

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 573
5410310**

BETWEEN

KIM MINTER

Applicant

AND

PAPATOETOE FUNERAL
COTTAGE LIMITED

Respondent

Member of Authority: Eleanor Robinson

Representatives: David Howe, Advocate for Applicant
Yvonne Graham, Advocate for Respondent

Investigation Meeting: 17 & 30 October 2013 at Auckland

Submissions received: 19th November 2013 from Applicant
20th November 2013 from Respondent

Determination: 13th December 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Kim Minter claims that he is owed unpaid wages and other monies by the Respondent, Papatoetoe Funeral Cottage Limited (PFCL).

[2] PFCL denies that Mr Minter is owed unpaid wages or other monies.

Background Facts

[3] Mr Minter commenced employment with Garvon Mortuary Products and Services Limited on 21 April 2008 as a Mortuary Assistant/Embalmer reporting to Mrs Yvonne Graham.

[4] Mr Minter said he had been issued with an individual employment agreement (the 2008 IEA) of which he had signed and retained a copy, however whilst he had returned a copy signed by him to Mrs Graham, she had neither signed or returned a signed copy to him.

[5] The terms and conditions of employment as outlined in the 2008 IEA included:

5. Hours of Work

1) The Employees normal hours of work shall be between the hours of 8.30 am and 5 pm on Monday thru Friday, and on-call duties. The Employee may also be required to perform such overtime as may be reasonably required by the employer in order for the employee to properly perform their duties. The Employee's salary fully compensates them for all hours worked.

6 Salary

The Employee's salary shall be \$72,600.32 per annum.

7. Holidays and Leave Entitlements

7.1 Annual Leave

The Employee shall be entitled to paid annual leave as set out in this clause ...

1) The employee shall be entitled to six weeks annual leave per year;

11 Termination of Employment

11.1 General Clause

The Employer may terminate this agreement for cause, by providing four weeks' notice in writing to the Employee. Likewise the Employee is required to give

four weeks' notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[6] Mr Minter said that in June 2011 he was informed that Garvon Mortuary Products and Services Limited was closing down and his employer would be PFCL, however there was no change to his duties or his terms and conditions of employment.

[7] Mrs Graham said that Garvon Mortuary Products and Services Limited had not been registered as a company; however Garvon Mortuary Services Limited was registered and was in fact the employing entity of Mr Minter.

[8] Mrs Graham said that Garvon Mortuary Services Limited was struck off the Companies Office Register in 2010 and PFCL assumed responsibility for the remuneration of all existing Garvon Mortuary Services Limited employees, Mr Minter had been advised at that time that this was the case, and was subsequently issued with a new individual employment agreement (the 2011 IEA) with PFCL.

[9] The terms of the 2011 IEA differed from those in the 2008 IEA in several areas, significantly:

- The salary was stated to be \$65,000.00 gross per annum
- On-call duties were stated to be performed at weekends
- Annual leave entitlement was stated to be “*in accordance with the Holidays Act 2003 and its amendments*” (i.e. 4 weeks)
- 2 weeks written notice of termination of employment to be provided by the employee.

[10] Mr Minter denied that he had been issued with the 2011 IEA, or that any changes in his terms and conditions of employment discussed with him. Mr Minter states that he had not agreed to any changes to his terms and conditions of employment after his employment transferred to PFCL, nor had he been aware that there were any until his employment ended.

Issues

[11] The issues for determination are:

- The identity of the employer
- The applicable employment agreement
- whether Mr Minter is owed:
 - unpaid wages
 - payment for his contractual 1 month contractual notice period
 - unpaid annual leave
 - unpaid public holiday entitlement

Determination

The correct identity of the Respondent

[12] Whilst the name of Mr Minter's employing company altered during the course of his employment, I note that at all times the effective ownership and control of the business vested in Mrs Graham and her husband.

[13] As such, when Garvon Mortuary Services Limited was struck off the Companies Register in 2010, its employees transferred with no break in employment to PFCL which assumed the mantle of the employer. PFCL continued the salary payments to the employees of Garvon Mortuary Services Limited, and Mrs Graham confirmed at the first Investigation Meeting that Mr Minter was told at that time that: "*the contract stayed the same as 2008*".

[14] There has been no evidence filed with the Authority to support Garvon Mortuary Services Limited was placed into liquidation or that any creditors were disadvantaged.

[15] I find therefore that Garvon Mortuary Services Limited (or Garvon Mortuary Products and Services Limited which Mr Minter understood from the 2008 IEA to be

the employing company) was amalgamated with PFCL and is therefore Mr Minter's employer and the correct Respondent for the purposes of this claim.

The relevant Employment Agreement

[16] The employer has a duty pursuant to s. 65 of the Employment Relations Act 2000 (the Act) to provide an employee with a written employment agreement containing the terms and conditions of employment. It is now a requirement of the Act that the employer retains a signed copy of the employment agreement for inspection at a later date; however I accept that this was not the case at the time Mr Minter was employed.

[17] Mr Minter has provided a copy of the 2008 IEA, but denies that he was provided with a copy of the 2011 IEA, or that he agreed to the change in his terms and conditions of employment as set out in the 2011 IEA.

[18] PFCL is unable to provide a copy of the 2011 IEA which has been signed by Mr Minter.

[19] The 2011 IEA contains significant changes to Mr Minter's terms and conditions of employment Pursuant to s 4(1A)(c) of the Act the duty of good faith:

....requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

(i) Access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) An opportunity to comment on the information to their employer before a decision is made.

[20] There is no evidence to support the claim by PFCL that any discussions were held with Mr Minter which related to a reorganisation, albeit only involving in-house parameters. Mr Minter denies seeing or agreeing to the change in his terms and conditions of employment as set out in the 2011 IEA, and PFCL cannot provide in evidence a signed copy of the 2011 IEA.

[21] It is the responsibility of the employer to keep adequate records and therefore in the absence of signed copies of the 2011 IEA or any other confirmatory documentation, I find that the 2008 IEA is the relevant one for the purposes of Mr Minter's unpaid wages and other monies claims.

Unpaid wages claim: Statutory entitlement to wages

[22] The Wages Protection Act 1983 governs the payment of wages between an employer and an employee:

4. No deduction for wages except in accordance with Act

Subject to sections 5 (1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

5. Deductions with worker's consent

(1) An employer may, for any lawful purpose, -

(a) with the written consent of a worker; or

(b) on the written request of a worker-

Make deductions from wages payable to that worker.

[23] Ms Graham claimed that Mr Minter had agreed to a salary of \$1,000.00 net per week, which claim was supported a written statement from by Mr Avikash Singh, a Chartered Accountant, who did not attend either of the Investigation Meetings but who provided a detailed spreadsheet analysis submitted by PFCL.

[24] Mr Minter agrees that he was told at the commencement of his employment that he would be paid \$1,000.00 net per week and that this net amount was equal to the gross amount of \$72,600.37 as set out in clause 6 of the 2008 IEA. Mr Minter said he had trusted Ms Graham and had relied on this information as being correct.

[25] The weekly net amount of \$1,000.00 continued to be paid to Mr Minter until October 2011 when it increased to \$1,035.62 as a result of a change in the rate of New Zealand income tax, and it continued at this amount until the termination of Mr Minter's employment, as evidenced by the record of wages paid to Mr Minter and supplied by PFCL.

[26] I find this to support the conclusion that there was no change to Mr Minter's gross pay entitlement during his period of employment, and this conclusion is further confirmed by the fact that Mr Minter's net pay changed only when a change to the income tax rates occurred.

[27] The record of wages supplied by PFCL do not support a consistent annual gross salary figure of \$72,600.32, and the IRD records supplied by Mr Minter do not support any consistent gross or PAYE figures relating to him.

[28] However the spreadsheet analysis in respect of Mr Minter supplied to the Authority by Mrs Graham for the year 1 April 2008 to 31 March 2009 clearly shows and states a gross pay figure of \$72,650.01 with tax deductions of \$19,650.01 and a net payment of \$53,000.00. Whilst these figures do not exactly correlate to those in the 2008 IEA, being \$72,600.32 as opposed to \$72,650.01, and net pay of \$1,000.00 as opposed to \$1,019.00 I find that they are confirmatory that Mr Minter's gross salary was as stated in the 2008 IEA and the net figure received by Mr Minter was \$1,000.00 per week.

[29] It is not the role of the Authority to determine the amount of PAYE taxation that an employer should pay to the IRD on behalf of an employee; this is set out in the relevant New Zealand statutes. It is however open to the Authority to examine what has been paid. In this case PFCL paid Mr Minter a consistent net amount of \$1,000.00 per week (changed to \$1,035.62 as a result of the income tax change in October 2011), and as set out in the IRD records relating to Mr Minter, provided the IRD with figures which were not based on the gross salary amount of \$72,600.32.

[30] In view of the inconsistency in the figures provided by the parties and the fact that the net payment to Mr Minter did not change (otherwise than minimally as noted) I have taken the spreadsheet analysis provided by Mr Singh on behalf of PFCL for the

year 1 April 2008 to 31 March 2009 as the correct model showing the tax allegedly deducted by the PFCL.

[31] I accept the copy IRD documents relating to the figures submitted by Mr Minter as correct; Mrs Graham has not directly challenged the figures and has not provided any corresponding IRD figures relating solely to Mr Minter.

[32] Pursuant to s. 4 and s. 5 of the Wages Protection Act 1983 I find that Mr Minter consented to a net payment of \$1,000.00 per week on the basis that this was the net amount pertinent to the residue after deductions in respect of the PAYE income tax on a gross salary amount of \$72,600.32 per annum.

[33] According to the spread sheet analysis supplied by PFCL an amount per week of \$391.29 was deducted from Mr Minter in respect of PAYE, however according to the IRD returns, this was not the amount that was paid to the IRD by PFCL. The differential is:

Tax Deducted			
Period	Per spreadsheet \$	Per IRD return \$	Difference \$
4/2008 - 3/2009	19,650	26,295	3,355
4/2009 - 3/2010	19,650	16,716	2,934
4/2010 – 3/2011	19,650	15,862	3,788
4/2011 – 3/2012	19,650	13,955	5,695
4/2012 – 31/12/2012	14,737	9,303	5,434
Total Difference: \$21,206.00			

[34] I find therefore that there has been an unlawful deduction from the wages owed to Mr Minter.

[35] I order that PFCL pay to Mr Minter the sum of \$21,206.00 gross in respect of unpaid wages.

[36] In the event that that the IRD subsequently confirms the level of PAYE paid by PFCL to be different from the figures provided by Mr Minter, leave is granted for PFCL to return to the Authority for a recalculation of the amounts due to Mr Minter.

Notice Period Claim

[37] There is no dispute between the parties that Mr Minter tendered his resignation in writing by email dated 29 November 2012. In that email Mr Minter stated that his final day of employment with PFCL would be 28 December 2012. This accorded with the four week notice provision in clause 11.1 of the 2008 IEA. Mrs Graham accepted the notice in writing on 7 December 2012 stating: *“Your resignation has been accepted as of the date tendered”*.

[38] Mr Minter claims that he was not paid for the four week notice period.

[39] The final spreadsheet analysis confirms Mr Minter’s final pay as being made on 27 November 2012, and Mrs Graham confirmed to Mr Minter in an email dated 6 December 2012 that no notice pay had been made to him: *“Your wages have now ceased due to no holiday pay being owed to you at this time”*.

[40] Mrs Graham stated that Mr Minter had been paid three weeks wages in advance at the commencement of his employment, and this claim is supported by the two spreadsheets submitted by PFCL, one showing net pay, the other showing gross pay.

[41] Although Mr Minter disputes that he did receive three weeks wages in advance, I find that, based on the spreadsheet evidence, it more likely than not that Mr Minter did receive the payment in advance.

[42] Having found the 2008 IEA to contain the applicable terms and conditions of employment, I determine that Mr Minter is entitled to be paid for the four week notice period, less the 3 weeks advance payment he received.

[43] I order that PFCL pay the sum of \$1,142.48 net (calculated as in net pay terms as \$4,142.48 less \$3,000.00) to Mr Minter in respect of unpaid notice period.

Annual Leave Claim

[44] In accordance with s 81(1) of the Holidays Act 2003, an employer must keep a holiday and leave record in the prescribed form in s 81(2). The effect of an employer failing to keep or provide access to holiday and leave records is set out in s 83 of the Holidays Act 2003 which states:

83 Failure to keep or provide access to holiday and leave record

(1) Evidence that an employer has failed to comply with section 81 or section 82 may be given in an action before the Authority –

(a) To recover holiday pay or leave pay from an employer; or

(b) To enforce an entitlement to annual holidays, public holidays, sick leave, or bereavement leave against an employer.

(2)

(3) If, after hearing the evidence, the Authority is satisfied that the employer failed to comply with section 81 or section 82 and that the failure prevented the claimant from bringing an accurate claim, the Authority may make a finding to that effect.

(4) If a finding under subsection (3) is made, then the Authority may accept, as proved, in the absence of evidence to the contrary, statements made by the employee about –

(a) holiday pay or leave pay actually paid to the employee;

(b) annual holidays, public holidays, sick leave, or bereavement leave actually taken by the employee.

[45] Mrs Graham confirmed at the Investigation Meetings that PFCL did not keep any holiday and leave records as mandated by the Holidays Act 2003 and consequently it was unable to prove or disprove the annual leave claims made by Mr Minter.

[46] Given this evidence, I find that PFCL failed to comply with sections (81) and (82) of the Holidays Act 2003 and that this failure prevented Mr Minter from bringing an accurate claim.

[47] I therefore, pursuant to s 83 of the holidays Act 2003, accept the statements made by Mr Minter in addition to his submitted spreadsheet analysis and hand written record of the holiday leave he believed he had taken during the period of his employment with PFCL.

[48] As previously stated, the 2008 IEA applies and this provides at clause 7 for six weeks annual leave entitlement accruing pro-rata from the first day of Mr Minter's employment.

[49] The evidence submitted by Mr Minter and his statements are that during the period 21 April 2008 until 28 December 2012 he took 88 days paid leave out of an entitlement of 144.5 days. This equates to an outstanding annual leave entitlement balance of 56.5 days.

[50] I find it is reasonable to assume that at the time of the amalgamation of Garvon Mortuary Services Limited (or Garvon Mortuary Products and Services Limited) and PFCL any accrual of annual leave entitlement would be carried over. At the date Mr Minter's employment terminated his weekly rate of payment was \$1035.62 net.

[51] I order that PFCL pay the sum of \$11,695.50 gross (calculated as \$207.00 net per day x 55.5 days) to Mr Minter in respect of unpaid annual leave entitlement.

Public Holidays Claim

[52] Mr Minter claims that during 2011 and 2012 he worked 13 public holidays for which he did not receive an alternative day. He has not submitted any documentation in support of this claim.

[53] I observe that although working on a public holiday incurs a payment at time and a half pursuant to s 80(1) of the Holidays Act 2003, Mr Minter has made no corresponding claim for an additional half an hour of pay in respect of the hours worked on those public holidays.

[54] Given the consistent amount of the weekly payments, I find it difficult to accept that Mr Minter would not have noticed the omission.

[55] Mrs Graham acknowledged that the appropriate records for public holidays had not been kept, but she did confirm in a written submission that Mr Minter had worked on two public holidays for which he had not been paid at the rate of time and a half.

[56] I find the PFCL withheld payments to which Mr Minter was entitled pursuant to s 50(1)(a) of the Holidays Act 2003 on 13 occasions.

[57] I order that PFCL pay the sum of \$4,036.50 net to Mr Minter in respect of unpaid public holiday entitlement.

Compensation

[58] Mr Minter has made a claim for compensation. Compensation is a remedy awarded pursuant to s 123(1)(c) of the Act for humiliation, loss of dignity and injury to the feelings of an employee who is found to have a personal grievance in respect of a claim as set out in s 103 of the Act.

[59] Mr Minter's claims against PFCL do not represent a personal grievance claim pursuant to s 103 of the Act and I award no compensation.

Interest

[60] Mr Minter has claimed interest on the amount of unpaid wages.

[61] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum¹.

[62] I consider that it is appropriate that PFCL is ordered to pay interest on the unpaid wages amount owed to Mr Minter.

¹ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[63] PFCL is to pay interest of \$1,060.30 to Mr Minter in respect of interest on the unpaid wages..

[64] Mr Minter is to be reimbursed the filing fee of \$71.56.

Costs

[65] While costs are reserved, I note here that, subject to his submissions, Mr Minter was not legally or professionally represented and, unless he can provide evidence of costs charged and paid. it is unlikely that he has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority