

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 353  
3072632  
3103952

BETWEEN

MARGRET ADDY  
Applicant

AND

THE GREAT ADVENTURE  
TOURISM COMPANY  
LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Ira White, advocate for the Applicant  
Shelley Eden, counsel for the Respondent

Investigation Meeting: 11 May 2021 in Napier

Determination: 10 August 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Margret Addy was employed by The Great Adventure Tourism Company Limited (GATC) as a hostel manager to run two of its lodges located in National Park. She worked for GATC from 27 October 2017 until her resignation effective 2 December 2018.

[2] By determination dated 14 October 2020 the Authority found Ms Addy had not raised personal grievances within time.<sup>1</sup> The balance of Ms Addy's claim for wage arrears for unpaid hours worked, respite weekends, bonus payments and interest on

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<sup>1</sup> *Margaret Addy v The Great Adventure Tourism Company Limited* [2020] NZERA 423.

those sums and GATC's counter-claim to recover the cost of repairs to the lodges from Ms Addy is now before the Authority for determination.

### **The Authority's investigation**

[3] The Authority has received evidence from Ms Addy, Liana Adams who worked for GATC at the lodges, Steven Green, GATC's Director of Operations and Theodore Sofia GATC's Business Development Manager along with information and submissions from the parties.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information received from the parties and the submissions of their representatives.

### **Issues**

[5] The following issues are before the Authority for investigation and determination:

Ms Addy:

- (i) Is Ms Addy entitled to the following:
  - a. wage arrears totalling \$14,614.80;
  - b. unpaid holiday calculated on any arrears;
  - c. unpaid respite weekends totalling \$2,100.00;
  - d. unpaid bonus of \$14,804.00; and
  - e. interest on any sums awarded.

GATC:

- (i) Did Ms Addy breach obligations owed to GATC under the parties' employment agreement?
- (ii) If so, did GATC suffer loss arising from those breaches?
- (iii) If so, is it entitled to recover from Ms Addy costs incurred consequent to those breaches?
- (iv) If so, are the costs of \$8,930.86 reasonable taking into account factors such as the age, quality and state of maintenance of the premises at the time the alleged damage occurred and the reasonable cost of repair less any improvement?
- (v) If any breach is established is an award of a penalty warranted?

### **The parties' employment agreement**

[6] The parties entered a written individual employment agreement (IEA) on 25 October 2017. For the purposes of this determination the relevant clauses are:

#### **Principal (sic) Terms of Employment**

...

Position: You will be employed on a full-time basis as a Hostel Manager

Supervisor: Corporate Management

Remuneration: \$40,000 per annum base salary, to be paid fortnightly.

Hours of work: You will work 40 hours per week, rostered in advance onto shifts covering a 24-hour, seven-day period. In addition you will have rostered on-call hours in accordance with the roster.

#### **2 Duties and responsibilities**

...

2.2 During your work hours you are required to devote the whole of your time and attention to the Employer's requirements (and to the exclusion of other activities). In addition to carrying out the specific duties assigned from time to time you will be expected at all times to use your best endeavours to protect and promote our business. We reserve the right to vary your duties and requirements from time to time.

#### **4 Hours of work**

4.1 Your hours of work will be as described in your principal terms of employment.

4.2 Hours of work on more than five days in any one week or outside normal working hours or on call shall not create an entitlement to additional salary at an increased rate. Your salary includes provision for your on—call hours.

4.3 You will be entitled to rest and meal breaks in accordance with the Employment Relations Act 2000.

#### **First schedule**

##### **Job description**

The Backpackers Manager is a full-time on-site position overseeing the day to day management of overall operations and staff, including but not limited to, ensuring workflow stability, maintenance of reservation/s platforms, finance and banking controls, ensuring internal/external marketing application are correctly placed and monitored, financial and guest statistical reporting. Responsibilities also involve ongoing cost containment/s alongside proper enforcement of safety and general maintenance procedures supported by management reports of daily, weekly, monthly and quarterly activity rolls.

[7] The bonus scheme is set out in a document titled ‘Hostel Manager Incentive Scheme’ which states it is effective from 1 February 2018. I am satisfied, for the reasons set out [26] – [29], it was part of the employment agreement and binding on the parties.

[8] The bonus scheme is made up of three components:

- a monthly bonus with a maximum monthly payment of \$1,200;
- a quarterly bonus with a maximum quarterly payment of \$2000; and
- an annual bonus with a maximum payment of \$2,600.

[9] Under the terms of the bonus scheme the maximum Ms Addy could earn in a bonus year was \$25,000.

#### **Ms Addy’s wage arrears claim**

[10] Ms Addy seeks payment for unpaid hours worked. She says she is entitled to be paid at least the minimum wage for all hours worked in excess of her agreed contracted hours.

[11] GATC does not dispute Ms Addy worked hard but says:

- (i) there was no agreement either general or specific that Ms Addy would be paid for hours worked in excess of her contracted hours;
- (ii) the fact she was working excessive hours was not known to GATC because Ms Addy never told GATC about the hours or made a claim for those hours during her employment. It says Ms Addy had the opportunity to do so. She had regular discussions with Mr Green about her work and the business, including on site, and she knew how hours of work were recorded because part of her role was submitting wage and time records for the other staff;
- (ii) it does not accept the excessive hours worked were necessary because Ms Addy was able to staff the lodge as she saw fit. In support of this GATC says it never declined any request from Ms Addy for additional staffing hours which was not disputed;
- (iii) the hours claimed are not sufficiently supported by evidence. It points to the lack of any contemporaneous record of Ms Addy's worked hours; and
- (iv) there was no need for Ms Addy to work the hours claimed based on occupancy and staffing levels.

*What were Ms Addy's agreed contracted hours?*

[12] Ms Addy's agreed contracted hours were as set out in clause 4 of the IEA. Under that clause she was to work 40 hours per week plus rostered on call/afterhours hours. All hours were to be rostered.

[13] Ms Addy and GATC did not agree an hourly rate of pay. As a salaried employee the maximum number of hours Ms Addy could work in a week and be ensured payment for every hour worked at least the applicable minimum wage (until April 2018) was 49 hours per week.<sup>2</sup>

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<sup>2</sup> When Ms Addy commenced employment with GATC the adult minimum wage was \$15.75: Minimum Wage Order 2017.

*What hours did GATC require Ms Addy to work?*

[14] A worker is entitled to be paid for every hour worked at least the minimum wage.<sup>3</sup> An employee in receipt of a salary is not excluded from coverage of the Minimum Wage Act 1983.<sup>4</sup> The question is whether Ms Addy can establish GATC required her to work the hours over her agreed contracted hours for which she seeks arrears.

(i) *October – December 2017*

[15] In her evidence to the Authority Ms Addy said she worked to the roster she was provided and she did not write the roster. This is consistent with the hours of work clause of the IEA. She said the consultant who GATC engaged to assist her at the start of her employment gave her a shell roster and this was the one she used. The shell roster is dated 8 – 14 January 2018. Also in evidence is a roster for a seven day Monday to Sunday week (the example roster) titled “Howards Staff Roster Oct 28 – Dec 21 2017 (Example only)”. Ms Addy’s evidence was this was drafted by the GATC consultant with her and she performed the duties allocated to her in that roster. I accept this is what occurred.

[16] I am satisfied the example roster was applied from the first week of Ms Addy’s employment until a housekeeper started on or around 21 December and the shell roster was provided for the following period when more staff, including a housekeeper were employed. It is clear on the face of the example roster it has been drafted for that reason – it contains Ms Addy and her partner’s names, the names of the three part time staff (known as Keas) and notes “Kea 4/Not available Sash/Marg Cover Staff”.

[17] The example roster provides for total staff hours per day of 24 (168 per week) made up of 1 hour for breakfast, 1 hour for lunch, 3 hours for front desk in the mornings, 7 hours for front of desk in the afternoon and 12 hours housekeeping. The roster splits the duties over the 3 existing part time staff (Keas), Ms Addy and her partner. The example roster allocates total weekly hours to Ms Addy of 85 and 11 hours per week to cover half the fourth kea role which was vacant. The 85 weekly hours rostered to Ms

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<sup>3</sup> Minimum Wage Act 1983, s 6.

<sup>4</sup> *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25.

Addy are made up of Ms Addy's 40 base hours plus on call/after hours of 26 hours plus 19 hours of housekeeping. When Ms Addy took over the role there was no housekeeper employed, that is why she was rostered housekeeping hours. In summary the October to December roster rostered Ms Addy onto 96 hours per week.<sup>5</sup>

[18] I am satisfied Ms Addy worked at least the hours as rostered for the period 28 October to 21 December 2017. She has given detailed evidence of the duties she was required to perform to fulfil the duties as rostered.

[19] I am satisfied GATC knew and required Ms Addy to work the hours as rostered. It was aware there was no housekeeper or a fourth kea employed during this period. It was aware of the roster because it was prepared by its consultant. Further it was aware Ms Addy was concerned about the long hours she was required to work because she drew this to its attention. Her evidence that she told the owner of the business about the long working hours at the December 2017 Christmas party and he responded by implementing the respite weekends was not challenged other than in broad terms by Mr Green who was not present during the conversation.

[20] In addition, I am satisfied the hours worked were required to be worked given GATC's occupancy level data for the months of the roster are comparable with other months where a housekeeper and full staff compliment were in place and there were fewer staff than any other period in the relevant time span.

[21] Accordingly, I am satisfied Ms Addy is entitled to be paid for unpaid hours worked in the eight week period 28 October – 21 December 2017 less the hours covered by her salary calculated at the applicable minimum wage<sup>6</sup>:

- eight weeks fulfilling the 17 additional rostered on call/afterhours hours per week at the applicable minimum wage rate = \$2,142.00 (gross).
- eight weeks fulfilling the 19 hours per week housekeeper duties at the applicable minimum wage rate = \$2,394.00 (gross).
- eight weeks fulfilling half the fourth kea role at 11 hours per week at applicable minimum wage of \$15.75 = \$1386.00 (gross).

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<sup>5</sup> 85 Manager hours (including on call and afterhours plus house keeper duties) plus 11 Kea hours being Ms Addy's rostered share of the fourth Kea's hours.

<sup>6</sup> Minimum Wage Order 2017 – adult rate \$15.75.

(ii) *hours after 21 December 2017 until 2 December 2018*

[22] After the house keeper was employed from 21 December 2017 along with additional staff Ms Addy would not have been required to work the additional rostered hours. Notwithstanding, Ms Addy says she continued to work excessive hours caused by:

- the inadequate washing machines and dryers which resulted in a lot of manual handling of the washing to hang it out to dry particularly over the summer and winter peak months;
- the requirement to train new staff and implement systems;
- a key staff member becoming unwell in July and taking a period of sick leave off, then returning on light duties; and
- GATC requiring merchandising at the front desk with concomitant administrative functions.

[23] There is no dispute the hours Ms Addy claims for this period were not specifically drawn to GATC's attention. There is also no dispute that there was no express agreement that Ms Addy was authorised or required to work the additional hours to fulfil her duties.

[24] I have considered whether, in broad terms, GATC has implicitly agreed to the hours worked because it turned a blind eye to the workload issues at the lodge in particular the workload created by the issues with the washing machines and dryers. The difficulty with this is it requires the Authority to ignore the clear evidence that GATC responded positively to Ms Addy's requests for additional staff hours and paid, without question, every hour claimed. Further, GATC has provided analysis which I am satisfied establishes the paid hours of work correspond to the occupancy levels which indicates, at least on its view, there was sufficient paid hours to get the necessary work done.

[25] For these reasons Ms Addy's wage arrears claim from 21 December 2017 until 2 December 2018 is unsuccessful.

## **Bonus**

[26] During her employment Ms Addy received total bonus payments of \$5,196.00. She seeks an award of unpaid bonus of \$14,804.00.

[27] Ms Addy says she was told when she was offered the role there was a \$20,000 bonus and that the details of the bonus were not provided at that time other than that it was 'achievable'. In her evidence she said the bonus scheme document was presented to her some time in February 2018, by then she had already received her first bonus payment before being presented with this document and she does not understand how it operates. Ms Addy says she understood 'achievable' to mean that the bonus was readily achievable, that she worked hard for GATC and she is entitled to a total bonus payment less what she has received.

[28] GATC says Ms Addy was paid the bonus she was entitled to under the terms of the bonus scheme and any questions she raised about the calculation of the bonus were responded to fairly.

[29] The initial bonus discussion described by Ms Addy did not include how the bonus would be calculated. This came later when the bonus scheme was presented to Ms Addy and I am satisfied she accepted this was how her bonus scheme would operate. In the absence of clear evidence the bonus scheme has not been correctly applied the claim cannot succeed. No such evidence has been provided.

## **Respite weekends**

[30] Ms Addy's evidence was GATC offered her respite weekends in December 2017 when she raised the issue of working more hours than anticipated. The terms of the respite weekends were Ms Addy would leave the lodge alternate weekends and claim back the accommodation and mileage.

[31] There is no dispute Ms Addy has been reimbursed for the respite weekends she took. Her claim is for reimbursement of notional respite weekends she was unable to take due to workload.

[32] The claim cannot succeed. Under the parties agreed terms of respite weekends Ms Addy was to be reimbursed costs for accommodation and mileage. She has been reimbursed all such costs. The parties' did not agree how respite weekends which were

unable to be taken would be reimbursed. In the absence of such an agreement there is no basis in the parties' contract for a claim for a respite weekend that was unable to be taken.

[33] It is understood Ms Addy's claim for arrears includes the weekends she was unable to take as respite. If that part of the arrears claim had been successful she would have received payment for those weekends.

### **GATC's counterclaim**

[34] GATC says Ms Addy is liable for costs incurred as a result of breaches of obligations owed under the parties' employment agreement in particular:

- clause 2.2 required Ms Addy to, during working hours, devote her whole time and attention to GATC requirements and use her best endeavours to protect and promote GATC's business;
- clause 2.5 required Ms Addy to conduct herself and perform her duties at all times in a manner which would enhance and support GATC's business, imager and reputation; and
- under the job description Ms Addy was required to oversee the day to day management of overall operations and staff.

[35] The asserted factual basis of the counterclaim is:

- Ms Addy knowingly allowed music videos to be filmed on the premise for a commercial purpose and without GATC's authorisation; and
- Ms Addy failed to adequately supervise and ensure maintenance services at the lodge premises which resulted in costs being incurred after her resignation to bring the premises up to standard.

[36] These claims are not made out.

[37] There was insufficient evidence Ms Addy knew or ought reasonably to have known about the filming of the music videos in question on the premises and/or that the music videos were for a commercial purpose. Ms Addy said her then partner, who also worked for GATC doing maintenance and grounds work, was an amateur musician and

she accepted the videos had been made but said she had no knowledge of them at the time. Her evidence was not challenged and is accepted.

[38] With respect to the failure to supervise maintenance claim, there was insufficient evidence of any maintenance schedule which was neglected and insufficient evidence of the condition of the premises and grounds when Ms Addy commenced her employment and when she left. Her evidence was the premises and grounds were run down when she arrived and that she and her team worked hard to maintain them. Mr Green, who regularly visited the premises and spoke with Ms Addy about her work and the business, did not contradict this evidence.

### **Holiday pay**

[39] As an employee Ms Addy was entitled to holiday pay upon the termination of her employment calculated at 8% of her gross earnings.<sup>7</sup> The termination holiday pay Ms Addy received did not include holiday pay calculation she was entitled to for the hours she worked for which wage arrears have been awarded.

[40] GATC is ordered to pay Ms Addy \$473.76 in holiday pay entitlements calculated on the wage arrears awarded within 14 days of the date of this determination.

### **Interest**

[41] Ms Addy is entitled to an award of interest on the total wage arrears awarded including the holiday pay component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement which in this case arose on Ms Addy's final day of employment when her termination pay including holiday pay was due.

[42] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[43] GATC is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:<sup>8</sup>

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<sup>7</sup> Holidays Act 2003, s 27.

<sup>8</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator)

- (i) Interest on the sum of \$6395.76 from 2 December 2018 until the date payment is made in full.

[44] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

### **Summary of orders**

[45] The Authority orders as follows:

- a) Within 14 days of the date of determination The Great Adventure Tourism Company Limited is ordered to pay Margret Addy the following sums:
  - (i) wage arrears of \$5922.00; and
  - (ii) holiday pay of \$473.76.
- b) Within 14 days of the date of determination The Great Adventure Tourism Company Limited is to calculate and pay Margaret Addy interest on wage arrears and holiday pay as awarded in paragraph [43] above.

[46] Ms Addy's claim for unpaid bonus and respite weekends is unsuccessful.

[47] The Great Adventure Tourism Company Limited's counterclaim is unsuccessful.

### **Costs**

[48] Costs are reserved. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and Ms Addy seeks a contribution to costs, she should file and serve a costs memorandum within 14 days of the date of this determination. The Great Adventure Tourism Company Limited should file any reply memorandum within 7 days of receipt of such.

Marija Urlich  
Member of the Employment Relations Authority