

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 105
5592342

BETWEEN	NICOLE CRABTREE Applicant
AND	SURF N' TURF CAFÉ & TAKEAWAYS LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Trevor Mackiewicz, Advocate for Applicant No appearance for Respondent
Investigation Meeting:	22 August 2016 at Masterton
Determination:	23 August 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nicole Crabtree claims to have been employed by Surf N' Turf Café & Takeaways Limited from 16 April 2015 to 12 August 2015 on which date she was dismissed. Ms Crabtree seeks arrears of wages, and asserts she was not paid throughout her employment other than for a cash payment of \$92 on the date of her dismissal.

[2] Graham Murrell, sole director of Surf N' Turf Café & Takeaways Limited (the Café), provided a statement in reply in which he denied Ms Crabtree had ever been an employee at the Café, which has since closed.

The Authority's investigation

[3] Ms Crabtree attended the investigation with two witnesses who gave evidence on her behalf.

[4] Apart from filing a statement in reply, the respondent has not participated further in the investigation of this matter. I am satisfied the Notice of Investigation Meeting was served appropriately, and the respondent was informed of the date, time and venue.

[5] I delayed the start of the investigation meeting to allow time for an Authority Officer to make contact with Mr Murrell in case he had been delayed unexpectedly from attending. The Authority Officer left a voicemail message for Mr Murrell asking him to contact her urgently. He did not do so.

[6] Accordingly, I proceeded to act in the matter as if the respondent had duly attended or been represented, in accordance with the provisions of clause 12, Schedule 2 of the Employment Relations Act 2000 (the Act).

Was Ms Crabtree an employee?

[7] As Mr Murrell had, in his statement in reply, denied Ms Crabtree had ever been an employee, I questioned her about her status. In particular I queried whether, in fact, she had volunteered her services to the Café. It was Ms Crabtree's evidence that she had been approached to work in the Café by Mr Murrell's daughter, Kirsten, and had agreed to do so on the understanding that she would be paid for her services.

[8] I accept that evidence which is supported by text communications between Ms Murrell and Ms Crabtree. Some of those texts referred to the contract Ms Murrell had prepared for Ms Crabtree, and to wages that the Café had prepared for her or would pay her.

[9] I am satisfied from the evidence that Ms Crabtree was an employee of the Café and not a volunteer from 16 April to 12 August 2015.

Are wages owing?

[10] It was Ms Crabtree's evidence that Ms Murrell had told her she would be paid \$15 an hour. There was some confusion over this as Ms Crabtree also referred to agreeing to work for the minimum wage which, throughout her employment was \$14.75 an hour. However, I accept that Ms Crabtree agreed to work for the minimum wage. Ms Crabtree said she had signed a contract but, despite repeatedly asking for a copy, had not been provided with one.

[11] Ms Crabtree said she understood her wages might be paid two or three weeks late initially as her employer had incurred set up costs which made finances an issue for the Café. She was prepared to be patient as she trusted Ms Murrell, whom she considered at that stage to be a friend. Ms Crabtree said she was told on numerous occasions that her wages would be ready the next week but there was always an excuse for them not being available.

[12] Records of the days and times Ms Crabtree had worked over the four months of her employment were provided. These were reconstructed from Ms Crabtree's memory and from extraneous sources, such as text messages both with Ms Murrell and with Ms Crabtree's partner. I am satisfied that Ms Crabtree had, through her advocate, sought time and wage records from her employer. The statement in reply lodged by Mr Murrell supports this. I am also satisfied that no such records were provided and that Ms Crabtree's ability to bring an accurate claim was prejudiced accordingly.

[13] I accept under s.132(2)(b) of the Act, Ms Crabtree's written record of the hours, days and times she worked. I also accept the only wages she received during her employment was the \$92 she was paid in cash on 12 August 2015. That occurred after Ms Crabtree had been dismissed by telephone that day and asked to return her work shirt.

[14] I find Ms Crabtree's last day at work was 5 August 2015 and that over the period of her employment she worked 275 hours. She was also entitled to two weeks' notice which would total a further 16 hours, based on the hours she was working in the last weeks of her employment. On Ms Crabtree's evidence she would not have been able to work one of those weeks due to sickness. She was not entitled to sick leave after four months' employment, and I find she is entitled to payment for eight of those hours. She is also entitled to holiday pay.

[15] Accordingly, Ms Crabtree is owed \$4,174.25 gross in outstanding wages, less the \$92 she was paid on 12 August 2015. Holiday pay of \$333.94 gross is also owing in accordance with s.23 of the Holidays Act 2003.

Determination

[16] Surf N' Turf Café & Takeaways Limited is order to pay arrears of wages to Nicole Crabtree as follows:

- (a) Pursuant to s.131 of the Act the sum of \$4,082.25 gross;
- (b) Pursuant to s.23 of the Holidays Act 2003 holiday pay in the sum of \$333.94 gross.

Costs

[17] Ms Crabtree was represented by an advocate from a community advocacy service and incurred no fees other than the filing of \$71.56.

[18] Surf N' Turf Café & Takeaways Limited is ordered to pay costs to Ms Crabtree in the sum of \$71.56.

Trish MacKinnon
Member of the Employment Relations Authority