

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 106
5439414

BETWEEN

MONICA VANESA
BALMACEDA
Applicant

A N D

AMPHIBIAN SWIMMING
ACADEMY LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: Applicant in person
No appearance for Respondent
Investigation Meeting: 24 March 2014 at Auckland
Submissions Received: 24 March 2014 from Applicant
Date of Determination: 24 March 2014

DETERMINATION OF THE AUTHORITY

- A. The Authority has jurisdiction to determine this claim despite the trial provision within Ms Balmaceda's employment contract;**
- B. Ms Balmaceda was unjustifiably disadvantaged by Amphibian Swimming Academy Limited's actions during her employment;**
- C. Amphibian Swimming Academy Limited is to pay to Monica Vanesa Balmaceda lost remuneration of \$3,745.10 within 7 days pursuant to s.123(b) and s.128 of the Employment Relations Act 2000;**
- D. An order that interest be paid on the above judgment sum at the rate of 5% per annum from 15 August 2013 until the date of payment pursuant to clause 11, Schedule 2 of the Employment Relations Act 2000;**

- E. Amphibian Swimming Academy Limited is to pay to Monica Vanesa Balmaceda compensation of \$5,000 within 7 days pursuant to s.123(c)(i) of the Employment Relations Act 2000;**
- F. Ms Balmaceda's behaviour was not causative and/or blameworthy requiring the reduction of any remedies otherwise payable under s.124 of the Employment Relations Act 2000;**
- G. Amphibian Swimming Academy Limited is to pay to Monica Vanesa Balmaceda contribution towards her costs of her \$71.50 filing fee and \$39.00 for the cost of the production of the medical certificate within 7 days.**

Employment relationship problem

[1] Monica Vanesa Balmaceda was employed by Amphibian Swimming Academy Limited (the respondent) as a swimming instructor on 10 June 2013 until she was dismissed on 15 August 2013 pursuant to a 90 day trial provision in her employment contract. Ms Balmaceda filed a personal grievance alleging unjustified action by the respondent which caused her disadvantage. The unjustified action is the refusal to pay her wages.

Issues

[2] There are three issues arising from this personal grievance application. These are:

- (i) Is Ms Balmaceda prevented from raising a personal grievance due to the trial provision within her contract?
- (ii) If no, was she unfairly disadvantaged by the non-payment of wages?
- (iii) If she was unfairly disadvantaged, what remedies should be granted?

Facts leading to dismissal

[3] Ms Balmaceda was approached by the respondent company to work as a swimming instructor. They were a new venture and she was excited and interested in promoting their business. She left a good job to work for the respondent.

[4] An employment contract was signed on or about 9 May 2013. The contract provided she be paid a wage of \$20 per hour, working a minimum of 30 hours per week (\$600 gross wages per week). Clause 5.1 of Ms Balmaceda's employment agreement provides for the payment of wages "*weekly by electronic funds transfer.*"

[5] There was also a clause providing for a probationary period of 90 days:

2. PROBATIONARY PERIOD

2.1 *A trial period will apply for a period of 90 calendar days of employment to assess and confirm suitability for the position.*

2.2 *During the trial period the Employer may terminate the employment relationship by providing 7 days written notice to the Employee within the trial period, and the Employee may not pursue a personal grievance on the grounds of unjustified dismissal. The Employee may pursue a personal grievance on grounds as specified in ss.103(1)(b-g) of the Employment Relations Act.*

[6] Ms Balmaceda was not provided with a signed copy. She produced an unsigned copy of her contract at hearing containing the above terms.

[7] Between 11 June and 15 August 2013 she was under-paid or not paid wages at all as set out in her contract.

[8] She raised non-payment several times during her employment. Ms Balmaceda has two children aged 1 and 3 years in paid care. Due to non-payment, her partner's income was the only income coming into the household. She could not afford to do her usual family activities or to purchase clothing for her children. She raised these concerns with ASAL but was ignored.

[9] On 3 August Ms Balmaceda received a letter from ASAL. It proposed a variation to her contract namely payment of \$600 per week with weekly additional payments of \$250 each Friday. This payment was to be made irrespective of the number of hours she worked. Ms Balmaceda was paid \$250 the following Friday but was still being under-paid the weekly wages she was owed.

[10] On 15 August 2013 prior to starting work, Ms Balmaceda raised non-payment again with the ASAL director, Debra Roach. It was a tense discussion. The parties

argued. Ms Roach gave no assurances Ms Balmaceda would be paid and when Ms Balmaceda went to start her work.

[11] When she finished work she was called into the respondent's offices by Ms Roach and her partner, Simon Terry. Mr Terry spoke to her telling her she had been terminated and provided her with a letter dated 15 August 2013 stating ASAL was giving notice of termination of her employment under the 90 days trial period. It did not require her to work out her referred to a notice period of 7 days. Ms Balmaceda was not paid for her notice period.

[12] Ms Balmaceda tried to discuss the termination. She was told to listen to what they had to say and then leave.

[13] On 16 August 2013 Ms Balmaceda attended her doctor. He diagnosed her as suffering from tension headaches, anxiety and stress as a result of her termination from work. She was prescribed medication and advised to seek counselling

[14] On 20 August 2013 she saw another doctor who directed she attend counselling. She attended eight sessions of counselling for stress.

[15] On 2 September 2013 she notified the respondent of her personal grievance.

[16] On 13 November 2013 she filed an application by way of statement of problem with the Authority. The Authority arranged for the filing and service by courier upon the respondent at its company address of 3 Glenway Place, Henderson, Auckland.

[17] On 15 November 2013 the Authority received confirmation that the statement of problem had been received by the respondent company. The statement of problem was signed for at the company address by the sole director's partner, Simon Terry. No statement in reply has been filed.

[18] On 9 January 2014 the Authority directed the parties to mediation.

[19] Between 13 and 21 February 2014 Mediation Services attempted to contact the respondent. There was no response.

[20] As a result the matter was referred to the (then) Authority member who set the matter down for an investigation meeting on 24 March 2014. Notice of this investigation meeting was couriered to the respondent company.

Non-appearance by respondent

[21] The respondent company failed to appear at the hearing today. The Authority has the power to proceed if a party fails to attend a hearing pursuant to clause 12, Schedule 2 of the Act. The requirements are *if without good cause shown, any party to a matter before the Authority fails to attend or be represented* the Authority may proceed in their absence.

[22] Having regard to the above facts, no good cause has been shown. The respondent has failed to engage at all in mediation or the Authority's processes. It has not shown any good cause for the lack of engagement. It has had notice this matter was to proceed today. In the circumstances, the Authority determines it shall proceed to determine this matter in the absence of the respondent.

Is Ms Balmaceda prevented from raising a personal grievance due to the trial provision within her contract?

[23] Section 67A(2) defines a trial provision, including what it is and what it does. In short if the trial provision in a contract complies with s.67A "*the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*" (s.67A(2)(c)).

[24] This personal grievance is not about a dismissal. The personal grievance is about unjustified disadvantage arising from the non-payment of her wages. Parties are required to be active and constructive under the duty of good faith. This must include the way an employer deals with employee concerns raised about non-payment of wages.

[25] Section 67A does not preclude Ms Balmaceda in these circumstances from bringing a personal grievance for unjustified action arising from events other than dismissal.

[26] In the circumstances the Authority determines it has jurisdiction to determine this claim despite the trial provision within Ms Balmaceda's employment contract.

Was Ms Balmaceda unfairly disadvantaged by the non-payment of wages?

[27] Ms Balmaceda's personal grievance is about her employer's action/or lack thereof about her concerns over non-payment of her wages during employment causing her unjustified disadvantage.

[28] An unjustified disadvantage claim usually arises when an employer's action leads to the breach of express or implied term of employment. Clause 5.1 of Ms Balmaceda's employment agreement provides for the weekly payment of wages. This did not occur. When she raised this issue, her employer did nothing then attempted to unilaterally vary the contract regarding payment, then did not comply with the varied payment arrangements either.

[29] The Authority accepts her evidence she was still owed wages of \$3,745.10 as at 15 August 2013.

[30] The lack of action by her employer caused her disadvantage. Ms Balmaceda says the respondent company was well aware of her personal situation and how stressed she was. She had young children and bills to pay. The loss of her income meant she had to rely upon her partner's sole income to meet the family's financial obligations and curtail spending with the exception of basic necessities. She has produced medical evidence confirming her stress.

[31] Having regard to the evidence before it, the Authority determines Ms Balmaceda was unjustifiably disadvantaged by the respondent company's action.

What remedies should be granted?

[32] Ms Balmaceda seeks recovery of her wages owed totalling \$3,745.10. This is appropriate and the Authority makes an order accordingly.

[33] Ms Balmaceda has lost use of that money and is entitled to interest. Accordingly interest at the rate of 5% per annum shall accrue from 15 August 2013 until the date of payment.

[34] Ms Balmaceda seeks an award of hurt and humiliation of \$10,000. Having regard to the medical evidence before the Authority and Ms Balmaceda's oral evidence today, an award of \$5,000 is appropriate.

[35] Ms Balmaceda is required to mitigate her losses. She gave evidence of applying for jobs immediately prior to the loss of her job and one month after her dismissal. She explained the delay in applying for jobs in the month after her dismissal was due to stress. She produced evidence in the form of a medical certificate detailing her diagnosis and treatment, including medication and counselling.

[36] There is no evidence she has contributed to the matters giving rise to the personal grievance.

[37] Having regard to the evidence before the Authority, no reduction in her remuneration either for mitigation of loss or contributory conduct is appropriate.

Costs

[38] A contribution towards her costs is sought of the filing fee of \$71.50 and her doctor's fees of \$83.00.

[39] Reimbursement of the filing fee is appropriate and an order shall be made accordingly. The doctor's fees for treatment purposes are not what costs awards are to meet. Costs awards are primarily for the costs of bringing this proceeding before the Authority. They do not include contribution to any further treatment an applicant may seek. This would more properly be in the form of a claim for damages.

[40] However Ms Balmaceda deposes to having to see a doctor in order to be initially assessed and for the medical certificate produced. The cost was \$39.00. Accordingly an award of \$39.00 towards her doctor's fees occurred in obtaining the evidence of the medical certificate is appropriate.

[41] Therefore the Authority makes the following orders:

- A. The Authority has jurisdiction to determine this claim despite the trial provision within Ms Balmaceda's employment contract;
- B. Ms Balmaceda was unjustifiably disadvantaged by Amphibian Swimming Academy Limited's actions during her employment;

- C. Amphibian Swimming Academy Limited is to pay to Monica Vanesa Balmaceda lost remuneration of \$3,745.10 within 7 days pursuant to s.123(b) and s.128 of the Employment Relations Act 2000;
- D. An order that interest be paid on the above judgment sum at the rate of 5% per annum from 15 August 2013 until the date of payment pursuant to clause 11, Schedule 2 of the Employment Relations Act 2000;
- E. Amphibian Swimming Academy Limited is to pay to Monica Vanesa Balmaceda compensation of \$5,000 within 7 days pursuant to s.123(c)(i) of the Employment Relations Act 2000;
- F. Ms Balmaceda's behaviour was not causative and/or blameworthy requiring the reduction of any remedies otherwise payable under s.124 of the Employment Relations Act 2000;
- G. Amphibian Swimming Academy Limited is to pay to Monica Vanesa Balmaceda contribution towards her costs of her \$71.50 filing fee and \$39.00 for the cost of the production of the medical certificate within 7 days.

T G Tetitaha
Member of the Employment Relations Authority