

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 8
5386620**

BETWEEN SARAH YANKELLOWITZ
Applicant
AND URBAN CAFÉ LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in person
Respondent in person
Investigation Meeting: On the papers
Submissions received: 10 December 2012 from Applicant
18 December 2012 from Respondent
Determination: 9 January 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Sarah Yankelowitz, claims that she is owed unpaid wages by the Respondent, Urban Café Limited (UCL), on the basis that she had not been informed that her hours of work were restricted to two paid hours per rostered shift, and she had worked in excess of two hours per rostered shift on occasion, and had not been paid for the additional hours she had worked.

[2] Ms Yankelowitz also claims that she is owed monies in respect of the failure by UCL to pay her at the correct statutory minimum hourly wage rate following its increase by 0.50c per hour from \$13.00 per hour to \$13.50 per hour with effect from 1 April 2012.

[3] UCL denies that it owes Ms Yankelowitz outstanding wages on the basis that Ms Yankelowitz would have been aware from the job advertisement and the job rosters that she was only required to work a two hour rostered shift.

Issues

[4] The issues for determination are whether Ms Yankelowitz is owed:

- Outstanding wages in respect of 17 hours worked and not paid during the period 17 February 2012 to 22 June 2012
- Payment in respect of hours worked and reimbursed at below the statutory minimum wage rate with effect from 1 April 2012.

Background Facts

[5] Ms Yankelowitz commenced employment with UCL on or about January 2012 as a Café Assistant. Ms Yankelowitz stated that she had responded to an advertisement which had been posted on the Student Job Search (SJS) website and which advertised the position as being remunerated at the rate of \$13.00 per hour.

[6] Ms Yankelowitz stated that the job advertisement to which she had responded did not stipulate that the position was limited in duration to two hours for each rostered shift.

[7] Mr John Evans, UCL Manager, provided a copy of an advertisement for the Café Assistant which had been pasted on the SJS website. This advertisement specified the hourly rate as \$14.00 per hour, the hours during which the duties were to be carried out as 3.30 pm - 5.30pm Monday to Friday, and stated: *Two of these days will be 2 hours longer as they involve a deep clean to be completed.*

[8] Ms Yankelowitz stated that this advertisement differed to that to which she responded, and highlighted the difference of the hourly rate in support of this contention.

[9] Ms Yankelowitz was provided with an individual employment agreement (IEA) signed on 10 February 2012 which detailed her rate of pay as \$13.00 per hour in Schedule A, and provided a job description in Schedule B. Ms Yankelowitz was also provided with a list of *Breakdown Duties* set out on a detailed list on UCL headed paper and which consisted primarily of cleaning duties.

[10] At clause 6 of the Employment Agreement entitled 'Hours of Work' it stated:

6.1 You are employed on a part time basis. Your days and hours of work will be as noted on Schedule A. Your hours of work will be set by roster and displayed within the work place at least seven days in advance wherever possible.

[11] Schedule A of the Employment Agreement stated at clause 1.3 (a):

Urban Café shall set up a roster of your ordinary hours of work which shall be given to you not less than one week before the commencement of that roster.

[12] Ms Yankelowitz provided in evidence an example roster which set out her hours as being within a two hour period and which states at the bottom in capital emboldened text: **'PLEASE KEEP TO YOUR ROSTER TIMES'**.

[13] Ms Yankelowitz stated that she had been given to understand that the roster time was approximate as her duties commenced after the café had closed, and her understanding had been that she had been expected to work until all her tasks were completed.

[14] Ms Yankelowitz stated that she had not been advised that her hours of work were restricted to two hours per shift, and that her payslips which were provided in evidence confirmed that UCL had not adhered to a pay limit of two hours per shift.

[15] UCL stated that Ms Yankelowitz had been advised many times that it was a two hour duty.

Determination

Is Ms Yankelowitz owed outstanding wages in respect of hours worked and not paid?

[16] UCL does not dispute that Ms Yankelowitz worked the additional 17 hours she has claimed, rather it claims that she is not entitled to the additional payment on the basis that the position required the incumbent to work two hours only, and the position had been advertised as being of two hours duration, which UCL claim was supported by the statement on the rosters which provided that employees should keep to the rostered times.

[17] Notwithstanding the content of the advertisement, which is only an indication of the proposed conditions of employment, I note that UCL employees are required to complete a Daily Time Sheet which states it must be completed each day and signed by the manager. As the Daily Time Sheet asks for the number of hours of actual work to be entered, it is reasonable to assume that the Rostered Hours as posted were indicative only and not

restrictive. I find that this is further supported by clause 6.1 of the IEA which states: “*You accept and understand that UCL cannot guarantee a minimum number of hours per week*”. Further the rosters make no mention of the additional hours required for ‘deep cleaning’ as per the advertisement.

[18] Ms Yankelowitz claimed that the advertisement submitted by UCL differed from that to which she had responded, in particular the hourly rate in the advertisement to which she had responded had been \$13.00 per hour.

[19] I find that Ms Yankelowitz’s claim in this respect is supported by the fact that the rate of hourly pay set out in Schedule A of the Employment Agreement provided to Ms Yankelowitz is \$13.00 rather than the \$14.00 per hour detailed on the copy of the advertisement provided by UCL, and by Ms Yankelowitz’s payslips which confirm her hourly rate as being \$13.00 per hour.

[20] On this basis I am prepared to accept Ms Yankelowitz’s evidence that the advertisement to which she had responded had not made it clear that the position was limited in duration to two hours for each rostered shift. In this respect I note that the advertisement submitted by UCL states that: “*Two of these days will be 2 hours longer as they involve a deep clean to be completed*”, which I consider supports this conclusion.

[21] UCL claim that Ms Yankelowitz had been informed several times that she was to work a two hour rostered shift, and the example roster provided does state ‘**PLEASE KEEP TO YOUR ROSTER TIMES**’.

[22] However the payslips provided by Ms Yankelowitz indicate that UCL had paid Ms Yankelowitz an amount in excess of two hours per rostered shift on occasion. The payslip for the period ended 30 March 2012 in particular shows that Ms Yankelowitz was paid for 16.25 hours.

[23] I find that the hours of work as posted on the Roster were indicative only and that the Daily Time Sheets completed by Ms Yankelowitz defined the hours worked. I further find that UCL had acknowledged and implicitly agreed to Ms Yankelowitz working hours additional to those rostered by making some payments in respect of some of those hours.

[24] I determine that UCL owes Ms Yankelowitz payment in respect of the 17 hours she worked but was not paid during the period 16 March 2012 to 22 June 2012. Ms Yankelowitz

is also entitled to statutory holiday payment in respect of the additional payment calculated at the rate of 8%.

[25] UCL is to pay Ms Yankelowitz \$238.60 (\$221.00 plus \$17.60) gross in respect of the 17 hours she worked but was not paid during the period 16 March 2012 to 22 June 2012.

Is Ms Yankelowitz owed payment in respect of hours worked and reimbursed at below the minimum wage rate with effect from 1 April 2012?

[26] The statutory minimum hourly rate increased from \$13.00 per hour to \$13.50 per hour with effect from 1 April 2012. Ms Yankelowitz claims that her hourly rate of payment did not increase from \$13.00 per hour after 1 April 2012. UCL does not dispute that this is correct and payslips submitted by Ms Yankelowitz confirm that her hourly rate after 1 April 2012 remained at \$13.00.

[27] I determine that Ms Yankelowitz is entitled to an additional 0.50c per hour for the 110 ¼ hours she worked after 1 April 2012. Ms Yankelowitz is also entitled to statutory holiday payment in respect of the additional payment calculated at the rate of 8%.

[28] UCL is to pay Ms Yankelowitz an additional \$59.54 (\$55.13 plus \$4.41) gross calculated at the rate of 0.50c per hour in respect of 110 ¼ hours worked post 1 April 2012.

[29] UCL is to pay Ms Yankelowitz a total payment of \$298.14 gross in respect of hours worked but not paid during the period 16 March 2012 to 22 June 2012, the unpaid increase in the statutory minimum wage after 1 April 2012, and statutory holiday payment.

[30] Ms Yankelowitz is to be reimbursed the filing fee of \$71.50.

Costs

[31] While costs are reserved, I note here that, subject to her submissions, the Applicant was not legally represented and, unless she incurred legal costs, it is therefore unlikely she has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority