

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 64
5644307

BETWEEN LEANNE REGAN
 Applicant

A N D AZENA MOTELS 2011
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Applicant in person
 No appearance by or for Respondent

Investigation Meeting: 31 January 2017
 Last information from the Applicant on 10 April 2017

Date of Determination: 1 May 2017

DETERMINATION OF THE AUTHORITY

Within 28 days of the date of this determination, Azena Motels 2011 Limited must pay Leanne Regan \$5,324.75 gross in leave entitlements and the \$71.56 filing fee.

Employment relationship problem

[1] Leanne Regan began working for Azena Motels 2011 Limited (Azena) on 18 January 2012 and signed an individual employment agreement on 6 February 2014. She worked as a cleaner and a receptionist. She gave notice and finished work on 14 August 2016.

[2] She claims that she was not paid her full leave entitlements when her employment ended. She considers Azena owes her approximately \$5,000.

[3] Ms Regan has not received any wages and time or holiday and leave records from Azena.

[4] I held a case management teleconference on 10 January 2017. Ms Regan participated. Kyung Jun Lee (John Lee), a director of the respondent company, took part only briefly. He said he had not received notification of the case management teleconference and the time was inconvenient to him. Therefore, I released him from the call.

[5] However, Mr Lee confirmed during our conversation that he had received the statement of problem lodged by Ms Regan and was aware of her claim. He agreed that he had not lodged a Statement in Reply on behalf of the respondent.

[6] In a Notice of Direction of 11 January 2017, I notified both parties that I would conduct an investigation meeting in Christchurch on 31 January 2017, at 9.30am. A Notice of Investigation meeting was attached confirming the date, time and venue. The purpose of the investigation meeting was for the parties to give me evidence about the matters raised by Mr Regan in her statement of problem.

[7] The notice also directed Azena to provide the Authority with a copy of the time and wages records and holiday and leave records for Ms Regan for the time she was employed. I wrote that it would be helpful if Mr Lee was able to provide those in advance of the investigation meeting.

[8] Mr Lee did not provide any time and wages records or any holiday and leave records before the investigation meeting.

[9] However, I directed that both parties should attend the investigation meeting with all relevant documents.

[10] Ms Regan was directed to bring her bank statements for at least the last month of her employment and the calendars on which she has based her typed record of hours and days worked.

[11] At 9.30am on 31 January 2017, Ms Regan was present for the beginning of the investigation meeting. However, Azena was not represented. At 9.35am I instructed the Authority officer to telephone Mr Lee on his mobile phone. The Authority officer did so and the telephone was answered but the Authority officer got no response and

the phone call was discontinued from Mr Lee's end. At 9.40am, having waited 10 minutes for Mr Lee, I entered the investigation meeting room to begin the meeting with Ms Regan only.

[12] However, only one or two minutes into that meeting, the Authority officer knocked at the door and informed me that Mr Lee was on the telephone to say that he was not able to attend because he was ill. Mr Lee requested a deferment of the meeting.

[13] Given the late notice and the fact that Ms Regan was available for the meeting, I elected to administer an affirmation to Ms Regan and to take her evidence to assist me in investigating her claim.

[14] The Authority officer informed Mr Lee over the telephone that that was how I intended to proceed. Mr Lee was also told, as was Ms Regan, that I would examine the records that I did have and make a preliminary decision about how much money was owed.

[15] After the investigation meeting, I instructed the Authority officer to direct Mr Lee to provide the time and wages and the holiday and leave records by Friday, 3 February 2017. However, he has not done so.

[16] Ms Regan provided her IRD summaries of earnings for the tax years ending 31 March 2012, 2013, 2014, 2015, 2016, and for 2017 to date. She also supplied at my request bank statements and copies of the Azena payroll records relating to her that she emailed herself from work.

[17] I formed a preliminary view of the amount owed and sent it to Mr Lee for Azena and to Ms Regan. They were given time until 14 April 2017 to respond and for Azena to provide any of the documentation on time and wage records and leave and holiday records that the company should have kept, but has not yet provided to the Authority. Mr Lee asked for an extension of time until 28 April 2017, I granted him until 21 April 2017 because I considered Azena had ample time, since being given the opportunity to lodge a Statement in Reply in October 2016. As at 1 May 2017, Azena had made no response.

[18] Ms Regan reminded me by email on 10 April 2017 that I needed to take into account the 268.75 hours of accumulated alternative hours off she had at the end of her employment, as well as the annual leave entitlement I had calculated.

The issues

[19] To resolve this claim, I need to determine:

- (i) how many days/weeks of annual holiday pay Ms Regan was owed at the end of her employment;
- (ii) how many hours/days of accumulated alternative days off Ms Regan had accumulated at the end of her employment; and
- (iii) how many annual holiday days/weeks she was paid for at the end of her employment.

Determination

[20] Section 130 of the Employment Relations Act 2000 (the Act) provides that an employer must keep a wages and time record for every employee. When an employee brings a claim to recover wages or other money the employee may call evidence to show that the employer did not keep or produce a wages and time record about that employee. If that failure to keep or produce a wages and time record prejudiced the employee's ability to bring an accurate claim the Authority may accept as proved all the employee's claims about the wages paid to her and the hours, days and time worked by her. That is the case unless the employer proves that the employee's claims are incorrect.¹

[21] At this point, I only have some payslips, because Azena did not always supply payslips, calendars Ms Regan kept recording her working hours, her IRD summaries of earnings, her bank statements and a statement of Ms Regan's annual leave calculations created by Azena. However, those calculations do not include the 29.71 weeks she worked for Azena, and accrued annual leave, during 2016.

[22] I have no wages and time record from Azena. That absence has prejudiced Ms Regan's ability to accurately calculate the wages owing to her for annual holiday

¹¹ Section 132 of the Act.

entitlements at the end of her employment. Therefore, I am entitled to rely on her evidence as proof of the days, hours and times she worked.

The relationship of time in lieu and alternative days to the annual leave balance

[23] During the employment relationship, the parties attended mediation over Ms Regan's concern that she was not being rostered for as many working hours as she was entitled to under her employment agreement.

[24] On 18 June 2015, they reached a mediated agreement, entitled "Memorandum of understanding for ongoing employment relationship". Ms Regan says Azena did not properly comply with that agreement.

[25] Part of the agreement was that, on a trial basis, for six weeks commencing Wednesday, 24 June 2015 Azena would guarantee Ms Regan 40 hours work per week, and give her any further hours on an "as and when available" basis. The agreement to the trial did not replace the hours of work clause in the employment agreement, which guaranteed 46 hours of work per week.

[26] Ms Regan agreed to use some of her alternative days, built up by working on public holidays, for leave in July 2015.

[27] The parties agreed to come to an agreement about "cashing up" the 4th week of Ms Regan's leave accrued in the years ending January 2013, January 2014 and January 2015. They agreed that after those weeks had been cashed up, Ms Regan's annual holiday entitlement would be nine weeks.

[28] Ms Regan says that Azena apparently 'cashed up' three weeks of annual holiday leave but did not pay her at the correct rate for those weeks. In the absence of correct records it is difficult to ascertain how much was paid as cashed up annual leave and how much was simply the amount Ms Regan earned in those weeks. However, her calendars show two weeks in July 2015 when she did not work. Her evidence is that those were alternate days off she took that need to come off her accumulated alternative days balance, but not her annual holiday balance. I accept her evidence.

[29] I also accept that Azena used hours from her accumulated alternate days off balance to pay her for other days taken off between June 2015 and the end of her employment in August 2016, as well as to 'top up' hours it had not rostered her on

for. The 'top up' arrangement was not what was agreed at mediation, but Ms Regan makes no claim for payment for hours used that way.

[30] From the records I have, and from evidence Ms Regan gave in answer to my questioning, I find the following:

- over the entire period of her employment Ms Regan became entitled to 91.5 days of annual holiday leave.
- She accumulated 290.75 hours of alternative leave from working on public holidays.
- She took 4 weeks and 4 days as paid leave; a total of 24 days, using all of her accumulated alternative leave and 22 hours (2.75 days) of her annual leave. That left a balance of 88.75 days of annual leave.
- Even if she was correctly 'cashed up' for three weeks (15 days) she was entitled to be paid for the balance of 52.5 days leave at the end of her employment. However, there is no evidence of her being paid out, or 'cashed up' for those days, instead payments into her bank account are consistent with the weeks she worked and the two weeks she took off made up of alternative days.
- Therefore, Ms Regan had an accumulated annual holiday balance of 88.75 days at the end of her employment.

[31] Section 24 of the Holidays Act 1983 (the HA) means that an employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is the greater of –

- the employee's ordinary weekly pay as at the date of the end of the employment, or
- the employee's average weekly earnings during the 12 months before the end of the last pay period before the end of the employment.

[32] I calculate that Ms Regan's average weekly earnings for the 12 months before the end of her employment was \$637.00 gross per week. This is higher than her

ordinary weekly pay as at the end of her employment. Therefore, the annual holidays entitlement should have been paid out at this rate.

[33] The number of weeks of annual holiday Ms Regan had left is 17.75 ($88.75 \div 5 = 17.75$). $17.75 \times \$637 = \$11,306.75$ gross. That is the amount owed to Ms Regan at the end of her employment.

[34] Azena made the last payment for what appears to have been weekly wages on 17 August 2016 when it paid \$537.96 (nett). Azena paid Ms Regan \$1,000 on 31 August 2016 and \$3,681.69 on 9 September 2016; a total of \$4,681.69. This will have been a nett sum. Ms Regan's IRD summary of earnings show the gross amount of \$5,982.00 credited to Ms Regan's earnings by Azena as at the end of September 2016. Once PAYE of \$1,300.65 is deducted that amounts to \$4,681.69.

[35] Azena has not provided any records showing how its calculations were reached. However, by my calculations Azena owes Ms Regan a further \$5,324.75 gross in leave entitlements, being $\$11,306.75$ gross - $\$5,982.00 = \$5,324.75$.

Costs

[36] Neither party was legally represented and therefore it would be unusual for either party to be awarded costs. However, Azena must also pay Ms Regan the \$71.56 filing fee she paid to lodge her claim in the Authority.

Christine Hickey
Member of the Employment Relations Authority