

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gavin John Hurlimann (Applicant)
AND Auckland College of Natural Medicine Limited (Respondent)
REPRESENTATIVES Gavin John Hurlimann In person
Ross France, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 27 February 2006
SUBMISSION RECEIVED 1 June 2006 from the applicant
8 June 2006 from the respondent
DATE OF DETERMINATION 18 September 2006

WAGES DETERMINATION OF THE AUTHORITY

I found that Mr Hurlimann had been disadvantaged by the respondent's unilateral variation of contract on 5 October and that he had subsequently been justifiably dismissed. It was left to the parties to try to resolve the matter of what wages were owed. They have not been able to reach agreement and the applicant seeks a determination on the matter.

Mr Hurlimann says he is owed the following unpaid wages:

- Core health wages \$4864.50
- Pharmacology wages \$759.00
- Uninvoiced Class time \$253.00
- Wages for working on a public holiday \$69.00
- Holiday pay \$356.73

The applicant also seeks the payment of interest.

Core Health

The applicant was given notice that the Core Health course would be postponed on 5 October and the notice period expired on 30 November 2005. There were 8 Core Health classes scheduled within the notice period.

Mr Hurlimann contends that he should be paid for one three hour lecture each week from 15 August 2005 to 4 July 2006 which was the date his employment agreement was to expire. The agreement to teach the Core Health unit standards was signed on 15 August.

In my determination I held that Mr Hurlimann was entitled to be paid any wages he had lost as a result of the withdrawal of the Core Health course. That notice was given on 15 August so any wages lost are to be calculated from that date. Mr Hurlimann cannot claim lost wages until 4 July 2006 because I found that his employment had been justifiably terminated.

Term 3 ended on 23 September and Term 4 began on 10 October. There would have no classes within the break between the terms. Mr Hurlimann was required to submit his material to the College for approval prior to teaching the classes. Ms Feng, the Academic Principal, did not approve Mr Hurlimann's lesson plan and that was why the Core Health classes were cancelled. The Core Health teaching plan Mr Hurlimann submitted for approval was for Term 4. Mr Hurlimann says that the plan he submitted was for Unit Standard 6127 and part of Unit Standard 20100. The remaining part of Unit Standard 20100 and Unit Standard 6422 were not due to be taught until the first term of 2006. As Mr Hurlimann's employment was justifiably terminated before 2006 there can be no claim for any wages that might have been earned in 2006 as Mr Hurlimann would not have been working that year and could not have any claim for reimbursement of lost remuneration pursuant to s. 123 (1) (b) because his dismissal was justified.

Mr Hurlimann is entitled to be reimbursed for the Core Health courses he would have taught in Term 4. Nine three hour lessons were scheduled, the last one on 9 December 2005. Mr Hurlimann's hourly rate was \$30 plus an allowance of 15% for marking and preparation. Twenty seven hours at \$30 plus 15% totals \$931.50.

The employment agreement provided for 8 weeks' notice. The employment was initially terminated on 2 November 2005 so Mr Hurlimann would have been on notice for the remainder of Term 4.

Pharmacology

The invoice submitted by Mr Hurlimann was dated 21 September 2005. On 17 November his employment was terminated within the notice period – he was told he was no longer to attend at the College and carry out any work. I found that this dismissal was justified. Mr Hurlimann taught three pharmacology classes before the 17 November that he is entitled to be paid for but has not invoiced for. He claims that he is entitled to be paid for the remaining pharmacology classes that he did not teach because he was dismissed on 17 November.

Given that Mr Hurlimann had not carried out the requisite preparation for the pharmacology course he could not have taught the classes and is therefore not entitled to any payments after 17 November.

Mr Hurlimann is entitled to be paid for the three two-hour classes that he did teach and did not invoice for. At \$30 per hour plus \$15% the amount owed is \$207.

Uninvoiced hours

There does not appear to be a dispute between the parties about the missing eight hours. The applicant would already have received for this had he done as instructed and invoiced the respondent. This was Mr Hurlimann's miscalculation and it was not picked up by the respondent. Mr Hurlimann says the amount is \$253.

Public Holiday

The parties agree that Mr Hurlimann should be paid for this day at the rate of \$69.

Holiday Pay

Mr Hurlimann is owed holiday pay at 6% on the following amounts:

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|--------------------|----------|
| Core Health | \$931.50 |
| Pharmacology | \$207.00 |
| Uninvoiced hours | \$253.00 |
| Wages already paid | \$253.00 |
| Public Holiday | \$69.00 |

Contribution

Section 124 Employment Relations Act 2000 requires that I consider the extent to which the actions of the employee contributed to the situation which gave rise to the personal grievance and, if the actions so require, reduce the remedies accordingly. In Paykel v Ahlfeld [1993] 1 ERNZ 334 the Court held that the employee's performance shortcomings were not sufficiently blameworthy to justify a reduction in remedies, because they were not properly brought to his attention, and he did not have the opportunity of correcting his performance. The onus was on the employer to show the employee had failed to perform his duties to such a degree that the remedies should be reduced. In this case, the employer similarly failed to give the employee a proper opportunity to discuss his alleged failings and consequently the respondent has failed to show that the reimbursement of wages for Core Health should be reduced.

Interest

Mr Hurlimann is entitled to be awarded interest on some of the sums owed. It is not fair and reasonable to award interest on monies that remained unpaid only because Mr Hurlimann failed to submit invoices. No interest is payable on the \$253 uninvoiced hours nor on the \$207 for the pharmacology courses.

The remainder of the monies owed, including the holiday pay, are subject to an award of interest. The interest runs at a rate of 9.5% from 17 November until the date on which the monies owing are paid in full.

Costs

If the parties are unable to resolve the issue of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member Employment Relations Authority