New Zealand Employment Relations Authority Decisions

Clearkin v Geneva Healthcare Limited (Auckland) [2018] NZERA 359; [2018] NZERA Auckland 359 (19 November 2018)

Last Updated: 7 December 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 359
3026391

BETWEEN BRONWYN CLEARKIN Applicant

AND GENEVA HEALTHCARE LIMITED

Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person

Merilyn Manik, Emma Andrews & Vaughan Thomas representing the Respondent

Investigation Meeting: 15 November 2018 at Auckland

Determination: 19 November 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Bronwyn Clearkin, claims that she is owed unpaid wages and travel payments by the Respondent, Geneva Healthcare Limited (GHL).

[2] Ms Clearkin also claimed that she had not been paid in respect of alternative holidays earned but not taken, and that there had been breaches of the Record of Settlement (ROS) entered into the parties on 15 January 2018, and of employment legislation.

[3] Geneva denies that any monies are owed to Ms Clearkin, but is prepared to pay any monies that the Authority determines are due to be paid.

[4] Geneva denies that it has breached the ROS or employment legislation.

Issues

[5] The issues for determination are whether or not:

• Ms Clearkin is owed unpaid wages

• Ms Clearkin is owed travel payments

- Ms Clearkin is entitled to be paid for alternative holidays earned but not taken

• there has been a breach of the ROS

• there has been a breach of the employment legislation

Background

[6] Geneva is a provider of healthcare services throughout New Zealand. It's services include homecare and community support services and nursing services. It employs approximately 4,000 caregivers and the management team and operation are the responsibility of the CEO, Ms Veronica Manion.

[7] The clients are predominantly funded by funding organisations such as ACC who notify Geneva of the funding parameters which inform the services provided to the client.

[8] Ms Clearkin commenced employment with Geneva as a Caregiver on or about 2012. In her role as Caregiver she visited clients in their homes providing care services.

[9] Ms Clearkin was employed subject to a fixed term individual employment agreement which Ms Clearkin had signed on 4 December 2012 (the Employment Agreement). In accordance with clause 1.3 of the Employment Agreement Ms Clearkin was employed: "*when available and required by Geneva … to undertake temporary assignments".* The Employment Agreement provided the following clauses:

• 2.1: You have the right to refuse or accept an Assignment.

• 6.2: You must forgo hours if you refuse to work the Assignment.

• 7.1: You understand you are employed on an hourly basis. Wages will be paid each week by electronic transfer by midnight Thursday, for work undertaken the previous week (Monday to Sunday) for which completed time sheets have been received by midnight Tuesday.

• 7.5: Geneva may make a rateable deduction from your wages for any time not worked through your default or absence.

• 9.2: You are offered employment on a fixed term agreement within the meaning of section 66 of the Employment Relations Act 2000 to cover a short term or temporary staffing requirement of Geneva or a Client. … Therefore it is not practical for Geneva to provide you with 4 weeks' annual leave. Your weekly pay will be inclusive of the 8% holiday pay calculation as provided for in section 28 of the Holidays Act 2003.

• 10.5: If we require you to work on a public holiday, in addition to the payment specified above you are entitled to an alternative paid holiday. This will be equal to actual hours worked on the public holiday and paid at your normal rate.

• 17.1: Where prior arrangements have been made with Geneva for you to use your own vehicle for any business purpose of the client, you will be reimbursed at appropriate rates.

[10] The parties attended mediation in January 2018 which resulted in a Record of

Settlement pursuant to s 149 of the Employment Relations Act 2000 (the Act) dated 15

January 2018. The ROS provided *inter alia* the following clauses:

4. Bronwyn Joy Clearkin has agreed to accept that she has no claims for any guaranteed hours over and above the 17 Guaranteed Hours currently agreed by the parties.

5. The parties have agreed all pay issues and disputes up to and including the

17th September 2017 and GENEVA HEALTHCARE LIMITED shall consider all pay issues and disputes that have currently been raised by Bronwyn Joy Clearkin since them.

6. In an attempt to preclude a similar escalation of issues in the future, the parties agree to meet once monthly at a time and place set by GENEVA HEALTHCARE LIMITED.

7. The parties reaffirm the need to and in good faith and to treat each other reasonably and respectfully. This obligation extends to all verbal and written communications Bronwyn Joy Clearkin may have with the employees of GENEVA HEALTHCARE LIMITED.

[11] Geneva confirmed that it had invited Ms Clearkin to attend meetings in accordance with clause 6 of the ROS, however Ms Clearkin had made it clear that she did not intend to do so.

[12] Ms Clearkin said that there had only been one meeting to which she had been invited by Geneva, and that had been arranged for a date which was not convenient for her. When an alternative date for the meeting had been suggested, it too had been inconvenient for her to attend.

[13] Ms Clearkin said she had raised a number of payment complaints with Geneva which had not been addressed and resolved.

[14] She said that she had attended a meeting in July 2018 but this had not resolved the payment issues.

[15] Ms Merilyn Manik, HR Manager, said that the purpose of the meeting in July 2018 had been disciplinary in nature and the wage payment issues had not been discussed other than those which had formed the basis of the disciplinary action.

Is Ms Clearkin owed unpaid wages?

[16] Ms Clearkin claimed she was owed unpaid wages in respect of certain clients over a period of time.

Client D: 27 September 2017

[17] Ms Clearkin said she was owed one hour's payment in respect of a shift she had

worked with Client D on 27 September 2017.

[18] Mr Vaughan Thomas, Administration Manager, said there was no record of a shift being booked into Ms Clearkin's roster for 27 September 2017, nor was it part of her guaranteed hours.

[19] I find that no payment is due to Ms Clearkin in respect of client D on 27 September

2017.

Client J: 24 October 2017

[20] Ms Clearkin claimed she was owed one hour's payment in respect of a shift she had worked with Client J on 24 October 2017.

[21] Ms Andrews, Payroll Manager, said that Ms Clearkin had been paid the one hour she claimed, however the itemised payslip she (Ms Clearkin) had printed herself had omitted the last two lines of the first page and it was on one of these two lines that the payment for the one hour care for client J had been itemised.

[22] A screenshot of the relevant payslip was shown at the Investigation Meeting and I am satisfied that full payment in respect of the hours worked with Client J on 24 October 2017 has been made.

[23] I find that no payment is due to Ms Clearkin in respect of client J on 24 October

2017.

Client E: 26 October 2017

[24] Ms Clearkin claimed she was owed one hour's payment in respect of a shift she had

worked with Client E on 26 October 2017.

[25] The details of the one hour shift payment in respect of Client E was set out on one of the same missing two lines of the payslip printed by Ms Clearkin and relating to Client J.

[26] A screenshot of the relevant payslip was shown at the Investigation Meeting and I am satisfied that full payment in respect of the hours worked with Client E on 26 October 2017 has been made.

[27] I find that no payment is due to Ms Clearkin in respect of client E on 26 October

2017.

Client J: 25 December 2017

[28] Ms Clearkin claimed she was owed two hour's payment in respect of a shift she had

worked with Client E on 26 October 2017.

[29] Mr Thomas said that the relevant shift for Client J had been cancelled as Client J had notified Geneva they would be away from home on 25 December 2017. However whilst Mr Thomas said that there was a record that a telephone communication with Ms Clearkin had taken place, there was no written confirmation establishing that Ms Clearkin had been informed of the cancellation

[30] However Geneva did note that whilst Ms Clearkin was scheduled to work three client shifts that day, and did in fact work, and had been paid for, three shifts, the three did not include Client J.

[31] However in the absence of documentary proof that Ms Clearkin had been advised the shift cancellation for Client J, Geneva agreed to pay Ms Clearkin for the two hour shift worked on that date.

[32] I find that payment is to be made to Ms Clearkin in respect of two hours payment for work with Client J on 25 December 2017.

Client E: 28 December 2017

[33] Ms Clearkin claimed she was owed one hour's payment in respect of a shift she had

worked with Client E on 28 December 2017.

[34] Ms Andrews confirmed that it appeared there had been an error made when entering information on the payroll and as a result Ms Clearkin had not been paid for the one shift on

28 December 2017.

[35] I find that payment is to be made to Ms Clearkin in respect of one hour payment for work with Client E on 28 December 2017.

Client J: 2 January 2018

[36] Ms Clearkin claimed she was only paid for a one hour shift on 2 January 2018 when she worked a two and a half hour shift, all of which should have been paid at time and a half.

[37] Ms Andrews explained that Ms Clearkin had been paid for a one hour shift claimed for 2 January 2018 in respect of Client J, however payment had been made and allocated against a different day in the same pay period.

[38] Accordingly Geneva would reassign the date worked to 2 January 2018 and Ms

Clearkin would pay at the rate of time and a half for that one hour shift.

[39] In addition although Ms Clearkin claimed payment in respect of a two and a half hour shift, Geneva noted that she had been rostered to work a two hour shift, not two and a half hours. However Geneva offered to pay Ms Clearkin for an additional half an hour, also at the rate of time and a half.

[40] I find that payment is to be made to Ms Clearkin in respect of one and a half hours payment for work with Client J on 2 January 2018 at the rate of time and a half.

Client J: 23 March 2018

[41] Ms Clearkin claimed she was owed a half hour payment in respect of a shift she had worked with Client J on 23 March 2018.

[42] Whilst Geneva dispute that Client J was scheduled to receive an additional half hour of care services on 23 March 2018, it agreed to pay Ms Clearkin an additional half hour payment.

[43] I find that payment is to be made to Ms Clearkin in respect of a half hours payment for work with Client J on 23 March 2018.

Client E: 29 March 2018

[44] Ms Clearkin claimed she was owed three hour's payment in respect of a shift she had worked with Client E on 29 March 2018.

[45] Ms Andrews confirmed that this claim had not been processed by Geneva, and that payment would be made.

[46] I find that payment is to be made to Ms Clearkin in respect of three hours payment for work with Client E on 29 March 2018.

Client J: 13 April 2018

[47] Ms Clearkin claimed she was owed a half an hour payment in respect of a shift she had worked with Client J on 13 April 2018.

[48] Ms Andrew explained that Ms Clearkin had been paid for the half hour payment shift worked with Client J on 13 April 2018 although the confusion had arisen as a result of the half hour payment being accredited to a different date as set on Ms Clearkin's payslip.

[49] I find that no payment is to be made to Ms Clearkin in respect of a half hours payment for work with Client J on 13 April 2018.

Client J: 2 August 2018

[50] Ms Clearkin claimed she was owed one hour's payment in respect of a shift she had

worked with Client J on 2 August 2018.

[51] Mr Thomas explained that Ms Clearkin had cancelled the assigned shift, notifying Geneva that she would not be available from 8 a.m. until 11 a.m. that day. As a result of which no payment was owed to her in accordance with clause 6.2 of the employment Agreement.

[52] Ms Clearkin agreed she had initially cancelled the assigned shift as she had to attend a telephone conference meeting on 2 August 2018. However the meeting having concluded sooner that she had anticipated, she had attended the shift with Client J at 10 a.m.

[53] Although Ms Clearkin was not entitled to payment in the circumstances, Geneva agreed in good faith to pay the one hour shift.

[54] Accordingly I find that payment is to be made to Ms Clearkin in respect of one hour's

payment for work with Client J on 2 August 2018.

Is Ms Clearkin owed travel payments?

[55] Ms Clearkin has claimed a significant number of travel payments in respect of attending client assignments during the period 18 September 2017 until 29 October 2018.

[56] Travel payments are made in accordance with the 'In Between Travel' system which came into effect from 29 February 2016 as a result of the implementation of the Home & Community Support (Payment Between Clients) Settlement Act 2016.

[57] Ms Clearkin denied having been made aware of the changes that took place in 2016; however Geneva said that the information had been (i) emailed to all caregivers and support employees, (ii) attached to payslips and (iii) a notification placed on the Geneva Facebook page.

[58] Ms Clearkin appeared to recognise the information documentation which was provided at the Investigation Meeting, and I am satisfied that she had been made aware of the changes to the legislation and Geneva Travel payments as a result of these.

[59] In accordance with the Home & Community Support (Payment Between Clients) Settlement Act 2016 payment for Between Client Travel is based upon a system which calculates the distance and time travelled between each of the Client's addresses. This is calculated in accordance with the most direct route.

[60] Ms Clearkin said that she preferred not to travel on a motorway and therefore planned her own individual route.

[61] I find that there is no restriction placed upon Ms Clearkin in regards to the route she chose to use when travelling to clients, however payment in accordance with the 'In Between Travel system would not be made in excess of the rate paid for the most direct route.

[62] I determine that Ms Clearkin is not owed for travel payments by Geneva.

Is Ms Clearkin entitled to be paid for alternative holidays earned but not taken?

[63] Ms Clearkin said that she had an entitlement to 42 hours of leave arising from an alternative holiday entitlement for which she wished to be paid.

[64] These alternative holidays had arisen as a result of Ms Clearkin having worked public holidays during the latter part of 2017 and in 2018.

[65] Section 61 of the Holidays Act 2003 states:

Alternative holiday may be exchanged for payment

(1) An employee may request the employer to exchange the employee's

entitlement to an alternative holiday for a payment.

(2) A request under subsection (1) –

(a) May be made only if 12 months have passed since the employee's

entitlement to an alternative holiday arose

[66] Ms Andrews confirmed that Ms Clearkin had an entitlement to 11 alternative days however only one of these, relating to the Labour Day public holiday on 23 October 2017, was able to be paid.

[67] Ms Clearkin said that she preferred to receive one payment in respect of the alternative holidays rather than payment being made on a scheduled basis as and when the 12 month period had expired.

[68] This was agreed by Geneva.

[69] I determine that Geneva is to make payment to Ms Clearkin in respect of alternative holidays which have expired in accordance with s 61 of the Holidays Act 2003, such payment to be made when Ms Clearkin so requests.

Has there been a breach of the ROS by Geneva?

[70] Ms Clearkin claimed that there had been a breach of clause 5 of the ROS by Geneva, namely that Geneva had not considered pay issues and disputes that had been raised by her since 17 September 2017.

[71] She said she had written emails in connection with pay issues, but these had not been resolved to her satisfaction.

[72] Ms Manik explained that Geneva had tried to hold meetings with Ms Clearkin pursuant to the agreement in clause 6 of the ROS in order to address all issues as and when they arose, however Ms Clearkin had made it clear that she had no intention of attending such a meeting and had refused to attend a meeting scheduled for early March 2018.

[73] Ms Clearkin said that she had not agreed to attend the suggested meeting on the first date offered as that had been her birthday, and the second date offered was also not suitable as she had arranged holiday for that date.

[74] Upon further questioning Ms Clearkin said that the meeting venue identified by

Geneva had been inconvenient for her.

[75] It was observed that had Ms Clearkin attended the agreed meetings outlined in clause

6 of the ROS, the accumulated number of pay issues could have been resolved at an early

stage without the need for the Authority's intervention.

[76] I find that by refusing to attend the meetings with Geneva as agreed would be the case in clause 6 of the ROS, Ms Clearkin was herself in breach of the ROS.

[77] Geneva offered, in light of Ms Clearkin's stated reluctance to travel to the venue

offered by Geneva, to meet with her at her home.

[78] Geneva further requested at the Investigation Meeting that Ms Clearkin adhere to the requirements of good faith as outlined in clause 7 of the ROS, particularly in regard to verbal and written communications. Ms Clearkin denied that her communications with Geneva had not adhered to the good faith requirements.

[79] Parties should deal with each other in good faith, that is a fundamental requirement of an employment relationship. Apart from the express terms of the Employment Agreement, parties also have implied terms, including the duty of mutual respect and should treat each other with sufficient consideration and courtesy to enable their contracts to be fulfilled.1

[80] Failure to do so will constitute a breach of clause 7 of the ROS.

[81] I determine that Geneva has not breached the ROS, but that Ms Clearkin has breached clause 6.

Has there been a breach of the employment legislation by Geneva?

[82] I find no breach of employment legislation by Geneva.

[83] I determine that there has been no breach of the employment legislation by Geneva**. Summary of Orders**

[84] Geneva is ordered to pay to Ms Clearkin the following:

• Client J on 25 December 2917: 2 hours

• Client E on 28 December 2017: 1 hour

• Client J on 28 December 2017: 1.5 hours

• Client E on 29 March 2018: 3 Hours

• Client J on 2 August 2017: 1 hour

[85] There is no order in respect of unpaid travel time.

1 *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486

[86] Ms Clearkin will advise Geneva when she requires payment to be made in respect of alternative holidays which have reached their 12 months expiry date.

Filing Fee

[87] Geneva will reimburse Ms Clearkin the sum of $71.56 in respect of the filing fee.

Costs

[88] I note here that, subject to her submissions, Ms Clearkin represented herself and, unless she incurred legal costs, it is therefore unlikely she has grounds to claim a contribution to any fair and reasonable costs.

[89] Furthermore, given the extent to which both parties have been successful, I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them.

Eleanor Robinson

Member of the Employment Relations Authority
