

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Neil Emery (Applicant)
AND Sand Piper Lodge Limited (Respondent)
REPRESENTATIVES Neil Emery In person
Robin Fischer, Advocate for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 21 November 2005
DATE OF DETERMINATION 24 November 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A Sand Piper Lodge Limited is ordered to pay to Neil Emery two weeks salary in the gross sum of \$1,880.00 as arrears of wages.**
 - B Sand Piper Lodge Limited is ordered to pay to Neil Emery the gross sum of \$1,300.32 as outstanding holiday pay.**
 - C Sand Piper Lodge Limited is ordered to pay to Neil Emery interest on the judgment sum of \$3,180.32 at the rate of 9% per annum from 11 October 2004 until the date of payment.**
 - D Sand Piper Lodge Limited is ordered to pay to Neil Emery the sum of \$70.00 as reimbursement of the lodgement fee.**
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The problem

[1] Mr Neil Emery (“Mr Emery”) asks the Authority to assist him to recover wages he says he is owed by his former employer Sand Piper Lodge Limited (“Sand Piper”). Mr Emery was formerly employed by Sand Piper as its Executive Chef. Mr Emery says he is owed three weeks salary and holiday pay. Sand Piper does not dispute that it owes Mr Emery holiday pay.

The facts

[2] Mr Emery commenced employment with Sand Piper on 11 May 2004. The terms of the employment were not recorded in an employment agreement but a letter of offer of employment dated 5 May 2004 describes the duties and salary arrangements. Mr Emery agrees that the letter confirms the terms agreed. The letter materially provides as follows:-

As discussed, responsibilities will cover a wide range of objectives including: purchasing, stock control, wastage, new menus and marketing promotions. On the subject of salary, I confirm an annual gross salary of \$60,000.00. I have your agreement that due to the nature of our business, in particular winter and summer trends, a reduced amount will be paid on a fortnightly basis during the month (sic) of May to October, whilst, the balance will be spread over the summer periods of November to April.

The salary is based on a 40 hour working week, and we both appreciate that the actual hours worked in the winter will fall short of this target, but been (sic) made up in the summer months. As agreed we will endeavour to meet the minimum requirement per week less PAYE, in consideration of living expenses that you and your family weekly incur. The net figure to be as close as \$700.00 to \$750.00 per week.

I felt that it was important to document our agreement and naturally we will be working closely together on continuing too (sic) promote Sand Piper Lodge to the various markets currently enjoyed.

*Kind regards
Robin Fischer
Owner*

[3] Mr Emery duly completed fortnightly timesheets recording the hours he worked. From the week ending 17 July 2004 he was paid weekly the sum of \$750.00 by direct credit to his nominated bank account. That arrangement followed discussions on 11 June 2004 as reflected in a letter dated 14 June 2004 that Mr Robin Fischer (“Mr Fischer”) wrote to Mr Emery. That advice stated:-

That instead of paying you fortnightly, we will be paying you weekly and also that you will advise us of your mortgage date payments, so that we can move towards organizing your Salary to be activated at the same time.

Understanding and appreciating your outgoings and also your appreciation of our winter trading trends, we will endeavour to pay more than what has been set out in my letter on the 5th of May, as when the cash flow permits. Been (sic) aware that the property is on the market and that any potential new owner may not require your services (although this would be open for discussion). You have our confirmation that in the event of a sale, you will receive a notice period of two months salary based on the annual salary, as set out in our earlier correspondence.

Should the sale happen during the winter trading months, where you are receiving a reduced remuneration, this will be corrected by you being paid the difference between what you have actually received and what is your annual salary, divisible by twelve, as would normally be.

I am indeed grateful for your dedication in wishing us to move forward, in securing new business and look forward to a long working relationship considering the way we have commenced over the last five weeks.

*Kind regards
Robin Fischer
Owner*

- [4] There was one occasion in either July or August where Mr Emery's salary was paid late.
- [5] The relationship deteriorated significantly when Mr Emery was not paid his salary for the week ending 4 October 2004. That payment was due in his bank account on Thursday 7 October 2004. Mr Emery raised the matter with Mr Fischer on Friday 8 October 2004.
- [6] Mr Emery's salary was not available for him on Saturday 9 October 2004 either. When he raised the matter with Mr Fischer that same day, Mr Fischer said he had forgotten to make the payment but he would deposit the monies the following Monday 11 October. Naturally enough, Mr Emery was not pleased but notwithstanding his displeasure, he worked that Saturday evening. Mr Fischer planned to pay Mr Emery from the weekend's takings.
- [7] Mr Emery resolved that he would leave the employment and on that Saturday evening after he had completed his work, he removed all his personal property from the workplace. I find that he did not tell Mr Fischer he had resolved to leave.
- [8] Mr Emery was not paid on Monday 11 October either. When he raised the matter again with Mr Fischer, Mr Fischer was apparently non-responsive.
- [9] On Tuesday 12 October 2004, Mr Fischer telephoned Mr Emery in relation to a meat order. During that discussion Mr Emery told Mr Fischer he would need to find another chef for a function that Thursday.
- [10] Mr Fischer personally called on Mr Emery at North Harbour stadium at about 2.30 pm that same day. Mr Emery asked about his salary. I find that Mr Fischer said he pay the salary "hopefully" by Thursday. Mr Fischer asked if Mr Emery would work on Thursday. Mr Emery said he had no money to get to work. Mr Fischer offered Mr Emery \$50.00 for travel expenses. Mr Emery declined the offer.
- [11] Mr Fischer then made arrangements for a replacement chef to attend to Mr Emery's duties.
- [12] Mr Emery delivered a letter of resignation dated 12 October 2004 to Sand Piper Lodge on 13 October 2004. The letter advised that Mr Emery would give two weeks notice and his employment would end on 27 October 2004. Mr Emery was told he was not required to serve notice because a replacement chef had been arranged. Mr Fischer requested time sheets to calculate Mr Emery's final pay. They both agreed to meet again later.
- [13] Mr Emery sent undated correspondence making request for two weeks arrears of pay, two weeks notice and holiday pay.
- [14] Mr Fischer responded by letter dated 20 October 2004. The letter materially stated:-

So that I may complete remunerations outstanding I would be grateful to receive timesheets for weeks ending: 23rd May 04, 30th May 04, 6th June 04, 19th & 26th September 04, 4th & 10th October 2004, so that we can accurately determine the hours actually worked during your employment period.

Please advise how you wish to repay the company monies received for hours still to be worked, in accordance with your timesheet and the remuneration for a 40-hour week. How you also wish to repay the \$100.00 cash advance that I gave from my personal wallet. I would like you to furnish me with an

explanation for the following:

1. petrol (for your personal car) charged to the company's dairy, milk and bread account at Matakana Mobil whilst I was on leave.
2. food stuffs purchased and received by the Lodge and subsequently stored in the Lodge's refrigeration to find on my return that the refrigerated items were in the back of your car.
3. kitchen tea towels approximately on dozen being the property of North Harbour Stadium.
4. On Wednesday 13th October you advised in person that you would ring and arrange a meeting the following week, I am still waiting to hear.

Yours sincerely
Robin Fischer
Owner

[15] On 27 October 2004, Mr Fischer received a letter from Mr Emery dated 22 October 2004. Mr Emery invited Mr Fischer to mediate matters.

[16] Mr Fischer replied by letter dated 4 November 2004. Mr Fischer did not respond specifically to the invitation to mediate. Instead he made demand of Mr Emery for the sum of \$3,044.36 to be paid by 27 November 2004. He indicated he was willing to meet to further discuss matters.

[17] By letter dated 30 November 2004, Mr Fischer made further demand of Mr Emery for the sum of \$3,044.36 by an invoice of the same date.

The determination

[18] Mr Emery was entitled to have his salary paid regularly and promptly. His salary for the week ending 4 October 2004 was not paid to him when it fell due.

[19] I find that when Mr Emery advised Mr Fischer "*he would need to find another chef for a function that Thursday*" that it was reasonable for Mr Fischer to apprehend that Mr Emery had no intention of continuing his employment. I accept that Mr Fischer made immediate arrangements for a new chef as a result of Mr Emery's advice. The advice was tantamount to a resignation without notice. As such, Mr Emery's written notice of resignation dated 12 October 2004 was meaningless. For this reason, I find that Mr Emery has no entitlement to claim two weeks salary in lieu of notice.

[20] However, I do not wish to be understood to be critical of Mr Emery in this regard. He was right to act in a repudiatory fashion because of Sand Piper's repudiatory conduct in failing to pay his salary.

[21] Mr Emery was entitled to a salary of \$60,000.00 and he was not a waged worker. He was entitled to be paid his annual salary by regular weekly instalment.

[22] I am satisfied that Mr Emery is owed wages in respect of the weeks ending 4 October 2004 and 11 October 2004. I am not informed that Mr Emery did not work in respect of the week ending 11 October 2004. Mr Emery accepts he is indebted to Mr Fischer in the sum of \$100.00. That sum may be deducted from the total arrears of wages owed of \$1,980.00. **I order Sand Piper Lodge Limited to pay to Neil Emery two weeks salary in the gross sum of \$1,880.00 as arrears of wages.**

[23] It is not disputed that Mr Emery is owed holiday pay. That sum shall be calculated on his total gross earnings to 11 October 2004. I calculated that sum as \$21,672.00 as follows:-

Fortnight ending	Gross
16 May 2004	882.00
30 May 2004	1,980.00
13 June 2004	1,980.00
27 June 2004	1,980.00
11 July 2004	1,980.00
25 July 2004	1,980.00
8 August 2004	1,980.00
22 August 2004	1,980.00
5 September 2004	1,980.00
19 September 2004	1,980.00
3 October 2004	1,980.00
10 October 2004 (week)	<u>990.00</u>
Total Gross earnings	\$21,672.00

[24] Mr Emery is entitled to be paid holiday pay in the sum of \$1,300.32 calculated at 6% of \$21,672.00. **I order Sand Piper Lodge Limited to pay to Neil Emery the gross sum of \$1,300.32 as outstanding holiday pay.**

[25] Sand Piper claims the sum of \$2,944.00 for overpayment of wages. I reject that claim. Firstly, Mr Emery is entitled to a regular weekly salary and no overpayments result from the correct payment to him of that salary. Secondly, it would be contrary to equity and good conscience to require him to account to his employer for salary in respect of which he was not permitted an opportunity to earn entirely because of the employer's failure to pay his salary as it fell due. In other words, he did not have a chance to earn any credit in the form of "overtime" hours because the employer caused the relationship to end by not paying his salary.

[26] I consider too that for the same reason in equity and good conscience, Mr Emery should not be liable for the cost of retaining a new temporary chef.

[27] I am satisfied Mr Emery used petrol for business purposes and is not obliged to reimburse Sand Piper in respect of the \$40.00 sum claimed.

[28] As Mr Emery has not had the use of the arrears of wages and holiday pay owing to him as from 11 October 2004, I think it fit that he have interest on those sums. **Sand Piper Lodge Limited is ordered to pay to Neil Emery interest on the judgment sum of \$3,180.32 at the rate of 9% per annum from 11 October 2004 until the date of payment.**

[29] Mr Emery is not entitled to pursue penalties against Sand Piper.

[30] Mr Emery is entitled to be reimbursed his lodgement fee on this application. **Sand Piper Lodge Limited is ordered to pay to Neil Emery the sum of \$70.00 as reimbursement of the lodgement fee.**