

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 122
5568887

BETWEEN	LYNETTE COOPER Applicant
A N D	WISECARE LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Wi Pere Mita and Jesse Tata, Counsel for Applicant No appearance for Respondent
Investigation Meeting:	4 April 2016 at Auckland
Date of Determination:	22 April 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Cooper) alleges that she was constructively dismissed from her employment by the respondent (Wisecare), that Wisecare breached its duty of good faith to her, and that she is owed wages from the employment.

[2] Wisecare provides care in the community for people with various disabilities and Ms Cooper was employed as a full time caregiver from 11 February 2014 until 20 December 2014.

[3] Despite the Authority's best endeavours, staff were unable to get any engagement from Wisecare.

[4] Despite that, I am satisfied that Wisecare was aware of the Authority's investigation and has simply chosen not to engage in the Authority's process.

[5] Moreover, Ms Cooper's various attempts during and after the employment to engage with the employer met with a similar result so it is difficult to believe that Wisecare did not understand there was a problem which needed its attention to rectify.

[6] It seems that the employment was uneventful until the last few weeks, save for Ms Cooper's various efforts throughout the engagement to get a written employment agreement supplied. Although never executed, Wisecare finally provided a proposed employment agreement five days before the employment concluded.

[7] Ms Cooper worked various hours over a two week cycle and Ms Cooper's evidence is that she habitually worked the unsociable hours.

[8] Difficulties began to appear. There was an incident when an intellectually disabled client created risks for Ms Cooper who was alone at night at the time but Wisecare did nothing to address the issue. Nor was Ms Cooper given any opportunity to take meal breaks if she worked eight hours or more.

[9] However, the precipitating event appears to have been Ms Cooper's insistence that she was entitled to be paid at least the minimum wage for the hours worked at night.

[10] Ms Cooper's evidence is that Ms Huxtable, who effectively ran Wisecare, said to Ms Cooper words to the effect: *"I don't pay people to sleep"*.

[11] Ms Cooper says that she insisted that she was entitled to be paid the minimum hourly rate and when that was eventually conceded, Wisecare deducted from the payment that it eventually made a \$50 tax-free allowance per shift, apparently on the footing that if Wisecare had to pay minimum wages for night shift work, then it wanted to claw back the tax-free allowance provided for staff to work unsociable hours at night. Such a decision of course is a unilateral change to the terms of the employment and Ms Cooper did not agree to that change.

[12] The issue concerning payment for night shift work was first raised by Ms Cooper in the first week of December 2014 and even after a formal meeting between Ms Cooper and Ms Huxtable on 11 December 2014 when Ms Cooper provided information from the Ministry of Business, Innovation and Employment outlining the legal position, Wisecare was still disputing Ms Cooper's entitlement.

[13] When it was finally conceded, Ms Cooper sought payment of the arrears in time for Christmas, but that request was denied and the back pay was not paid until 20 January 2015.

[14] Ms Cooper says that what happened next was that she was told that instead of a sleepover shift she would be required to be awake, that is she would work a wake shift and the effect of that was to make it impossible for Ms Cooper to work back-to-back shifts which she had habitually done before, so she could not work a wake shift followed by a sleepover or a sleepover followed by a wake shift.

[15] Effectively, this unilateral change by Wisecare meant that Ms Cooper was being given a wage cut of 50% because the number of hours that she could work was reduced by half.

[16] That issue, together with Wisecare's announcement that it was going to claw back the \$50 non-taxable allowance for each night shift worked (a decision Wisecare announced on 19 December 2014), contributed to bringing matters to a head.

[17] In addition to the events of 19 December 2014, Ms Cooper was told she would not be working over Christmas (which of course is a relatively lucrative time of the year for low paid wage workers), and after Ms Cooper had indicated to her children that she would be free for Christmas to spend with them, Wisecare asked Ms Cooper to work Christmas after all. Ms Cooper refused, having promised her children the time instead.

[18] Accordingly, on 20 December 2014, having completed her shift, Ms Cooper gave notice of her intention to bring the employment to an end because Wisecare consistently ignored her legal rights and she "*felt used*" by Wisecare.

[19] There then followed an extensive attempt by Ms Cooper and her able legal team to extract from Wisecare wage and time records. The records that were provided were incomplete and that issue has never been addressed by Wisecare.

[20] A personal grievance was then raised, and responded to by solicitors for Wisecare which amongst other things confirmed that Wisecare would attend mediation in an endeavour to resolve matters by agreement but in the result, Wisecare failed to honour that undertaking and the matter then proceeded to the Authority where Wisecare has simply failed to engage.

[21] I am satisfied that that failure to engage is deliberate rather than inadvertent and I intend to proceed to determine this matter on the basis of the material before me. I consider it would be an affront to justice to further delay proceedings as I am satisfied that staff have done everything they reasonably could have to notify Wisecare of the Authority's process in dealing with Ms Cooper's claim. In any event, given the history of this matter, Wisecare cannot be in any way surprised about the claim as it was well aware of its existence at a formative stage.

The issues

[22] The questions for the Authority to answer are as follows:

- (a) Was Ms Cooper unjustifiably constructively dismissed; and
- (b) Is she owed wages from the employment?

Was Ms Cooper unjustifiably dismissed?

[23] I am satisfied on the evidence before me that Ms Cooper was unjustifiably dismissed from her employment because Wisecare had made it impossible for her to continue working for it by reason of the unsatisfactory way in which it treated her, once she began to seek to claim her legal entitlements.

[24] It is clear law that a constructive dismissal can occur where an employee is put in a position where it is simply untenable to continue in the employment. Here, the employer has adopted a cavalier attitude to the payment of wages to which Ms Cooper is legally entitled, by failing to pay the minimum wage for sleepovers until tested about it by Ms Cooper, by failing to pay holiday pay, by deducting the non-taxable allowance on a unilateral basis and of course by unilaterally changing the nature of Ms Cooper's shifts so that she effectively had her income cut in half. It is difficult to think of a clearer breach of the employer's various duties in the employment.

[25] It follows that I am satisfied that Ms Cooper had no choice but to repudiate the employment agreement and it was reasonably foreseeable, given the treatment meted out to her by Wisecare, that she would do that. I find that Ms Cooper was constructively dismissed from the employment and is therefore entitled to remedies.

Is Ms Cooper entitled to wages from the employment?

[26] I am also satisfied that Ms Cooper is entitled to wages from the employment.

[27] First, I deal with the \$50 per night shift non-taxable allowance. This was a term of the informal employment agreement between the parties. When Wisecare was required to pay the minimum hourly rate for the hours that Ms Cooper worked during the night time hours, it clawed back the \$50 payment that had previously been paid. Ms Cooper did not agree to that claw back and as it was a term of the agreement, albeit an informal agreement, I am satisfied that Ms Cooper is entitled to that money. The total amount involved is \$6,800 net.

[28] Next, and most significantly, it appears on the basis of the sketchy information available that Ms Cooper has been underpaid wages as well. Ms Cooper's very capable legal team from Community Legal Services South Trust in Otara identified that there was a discrepancy between what Ms Cooper ought to have been paid and what she was in fact paid. Moreover, Wisecare has failed to declare to the Inland Revenue Department income earned by Ms Cooper for two months of the employment.

[29] The gross wage arrears owed have been calculated by counsel on the basis of the wage and time records (such as they are) that were obtained from the employer and on that basis, a total sum of \$14,502 gross appears to be owing in unpaid wages.

[30] Next, holiday pay of \$1,160.16 is also owing.

[31] The Authority's ability to make orders in these circumstances is clear enough. By the effect of s.132 of the Employment Relations Act 2000 (the Act), where the employer party fails to provide proper wage and time records or the wage and time records that are provided are inadequate, the Authority is able to rely on the calculation and records produced by the employee. This is just such a situation. Indeed, the calculations done for Ms Cooper are to a great extent based on the more or less sketchy information that was obtained by Ms Cooper and her legal advisers from Wisecare, so it seems reasonable to me to rely upon the calculations that counsel have prepared and submitted to me for consideration.

[32] Having studied those calculations, I am satisfied that they are properly made.

Determination

[33] I have determined that Ms Cooper has a personal grievance for unjustified dismissal. Before considering remedies, I need to determine whether anything she has done has contributed materially to the circumstances giving rise to the dismissal. I am satisfied that she is blameless.

[34] Accordingly, Ms Cooper is entitled to the totality of the remedies that I might award. I consider that compensation of \$5,000 under s.123(1)(c)(i) of the Act is appropriate and as she has also been unable to get new employment for three months after the dismissal, she is entitled to a contribution to the wages that she has lost as a consequence of the dismissal. While her monthly wages fluctuated somewhat, and she tells me that she received the unemployment benefit for two weeks, which of course needs to be deducted from the totality of the wages that she is allowed to claim against Wisecare, it is also the fact that her new role pays nearly \$2 an hour less than she was paid by Wisecare. Taking all that into account, I direct that Wisecare is to pay to Ms Cooper the sum of \$7,500 gross as a contribution to the wages that she lost as a consequence of her unjustified dismissal.

[35] Wages owed from the period Ms Cooper was in the employ of Wisecare amount to \$14,502 gross and those arrears of wages are to be paid to Ms Cooper by Wisecare.

[36] In addition, unpaid holiday pay amounting to \$1,160.16 is to be paid to Ms Cooper by Wisecare.

[37] Ms Cooper is also to be paid the sum of \$6,800 net being the non-taxable allowance previously paid for night shift work which was clawed back when Ms Cooper was finally paid an hourly rate for night shift work.

[38] Finally, Wisecare is to pay to Ms Cooper the sum of \$71.56 being the Authority's filing fee.

[39] A certificate of determination is to issue with this determination.

[40] I decline to make a separate award in respect of the breach of good faith although I am satisfied there has been a breach of good faith by the employer; the awards I have already made appropriately address remedies.

Costs

[41] Ms Cooper's representatives should endeavour to obtain some engagement from Wisecare to see if costs can be agreed but assuming that is not possible, a brief submission filed and served on Ms Cooper's behalf seeking an award of costs should be made and Wisecare will have 14 days thereafter to file and serve its response.

James Crichton
Chief of the Employment Relations Authority