

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 213
5627636

BETWEEN DEBRA ANNE GARDNER
 Applicant

A N D HARDY STREET PHARMACY
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Debra Anne Gardner
 John Handforth for Respondent

Investigation Meeting: On the papers

Date of Determination: 6 December 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Gardner, was employed by the respondent, Hardy Street Pharmacy Limited (Hardy Street), from 4 June 2015 until 1 April 2016. Ms Gardner claims she was underpaid the holiday pay owed at the termination of her employment.

[2] At the end of her employment, Ms Gardner's payslip recorded that she was owed 16 days holiday pay. In her final pay after termination of employment Ms Gardner was paid \$1,369.87 (gross) for accrued but untaken holiday pay. Ms Gardner calculated her normal daily pay as \$131.25 (gross) so based on 16 days holiday at this rate she believes she should have been paid approximately \$2,100.00 (gross).

[3] Mr Handforth for Hardy Street says the final payment of holiday pay was calculated correctly through the payroll system the company uses. When Ms Gardner queried the amount she received, he had her entitlement audited to check the amount.

This audit, conducted by Ace Payroll, identified that Hardy Street had incorrectly recorded the number of days of holiday owing. Hardy Street had based the calculation of days owing based on a five-day working week whereas Ms Gardner only worked three days per week.

[4] The audit did reveal that Hardy Street owed Ms Gardner a small amount as it had used the incorrect average daily rate to calculate the payment. The amount owed was \$45.46 and Hardy Street offered to pay this.

Preliminary matter

[5] Because of the evidence provided in compliance with my directions I am satisfied that the information required for me to calculate the holiday pay owing (if any) was agreed and therefore there was no need to hold an investigation meeting. I decided I could determine this matter on the papers, relying on the documentary evidence and the parties' statement of problem and correspondence submitted by Hardy Street in reply to the statement of problem.

Events giving rise to the employment relationship problem

[6] Ms Gardner was employed by Hardy Street from 4 June 2015 until 1 April 2016.

[7] During her employment, Ms Gardner's gross earnings were \$19,598.50 excluding the final payment for accrued but untaken holiday pay.

[8] Ms Gardner took three days holiday during her employment with Hardy Street and was paid a total of \$421.87 (gross) holiday pay for these three days.

[9] Ms Gardner was paid final holiday pay after the termination of her employment, of \$1,369.87 (gross).

Calculation of holiday pay

[10] As Ms Gardner worked less than 12 months for Hardy Street, the calculation of her holiday pay is governed by s 23 of the Holidays Act 2003. Ms Gardner is to be paid 8% of her gross earnings less any amount paid to her for annual holidays taken in advance.

[11] The calculation of holiday pay owing to Ms Gardner on termination of her employment is:

$\$19,598.50$ (gross earnings) \times 8% = $\$1,567.88$

$\$1,567.88$ - $\$421.87$ (payment for holidays taken in advance) = **$\$1,146.01$**

[12] As Ms Gardner was paid $\$1,369.87$ for holiday pay owing to her there is no further payment due.

Determination

[13] Hardy Street has paid Ms Gardner the holiday pay due on termination of her employment and her claim is dismissed.

Counterclaim

[14] Hardy Street has never lodged a statement in reply rather it set out its position in an email that included relevant documents. As part of that email Hardy Street indicated that it wished to raise a claim against Ms Gardner for the cost of the audit it undertook and the emotional distress caused to it.

[15] The Authority requested that Hardy Street lodge a statement in reply particularly because it wished to pursue a counter claim. Hardy Street declined to do so as it could “see no point in collating what I have sent thus far in response to this claim.”

[16] Whilst not ideal, I was prepared to progress this matter on that basis and made directions for the filing of witness evidence. I suggested that if the evidence filed by Hardy Street identified the basis for its claim I could then determine if an investigation meeting was required.

[17] Hardy Street has not filed any evidence in support of the counterclaim it wished to raise.

[18] Because of neither filing a statement in reply with a counterclaim nor filing any evidence to support a counterclaim, there is nothing before me to investigate or determine on behalf of Hardy Street.

[19] If Hardy Street still wishes to pursue a claim against Ms Gardner it will need to lodge a counterclaim in the Authority. I note however that it is unlikely that any claim for emotional distress will succeed, as a company cannot suffer any emotional harm¹. And, any claim for costs associated with the audit can be considered by me in any application for costs in this matter.

Costs

[20] Costs are reserved.

[21] If either party believes it is entitled to costs it may lodge and serve a memorandum setting out the costs sought, within 28 days of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply.

Peter van Keulen
Member of the Employment Relations Authority

¹ See for example *GL Freeman Holdings Limited v Diane Livingston* [2015] NZEmpC 120 where Judge Couch found that a company could not suffer stress.