

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 23
5345458

BETWEEN AMANDA AKESON
Applicant

AND JANINE & HAMISH
LEARMONTH
Respondents

Member of Authority: James Crichton

Representatives: Applicant in person assisted by Chris McKay
Hamish Learmonth, for Respondent

Investigation Meeting: On the papers

Determination: 16 February 2012

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

[1] By determination dated 23 September 2011, the Authority issued a determination in respect of the employment relationship problem of these parties.

[2] Because of an error made by the Authority, which is regretted, that determination of 23 September 2011 issued before the respondent employer had filed closing submissions. In issuing its original determination, the Authority understood (erroneously) that the respondent did not wish to have any further matters considered.

[3] In addition to the last mentioned error, the Authority also regrets that the respondents' surname was incorrectly spelt throughout the initial determination. That error is also regretted and the Authority apologises to Mr and Mrs Learmonth for that mistake.

[4] When it became clear to the Authority on 3 October 2011 that the respondent did in fact wish to have final submissions heard, the Authority promptly indicated that it was prepared to consider reopening the matter. In order to give consideration to those submissions which have now been filed (after a significant delay and well

outside the timeframe set by the Authority), the Authority now formally reopens the investigation. The purpose of the reopening is to consider and take into account the closing submissions filed by the respondents. As part of the application to reopen, the respondents have sought a re-hearing of the matter by another Member of the Authority. The applicant in this matter, Ms Akeson, is a Swedish national who worked in New Zealand principally as an au pair, and who has now returned to her homeland.

[5] A re-hearing would, in consequence, be extraordinarily difficult from a logistical point of view, given the tyranny of distance. In any event, the Authority is satisfied that the proper approach is for the Authority Member who heard the original evidence to now consider the submissions filed by Mr and Mrs Learmonth and make any amendments thought fit to the Authority's findings, after that consideration.

[6] The process the Authority adopted was to consider the submissions (and fresh evidence) filed by the Learmonth's, refer that to Ms Akeson by email and then refer the response obtained by that process back to the Learmonth's. By this somewhat laborious process the Authority is satisfied it has given both parties the opportunity to be heard and in particular, to comment on what the other had said.

The respondents' submissions

[7] In their concluding submissions, Mr and Mrs Learmonth identify a number of issues on which they desire to comment and for ease of reference, the Authority intends to deal with each of those issues in turn. Each issue that follows is informed, not just by the views of the Learmonth's, but also by the further information provided by Ms Akeson.

The arrangements for the Samoa trip

[8] In the statement from Mrs Learmonth now supplied to the Authority, she makes some pertinent observations about the family trip to Samoa. Amongst other things, she makes the point that, although it was true that Ms Akeson was going to be taken to Samoa very soon after arriving in New Zealand, the Learmonth's had discussed the matter with Ms Akeson, in particular told her about the likely sleeping arrangements and the general informality of Samoa, and got Ms Akeson's apparent consent. As Mrs Learmonth points out, this information is relevant because Ms Akeson described the Samoan trip as "*a nightmare*" and complained particularly

about the absence of privacy, a matter which, according to Mrs Learmonth's statement, was carefully explained to Ms Akeson in advance. There is email traffic supplied by Mrs Learmonth which supports her observations in this regard. It is fair for the Authority to observe then that Ms Akeson was not taken to Samoa in any sense against her will. Indeed, the email traffic suggests that she looked forward to it and the au pair agency actually made the necessary travel arrangements to ensure that she was able to travel to Samoa with the family.

[9] Of course, this evidence now available to the Authority for the first time raises real doubt about Ms Akeson's contention that the Samoa trip was "*a nightmare*" for her. Plainly, on the basis of this email exchange which is now put before the Authority for the first time, she knew precisely what would confront her in Samoa and, notwithstanding that, she accepted the obligation to travel there, with apparent alacrity.

[10] On the basis of the evidence now before the Authority, it must conclude that if Ms Akeson did not enjoy the Samoa experience, no criticism can properly be levelled at the Learmonth's because the email traffic in particular supports the conclusion that Ms Akeson was properly briefed before the trip and gave her informed consent before undertaking the trip.

Ms Akeson's return from Samoa

[11] Mrs Learmonth states that the initiative for Ms Akeson's return to New Zealand came from Ms Akeson and not from the Learmonth's and that the amount of money that the Learmonth's gave Ms Akeson was the equivalent of NZ\$90 and not NZ\$20. However, the important aspect here is not the difference between the parties on the money, but the difference between the parties in relation to who initiated the return to New Zealand. Ms Akeson gave evidence on oath before the Authority at the investigation meeting on 19 August 2011 that the Learmonth's (to quote the Authority's original determination) "*forced her to leave because she was wrecking their holiday*" (para.[18] determination 23 September 2011). The Learmonth's maintain that Ms Akeson was plainly unhappy in Samoa and that they sought to address that unhappiness, as best they could. Mrs Learmonth makes the point that communications between Samoa and New Zealand were difficult and they would have preferred to seek the advice of the au pair agency that placed Ms Akeson with them, but that was simply not possible.

[12] It is plain to the Authority that there is a very significant gulf between the parties in this previous employment relationship. As the Authority has already remarked, it would have materially assisted if Mrs Learmonth had made herself available to the Authority so that some of the observations she had about the matter, from her personal involvement, could have informed the Authority's original investigation. As it is, the Authority is forced to try to catch up and, to do justice between the parties notwithstanding that some evidence is not given on oath and some is not given in the presence of the other party where it can be subject to challenge and counter-argument.

[13] Those qualifications notwithstanding, the only proper course is for the Authority to vacate its conclusion in the original determination on this point, and substitute it for a fresh view that whatever the genesis for Ms Akeson's departure from Samoa, no fault can be attributed to the Learmonth's.

Ms Akeson's departure from Samoa

[14] In her evidence before the Authority, Ms Akeson made something of the fact that she was simply deposited at the international airport and left to fend for herself to get back to New Zealand. But Mrs Learmonth's submission is that she actually rang Air New Zealand, established that there were seats on the relevant flight, found out what the upgrade cost was, and provided sufficient funds, namely the NZ\$90 the Authority referred to earlier, to enable Ms Akeson to change her flight. Furthermore, Mrs Learmonth's submission says that she made sure that Ms Akeson was being looked after before departing and was assured by Ms Akeson that she was being looked after. Mrs Learmonth had already checked with Air New Zealand to establish there were seats on the flight in question. Mrs Learmonth says that she actually waited at the airport for "*up to an hour*" to ensure that Ms Akeson was properly provided for.

[15] Mrs Learmonth also made available to the Authority the electronic link in the Air New Zealand web site which outlines the entitlement to change the kind of ticket Ms Akeson was travelling on. In addition, Mrs Learmonth indicates that the Air New Zealand system confirms that there was no application to change flight for Ms Akeson.

[16] The Authority is again left with the emphatic evidence of Ms Akeson on oath, that she was effectively dumped at the airport to fend for herself balanced against a point by point rebuttal from the Learmonth's. The Authority must again vacate its original conclusion from the original determination and substitute it with a fresh conclusion that, whatever happened when Ms Akeson commenced to leave Samoa for New Zealand, no criticism can be levelled at the Learmonth's, based on the evidence now before the Authority.

The issue of the tyre

[17] Ms Akeson was driving the family vehicle when a tyre was destroyed. There was an issue about responsibility. Ms Akeson's evidence is that it was agreed between the parties that she made the first half payment and accordingly was only liable for the second half of the cost of the replacement tyre. Mrs Learmonth is adamant that the first half of the payment was never made.

[18] Mrs Learmonth makes the point that it would be unusual if she was still asking Ms Akeson for the money some five days after Ms Akeson claims she paid it. Ms Akeson says she paid the money (the first half payment she says she made) on 13 January 2011 yet Mrs Learmonth is asking for the money in her email to Ms Akeson on 18 January 2011.

[19] The Authority is obliged to conclude that it is more rather than less likely that the money was not paid based on this evidence, and thus the assessment made in the original determination is vacated in favour of this one.

The period from 16 to 22 November

[20] Mr and Mrs Learmonth protest that this period (both days inclusive) were not working days for Ms Akeson (and therefore she is not entitled to payment for those days) because Ms Akeson had asked to attend an Au Pair link programme being run in Christchurch during this period and to spend the balance of the time away with her cousin. Mrs Learmonth is adamant that this was agreed in advance between the Learmonth's and Ms Akeson.

[21] The Authority notes that Ms Akeson appears to concede the point that she is not entitled to payment for this period, in her email response to the Authority. If this is in fact her intention, it is different from the claim made in her statement of problem.

Whatever Ms Akeson's position on the point, the Authority concludes that no payment ought to be made for this period; she clearly was not working and therefore ought not to be paid. The Authority was assisted in reaching this conclusion by the conversation the Member had with Ms Cushla Neale of Au Pair Link the agency who placed Ms Akeson with the Learmonths.

3 November and 11 November

[22] On these two dates, Ms Akeson told the Authority that she was unable to work due to illness. The Learmonths concede this was the case and so they paid her for those days anyway but on the basis that she would make up the hours at a later time because she was not entitled to paid sick leave, having not worked for them for more than six months.

[23] Of course, it is the position that there is no entitlement to sick leave by statute until six months into an employment relationship. It follows that the arrangement that the Learmonths refer to makes sense. The Learmonths' claim that Ms Akeson did not make the hours up as promised, is consistent with the diary kept to document the Au Pair relationship. In particular, there is no evidence that Ms Akeson worked Thursday 17 and Friday 18 February 2011 which the Learmonths say she agreed to do to make up those two earlier dates 3 and 11 November 2010. Thursday 17 and Friday 18 February 2011 were the two days after Ms Akeson's notice period expired. The Authority concludes that the Learmonths' evidence on this point is to be preferred to the evidence earlier heard from Ms Akeson.

The hours of work

[24] The Au Pair diary just referred to, the original of which has been provided to the Authority with the Learmonths' submissions, documents the employment relationship. It is, in the Authority's view, a vital piece of evidence and again, it would have been incredibly useful if it had been made available to the Authority at first instance rather than at the eleventh hour. That diary makes clear that the hours worked each week are not always the same and that hours are frequently carried over from one week to the next. Furthermore, the diary is evidence for the view that, contrary to the Authority's earlier finding, the employment is on an hourly rate basis and not a weekly basis with some considerable flexibility about the total hours that are actually worked.

[25] Amongst other things, the diary is evidence for the view that Ms Akeson had 25 un-worked hours outstanding when she left.

The Hawke's Bay Christmas holiday

[26] Ms Akeson had told the Authority that she was precluded from going to Hawke's Bay with the family and that that was unfair and inappropriate. The Learmonths say that no arrangements were made for Ms Akeson to travel to the Hawke's Bay with the family because she had given four weeks notice of her intention to resign her employment prior to the travel arrangements for Hawke's Bay being made. Subsequently, it is true that Ms Akeson revised her resignation date but by then the travel arrangements had already been made.

[27] Nothing turns on whose evidence on this point is to be preferred but for the sake of completeness, again it would seem that if the Authority had been told at first instance about the position with the Hawke's Bay trip, it would have been disinclined to accept Ms Akeson's view.

Actual hours worked

[28] Ms Akeson's fundamental claim is that she worked for 17.5 weeks and therefore is entitled to payment for 17.5 weeks and holiday pay calculated on that same period. However, the Learmonths say that she actually only worked for 14 weeks and thus her remuneration must be based on that.

[29] The Learmonths justify their conclusion by reference to the following matters:

- (a) The period between 14 and 22 November 2010 was off pay, this period being the occasion when Ms Akeson attended an Au Pair Link programme in Christchurch and stayed with her sister;
- (b) The period from 25 December 2010 to 12 January 2011 (except for the statutory days) was off pay, this period being the occasion when the family travelled to the Hawkes Bay;
- (c) There were two days sick pay in Samoa which Ms Akeson was supposed to make up after she was paid for those days and she did not;

- (d) There was a half week of sick leave in early December for which \$100 was deducted as agreed with Ms Akeson;
- (e) Ms Akeson had 25.5 hours to work for outstanding hours in Samoa but she never completed provision of those hours which would have been provided on 17 and 18 February.

[30] Again, the eleventh hour evidence provided by the Learmonths on this point is compelling. The fundamental claim that Ms Akeson made, was a claim that she had been short paid. But that claim is only sustainable if she was entitled to 17.5 weeks pay rather than 14 weeks pay. If the Learmonths' calculation is accepted, then there is no entitlement to any further remuneration.

[31] The Authority is satisfied it must reverse its earlier conclusion and determine that Ms Akeson has not made out her case that she has been short paid wages. The Authority is persuaded that the total number of hours worked is indeed 14 weeks, not 17.5 weeks and she has received payment for that period already.

[32] The Authority reaches this conclusion first by a careful analysis of the diary provided by the Learmonths, second by the other evidence provided by the Learmonths and referred to in this second determination, and third by the assistance of Ms Cushla Neale from Au Pair Link who both parties gave the Authority permission to speak to.

Determination

[33] In order to do justice between the parties, and notwithstanding the inadequacies of the process, the Authority must, in all good conscience, set aside the original determination as set out in its decision of 23 September 2011 and replace it with this determination.

[34] By reason of the conclusions reached no further payment is required to be made by the Learmonths, they having now satisfied the Authority that they have already paid Ms Akeson all she is entitled to.

[35] Strictly speaking, Ms Akeson should pay to the Learmonths the total sum to reimburse for the destroyed tyre and reimburse the Learmonths for her personal

telephone calls. However, in the particular circumstances of this case, the Authority makes no order in that regard.

[36] As the parties acted without legal advice, there is no order in regard to costs.

James Crichton
Member of the Employment Relations Authority