

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 140
3134156

BETWEEN

QUIBAO GUAN
Applicant

AND

APEX CHIROPRACTORS
GROUP AUCKLAND
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Helen McDermott and Sophie Gallagher, counsel for the
Applicant

No appearance for the Respondent

Investigation Meeting: 8 April 2022

Determination: 12 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Quibao Guan worked for Apex Chiropractors Group Auckland Limited (ACGAL) as a receptionist from 7 July 2020 until her resignation 13 October 2020 effective 16 October 2020. She seeks orders for holiday pay arrears of \$538.27, interest on that sum and a contribution to costs.¹

¹ Ms Guan withdrew her claims for wages arrears and compliance orders at the investigation meeting.

[2] ACGAL has not filed a statement in reply, filed relevant documents as directed or otherwise participated in the Authority process.

The Authority's investigation

[3] As stated above ACGAL has not participated in the Authority process. At 11.52 am on 19 March 2021 Ms Guan's statement of problem was served on ACGAL by courier at its address for service as provided in the Companies Office register. ACGAL did not lodge a statement in reply within the 14-day statutory period. I am satisfied ACGAL has been properly served with the statement of problem.

[4] I am also satisfied on 6 November 2021 ACGAL was served by courier with the Authority minute dated 1 November 2021 (the minute) and notice of the investigation meeting at the addresses provided in the Companies Officer register of ACGAL, its sole director and that of the agent who filed the annual return.

[5] In the minute the Authority identified the issues to be investigated and determined and proposed timetabling directions including that a direction to mediation be issued, dates for filing witness statements and relevant documents and the investigation meeting date. The parties were invited to file any objection to the proposal within seven days of the date of the minute. Additionally, the minute directed ACGAL to file documents related to Ms Guan's employment including wage and time records, holiday and leave records, payslips and final pay details. The minute stated ACGAL would require leave to lodge a statement in reply. Ms Guan confirmed the proposed timetabling. ACGAL provided no comment. The proposed timetable was duly confirmed. For completeness the parties have not attended mediation as directed which is understood to be because the mediation service was unable to contact ACGAL.

[6] The day before the scheduled investigation meeting, at my direction, an Authority Officer rang Dr Htet Ko Ko, the sole director of ACGAL on the mobile telephone number provided to the Authority for that purpose in the statement of problem. The telephone was not answered and a voice message was left advising the investigation meeting would proceed as scheduled. The Authority Officer then emailed Dr Ko Ko confirming the message. Shortly after the scheduled start time of

the investigation meeting, again at my direction, an Authority Officer attempted to ring Dr Ko Ko and left a message on the voice mail that the investigation would commence shortly.

[7] The start of the investigation meeting was delayed by a further 10 minutes to accommodate lateness on ACGAL's part. ACGAL did not participate in the investigation meeting and has not returned the Authority Officer's voice messages or otherwise subsequently contacted the Authority. For completeness the Authority records show a representative of ACGAL confirmed to an Authority Officer on 20 October 2021 that the email address being used to communicate with the respondent company was the correct one for that purpose.

[8] 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 information received.

Issues

[9] The issues identified for investigation and determination are:

- a) Is Ms Guan entitled to holiday pay arrears?
- b) If so, should interest be calculated on any arrears?
- c) Should either party contribute to the costs of representation of the other party?

Relevant law

[10] An employer is obliged to retain a copy of the individual employment agreement: s 64 of the Employment Relations Act 2000

[11] An individual employment agreement must be in writing and comply with statutory content requirements: s 65 of the Act

[12] An employer must keep a wage and time record and provide access to or a copy on request of the employee: s 130 of the Act.

[13] Where there has been a default in payment to an employee of wages an employee may bring a claim for recovery of arrears: s 131 of the Act

[14] Where an employer fails to keep or produce a wages and time record as required, and this failure has caused difficulty to the employee in making an accurate claim, the onus of proof shifts to the employer: s 132 of the Act

[15] An employer must keep a holiday and leave record and provide access to or a copy on request of the employee: s 81 and 82 of the Holidays Act 2003

[16] Where an employer fails to keep or produce a holiday and leave record as required, and this failure has caused difficulty to the employee in making an accurate claim, the onus of proof shifts to the employer: s 83 Holidays Act 2003

[17] Where an employee's employment has come to an end before annual leave has been taken an employer is obliged to pay annual holiday pay in the final pay: s 27 Holidays Act.

[18] Ms Guan has not sought penalties against ACGAL for breaches of statutory duties where such a penalty claim could be brought, and the Authority is unable to impose a penalty of its own motion for such matters. If she had done so ACGAL may have been vulnerable to a penalty for failing to comply with statutory obligations.

Discussion

[19] The documents before the Authority show Ms Guan repeatedly asked ACGAL to provide records it had a statutory duty to keep, maintain and produce on request and which were necessary for her claim. ACGAL did not provide the documents. As stated above ACGAL has not complied with the Authority direction to provide these documents. Ms Guan has had to establish her claim by careful review of her own records.

[20] Based on Ms Guan's unchallenged evidence I am satisfied she was employed by ACGAL as a receptionist at its chiropractic practice located in Dominion Road to cover a period of parental leave from 7 July 2020 until her resignation effective 16 October 2020. She worked Tuesday, Wednesday, Friday and Saturday and her work hours correlated with patient appointments from late afternoon until early evening. Her agreed rate of pay was the applicable minimum wage, which at that time was \$18.90 per hour. Ms Guan's evidence is accepted that she worked a total of 356 hours for ACGAL during her employment.

Holiday pay arrears

[21] As an employee Ms Guan was entitled to holiday pay upon the termination of her employment calculated on her total earnings.² Ms Guan said she took none of her annual holiday entitlement during her employment and was not paid termination holiday pay when her employment ended on 16 October 2020. This is accepted. She is entitled to holiday pay calculated at eight per cent of gross total earnings which has been due and owing since 16 October 2020.

[22] ACGAL is ordered to pay Ms Guan \$538.27 (gross) in holiday pay entitlements within 21 days of the date of this determination.³

Interest

[23] Ms Guan is entitled to an award of interest on the holiday pay arrears. 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.

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

[25] Apex Chiropractors Group Auckland Limited is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:⁴

² s 27 Holidays Act 2003.

³ \$1074.20 + \$159.60.

⁴ www.justice.govt.nz/fines/civil-debt-interest-calculator

- (i) Interest on the sum of \$538.27 from 16 October 2020 until the date payment is made in full.

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

Costs

[27] Ms Guan seeks a contribution to costs of at least the daily tariff of \$4,500.00 and reimbursement of disbursements of \$253.00 (made up of the Authority filing fee, photocopying, bundle preparation and courier costs). She says though the matter took half a day investigation meeting time an uplift is warranted given the additional costs Ms Guan has incurred consequent to ACGAL not participating in the Authority process or providing documents it was required to keep and maintain as an employer when she requested them or when the Authority directed their filing. I am satisfied the actual legal costs Ms Guan has incurred in pursuing this matter far exceed the daily tariff of \$4,500. I am also satisfied ACGAL's failure to provide documents as directed justifies a significant uplift in the usual tariff because Ms Guan has been put to the cost of establishing matters which would be readily verifiable from the documents ACGAL was directed to file including the employment agreement and wage, time and leave records.

[28] Applying the usual principles guiding the exercise of the discretion to award costs and having considered the submissions and information received Ms Guan is entitled to a contribution to costs reasonably incurred of \$3,500.00 and to be reimbursed total disbursements of \$253.00.

Summary of orders

[29] The Authority orders as follows:

- a) Within 21 days of the date of determination Apex Chiropractors Group Auckland Limited is ordered to pay Ms Guan the following sums:
 - (i) \$538.27 (gross) in holiday pay arrears;
 - (ii) \$3,753.00 as a contribution to cost;

- b) Within 21 days of the date of determination Apex Chiropractors Group Auckland Limited is to calculate and pay Ms Guan interest on holiday pay as awarded in paragraph [25] above.

Marija Urlich
Member of the Employment Relations Authority