

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 400/09
5163033

BETWEEN LEE WILLIAMS
 Applicant

AND CHESTERTON GROUP LTD
 Respondent

Member of Authority: K J Anderson

Representatives: T Oldfield, Counsel for Applicant
 No Appearance for Respondent

Investigation Meeting: 21 September 2009 at Auckland

Further information
received: 24 September 2009

Determination: 12 November 2009

DETERMINATION OF THE AUTHORITY

Non-Appearence for the Respondent

[1] On the morning of the investigation meeting (Monday, 21st September 2009), the Authority received an email, sent at 8:11a.m, by Ms Rachael Storey, whom to this date, has been the representative of the respondent. Ms Storey was seeking an eleventh hour adjournment of the investigation meeting on the ground she had only met with the barrister for the respondent on Thursday afternoon of the previous week. Apparently, the barrister was to contact the Authority on Friday 18th September but had failed to do so. Ms Storey also says that the respondent did: "... not realise legal advice was the needed course of action." At 8:54a.m, Mr Oldfield, for the applicant, responded indicating that an adjournment was opposed.

[2] At 9:33a.m, the Authority received an emailed letter from the barrister for the respondent, Mr Foley. At odds with what Ms Storey had earlier conveyed, Mr Foley indicated

that he had: "... not had an opportunity to meet with the respondent or review the issues in dispute." Mr Foley also made a request for an adjournment of the investigation meeting.

[3] Apart from the very late request for the adjournment, I also declined it because:

- a. The respondent has previously failed to engage in presenting a response to the claims despite being given three opportunities to do so on; 13th July, 4th August and 31 August 2009.
- b. The *Notice of Investigation Meeting* was sent to the respondent on 31st August 2009, hence there has been ample opportunity for the respondent to seek legal assistance. Further, the notice includes the standard caution: "If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant."
- c. In all the circumstances, I considered it was appropriate to proceed pursuant to Clause 12 of Schedule 2 to the Employment Relations Act 2000. It provides that:
"If without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented."

Identity of the Respondent

[4] I note that at paragraph 4 of his letter (referred to above), Mr Foley alludes to; "a fundamental issue" as to whether or not the cited respondent was the employer. While the evidence of Ms Williams is that she was employed and supervised by the managers of the motel (Kathy and Pat), I am satisfied that the overall evidence points to the correct party being cited as the entity with whom Ms Williams had an employment relationship; Chesterton Group Limited.

Employment Relationship Problem

[5] The applicant, Ms Lee Williams, brings several matters to the Authority for which she requires a determination:

1. A claim of unjustified constructive dismissal;
2. A claim of unjustified disadvantage;

3. A claim for payment for working on 6 public holidays, being: Christmas Day and Boxing Day 2008, New Years Day and the day after 2009, Auckland Anniversary Day 2009, and Waitangi Day 2009;
4. A claim for payment at time and a half for working on the above public holidays;
5. A claim for payment of annual holiday pay at 8% of gross earnings from 13th November 2008 to 17th June 2009;
6. An order for interest to be paid on all of the above monies;
7. An order that the respondent produces wage and time records for the period 1st April 2009 to 25th June 2009¹ and a penalty against the respondent for the failure to produce these records to date; and
8. An order for a penalty to be awarded for a failure to provide an employment agreement pursuant to s.63A of the Act.

Background

[6] Ms Williams commenced her employment as a housekeeper/cleaner/laundry person at the Unicorn Motel on 13th November 2008. The evidence of Ms Williams is that she was interviewed for the job on 12th November 2008 and it was agreed that she would work Monday to Friday each week and every second Saturday. The hours of work would be four to five each day beginning at 9:00a.m. The pay rate was \$16.00 per hour.

[7] The evidence of Ms Williams is that in early 2009, her hours of work began to reduce as she was sent home early. She also says that sometimes very late in an evening, she would receive a text from one of the managers of the motel (Kathy) informing that she would not be required to work the next day. Ms Williams says that she complained to Kathy about the reduction in the hours of work and received the response that if she didn't like it she could leave. Ms Williams also says that because she was concerned about the reduction in her hours of work, the attitude of the managers of the motel and the fact that she didn't have an employment agreement, she joined the Service and Food Workers Union in order to obtain some assistance.

¹ This should be 17th June 2009, the last day of Ms Williams' employment with the respondent.

[8] The further evidence of Ms Williams is that from April 2009, after the Union became involved, her hours of work reduced further. However, the payslips and bank account records provided by Ms Williams show a somewhat different picture which I will refer to later.

[9] Ms Williams also related to meeting Ms Rachael Storey on one occasion when issues about getting paid on time arose. Ms Williams also gave evidence about a meeting with Mr Brian Storey, the apparent owner of the motel and the listed sole director of the respondent company. Ms Williams says that she was intimidated and shocked by the way Mr Storey spoke to her and her colleague and she didn't want to meet with him again. The Union Organiser, Ms Lynette Slade, then handled matters for Ms Williams.

[10] Evidence was presented by Ms Williams relating to the failure of the respondent to pay time and a half and lieu days for working on public holidays. She also gave evidence about the deterioration in the working relationship with the managers of the motel and the reduction in her earnings, all of which culminated in Ms Williams resigning with three weeks' notice. Ms Williams ceased her employment at the Unicorn Motel on 17th June 2009.

[11] There was evidence from Ms Slade relating to her involvement with Ms Williams and attempts to procure wage and time records and employment agreements for Ms Williams and her colleague. Ms Slade referred to her contact with Mr Storey and the general lack of cooperation in regard to finalising the employment agreements and obtaining agreement on the hours of work and appropriate payments. I record at this point that I conclude that more probably than not, Ms Williams was a permanent part time employee and she was not employed on a casual basis. This conclusion is based on the draft employment agreement presented to Ms Williams by her employer (*Individual Employment Agreement (For Full-Timers and Part-Timers)*), and the identified pattern of work set out in the wage and time records for the period provided.

Issues and Conclusions

1. *Was there a constructive dismissal and/or an unjustified disadvantage?*

[12] It has been submitted for Ms Williams that the unilateral reduction of her hours of work, combined with the failure to pay the correct rate of pay for working on public holidays, was a "classic" breach of duty making it foreseeable that Ms Williams would resign, hence a constructive dismissal arises. It is difficult to accept this proposition. From an analysis of the

wage and time records for the period w/e 16th November 2008 to w/e 29th March 2009, and the payslips and bank statements for Ms Williams, whilst they show reduced hours of work for some weeks, it is not conclusive that there was an actual point in time where it could be said that the hours of work were reduced and remained so. On the contrary, the evidence reveals considerable fluctuation in the hours of work and the consequent pay received. While I accept that Ms Williams more probably than not reached an understanding that she was to work approximately 20 hours per week, Monday to Friday and every second Saturday, the records available show that even as early as December 2008 and January 2009, there were some weeks when this did not happen. Then at the other end of her period of employment (3 June 2009), she was paid for more than 20 hours, according to her bank statement.

[13] While clearly there were some weeks where Ms Williams was paid for less than 20 hours, in the absence of a clear contractual agreement between the parties, combined with the evidence which shows various fluctuations in the weekly hours of work during most of the time that Ms Williams worked at the motel, I find that there is no tangible evidence of a fundamental breach of a contractual duty of sufficient substance to convert the resignation of Ms Williams into a constructive dismissal. On the same reasoning, I conclude that Ms Williams did not incur an unjustified disadvantage.

[14] In regard to the failure to pay Ms Williams the appropriate rates for working on the respective public holidays, this is a matter which can be appropriately rectified under the respective provisions of the Holidays Act and the Employment Relations Act.

2. *The claims for working on 6 public holidays.*

[15] The days claimed are: Christmas Day and Boxing Day 2008, New Year's Day and 2nd January 2009, 26th January 2009 (Auckland Anniversary Day²) and Waitangi Day 2009. The wage and time records which have been provided by the respondent confirm that Ms Williams worked on all of the days as claimed. Section 50 of the Holidays Act 2003 provides that if an employee (Ms Williams) works on a recognised public holiday, she must be paid time and one half of her "relevant daily pay." Additionally, under s.56 of the Act, Ms Williams is entitled to have a paid day off work in lieu of working on the public holiday. I am satisfied that Ms Williams has an entitlement under both provisions of the Act for which the

² The official date of the Anniversary is 29th January but the custom is to observe it on a Monday. In any event, the records show that Ms Williams worked on both days.

respondent is liable. While the hours that Ms Williams worked fluctuated during the times in question, adopting a fair and equitable approach based on the wage and time records overall, I have calculated the payments due as follows:

(a) *Time and one half*

(i) The hourly rate is \$16.00 per hour hence the extra half rate is \$8.00 per hour .

(ii) 4 hours x 6 days = 24 hours x \$8.00 = \$192.00

(b) *Days in lieu* 6 days x 4 hours x \$16.00 = \$384.00

Total entitlement for payment for working on 6 public holidays: **\$576.00**. An order follows.

3. *Payment of annual holiday pay at 8% of gross earnings from 13th November 2008 to 17th June 2009.*

[16] I am satisfied that Ms Williams has an entitlement to be paid annual holidays as claimed pursuant to s.23 of the Holidays Act. Unfortunately, despite being requested to do so, because the respondent has failed to provide wage and time records from April to June 2009, it is not possible for the Authority to calculate the sum due to Ms Williams. To address this situation, orders will follow.

4. *Penalty Claims*

[17] Ms Williams asks that a penalty be awarded in regard to the failure of the respondent to provide wage and time records and an employment agreement pursuant to s.130(4) and s.63A respectively of the Employment Relations Act 2000. In regard to providing an employment agreement, while the evidence is that the respondent was extremely tardy in regard to engaging in the process of completing an employment agreement for Ms Williams, I find that there was a reasonable attempt to at least provide a draft employment agreement hence a penalty is not appropriate in all the circumstances. In regard to the failure to provide wage and time records and the consequent disadvantage to Ms Williams pertaining to calculating her entitlements, a penalty is appropriate. An order follows.

Summary of Decision and Orders

1. I find that Ms Williams does not have a personal grievance as she was not unjustifiably dismissed or unjustifiably disadvantaged.

2. Pursuant to the respective provisions of the Holidays Act 2003, I find that Ms Williams is entitled to be paid time and one half for working on the six public holidays identified and she is entitled to be paid for days in lieu of working on those public holidays. Chesterton Group Limited is ordered to pay to Ms Williams the gross sum of **\$576.00**.
3. Pursuant to s.23 of the Holidays Act 2003, I find that Ms Williams is entitled to be paid annual holiday pay calculated at 8% of her total gross earnings while employed by the respondent. Chesterton Group Limited is ordered to pay to Ms Williams a gross sum calculated accordingly. In the event that this sum cannot be agreed between Ms Williams and the respondent, leave is granted for the parties jointly or separately, to return to the Authority for an appropriate order.
4. Pursuant to Clause 11 of Schedule 2 to the Employment Relations Act 2000 and s.84 of the Holidays Act 2003, Chesterton Group Limited is ordered to pay to Ms Williams, interest on the monies set out in clauses 2 and 3 above at the rate of 4.85% per annum from 17th June 2009 until the date of payment.
5. Pursuant to s.160(1) of the Employment Relations Act 2000, within 14 days of the date of this determination, Chesterton Group Limited is ordered to provide to Ms Williams and to the Authority, wage and time records from 1st April 2009 to 17th June 2009, and a record of the gross earnings of Ms Williams, for the total period of her employment.
6. Pursuant to s.130(4) and s.135 of the Employment Relations Act 2000, Chesterton Group Limited is ordered to pay a penalty sum of \$500 to Ms Williams.

Costs

[18] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, Mr Oldfield has 28 days from the date of this determination to file and serve submissions with the Authority on behalf of Ms Williams. Chesterton Group Limited has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority