

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 57/08
File Number: 5054180

NON-PUBLICATION
ORDERS IN PLACE.
REFER TO FOOTNOTES
1 & 2 AND
PARAGRAPH [2].

EVIDENCE NOT
TO BE PUBLISHED
REFERRED TO AT
PARAGRAPHS [2],
[10] AND [17].

BETWEEN

“A”
Applicant

AND

“R” a limited liability company
Respondent

Member of Authority: P R Stapp

Representatives: A support person for the Applicant¹
“O”, for Respondent²

Investigation Meeting: Wellington 1 May 2008

Determination: 7 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The statement of problem filed in the Authority and served on the respondent involved a claim for arrears of wages, “wrongful suspension” and “claim for damages for wrongful dismissal, humiliation and distress”. There was an application made on behalf of the applicant for the non-publication of the applicant’s name before the Authority’s investigation meeting. I decided to put in place an interim measure prohibiting the publication of the names of the applicant and respondent and prohibited the publication of any evidence until the Authority’s investigation meeting when it could be considered further.

¹ The name of the applicant’s support person is subject to a non-publication order to protect the identity of the applicant.

² The name of “R’s” owner is the subject of a non-publication order because disclosure could lead to the identity of the applicant. The applicant’s and respondent’s names are also prohibited from publication for reasons given in paragraph [2].

[2] I decided to continue the non-publication of the applicant's and respondent's names to prevent the applicant's identification because some of the factual details relating to the personal grievance involved the applicant as a complainant, and involved a co-worker in criminal proceedings (including a conviction for a serious offence), where there has been a significant impact on the applicant's emotional wellbeing, which involved counselling. The applicant's name was suppressed in other court proceedings. The detail of this evidence as it relates to the applicant by name is prohibited from publication. The respondent agreed that the applicant's name should not be published. The respondent's trading name and owner's name are also prohibited from publication so as to protect the applicant's identity, as is the name of the applicant's support person. This is because of the small size of the business and the location where it was trading. It is likely that the publication of the name of the respondent and its trading name could lead to the identity of the applicant. To protect the identity of the applicant I have found it unnecessary to go into the detail of the incident that has had an impact on "A", and I have prohibited from publication that evidence as it relates to the applicant by name. I am satisfied it is not in the public interest to publish the name of the respondent, especially since the business was sold and the company is no longer trading. If this matter was solely concerned with the wages claim I would not have made such orders.

[3] Any variation to these orders will be considered on application of the parties and I reserve leave accordingly.

[4] The respondent has not acknowledged that all the money claimed is owed, has denied all allegations and says that the business was sold and there is no liability. The respondent's statement in reply accepted that there are three matters of wages, suspension and dismissal in issue.

The Issues

[5] Who was the applicant's employer and is it liable? Is the applicant owed any wages and if so, how much? Was the applicant unjustifiably suspended? How did the applicant's employment end?

The Facts

[6] The applicant was employed by "R", a limited liability company using another trading name. The name of the company was referred to in the applicant's bank statements as paying the wages and the statement of problem and other correspondence identify it as the employer. The

company is still registered, although “O” says it will be struck off. “O” is the owner and director and sole shareholder of the company.

[7] “A” commenced work from 6 May 2006. The applicant’s employment ended on or about 10 September 2006.

[8] The applicant was paid \$6.50 per hour and this was increased to \$7.50. There was no employment agreement. There were no proper wages and time records, other than a copy of a summary of hours and times written by “O” and produced by the applicant’s mother and used to help calculate the correct hours worked.

[9] During the applicant’s employment, gross earnings that the applicant should have been paid were \$3,342.88. The applicant received \$1,326.70 in payments by cash and direct credit to “A’s” bank account. The applicant accepted that the cost of \$142 for meals received during the employment needed to be deducted. The applicant has claimed unpaid wages of \$1,874.18.

[10] The applicant made a complaint to the Police about a co-worker. This resulted in criminal proceedings (including a conviction for a serious offence). It is not necessary to go into detail. The detail as it applies to the applicant by name is subject to a non-publication order. On 11 August 2006 the applicant was suspended on pay by “O” *“while complaints were to be investigated and “A” was told not to come to work”*. The decision was conveyed first by telephone text, and secondly, in a letter, from “O”. “A’s” employment ended when the applicant was suspended and informed not to return to work and when “A” saw new signs being put up.

Determination

Who Was the Applicant’s Employer and Is the Employer Liable?

[11] I find that applicant’s employer was “R”, a limited liability company using another trading name. It has not been struck off yet and there is no documentation to prove that it will be struck off.

[12] Thus, the company has an on going responsibility to meet any wages and holiday pay and any other remedies as “A’s” employer. It is not a defence for “R” to claim that because the business was sold a claim cannot be made against the company. There has been no documentation provided

to support that the liabilities of the company were taken over by someone else or another company when the business was sold.

Are There Any Wages Owing To The Applicant?

[13] The applicant was paid in cash and wages were put into “A’s” bank account. The applicant received a total of \$1,326.70 gross during the time payments were being made. There are no proper wages and time and holiday records kept by the employer despite being requested to provide all relevant documents. The employer did not provide an intended employment agreement at the outset of the applicant’s employment. A list of hours provided during “A’s” employment by the respondent has been disputed by “A”. “A’s” calculations of the hours show errors in “O’s” list of hours.

[14] “A’s” mother’s calculations have been relied upon by “A” for the pay details and hours, after it was discovered by them the proper pay for the hours worked was not being paid by the employer. “A” copied the details of the hours and time worked and meals from a book at the restaurant. “O” says that book is now missing. I accept that “A’s” mother’s record and “A’s” bank records are the best available, in the absence of any documents being provided by the employer. I have accepted the “A’s” mother’s spread sheet as the more reliable document and especially as it included any errors in the respondent’s favour.

[15] The applicant is owed \$1,874.18 wages.

The Applicant’s Suspension on Pay

[16] I find the suspension was wholly unjustified. There was no reason for it. Further my reason to find the suspension unjustified is that it was carried out by text and letter and there was no opportunity for the applicant to have any input and right to comment before the decision was made. Furthermore, the text message failed to convey what the allegation requiring an investigation was about and what the reasons for the suspension were.

[17] There was an incident that occurred during the applicant’s employment that caused “O” to suspend the applicant, in the absence of any other matter being raised. It is not necessary for me to go into much detail suffice to say that the incident involved the applicant making a complaint to the Police about a co-worker and that person was convicted for a serious offence, and it was the

applicant who was suspended. That on its own was manifestly unjustified. Since the matter I referred to probably did have some bearing on the decision to suspend the applicant it was also plainly unjust to suspend the applicant without a proper and fair process the decision was made. The details of the incident provided in the evidence are subject to a non-publication order as they relate to the applicant by name.

[18] The applicant had no opportunity to get representation. Given the applicant's age a fair and reasonable employer would have put the applicant on notice of the right to have representation and or support and to know in advance of any possibility of being suspended and the grounds for it.

[19] "A" was disadvantaged by the suspension as 'A' was not paid and "A's" employment subsequently ended. The applicant says a series of letters dated 5 June 2006 and 20 July 2006, and 1, 16 and 31 August 2006, produced by the respondent for the Authority's investigation were not given to the applicant. The letters gave notice of the owner's intention to sell the business, that the new owner would be hiring his own staff and confirmed the sale. There was no proof to contradict that "A" was not personally handed any of the letters and did not understand what was happening with the sale of the business. The respondent accepted that two of the letters had incorrect addresses. In other words there was no proof that the applicant received the letters at the time.

The End of the Applicant's Employment

[20] I find the applicant's employment effectively ended when "A" was suspended and subsequently saw new signs being put up at the business's premises and having had no contact from the employer since the suspension. The sale and purchase took effect from about 10 September 2006. The applicant denied ever seeing the letters referred to above until these proceedings. They were received for the first time in the Authority on 23 April 2008 and were not attached to the statement in reply when it was filed. I accept the applicant's evidence considering that "O" could not produce any evidence to contradict the applicant's evidence that the applicant and the applicant's mother had not seen these letters. However it is accepted by the applicant that, with the knowledge now, employment could have ended on 10 September 2006 with the change of ownership.

Orders of the Authority

[21] It is my decision that "R" is to pay "A" the arrears of wages in the sum of \$1,874.18.

[22] I confirm that the applicant has a personal grievance against “R” for an unjustified suspension and actual dismissal. “A” was disadvantaged in employment. The applicant is entitled to remedies for a personal grievance.

Contribution and Remedies for Personal Grievance

[23] I find that “A” did not contribute to the personal grievance and I have not reduced the remedies as awarded (s 124 of the Act applied). “A” has claimed three months lost wages from 17 September until 10 December 2006, and future lost wages for the period 11 December 2006 until 10 July 2007. Given that the employment of the applicant would have ended on 10 September any losses should be until that date. Also “A” was entitled to notice and I find that notice was not properly and adequately provided. There was no contractual notice period because there was no individual employment agreement. It is my assessment that such notice should amount to 4 weeks given the correspondence the respondent says was given to staff and that “A” was an hourly worker, the nature of the industry and the length of the “A’s” employment. There was no guarantee that the applicant would have had employment after 10 September 2006 with “A’s” employer given the business was sold.

[24] The applicant has tried to mitigate the loss of wages although apparently without much success at the time to find alternative work before taking on a training course full time in 2007. There was no employment agreement and I have accepted that the applicant did not receive the series of letters from “R” to know what notice was being given of the sale of the business and alternative employment arrangements and the employment ending. Therefore any notice and any payment in lieu of notice were not addressed and a fair and reasonable employer would have properly addressed this.

[25] My assessment is that the applicant is entitled to \$750 for 4 weeks notice.

[26] I now turn to compensation for humiliation, loss of dignity and injury to feelings. I accept that “A” felt “gutted” and “hurt” personally about how the suspension decision was conveyed, not being provided with adequate information about what the reasons were for the suspension and how the employment ended and seeing the signs changed. Also the employer’s handling of the suspension left “A” confused knowing that no action was taken on the co-worker after the

complaint was made. This impacted on “A’s” feelings. My assessment is “A’s” claim is worth \$7,500 for hurt feelings.

[27] No costs were incurred by the applicant for paid professional representation and preparation. Therefore, I have decided to restrict costs to the \$70 filing fee. I must say that the applicant has been most fortunate that “A’s” mother and support person have been involved and had the foresight to keep a record of hours and time worked and calculated the wages.

Summary of Orders of the Authority

[28] In conclusion “R” is to pay “A”:

\$1,874.18 for arrears of wages under s 131 of the Act

\$750 for lost wages under s 123 (1) (b) and s 128 of the Act

\$7,500 for compensation for hurt feelings under s 123 (1) (c) (i) of the Act

\$70 for the filing fee under clause 15 of Schedule 2 to the Act.

[29] Leave is reserved for any application on notice from the parties for variations on the non-publication orders contained in this determination.

P R Stapp
Member of the Employment Relations Authority