

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 113/09  
5140853

BETWEEN                      CLINICAL HORIZONS  
   LIMITED t/a THE DENTISTS  
   Applicant

AND                              ANITA LORNIE  
   Respondent

Member of Authority:      Robin Arthur

Representatives:            Brian Turner and Veronique Turner for Applicant  
   Respondent in person

Investigation Meeting:      3 April 2009 at Tauranga

Determination:              7 April 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]      Clinical Horizons Limited (CHL) seeks orders regarding money overpaid to its former employee, Anita Lornie.

[2]      Ms Lornie finished working for CHL in late December 2006. In early January 2007 the company identified a substantial overpayment of annual leave had been made to Ms Lornie. It promptly sought reimbursement of the money.

[3]      Over a period of some months the parties disputed who was at fault for the overpayment – Ms Lornie in her former role at CHL’s payroll administrator or CHL’s accountant. In April 2008 they met with a mediator’s assistance. A record of settlement was signed and certified under s149 of the Employment Relations Act 2000 (the Act).

[4]      Under the settlement agreement the matter was referred to a Labour Inspector for an opinion and the parties agreed “*to abide by the opinion as a way of resolving all the issues in relation to wages, holiday pay and sick leave entitlements*”.

[5] The Labour Inspector's opinion, issued on 15 September 2008, concluded that Ms Lornie "*has been overpaid the gross sum of \$4,304.76 for annual holidays and 0.50 days of sick leave*". The Inspector left it to the parties "*to decide what, if any, further action is taken*".

[6] CHL then demanded Ms Lornie promptly pay the amount that the Inspector found was due. She responded by sending a part-payment of \$20. She has since made five part-payments of amounts varying from \$40 to \$200. Altogether Ms Lornie repaid \$490 between 15 October 2008 and 27 March 2009.

[7] The parties agree that the outstanding amount for overpaid annual leave and sick leave now stands at \$3,894.76.

[8] The issues for determination now are:

- (i) whether Ms Lornie may pay the amount due by instalments or must pay it immediately; and
- (ii) whether Ms Lornie should pay interest on the amount due from the date of the Labour Inspector's assessment (15 September 2008) until the date of full repayment; and
- (iii) whether Ms Lornie breached the terms of the Record of Settlement by not promptly paying the full amount assessed by the Labour Inspector, and, if so, whether a penalty should be imposed.

[9] CHL's managers, Brian Turner and Veronique Turner, and Ms Lornie each gave sworn oral evidence at the investigation meeting.

### **Instalments**

[10] Ms Lornie proposes paying the remainder due by instalments from earnings made from her two present jobs of around \$540 gross per week. She avers that she has no assets. The family home she shares with her partner is owned by a family trust.

[11] I accept CHL's submission that an order for payment by instalment is unsatisfactory. CHL has never agreed to payment by instalments and those tendered

by Ms Lornie have been small and irregular. It is not just for CHL to remain what is effectively an involuntary lender to Ms Lornie.

[12] Ms Lornie has had the use of more than \$4,300 of CHL's money for more than two years. Over the last five months, since the Inspector's opinion confirmed the amount due, she has paid back just a little over one tenth of it.

[13] I am not satisfied that Ms Lornie has properly explored the prospects for borrowing the money needed to pay her debt to CHL.

[14] She says she has been told by a commercial lender that without assets to use as security she cannot borrow the amount needed. However Ms Lornie also confirmed that she had not explored the option of having the trust which owns her family home borrow the money as an extension to its mortgage on that property. Other avenues are to borrow from family or friends.

### **Interest**

[15] CHL seeks interest on the amount due from the date of the Labour Inspector's opinion until the amount is paid in full.

[16] Mr Turner averred that throughout this period CHL has operated with an interest-bearing overdraft which would have been reduced if Ms Lornie had repaid the amount due. He says that interest rate has varied from 9.25 per cent to 10.45 per cent and is currently 10.25 per cent.

[17] I accept CHL has incurred a real cost as a result of loss of use of its money and is entitled to an award of interest.

[18] Under clause 14 of Schedule 2 of the Act the Authority has the discretion to award interest of up to 2 per cent above the 90-day bill rate as at the date of the order on the whole or part of the money due.

[19] I award interest on the amount of \$4,384.76 at the rate of 3.19 per cent (being today's 90-day bill rate) for the period from 16 September 2008 to 7 April 2009 inclusive (that is 204 days). To allow for the reduction on the total amount due through the six part-payments made in the period between 15 October 2008 and 27 March 2009, I have not included the 2 per cent margin which could have been added to that rate.

[20] From the date of this determination until the date that the outstanding amount of \$3,894.76 is paid in full, interest is awarded at the full allowable rate of 5.19 per cent - that amounts to 55 cents a day. This does not include interest on the interest already awarded.

### **No breach of settlement agreement**

[21] CHL seeks a penalty for what it says was a breach by Ms Lornie of the terms of settlement because she did not “*abide by*” the opinion of the Labour Inspector. It says that term required Ms Lornie to promptly pay whatever amount the Labour Inspector assessed as due. However, Ms Lornie submits that term was to resolve the amount due and did not set the timing or terms on which payment would be made.

[22] I agree that the face of the Record of Settlement does not show that the parties had turned their minds to and agreed how and when whatever payment was due would be paid. On that basis, I find that Ms Lornie did not breach an agreed term of a certified settlement so as to make her liable for a penalty.

### **Determination**

[23] Ms Lornie is ordered to pay to CHL by no later than 19 May 2009 the following sums:

- (i) \$3,894.76 in settlement of her debt for overpaid annual and sick leave;  
and
- (ii) \$78.18 as interest on the amount due from 16 September 2008 to the date of this determination; and
- (iii) \$0.55 a day as further interest from the first day after this determination until the amount remaining due is paid in full; and
- (iv) \$70 in reimbursement of the fee for lodging its claim in the Authority.

Robin Arthur  
Member of the Employment Relations Authority