

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 467
5429924

BETWEEN

CLAIRE DUNCAN
Applicant

AND

AMPHIBIANS SWIMMING
ACADEMY LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
No appearance for Respondent

Investigation Meeting: 10 October 2013

Determination: 10 October 2013

DETERMINATION OF THE AUTHORITY

- A. By no later than 28 days from the date of this determination Amphibians Swimming Academy Limited (ASAL) must pay to Claire Duncan the following amounts:**
- (i) \$1539.00 as wage arrears for hours she was entitled to be paid but was not; and**
 - (ii) \$190.76 as holiday pay on her gross earnings as calculated in this determination; and**
 - (iii) \$15.87 as interest (for the period from 5 August to 10 October 2013) on wages and holiday pay owed to her.**
 - (iv) \$0.24 cents per day as interest from 11 October 2013 until the amounts owed are paid in full.**
- B. ASAL must also pay Ms Duncan \$71.56 in reimbursement of her fee for filing her application in the Authority.**

Employment relationship problem

[1] Amphibians Swimming Academy Limited (ASAL) ended Claire Duncan's employment as a part-time administrator at its swim school business in Henderson on 4 August 2013. Its letter advising her of that decision said she would be paid her "*contract salary*" for the seven day notice period and "*all or any owed salaries*" would be paid "*in full*" by 17 August 2013.

[2] After ASAL failed to meet the commitments made in that letter Ms Duncan lodged a claim for outstanding wages and holiday pay, interest on money owed to her, and her costs in bringing her claim to the Authority.

[3] ASAL did not lodge a statement in reply to Ms Duncan's claim and no representative attended the Authority's investigation meeting held to consider her claim. Authority correspondence to ASAL's registered office address at the time (as shown on Companies Office records) was returned unopened but courier records of deliveries to the Henderson business premises (and ASAL's registered office and address for service since 3 October) show Simon Terry signed for a copy of the statement of problem on 26 August 2013 and Debi Willis appears to have signed for a copy of the Notice of Investigation Meeting on 19 September 2013.

[4] Ms Willis had signed the letter offering Ms Duncan employment on 19 April 2013 and ASAL's employment agreement with her on 20 May 2013. On both documents Ms Willis is described as director of ASAL. Mr Terry signed the employment agreement as witness to Ms Willis' signature.

[5] On the basis of that information I was satisfied ASAL had adequate notice of the claim and the investigation meeting. At the notified time for the Authority investigation meeting I waited a further 15 minutes and then exercised the Authority's power to proceed if a party, without good cause shown, fails to attend or be represented.¹

[6] Ms Duncan and her mother, Jenny Duncan, both attended the investigation meeting. Under affirmation, they explained how they had calculated the wage claim. Ms Duncan also confirmed that there were two days in June that she was not available

¹ Clause 12 of Schedule 2 of the Employment Relations Act 2000.

to work her contracted hours as she had to attend exams required for her studies (and had advised Ms Willis of this well in advance of doing so).

Issues

- [7] The questions for determination were:
- (i) How many hours was Ms Duncan entitled to be paid for (after deducting time she was not available to work); and
 - (ii) Was she entitled to be paid for hours spent in training (on 23 and 24 April 2013); and
 - (iii) What wages and holiday pay remain due (after deducting amounts she had been paid); and
 - (iv) Whether interest should be awarded on the amounts due and for what period; and
 - (v) Whether ASAL should reimburse Ms Duncan for the Authority's filing fee?

Ms Duncan's contractual entitlement

[8] Ms Duncan's written employment agreement provided for a trial period of 90 days. She began her normal duties for ASAL with one day's work on 29 May 2013. She was then available to work in each of the following nine weeks until, some 67 days after beginning work, she was given notification of the end of her employment.

[9] She had been available to work for ASAL from earlier in May, as suggested in the written offer of employment to her, and had attended two training days on 23 and 24 April. However she has not taken issue with ASAL's apparent use of the 90-day trial period to end her employment on seven days' notice without giving any reason for doing so.

[10] Under the following clauses of her employment agreement Ms Duncan was entitled to be paid for at least 12.5 hours a week at an agreed rate of the \$19 an hour, unless she was consulted about a proposal to change her hours and days of work and provided with an agreed period of notice for the change:

5.1 The Employee shall commence employment on a wage of \$19.00 per hour which excludes superannuation. This will be paid to the Employee weekly by electronic funds transfer.

...

6.1 The Employee is **contracted to work a minimum of 12.5 hours per week**. Normal requirements of employment mean that the Employee may work hours in excess if required. (*emphasis added*)

6.2 The Employee's ordinary daily hours of part-time work shall be 3-5 hours per day, 3 days per week. The Employee shall work on Monday, Tuesday & Wednesday. The Employer may change the Employee's days of work after consulting with the Employee and providing two weeks' notice.

...

6.4 The Employee's work hours are flexible and may be subject to change during the course of the Employee's employment with the Employer.

[11] A schedule to the agreement confirmed that Ms Duncan's "*contracted days/hours*" were "*12.5 contracted hours*" that were specified to be "*Monday 3.00pm-6.30pm, Tuesday & Wednesday 2.00pm-6.30pm*".

[12] While Ms Willis asserted in an email to Ms Duncan on 28 July that ASAL was entitled to notify her of a shutdown period and not pay her for her minimum contracted hours in such weeks, there is no evidence that such reductions were agreed to by Ms Duncan or properly implemented as a result of the consultation and notice required by the terms of her employment agreement. Wages are claimed for three weeks during which ASAL closed its premises between 14 July and 2 August.

[13] I find Ms Duncan was entitled to be paid for her minimum contractual hours for each week from the week beginning 3 June to the week ending 3 August and a further week for the notice period – that is a total of 125 hours. To that must be added 4.5 hours for work she did on 29 May and three hours for an additional hour worked in each of the weeks beginning 10 June, 1 July and 8 July. However seven hours must then be deducted for time she was not available for two days in the period between 17 and 28 June due to exam commitments. As a result of that calculation I find she was entitled to be paid for 125.5 hours during her term of employment.

Training hours

[14] There is insufficient evidence to confirm Ms Duncan was entitled to be paid for eight hours she spent at two training sessions on 23 and 24 April before starting the job. Although the letter offering her employment said she was required to attend

those training days, there was no commitment to pay her for that time. Ms Duncan said she had assumed she would be paid but accepted she was not told she would be.

Wages and holiday pay owed

[15] Ms Duncan was paid four times during her employment. She received payments by direct credit to her bank account totalling \$742.43. She asked for but was not provided with any payslips indicating the hours and days for which she was paid or the rate of tax deducted.

[16] She has made a calculation based on the assumption that she should have been taxed at the rate of 12.2 per cent (as her sole income for the tax year was to be from the job with ASAL and would be under the total income for that tax rate, and she had no student loan repayment requirements).

[17] On that basis, giving an after tax payment of \$16.68 an hour, she was paid for only 44.5 hours of the 125.5 hours to which she was entitled. In the absence of pay slips or other evidence to the contrary I accept and adopt calculations and the assumptions on which they are based as reasonably made.

[18] The total for wages still due to Ms Duncan is \$1539 (calculated on the gross hourly rate of \$19) for 81 hours that she was entitled to be paid but was not.

[19] Her total gross pay should have been \$2384.50 for the full period of her employment and accordingly she was entitled to \$190.76 in holiday pay.

[20] The total owed to her at the termination of her employment on 4 August was \$1729.76 in wages and holiday pay.

Interest

[21] Ms Duncan is entitled to an award of interest, at the annual rate of five per cent, on the money owed to her from the date it was due until the amount is paid in full.² For the 67 days from 5 August to 10 October 2013 that interest amounts to \$15.87. Interest additional to that total continues to accrue at the rate of 24 cents per

² Under clause 11 of Schedule 2 of the Act and the Judicature (Prescribed Rate of Interest) Order 2011.

day from (and including) 11 October 2013 until the day that ASAL pays the full amount due to her.

Costs

[22] Ms Duncan is entitled to be reimbursed by ASAL for the Authority filing fee of \$71.56.

Robin Arthur
Member of the Employment Relations Authority