

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 265
3147782

BETWEEN

STACEY ANN KING
Applicant

AND

GRAB A CAB DUNEDIN 2011
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
No appearance by the Respondent

Investigation Meeting: 20 June 2022 by Zoom

Submissions Received: On the day

Date of Determination: 23 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Stacey King seeks holiday pay from her previous employer Grab a Cab Dunedin 2011 Limited (Grab a Cab). Ms King had commenced working for Grab a Cab in August 2015 and resigned at the end of January 2020. She initially claimed payment for alternative holidays as she worked on public holidays but was unable to establish what public holidays she had worked. Ms King withdrew that aspect of the claim.

[2] After her resignation Ms King sent many text messages to the person who oversaw the finances of Grab a Cab and payments to employees. The holiday pay remained unpaid. She then contacted a lawyer and the Labour Standards early resolution team but no-one from Grab a Cab would respond.

[3] Eventually Ms King lodged a statement of problem with the Authority on 9 August 2021. I am satisfied that the statement of problem was served on Grab a Cab at its registered office. The sole director of Grab a Cab is Alan Smith. No statement in reply has been lodged.

[4] The Authority held an initial case management conference to attempt to obtain the required information so that it could undertake a calculation of holiday pay. I am satisfied that the company and Mr Smith were advised of the time for the case management conference but failed to participate. The numbers that the Authority was provided with, by Ms King for Mr Smith, went to answer service.

[5] In a direction dated 22 February 2022, the Authority stated it required information from Grab a Cab within 20 days:

- (a) Wage and time records for the duration of Ms King's employment;
- (b) Holiday and leave records for the duration of Ms King's employment; and
- (c) A copy of Ms King's employment agreement.

[6] Ms King was also asked to provide information that would enable the Authority to assess any moneys that were owed to her. This included Inland Revenue Department records (IRD records) for the duration of her employment and payslips received.

[7] There was no information received at all from Grab a Cab in accordance with the directions. Ms King provided her IRD records. These showed gross earnings received from Grab a Cab from August 2015 until January 2020.

[8] Ms King stated during the case management conference that she never took any leave at all during her employment. On that basis the Authority assessed holiday pay based on the IRD records and provided this preliminary assessment to both parties in a minute dated 11 May 2022. This was accompanied by advice that they would have an opportunity to attend an investigation meeting to provide further information and evidence about holiday pay due and owing.

[9] I am satisfied that the minute was served on the registered office of Grab a Cab and at the address of Mr Smith. It was signed for by "L Smith". The notice of investigation meeting was served at the registered office of Grab a Cab and on its director, Mr Smith. At the address of Mr Smith, it was signed for by "Grab Cab."

[10] The parties were invited to attend an investigation meeting by Zoom, however, there was no appearance on behalf of the company. In the absence of any good cause shown for the failure of Grab a Cab to attend the investigation meeting the Authority proceeded under clause 12 of the second schedule of the Employment Relations Act 2000 to hear evidence from Ms King.

Assessment and discussion about holiday pay

Payslips

[11] The last payslip that Ms King received was dated 1 December 2019. She did not receive a final payslip when her employment ended. The December payslip stated that Ms King was owed 61.5 days accumulated leave. Ms King did not accept that the payslip accurately reflected the leave that was owing.

[12] Her evidence which was consistent with a written summary of her claim attached to the statement of problem was that she was unable to take days off or holidays as she had to cover the shifts for other employees and/or no-one was willing to cover her time off. She also said that she was told she had to work even when very sick and in possession of a medical certificate because she was told there was no-one to cover her shift. Ms King said that there had been issues previously with her pay and the payslips.

[13] I am not satisfied that the accumulated leave on the payslip can be relied on in the absence of a holiday and leave record.

Anniversary date

[14] The IRD information recorded that for the first month of employment with Grab a Cab in August 2015 Ms King received \$2,065 gross. Considered with the months that follow, the payment for the first month supported work for less than a full month but not significantly so.

[15] An anniversary date is necessary to calculate holiday pay accurately. Ms King said she signed an employment agreement but did not retain a copy. Grab a Cab has failed to provide the employment agreement or any records when directed to do so by the Authority. These documents would have clarified the date employment commenced.

[16] I assess an anniversary or commencement date of employment for Ms King of 10 August 2015. Ms King did not take issue with that date or the approach in her evidence.

Entitlement to annual leave

[17] Under s 16 of the Holidays Act 2003 (the Holidays Act), Ms King is entitled, at the end of 12 months of continuous employment, to not less than four weeks paid annual leave.

Leave taken

[18] Ms King said in her evidence that she did not take any paid leave for the entire period of her employment. I asked her whether this included over the Christmas/January periods, and she stated that she had not taken leave over that period.

[19] I am satisfied under s 83(3) of the Holidays Act that there has been a request for access to and/or a copy of Ms King's holiday and leave records. Grab a Cab has failed to comply with s 82 of the Holidays Act and has failed to engage about the matter at all over a period of more than two years. Section 83(3) of the Holidays Act provides that I may accept as proved, in the absence of evidence to the contrary, Ms King's statements about leave taken. There is no evidence to the contrary. I accept the evidence from Ms King that no paid annual leave was taken by her over the time she was employed.

Calculation of holiday pay

[20] Holiday pay should be calculated in accordance with s 24 of the Holidays Act, for employment that has ended and where an entitlement to holiday pay has arisen. It should be calculated in accordance with s 25 of the Act for the period between 10 August 2019 and January 2020, because that is a period where Ms King's employment ended, before a second or subsequent 12-month period of employment commenced.

[21] Section 24 provides that an employer must pay an employee for the portion of the annual holiday entitlement not taken. Sections 24(2)(a) and (b) provide that the entitlement must be paid at a rate based on the greater of the employee's ordinary weekly pay as at the end of the employee's employment or the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[22] The IRD records record that Ms King's payments fluctuated. It is appropriate to calculate a rate based on average weekly earnings during the 12 months immediately before Ms King's last pay period before her employment ended.

[23] The Authority used the IRD records in the absence of any other records, to calculate average weekly earnings during the 12 months before Ms King's last pay. Based on those calculations the average weekly earnings during that period were \$767.37. There is an absence of clear information about the ordinary weekly pay at the end of Ms King's employment. I am satisfied the average weekly earnings are likely the greater of the two rates.

[24] At the end of 12 months of continuous employment, Ms King was entitled on 10 August 2016 to four weeks paid annual holiday. I have concluded that the entitlement was the minimum statutory entitlement to annual leave.

[25] Ms King was then entitled to a further four weeks paid annual holiday on 10 August 2017, 2018, and 2019. That is 16 weeks annual leave that is owing and not taken. The sum of \$767.37 multiplied by 16 weeks is \$12,277.92 gross.

[26] For the period 10 August 2019 to 31 January 2020, Ms King is entitled to eight percent of her gross earnings. I have divided the gross earnings for August 2019 by four, to arrive at a weekly average of \$761.10. I have then reduced the gross earnings for that month by \$761.10 to reflect the anniversary date of 10 August.

[27] Ms King's gross earnings during the period 10 August 2019 to 31 January 2020 were \$19,949.63 gross. Eight percent of that amount is \$1,595.97 gross. The combined total of \$12,277.92 and \$1,595.97 is \$13,873.89 gross. That is the holiday pay owing to Ms King.

Costs

[28] Ms King represented herself and is not entitled to costs, but I do order reimbursement of the filing fee of \$71.56.

Orders

[29] I order Grab a Cab Dunedin 2011 Limited to pay to Stacey Ann King the sum of \$13,873.89 gross being holiday pay.

[30] I order Grab a Cab Dunedin 2011 Limited to pay to Stacey Ann King the sum of \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority