 111-2 BBQ 3,4,5 and 8 February Fish and Chip dinners 5 and 7 February 2014

Public Holidays

[39] I do not accept there was a necessity for Ms Smith-Hughes to work on Auckland Anniversary. Mr Halbert's uncontested evidence was that there were no staff or students present at the school. I accept his evidence and decline to make any award for Ms Smith-Hughes work undertaken on 27 January 2014.

[40] There also seemed little necessity for Ms Smith-Hughes to undertake shopping on a public holiday (Waitangi Day). Mr Halbert also questioned whether any of the suppliers were open. He accepts Ms Smith-Hughes supervised dinner on Waitangi Day but recalls her having to place a last minute order for cold meats and rolls for the powhiri the following day because she had forgotten to do so earlier. At best she is entitled to recompense for working a statutory holiday. I decline to award any overtime.

[41] I am not satisfied on the balance of probabilities Ms Smith-Hughes was required by the respondent employer to do the alleged overtime and/or it was reasonably required to properly perform her duties. The application for payment of wage arrears for alleged overtime is dismissed.

Holiday pay

[42] The respondent does not dispute that there is an entitlement to a further payment for holidays. The delay in payment was due to some confusion over whether or not this employee had resigned. That position has now been clarified and she resigned in August 2014.

[43] The respondent accepts the following payments have been made and/or are due and owing:

- 1.5 days for Waitangi Day;
- 1.5 days for Auckland Anniversary Day.

[44] It also seeks a deduction for two paid sick days on 9 and 18 February due her lack of sick leave entitlement.

[45] The respondent accepts for the purposes of settling the amounts owed that the daily pay pursuant to s.9 of the Holidays Act 2003 is $146.27. The total gross earnings for the period 21 January to 18 February 2014 was $3,803.09. The final holiday pay owed is calculated as follows:

• Holiday pay – 8% of gross earnings ($3,803.09) -	$304.25
• 1.5 of the daily rate of $146.27 for Waitangi Day	$219.41
• 1.5 of the daily rate for Auckland Anniversary	$219.41
Total final pay entitlement	**$743.07**

[46] As noted above I decline to award any payment for Auckland Anniversary. I make an adjustment of $219.41 to reflect this.

[47] I decline to make any further deductions because there is no claim she worked on 9 February and she only received a part payment for the period 17 February to 2 March 2014 which has not been broken down on a daily basis. It appears she attended the workplace again on 19 February and this may reflect that. She would also have been entitled to payment of her first week's wages while receiving ACC.

[48] Te Whanau o Hato Petera Trust is ordered to pay Hellen Smith-Hughes wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling $523.66.

[49] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority