

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**CA 85/07  
5053214**

BETWEEN REBECCA WEBSTER  
Applicant

AND ANTONY BUSH and ALLAN  
GARARD t/a QUEENSTOWN  
PHYSIOTHERAPY  
Respondents

Member of Authority: James Crichton

Representatives: Rebecca Webster in person  
Antony Bush for respondents

Investigation Meeting: Interview with applicant at Wellington on 6 June 2007  
Interview with respondents (Mr Bush) at Queenstown on  
20 July 2007

Determination: 25 July 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant (Ms Webster) brought a claim against the respondents (Queenstown Physiotherapy) alleging she was owed arrears of wages from her period of employment with Queenstown Physiotherapy.

[2] When Queenstown Physiotherapy filed their statement in reply on 31 October 2006, they also lodged with the Authority a cheque in full settlement of the arrears of wages which cheque was promptly forwarded by the Authority to Ms Webster.

[3] In their statement in reply, Queenstown Physiotherapy made a counterclaim alleging in effect that the early termination of Ms Webster's employment caused them loss which, given their allegation that the early termination was in breach of the employment agreement, was actionable.

[4] I directed the parties to mediation in the hope the matter might settle by agreement but the mediation was unsuccessful. Neither party was keen to incur further cost at a full investigation meeting, particularly as Ms Webster had returned to Wellington and was loathe to come back to Queenstown for an investigation meeting.

[5] Accordingly, I advised the parties I would interview each of them separately, in their respective locations, and then make decisions about how to deal appropriately with the matter.

[6] Having conducted those interviews, I am now satisfied that there is no further information I require and that I am in a position to issue a determination. Both parties have been made aware of my conclusion in this regard and are comfortable with it.

[7] The essence of the matter still in contention between the parties is whether Queenstown Physiotherapy's counterclaim can be made out. As a matter of fact, Ms Webster's original wages claim has been satisfied and there is no other outstanding issue.

[8] In their counterclaim, Queenstown Physiotherapy allege that they are owed the following sums:

- (a) An amount equivalent to one week's pay representing the one week short in the notice that Ms Webster gave when she resigned her employment, being \$449.80;
- (b) An amount of \$1,023.36 being Queenstown Physiotherapy's loss of earnings over that week;
- (c) An amount of \$5,116.80 in compensation for loss of earnings over the balance of the period that Ms Webster, according to Queenstown Physiotherapy, ought to have worked given their contention that Ms Webster was employed on a fixed term engagement without the ability to resign early (as in fact she did);
- (d) Reimbursement of legal costs of \$247.88.

[9] After the mediation, and the subsequent telephone conference with me, it became clear that the only matter separating the parties was payment of one week's wages which had been agreed at a figure of \$412, this on the footing that it was

suggested both parties had incurred legal costs and that those would effectively be set off the one against the other. Queenstown Physiotherapy declined to pursue their original claims for loss of earnings.

[10] It was clear that both parties were treating the issue as a matter of principle and it was on that basis that I agreed to the unusual process that I adopted with a view to making a determination to assist the parties resolve their issue.

### **Interview with Ms Webster**

[11] When I spoke with Ms Webster at Wellington on 6 June 2007, she indicated to me that the essence of her principled stance was Queenstown Physiotherapy's failure to do what they promised when she was engaged. Ms Webster agreed that she had been told that this was to be a short term engagement to assist Queenstown Physiotherapy to deal with their winter rush, agreed that she was given an extensive briefing on the nature of the employment but relied on the fact that the written employment agreement which she was subsequently presented with and which governed the employment relationship referred to her working for "*approximately 40 hours per week*". Ms Webster also told me that when she was engaged, in the pre-employment briefing, she was given to understand that she would in fact be working for approximately 40 hours a week.

[12] She says that in the result, she worked for approximately 24 hours a week, that is to say barely more than half of what she anticipated and that she was simply unable to meet her obligations at that reduced level of income. She says that she was particularly distressed to discover once she was engaged that all of the locum physiotherapists employed by Queenstown Physiotherapy were treated as "*part time*" so in her view there was never any prospect of her being employed for "*approximately 40 hours*". Indeed, she drew my attention to an organisation chart provided by Queenstown Physiotherapy which referred to the locum physiotherapists as being "*part time*".

[13] Ms Webster told me that had she understood that the work was "*part time*" when she was inquiring about the job, she would never have accepted the position but it was not until she got down to Queenstown and commenced work that she realised that she might not have access to the number of hours she expected.

**Interview with Queenstown Physiotherapy**

[14] I spoke with Antony Bush at Queenstown on 20 July 2007 and during the course of that interview put to him the issues that seemed to me to arise from my interview with Ms Webster. He very honourably accepted that there was a fundamental problem with the employment agreement which Ms Webster had signed which clearly contained provisions which did not accord with the nature of the relationship which Queenstown Physiotherapy desired to have with its locum physiotherapists. In particular, he referred to the clause which Ms Webster relied upon to effect her resignation (no longer a matter in dispute between the parties) and the provision in the agreement where in two separate parts of the document there is reference to the locum physiotherapist having access to approximately 40 hours work per week. Mr Bush acknowledged that that in fact was inaccurate.

[15] The practical reality was that the locum physiotherapists were indeed employed traditionally on a part time basis in order that they could come to the Queenstown area during the ski season and spend some time skiing and some time working. Traditionally, Mr Bush told me that the practice did indeed employ locum physiotherapists working perhaps four days a week for say six hours a day (the 24 hours a week Ms Webster talks about), the rest of the week being devoted to the locum physiotherapist's recreational activities on the ski field. Mr Bush told me that when the practice was particularly busy, he would approach the locum physiotherapists to see if they could increase their working hours at the expense of their recreation time and many agreed to do this.

[16] He accepted without reservation that, insofar as the employment agreement provided for "*approximately 40 hours of work per week*", it was inaccurate, but he denied that, in the original briefing that Ms Webster would have received, there was any promise that she would have had access to "*approximately 40 hours of work per week*". However, Mr Bush acknowledged that Ms Webster could point to the provisions in the employment agreement which plainly did not accord with the practical reality.

[17] However, Mr Bush also made clear that had Ms Webster made it clear to Queenstown Physiotherapy that she needed more hours, they would readily have been provided; Mr Bush's evidence was that Ms Webster never asked for additional hours and that on receipt of her resignation (which caused the original dispute between the

parties), Ms Webster was immediately offered additional hours in order to encourage her to remain in the practice but she declined.

### **Determination**

[18] In all the circumstances, I do not think the counterclaim has been made out. I think the relationship between the parties has been clouded by the disjunct between the practice of Queenstown Physiotherapy and the way in which it documents that practice by way of the employment agreement which was provided to Ms Webster.

[19] Ms Webster expected “*approximately 40 hours work per week*” in accordance with her employment agreement and she received barely 60% of those hours. In the circumstances, it appears to me unfair and unjust to further penalise her by requiring her to pay Queenstown Physiotherapy the one week’s wages which it is agreed her notice period was short by. My conclusion, albeit hypothetical, is that had Ms Webster received the hours which she says she thought she was contracting for, there might never have been a resignation.

[20] The counterclaim having failed, that concludes the determination of the outstanding issue between the parties. It is, however, appropriate for me to record that Queenstown Physiotherapy have used this experience as “*a teachable moment*” and rewritten their employment agreement template that they use for locum physiotherapists so as to accord with what actually happens in practice. They are to be commended for that.

[21] I thank both parties for their courtesy and assistance to the Authority in resolving this employment relationship problem.

James Crichton  
Member of the Employment Relations Authority