

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 200
5352825

BETWEEN

SONJA WHYTE
Applicant

AND

SETAR EIGHTY ONE
LIMITED t/a ESQUIRES
NAPIER
Respondent

Member of Authority: G J Wood

Representatives: Andrew Pulman for the Applicant
Rebecca Askin for the Respondent

Investigation Meeting: 22 November 2011 at Napier

Information Received: 22 November 2011

Determination: 6 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Sonja Whyte, claims that she was underpaid during the course of her employment with the respondent (Setar/Esquires). This is denied by Setar.

Discussion and Findings

[2] Ms Whyte was not provided with pay slips regularly or promptly, mainly because the principals of Setar, Mr Michael and Ms Rebecca Askin, are based in New Plymouth, where they also run another Esquires coffee house. They were reliant on Ms Whyte, the coffee house supervisor in Napier, for sending clock-on/clock-off records in order to make up weekly wages, then subsequently rosters amended by hand, from which the wages were compiled. During this latter period, the clock-

on/clock-off system continued to operate, but Ms Whyte did not rely on it in informing the Askins of her and the staff's hours.

[3] Over the course of Ms Whyte's employment, a number of problems arose over her wages between November 2010 (when Setar's coffee house first opened) and May 2011. There were seven different fortnightly periods over which the claims were made. A complex reconciliation has been required between the rosters, the pay slips, the time clock records and the oral evidence, in order to ascertain what, if any, monies Ms Whyte has been underpaid, at her hourly rate of \$15.00. In total she claims \$405.35 gross

[4] First, I have no reason to doubt the genuineness of Ms Whyte's evidence that for all the times when she claimed under the rosters for time worked she did work for that period. On the other hand, however, the clock-on/clock-off records show when she left the premises. In the absence of better evidence I have therefore relied on the latter, on the balance of probabilities.

[5] Second, Setar has deducted a quarter of an hour's pay from Ms Whyte's claims for every occasion when she took a break of over 15 minutes. On the balance of probabilities, I prefer Ms Whyte's evidence that it was understood and accepted that she was entitled to take her two 10 minute breaks at one time together (rather than separately as set out in the parties' employment agreement) because there was simply not time to do so, usually because of pressing customer demands. While this was not written down and was contrary to the terms of the written employment agreement, I consider that this was something that Setar accepted during the course of Ms Whyte's employment. I therefore reject all the deductions in hours claimed by Setar over this issue.

[6] Third, I accept that when Ms Whyte clocked in she was working and if she arrived and started work earlier than rostered, then this was to the benefit of Setar, as she was working, and that on occasion this was at the direct request of Mr Askin. I have therefore not accepted any submissions that the claims should be reduced because of early starts.

[7] Fourth, Ms Whyte would finish earlier if the café was quiet and did not claim to be paid for those periods. I also accept that Ms Whyte did work outside of clock-in/clock-out hours. These were the sorts of swings and roundabouts in a normal

employment relationship which, unlike early starts, can not be compensated for under this claim.

[8] On the basis of the above analysis I therefore accept Ms Whyte's claim for the period ended 17 October 2010 of 0.75 of an hour.

[9] For the period ended 28 November 2010, Ms Whyte accepted that miscalculations had been made in her claim and it was agreed that 0.5 of an hour was owed.

[10] For the period ended 6 February 2011, I accept that Ms Whyte mistakenly claimed one hour's pay for a split shift, which was more likely to have been someone else mistakenly clocking in using her card. I therefore accept that only 4.95 hours are owed.

[11] For the period ended 20 February 2011, leaving aside the breaks issue, it is clear that 8 hours has been underpaid, given my acceptance of Ms Whyte's calculations.

[12] For the period ended 1 May 2011, I accept Setar's calculations, based on the clock-on/clock-off records, and thus no hours are owed.

[13] For the period ending 15 May 2011, I again accept the clock-on/clock-off records of Setar (apart from the breaks issue) and therefore accept that one hour is owed.

[14] For the period ending 29 May 2011, no hours can be awarded. This part of the claim is unsuccessful because it relies on a computer-generated miscalculation in the roster system of six hours.

[15] From the above analysis it therefore follows that the number of hours owing by Setar to Ms Whyte is 15.20 hours. I therefore order the respondent, Setar Eighty One Limited t/a Esquires Napier, to pay to the applicant, Ms Sonja Whyte, the sum of \$228.00 gross.

Costs

[16] Ms Whyte has been partially successful in her claim. She has had to bring the claim to the Authority to obtain any monies and it therefore follows that she is entitled to be reimbursed the cost of her application.

[17] I therefore also order the respondent, Setar Eighty One Limited t/a Esquires Napier, to pay to the applicant, Ms Sonja Whyte, the sum of \$71.56 in expenses.

G J Wood
Member of the Employment Relations Authority