

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 206  
3034411

BETWEEN

KRYSTAL DELAMERE  
Applicant

AND

HOWARD McGUIRE t/a HMG  
CATERING AND EVENTS  
Respondent

Member of Authority: Michael Loftus

Representatives: Adrian Plunkett, advocate for the Applicant  
Respondent in person

Investigation Meeting: 4 April 2019 at Napier

Submissions Received: At the investigation

Date of determination: 8 April 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Krystal Delamere, seeks to recover an underpayment of wages and non-payment of both holiday pay upon termination and the employer kiwisaver contribution. She also asks penalties be imposed upon the respondent for its failure to keep and/or provide time and wage records<sup>1</sup> and the employers failure to pay wages due.

[2] The respondent, Howard McGuire, is of the view Ms Delamere has been paid her wages. He concedes the holiday pay remains owing, as does the kiwisaver contribution though he says rectification of that is currently being discussed with the Inland Revenue Department.

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<sup>1</sup> Section 130(2) of the Employment Relations Act 2000

**Background**

[3] Mr McGuire operates a catering business which trades as HMG Catering and Events. There is some disagreement about her starting date with Ms Delamere saying 25 May 2017 while Mr McGuire says 5 June which coincides with her first pay. On this I prefer Ms Delamere's view as she says her first shift was a Thursday evening. 25 May was a Thursday and it is stated to be the commencement date in her employment agreement. She remained until resigning in early February 2018 though there is again some dispute as to what her final day was.

[4] There was a written employment agreement though the signed original held by Mr McGuire can no longer be found. That said, the parties agree it contained the following clauses which are pertinent to this claim:

**Hours of work**

The employee will work for 30 hours each week on Monday to Saturday, between the core hours of 6am-12am.

The employee can choose when to start and end each work day (within agreed limits), as long as they work the agreed number of hours and perform their duties as outlined in their job description.

**Remuneration and Benefits****Payment of wages**

The employee will be paid a gross annual salary of \$25,740 which covers all the time worked.

[5] Ms Delamere claims that notwithstanding the above there were occasions on which Mr McGuire failed to pay the guaranteed 30 hours a week.

[6] Ms Delamere says she also worked significantly longer hours for a four week period following the chef's resignation in either late July or early August. She estimates 70 hours a week and claims she received no additional pay which would have been required pursuant to the Minimum Wage Act 1983.

[7] Ms Delamere says she was required to complete handwritten timesheets but despite requests Mr McGuire has failed to produce either those or her time and wage records which has impeded her ability to quantify her claim. It is this alleged failure which underpins one of her penalty claims.

## Discussion

[8] There are two parts to Ms Delamere's underpayment claim. The first is she was not paid her base salary in full. The second relates to the claim overtime must be payable for the four weeks following the chef's departure as she essentially performed two jobs and worked considerable overtime – 70 hours a week instead of the contractual 30.

[9] Dealing first with the claim Ms Delamere has not received her base salary. She supported her claim with both payslips sourced from the respondent and full copies of her bank statements for the period May 2017 to February 2018. Unfortunately the two do not correlate with timesheets suggesting payments which were never banked and payments with no accompanying timesheet.

[10] Given these inconsistencies Ms Delamere chose to use the bank records and payments actually received to quantify her claim and she now seeks \$3671.00 gross. It should be noted this sum is less than that in the statement of problem and one which the timesheets would have supported.

[11] The employment agreement expressly states Ms Delamere would be offered 30 hours work a week and paid accordingly. It does not allow Mr McGuire to alter or reduce that but documents before the Authority, and Mr McGuire's concessions when answering questions, confirm lesser sums were paid. In trying to explain this Mr McGuire asserts this was because Ms Delamere often sought leave and failed to work the required hours. He repeatedly said he had documents that could support his assertions.

[12] Here, however, Mr McGuire faces a problem. Section 132(2) of the Employment Relations Act 2000 provides where the employer fails to keep or produce a wage and time record and that affected the employees ability to accurately quantify their claim I may accept the claim unless the respondent can prove it incorrect.

[13] There is no denial Ms Delamere completed timesheets as she claims. There is evidence relevant records were sought and it is accepted they were not produced. Not only that, Mr McGuire stated in a telephone conference in December 2018 they would be produced forthwith along with a statement in reply. Neither was forthcoming and given the inconsistencies between the available documents it is clear their absence has impeded Ms Delamere's ability to quantify her claim.

[14] Turning to whether or not Mr McGuire can then disprove her claim. Mr McGuire accepts the relevant documents exist but claims he does not know where they are. It is Mr McGuire who has a duty to maintain and produce the records and their absence, which must be attributable to his failures, means he cannot disprove the claim.

[15] What little Mr McGuire can produce may actually be considered to support Ms Delamere's position. Mr McGuire stated she often sought, and was granted, both leave in advance and leave without pay. In support of that assertion he produced three e-mails seeking leave in advance but the leave referred to there-in correlates exactly with leave Ms Delamere had already conceded she took and the value of which had been deducted from her claim.

[16] Given the above, and especially s 132, I have to conclude the claim should be accepted

[17] Turning to the claim Ms Delamere worked considerable additional hours for a four week period. It is her assertion she should have been paid accordingly. Mr McGuire accepts the chef departed but vehemently denies Ms Delamere was asked to work additional hours as a result.

[18] Here Mr McGuire faces the same problem he faced with respect to the base salary claim. He is responsible for producing the requisite records and in the absence there-of must prove Ms Delamere's claim incorrect. Other than his assertion there is no such evidence so again the claim must, with amendment, be accepted,

[19] I say with amendment as the claim is calculated using Ms Delamere's salary as the basis of computation. That is not appropriate. A claim such as this can be based on contract or statute but not both. It has no contractual base given the 'cover all' salary so that leaves statute. Ms Delamere's salary would, if she worked the required 30 hours, exceed the minimum wage as it was based on an hourly rate of \$16.50.

[20] 70 hours at the then applicable minimum wage is \$1,102.50 gross. From that should be deducted the salary either paid or already ordered above - \$495.00 gross. The residue for a four week period is \$2,430.00 gross and that is payable.

[21] As already said the holiday pay claim is conceded. Including holidays payable on the additional amounts due under this determination minus the value of those taken in advance leaves a residual debt of \$356.72 gross.

[22] Turning to the employer's kiwisaver contribution which Mr McGuire accepts has not been paid. Using the principles applied when calculating holiday pay I conclude the amount due is \$627.85. I note Mr McGuire's advice he is already discussing rectification with the Inland Revenue Department and therefore order he complete that discussion and ensure the above amount be paid to Ms Delamere's kiwisaver account.

[23] Finally there is the matter of penalties. For two reasons I take that no further.

[24] First I dismiss the claim concerning failure to keep and produce records. In the statement of problem the claim was for a penalty pursuant to s 13 of the Wages Protection Act 1983. That section allows the imposition of a penalty for any contravention of said act and there are multiple possibilities. A respondent is entitled to be made aware of the claims against it and yet here specificity was lacking until after the investigation commenced. This reservation does not apply to the other claim but I note neither was pursued with any vigour – indeed there was no relevant submission.

[25] Crucially however I note two other points. There was no request any penalty be payable to Ms Delamere and the Crown would be the only beneficiary. I also note that while there was no supporting evidence there are strong indications Mr McGuire is going to struggle to pay Ms Delamere the amounts due. I consider it preferable his resources be directed toward ensuring she is paid rather than the Crown.

### **Conclusion and orders**

[26] For the above reasons I conclude Ms Delamere is, as claimed, owed various amounts for unpaid wages and holiday pay. As a result I order the respondent, Howard McGuire, pay the applicant, Krystal Delamere, \$6,457.72 (six thousand, four hundred and fifty seven dollars and seventy two cents) gross being the total due. PAYE and employee kiwisaver contributions may be deducted before payment and forwarded to the Inland Revenue Department.

[27] Mr Howard is also ordered to ensure a further \$627.85 is paid to the Inland Revenue Department for crediting to Ms Delamere's kiwisaver account.

[28] The payments in [26] and [27] above are to be made no later than 4.00pm on Monday 6 May 2019.

[29] Costs are reserved.

**Michael Loftus**  
**Member of the Employment Relations Authority**