

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 142
5345658

BETWEEN AMANDA AKESON
 Applicant

A N D JANINE and HAMISH
 LEARMOUTH
 Respondent

Member of Authority: James Crichton

Representatives: Amanda Akeson in Person
 Hamish Learmouth in Person

Investigation Meeting 19 August 2011 at Queenstown

Date of Determination: 23 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Akeson) alleges that she is owed unpaid wages and holiday pay totalling \$1,189.99 and the respondent (the Learmouths) deny that there is any money owing.

[2] Ms Akeson, a Swedish national, worked for the Learmouths as an au pair. The relationship between the parties was covered generally by an umbrella agreement provided by Au Pair Link Limited, which in effect introduced Ms Akeson to the Learmouths and provided the contractual framework for that three way relationship. The contractual framework is specific that the employment relationship is between the Learmouths as employer and Ms Akeson as the au pair. Au Pair Link Limited has no part in that employment relationship.

[3] A general statement of that position is contained in para.1.6 of the umbrella document styled *Au Pair Link – host family general terms and conditions*. The relevant part of para.1.6 reads as follows:

You understand that your au pair is your direct employee and not the employee of us. The au pair that you select to join your family will be employed by you personally for the duration of their stay with you. As your employee the au pair will be entitled to all the benefits and rights that a normal employee enjoys under New Zealand law.

[4] Ms Akeson worked for the Learmouths for a total of 17.5 weeks and was not paid the final three weeks' wages or any holiday pay for the total period of the employment. The sum of those two items equals \$1,189.99.

[5] There is no argument that Ms Akeson worked for the Learmouths for the period in question; the dispute between the parties relates to set offs which the Learmouths claim they are entitled to. These set offs are under three broad headings, viz a period when it is alleged that Ms Akeson did not work at all, an outstanding telephone account, and a dispute about the cost of a damaged tyre to the Learmouths' vehicle.

Issues

[6] It will be convenient if the Authority assesses the evidence in relation to each of the claimed set offs. The questions for determination then are:

- (a) What was the position with the telephone account?
- (b) What was the position with the damaged car tyre?
- (c) Is Ms Akeson claiming payment for work not provided?

What is the position with the telephone account?

[7] The Learmouths claim that Ms Akeson ought to reimburse them for personal calls that she made from their telephone totalling \$117.19. They rely on the provision in the Au Pair Link agreement in the section entitled *General Terms* and para.2.4. Under the subheading *liability accepted by you*, there is a general statement about the au pair's obligations to the host family which concludes with the following pertinent sentence:

Whilst in the employment ... you [the au pair] are responsible for any and all debts that you may incur such as personal telephone calls.

[8] At the investigation meeting, Ms Akeson acknowledged that if she had made telephone calls on the Learmouths' telephone which she had not paid for, then she

would make the necessary payment, once she was satisfied the calls were actually hers. She indicated to me that she had always been clear with the Learmouths that she would honour her obligations in respect to the telephone calls as soon as they met theirs in respect to the payment of outstanding wages and holiday pay.

[9] At the investigation meeting, Mr Learmouth tabled telephone records to demonstrate the sum allegedly owed. In her written response, Ms Akeson had this to say:

... the whole time I was there they said use the phone as part of living here and never was told to pay for calls. This has only arised [sic] since I have taken action with the Employment Relations Authority. I do agree that I was to pay for calls for the 2½ weeks while they were in the Hawke's Bay as I was the only one at home and thought this was fair.

[10] In effect, this observation by Ms Akeson suggests a verbal agreement varying the written terms of the au pair agreement I quoted above. I accept it is conceivable that the parties did enter into a verbal variation of agreement and that that verbal variation has been further unilaterally varied by the Learmouths as a consequence of Ms Akeson bringing her claim in the Authority.

[11] However, I am persuaded that the correct approach is to require Ms Akeson to pay the amount claimed of \$117.19. Such a conclusion is supported by the evidence from Mr Learmouth, the agreement between the parties, and the verbal evidence which Ms Akeson herself gave at the investigation meeting. Having examined the documents filed by Mr Learmouth concerning the telephone account, I am satisfied, as best I can, that the amount claimed against Ms Akeson is properly her debt.

What is the position with the car tyre?

[12] Mr Learmouth maintained that Ms Akeson had irretrievably damaged a tyre on the family vehicle to the value of \$125. In essence, he claimed that the damage had occurred when the vehicle was “... *under her care and in her personal time ... and she had made a negligent decision to keep driving on a tyre that was very flat*”. In support of his position, Mr Learmouth calls in aid clause 3.6 of the general terms agreement covering the tripartite relationship between Au Pair Link Limited, Ms Akeson and the Learmouths. That clause, while principally directed at out-of-pocket costs incurred in motor vehicle accidents (that is the difference between costs

actually incurred and the insured cost of any damage), makes perfectly clear the principle that the au pair is responsible for damage they cause.

[13] Ms Akeson, in response, referred to an agreement that she had reached with Ms Learmouth whereby Ms Akeson undertook to pay half of the cost of the tyre, that is \$62.50, and she paid that sum to Ms Learmouth. Mr Learmouth had no knowledge of that arrangement and accordingly denied any such arrangement had been reached by Ms Akeson with his wife.

[14] It is difficult to reach a satisfactory conclusion in this matter. On the one hand, it is clear that the agreement sheets home the responsibility for the damage to Ms Akeson. On the other, she says that she has reached an arrangement with a representative of her employer to pay half the cost and she has done so. I accept without reservation that Mr Learmouth did not know about the arrangement and so his evidence on the matter was truthful; I also have no reason to think Ms Akeson was dishonest. It follows that she has paid half of the total cost of the damage. I think I am obligated to apply the agreement between the parties according to its tenor. That means that Ms Akeson is responsible for the whole amount, having satisfied me that she has paid half the amount, she owes the Learmouths a further \$62.50.

Is Ms Akeson claiming wages when she did not work?

[15] Mr Learmouth maintains that the principal difference between the parties and the major reason that the Learmouths declined to pay Ms Akeson's final three weeks' wages and her holiday pay was the employer's contention that Ms Akeson had not in fact provided the services for which she was being paid principally during a period when the family was holidaying in Samoa and a subsequent period shortly after their return. In essence, the Learmouths' position is that, by virtue of the alleged "*down time*", Ms Akeson actually worked 14 weeks, not 17.5 and is only entitled to be paid for that. It follows that while Ms Akeson's calculation is that she ought to have received \$3,850 (but was short paid at \$1,189.99), the Learmouths' calculation is that she should only have been paid \$3,196.69, roughly \$650 difference.

[16] It is clear that the Learmouths spent significant sums taking Ms Akeson with them to Samoa. But of course, this was a business arrangement for them and Ms Akeson was there to work. The Learmouths say that there was a period from 3 November 2010 down to 11 November 2010 when Ms Akeson simply did not work.

As a consequence, the Learmouths decided to send Ms Akeson back to New Zealand to stay with a cousin that she had in Christchurch. The Learmouths apparently assumed (wrongly) that Ms Akeson could simply change her existing return ticket for an earlier return and in the belief that that would work, the Learmouths deposited Ms Akeson at the international airport, stayed around, according to Mr Learmouth, for about half an hour, and then left.

[17] Ms Akeson's evidence on this episode is to the contrary. She denies that she refused to work or was difficult or failed to perform the services for which she was being paid, so there is a clear conflict between the parties on this point.

[18] Also, on the return home aspect, Ms Akeson formed the view that the relationship with the Learmouths was tense and that the unfamiliar Samoan environment made things a whole lot worse. She says that the Learmouths forced her to leave because she was "*wrecking their holiday*". Certainly, Ms Akeson is adamant that there was no sense in which she agreed to return home to New Zealand early. What is clear is that neither party was happy with the other. Ms Akeson refers to being "*very emotional as I'd just come from Sweden and was taken to Samoa which turned into a nightmare for me with the Learmouths ...*". From the Learmouths' perspective, I have already noted Mr Learmouth referred to Ms Akeson's "*lack of performance*" in Samoa.

[19] Turning to Ms Akeson's departure (or purported departure) from Samoa, the arrangements made by the Learmouths for her to leave Samoa were clearly inadequate. As I have already noted, they thought (wrongly) that Ms Akeson could change her return ticket so that she could go home to New Zealand earlier, but that was not possible and Ms Akeson was left at the international airport with insufficient personal funds to buy a fresh ticket and nobody to assist her. In the end, Ms Akeson told me that she was befriended by some other tourists who effectively took her in and looked after her for a period until she ran across the Learmouth family at one of the resorts. By all accounts, that chance meeting did not go well. Mr Learmouth told me that he and his wife were cross that Ms Akeson was still in Samoa and had not left as they had instructed, and Ms Akeson, from her evidence, clearly got the message that the chance encounter was most unwelcome.

[20] When the protagonists eventually returned to New Zealand, the Learmouths say that Ms Akeson took a week of unpaid leave at her behest; Ms Akeson says that

she was instructed to take the time off by the Learmouths and she was ready, willing and able to work.

[21] Similarly, the Learmouths maintain that Ms Akeson failed to provide services for 2½ weeks over the Christmas period in 2010, but again Ms Akeson told me that she was ready, willing and able to work but that the Learmouth family travelled to the Hawke's Bay for the holiday period and that she was simply not invited.

[22] The suggestion that Ms Akeson left the employment two days before her notice period expired is also contested.

[23] Clearly, this was not an employment relationship made in heaven. Neither party, on the evidence before the Authority, seemed to enjoy the relationship and it plainly ended on a sour note for both parties. Each now blames the other for the relationship having foundered. There is dispute between the parties on the facts, particularly around whether Ms Akeson was working diligently or not and/or whether she had simply, for periods of time, withdrawn her labour.

[24] The legal position is clear, even if the facts are not. While there are unique stresses and strains to a relationship between an au pair and a family, particularly where that relationship does not work well, this is still an employment relationship covered by New Zealand law. Just as it would be a breach of normal legal principles to simply stop paying an ordinary worker on a unilateral basis, so, in the present case, it is not available to the Learmouth family to simply withdraw payment because of dissatisfaction with the work being provided. If, as is contended by the Learmouths, Ms Akeson failed to give satisfaction, then there are clear principles in the governing agreement which require them to comply with the law of the land and, amongst other things, there is no ability to unilaterally stop payment because of some dissatisfaction. There are clear references to the disciplinary warning system in the governing agreement, together with obligations on the host family to continue to make payments during the term of the agreement. It cannot be fair and just for payments to be arbitrarily stopped and started because of dissatisfaction. If there is dissatisfaction with the services being provided, then there are clear procedures in the law for dealing with that dissatisfaction; no such procedures were engaged or undertaken in the present case.

[25] It is clear that Ms Akesson is entitled to be paid for the total period of her employment by the Larmouths and I am satisfied her claim for the outstanding amount of \$1,189.99 has been made out.

[26] It is also appropriate for the Authority to comment on the Larmouths retention of wages due and owing to Ms Akesson on the basis of a set off with moneys owed by her to them (in part), and also their contention that they were entitled to dock her pay for hours they say she did not actually work. Of course, the Wages Protection Act provides statutory protection for the payment of wages and asserts the primacy of wages payments, in effect, against all comers. Accordingly, the correct course of action is to pay the wages due and owing but, contemporaneously, insist on payment of the debts owed back, the process which Ms Akesson apparently proposed.

Determination

[27] The determination of the Authority rests on the agreement between the parties which provides for a weekly payment of \$200. Nothing in the evidence before the Authority suggests any agreement or understanding that that amount was divisible and the practical reality of the arrangement was that the hours per week worked by Ms Akesson varied quite markedly without any effect on the remuneration. On general principles, this suggests a payment in the nature of a salary for all hours worked and on that footing, the purported divisibility of the payment made by the Larmouths, allegedly for poor performance, cannot stand.

[28] Ms Akesson is entitled to payment of the outstanding wages due and owing to her in the total amount of \$1,189.99. The Larmouths are to pay that sum to Ms Akesson. Conversely, Ms Akesson is to pay to the Larmouths the total sum of \$179.69 being the sum of the telephone calls she made from the Larmouth household and the half of the tyre replacement cost, she having already paid the first half.

Costs

[29] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority