

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 124
5616526

BETWEEN	KOMANG SUARDANI Applicant
AND	HELEN ENG t/a ASIANA DAY SPA First Respondent
AND	EVERGREENS DAY SPA GROUP LIMITED Second Respondent

Member of Authority:	James Crichton
Representatives:	Graeme Ogilvie, Advocate for Applicant Chin Soon, Advocate for Respondents
Investigation Meeting:	15 September 2016 at Wellington
Determination:	6 October 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Suardani) alleges she is owed wages and holiday pay from her employment with the respondents. The respondents agree that money is owed but the parties have been unable to agree the amount.

[2] There were two periods of employment, the first from 18 December 2010 to April 2013 when, by common consent, Ms Suardani was employed by the first respondent while in the second period of the employment, from 3 January 2014 down to the termination of the employment in the middle of 2015, the date of which is in dispute, the employer was the second respondent.

[3] Because there is a commonality of interest between the first and second respondent, it will be convenient if I refer to the employers generically as Asiana Day Spa. I observe that the proceedings were originally filed against Evergreens Day Spa Limited. For the avoidance of doubt, I rely on the power conferred by s. 219 (1) of the Employment Relations Act (the Act) to correctly refer to the two respondents in the entitling.

[4] This claim is only concerned with the recovery of wages and as a consequence it is unnecessary for me to traverse the nature of the relationship between the parties save to say that it appears to have been harmonious enough in its early stages but deteriorated rapidly at the end of the relationship, about which more later.

Issues

[5] There are two periods of employment where it is alleged wages are due and owing and it will be convenient if I consider each in turn. These two periods of employment do not correspond to the change in the employer; rather, it is convenient to deal with the position up to the date of a significant meeting on 9 July 2015, and then the position after that.

Are wages owed for the first period of employment?

[6] The first point I desire to make is that as with most of the wage claims that come before this Authority, the employer's position is materially affected to its disadvantage by incomplete or non-existent wage and time records. In the present case, Ms Suardani's representative requested wage and time records from Asiana Day Spa on 3 February 2016 and was finally provided with time records only at my investigation meeting. This paucity of records makes the Authority's investigation more challenging and makes it more difficult for the former employee to properly quantify what it is she/he is entitled to.

[7] That is why the legislature has enacted s.132 of the Act which provides that on a wages claim where the employee is unable to adequately quantify what she/he is owed because of inadequate record-keeping by the employer (in breach of the same Act), the Authority is entitled to rely on the evidence provided by the employee.

[8] In the present case, insofar as I am unable to rest my conclusions on the proper business records of the employer, I will make judgments in reliance on the evidence for the employee.

[9] There are a number of separate examples of this reliance throughout the evidence in this matter. For instance, Ms Suardani maintains that she worked eight public holidays between January 2014 and February 2015 and 20 further days between 18 December 2010 and April 2013; conversely, Asiana Day Spa claims that normally public holidays were not worked and doubts Ms Suardani's evidence. But in the absence of proper wage and time records for the totality of the period, the employer's position is difficult to sustain.

[10] A further example is a payment supposedly of holiday pay by cheque of \$2,000 exactly, which according to the evidence I heard at the investigation meeting was paid on 26 January 2011. The statement in reply even gave me the cheque number and confirmed the date. According to Asiana Day Spa, Ms Suardani was paid that cheque on account of holiday pay.

[11] But she denied receipt of it, then or at any other time, and pointed out that at the point at which she was supposed to have received this payment, she would not have been entitled to it because she had not worked long enough to be entitled to a holiday payment of that magnitude. As her representative correctly pointed out, that amount constituted roughly two thirds of a month's salary for Ms Suardani.

[12] I questioned Mr Chin Soon who gave evidence for Asiana Day Spa about this \$2,000 cheque and he was adamant that his company records showed it had been paid to Ms Suardani but he was unable to explain her point about the improbability of receiving that sum so soon after the first period of employment started.

[13] I directed Asiana Day Spa to produce evidence of this cheque in its closing submissions and it has done so and amongst other things apologised for getting the date wrong; the cheque is actually dated a year later, that is 26 January 2012 and despite Ms Suardani's adamant evidence that she had not received any cheque for \$2,000 I have asked her, through her representative, to comment further on this payment and she maintains her position that she never received it.

[14] Moreover, as Ms Suardani's representative astutely pointed out, given the payment was supposedly for holiday pay, and there is no claim for holiday pay for

this period of the employment, it cannot be taken into account in the present proceeding.

[15] The first issue I need to decide is Ms Suardani's entitlement to wage arrears for the period January through to March 2011 inclusive. The relevant Inland Revenue Department forms for that period disclose what was declared as income for her and those amounts tally with the other evidence before the Authority.

[16] It appears to be common ground (unchallenged by Asiana Day Spa) that Ms Suardani was paid \$3,000 per month gross so she should have received a total of \$9,000 gross for the three months in question rather than the sums recorded in the IRD's records.

[17] The calculation is simple. Ms Suardani has been paid \$5,536 and ought to have been paid \$9,000, both figures gross. Accordingly, she is entitled to the payment of a further \$3,464 gross.

[18] I have not been persuaded by any of Asiana Day Spa's evidence that that figure can be rebated, as it proposes. It has produced a series of photocopies of cheques which purport to show payments to Ms Suardani; she denies receiving them and her bank statement does not disclose receipt of such payments.

[19] It is conceivable that Ms Suardani could have arranged to cash these cheques to avoid the necessity of transacting them through a bank account and had she done that, the payment could still have been in her hands but there would be no evidence of it now. I accept that that is a possibility but it is the employer's obligation, both in the law and in terms of good business practice, to keep proper records of moneys that are paid, whether to employees or to others, and in the absence of those proper records, I am entitled to prefer the evidence of the applicant, which I do.

[20] The second claim I must deal with relates to public holidays where again there is dispute between the parties but this time only as to quantum. Asiana Day Spa agrees that public holiday pay is owed but denies the totality of the claim made by Ms Suardani.

[21] Her evidence is that she was "*never paid time and a half for working on a public holiday*" but was effectively paid the normal hourly rate and no more. That calculation is again supported by the records of the Inland Revenue Department. In

addition, Ms Suardani was not given days off in lieu and so she is entitled to payment for that as well.

[22] I accept the calculations in these two regards from Ms Suardani and on that basis she is entitled to the sum of \$1,959.15 which represents the 50% loading and \$3,907.85 representing the days in lieu, being a grand total of \$5,867.

[23] Next, the applicant is entitled to unpaid wages for the period 1-7 July 2015 and that amount anyway is agreed by Asiana Day Spa. The amount owed is \$642.30 gross.

What is Ms Suardani's entitlement to wages after the meeting on 9 July 2015?

[24] What happened at the meeting on 9 July 2015 is relevant for the purposes of determining any arrears of wages that might be owed to Ms Suardani because it is common cause that from that date, she was not offered any further work and in fact by letter dated 16 July 2015, she was dismissed from the employment.

[25] However, the matter is not straightforward because according to Ms Suardani she was told to resign at this meeting and she refused to do so, and in consequence Asiana Day Spa said that it would have to consult its lawyer.

[26] Ms Suardani understood that the reason that she was asked to resign was because of a claim made by Asiana Day Spa that she had "*stole*" Asiana Day Spa's clients by working for a friend during her free time performing the same services that she performed at Asiana Day Spa.

[27] The evidence for Asiana Day Spa is that Ms Suardani was seen working at this opposition business sometime in March 2015, that she was warned by Asiana Day Spa that she could not work for a competitive business without permission and that permission would not be granted because she was employed in terms of a work visa which limited her employment to Asiana Day Spa.

[28] The employer says that the matter was raised a second time and then on the third occasion (the meeting of 9 July 2015) matters came to a head apparently after a representative of Asiana Day Spa had visited the other business and even taken photographs of relevant material connected with the other business.

[29] Asiana Day Spa says that it told Ms Suardani to either resign or she would be dismissed and that Ms Suardani chose to resign at the meeting so the employer is mystified by the suggestion that there was any prospect that the employment continued beyond that date, as Ms Suardani postulates.

[30] Equally puzzling is that in addition to denying that she resigned at the meeting, Ms Suardani also denies ever receiving the letter of dismissal which presumably goes some way to explaining why she says that she continued to contact the employer asking when she was going to be allocated further work.

[31] Eventually, when Ms Suardani concluded that she was not going to be offered any further work, she provided a resignation but that was not until 20 October 2015 and the response from Asiana Day Spa was to draw her attention to the dismissal letter of 16 July 2015 and indicate that the employment had long since ended and so the resignation was quite unnecessary.

[32] There is no claim for constructive or any other sort of dismissal so the relevance of this material is simply that Ms Suardani is claiming wages from 9 July 2015 down to the date of the resignation on 20 October 2015.

[33] I have already dealt with the wages owing to Ms Suardani for the week ending at the date of the July 2015 meeting; there is no dispute that that money is owed. But there is dispute about why Asiana Day Spa should pay Ms Suardani for the period from the July meeting down to the date of the resignation when the employer's position is either that Ms Suardani resigned her employment at the meeting on 9 July 2015 (denied) or she was dismissed effective 16 July 2015 on receipt of the letter of dismissal (also denied because Ms Suardani denies having ever received this letter although she acknowledges that it was correctly addressed).

[34] When I asked Ms Suardani why she was claiming to be paid from the date of the 9 July 2015 meeting down to the date of her "*resignation*" dated 20 October 2015, she simply said that she wanted her outstanding wages and holiday pay paid, almost as if she did not understand that the wages claim I have just alluded to was being made on her behalf by her representative.

[35] I should hasten to add that the language challenges which the applicant's representative had to deal with were significant; he did not speak her language and she did not speak his so communication between them was, at best, challenging.

[36] Put shortly, I am not persuaded there is any reasonable basis on which Ms Suardani can expect payment of wages from the date of the subject meeting down to 20 October 2015. She performed no services whatever for the employer from the date of the meeting onwards and so there would need to be a special justification for wages to be due and owing after that date.

[37] Such a special entitlement exists in respect of notice and I am pleased to observe that Ms Suardani's closing submissions reduced her claim for wages to a combination of a further week for the period from 9 July 2015 (the date of the meeting) to 16 July 2015 (the date of the dismissal letter) and then a month beyond that for notice as prescribed by the operative employment agreement.

[38] I have concluded that Ms Suardani is not entitled to be paid for the period between the meeting and the dismissal letter because nothing turns on the dismissal letter just as nothing turns on the subsequent "*resignation*". The employment ceased effectively on 9 July 2015 for whatever reason and given Ms Suardani's own evidence that she never received the letter of dismissal, the logic for paying her for the week between the fateful meeting and the date of the dismissal letter frankly escapes me. Had she claimed to have received the letter, the position would have been different.

[39] However, Ms Suardani is entitled to notice. She was either dismissed at the 9 July 2015 meeting or she may have been constructively dismissed especially as the employer's position is that it offered her the choice of resigning or being dismissed, literally a classic formulation of the first leg of the constructive dismissal stool. But of course the employer says that she did resign but then resiled from it the day after the meeting which prompted Asiana Day Spa to write the dismissal letter, a letter which as I have already noted, Ms Suardani said she never received.

[40] So I think the proper course is for Ms Suardani to be paid one month's notice in accordance with the terms of the contract, that month to run from 9 July 2015 which I am satisfied Ms Suardani is entitled to as of right because there was no notice given to her of the termination of the employment. That entitlement is \$2,764 gross.

[41] I make no comment whatever about the statements put in by the employer which allegedly support the employer's view that Ms Suardani was trying to take clients off it. I decline to make any findings about Ms Suardani's behaviour; I simply do not have evidence to support the position one way or the other and there is no

claim by Ms Suardani as to the propriety of the termination of the employment so the only issue I am required to deal with is the allegation that she is owed wages.

[42] There are two further components to the holiday pay claim that I need to deal with now. The first is conceded by Asiana Day Spa and relates to the holiday pay due to her for the period from 1 January 2015 down to the end of the employment and I am satisfied that Ms Suardani is entitled to the sum of \$1,331.12 gross. I am unmoved by any suggestion that that be rebated in the variety of ways that Asiana Day Spa proposes.

[43] Lastly, there is a small amount owing in respect of holiday pay for the year 2014 where holiday pay was calculated on 20 days annual leave but should have been calculated on 24 days leave. An additional payment of \$426.68 gross is to be paid to Ms Suardani.

Determination

[44] Ms Suardani has proved her claim that she is entitled to arrears of wages and holiday pay in accordance with the following schedule:

[45] I direct that Evergreens Day Spa Group Limited pay to Ms Suardani the total sum of \$14,495.10 gross in settlement of Ms Suardani's claim. That figure is made up of the following amounts: short paid wages for January to March 2011 of \$3464 gross; short paid public holidays of \$5867 gross; unpaid wages for the period 1 to 7 July 2015 in the sum of \$642.30 gross; unpaid notice of \$2764 gross; unpaid holiday pay for the 2015 year in the sum of \$1331.12 gross; miscalculated holiday pay in the sum of \$ 426.68 gross

[46] Evergreens Day Spa Group Limited is to account to the Inland Revenue Department for the income tax on those sums and to facilitate that, I direct that my Authority officer is to make a copy of this determination available to the Inland Revenue Department to ensure compliance with this requirement.

Costs

[47] Costs are sought by the successful applicant in the sum of \$3,500. That matter is not addressed by Asiana Day Spa. I direct that Asiana Day Spa is to have 14 days

from the date of this determination to provide me with comments on Ms Suardani's claim for costs in the sum of \$3,500.

[48] If I have not received submissions from Asiana Day Spa within that timeframe, I will make an order directing that Asiana Day Spa pay Ms Suardani the sum of \$3,500 as a contribution to her legal costs in this matter.

James Crichton
Chief of the Employment Relations Authority