

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 54
5548145

BETWEEN CECILIA BARR
 Applicant

AND VINOD KUNDU
 First Respondent

 HUTT CITY VETERINARY
 CARE LIMITED
 Second Respondent

Member of Authority: M B Loftus

Representatives: Graeme Ogilvie, Advocate for Applicant
 Vinod Kundu on behalf of Respondents

Investigation Meeting: 30 March 2016 at Wellington

Submissions Received: At the investigation meeting

Determination: 18 May 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Cecilia Barr, seeks to recover unpaid moneys. This includes unpaid wages, holiday pay and the employer contribution to her kiwisaver account.

[2] Ms Barr also alleged a constructive dismissal but withdrew the claim prior to the investigation meeting.

[3] The respondents' deny moneys are owing and rely on:

- (a) A *volunteers* agreement for the period 15 to 19 December 2014 under which Ms Barr agreed she would not be paid;

- (b) A *training* agreement signed by Ms Barr which, in the respondents view, entitles the recouping of the cost of training provided by Madhuri Singh, the Chief Veterinarian and Mr Kundu's wife; and
- (c) A claim the employment agreement allows the respondents to recoup the cost of investigating various allegations of serious misconduct against Ms Barr. That said, it would also appear a portion of the alleged misconduct was not that of Ms Barr but her husband when he accompanied her to the employer's premises on 17 March 2015.

[4] In a document dated 28 March, but not received by either Mr Ogilvie or the Authority till the morning of the investigation is advice *The cost company seeking in the form of counter claim is \$26,560*. This is said to reimburse 154 hours of training provided to Ms Barr at \$90 an hour; an additional \$2,700 of resources used in providing the training and \$10,000 toward *business interruption* allegedly suffered by HCVC.

Citation of the Respondent

[5] The claim, as initially lodged, cited the respondent as Upper Hutt Veterinary Care. This is a trading name used by Hutt City Veterinary Care Limited (HCVC) and appears on some of the relevant documents. This was changed on a subsequent filing and Mr Kundu, the company's sole director and shareholder, was added due to some doubts as to who the employer might really be.

[6] This was discussed and the parties agree the company should be the respondent. The citation was then changed by agreement.

Background

[7] Ms Barr is a qualified Veterinarian. She commenced with HCVC on 15 December 2014. Prior to doing so she signed a document entitled *Volunteer Agreement*. It purports to take effect from 11 December 2014 and advises *The purpose of this role within Upper Hutt Veterinary Care is to develop skills as a Veterinarian*. It also states *As a Volunteer you agreed that you will not be paid for your volunteer work*.

[8] On 20 December 2014 Ms Barr signed an individual employment agreement. It provides for a salary of \$55,000 per annum with payment to be made monthly. It also contains a deductions clause (7.3) which, amid other things, provides:

The Employee shall be liable to pay the training cost if he/she discontinue employment during the training period.

The Employer shall be entitled to deduct from any salary the amount owed by the employee toward the company or employer.

The Employer shall be entitled to deduct the whole day's salary if an employee leaves before the time or did not complete the full shift.

[9] The agreement also contains a termination clause (12.2) which HCVC referred to in correspondence but which was not mentioned in evidence. Amidst other things it contains the following:

The Employer may terminate this agreement for cause, by providing one week notice in writing to the Employee. The Employee is required to give one month's notice of resignation. The Employer is not liable to pay remuneration of any notice period.

[10] The training period referred to in [8] above is not mentioned elsewhere in the agreement and not defined. On receiving her copy of the employment agreement Ms Barr sought clarification on seven items. One of those was:

Training period – since you've kindly decided to eliminate the training period, will you delete the relevant sentence from clause 7.3?

[11] HCVC did not respond and as a result Ms Barr never signed the employment agreement.

[12] Ms Barr received her first monthly pay on Wednesday 21 January 2015. Her second pay was due on 18 February 2015. She did not receive it.

[13] On 22 February, Mr Kundu (who performs a management function) and Mrs Singh took annual leave and went to India. They returned on 15 March.

[14] It appears Ms Barr was not the only one who was not paid mid-February. On 25 February Mr Kundu sent an email to staff advising he was having problems with internet banking and the payroll may not proceed until Friday 27 February.

[15] Ms Barr was unaware of that and wrote to Mr Kundu about her lack of payment the following day (26 February). She received a reply advising Mr Kundu was having issues with processing internet banking from India.

[16] On 28 February 2015 Ms Barr advised Mr Kundu, by email, that she had decided to resign effective 28 March. The message was placatory and thanked Mr Kundu for the support and opportunities provided. This was followed with four further queries concerning the whereabouts of her pay sent between 1 and 5 March.

[17] The response, when it eventually arrived on 6 March, advises:

It is quite shocking to know about your decision especially when I am in overseas. Company expect you to work in good faith of clinic until I am back. I need to discuss about your contract with my legal and accountant which is not possible from overseas.

I am sorry to advice you that I can not answer or sort out your employment issue until I am back as I have no document with me in overseas.

It seems you had this in your mind preplanned before I left for overseas which is not acceptable at all. I had so many meetings with you before I left and you didn't mentioned this at all not even 1 single clue.

Anyway I will sort out everything once I am back.

I Will advice you to maintain professional environment at clinic and not involve in any matter which force company to take legal action.

[18] Ms Barr replied to that advising her decision to resign was attributable to the lack of payment.

[19] Similar emails had been passed between Mr Kundu and other staff and the same day, 6 March, he advised the others the banking problems had been resolved and they would receive their pay within a day or two. Ms Barr, however, was once again not paid and it would appear the same applied to others. On 12 March another employee advised she was unwilling to work an overnight shift given the lack of payment.

[20] Further attempts to clarify the situation and whether or not she would be paid for work performed up to 28 March went unanswered until 15 March. On that day Mr Kundu sent an email to Ms Barr advising the roster for the week starting 16 March. He also said advised he sought a meeting with Ms Barr and would advise a date and time *by tomorrow*.

[21] Ms Barr responded the following morning saying she would like to meet at 11am. Mr Kundu's response was that they could not meet that day and that he would soon advise a date and time.

[22] By the time she received that response Ms Barr was already in the workplace in the expectation of a meeting. She replied by stating *If you do not agree to meet with me today, I am formally applying with the Employment Relations Authority to recover my payroll.*

[23] Here it should be noted that in the interim (10 March) Ms Barr had approached Inland Revenue and discovered it had no record of her employment and received neither PAYE or KiwiSaver contributions. That led her to approach the Department of Labour (as have a number of other ex-employees of HCVC).

[24] Ms Barr returned to the workplace the following day (17 March) given she knew Mr Kundu was meeting with other staff on an individual basis that day. She was accompanied by her husband.

[25] Ms Barr says she was told by Mr Kundu that as she had both contacted the Department of Labour and commenced proceedings she could now wait for *them* to sort it out before being told she had 2 minutes to leave or she would be considered a trespasser. Ms Barr refused to go until Mr Kundu discussed her outstanding pay. She and her husband then went and sat in the Clinic's lobby.

[26] It was then another employee arrived to meet with Mr Kundu. It is not known what occurred in the meeting, but the employee's support person left expressing disquiet at the way Mr Kundu and Mrs Singh were treating the employee. Mr Barr then offered the employee his services as a support person. It is claimed Mr Kundu took exception to that, blocked the doorway to the room in which the meeting was occurring and *bumped* Mr Barr with his chest. The employee then declined Mr Barr's offer and he returned to the Clinic lobby to wait with Ms Barr.

[27] A little later Mrs Singh saw they were still there. She texted Mr Kundu who called the Police and demanded Mr Barr be removed. While she was advised she could stay, Ms Barr chose to leave with her husband.

[28] Later that day Mr Kundu sent an email advising he was laying a complaint with the Police alleging Mr Barr had harassed his employees. The email also advised

an expectation Ms Barr would continue working but added *to maintain the professional clinical decorum you are only allowed to clinic during working shift only and to work in good faith of company.*

[29] Ms Barr's response was to ask when Mr Kundu would meet to discuss her pay. No meeting occurred. Ms Barr did not return and the moneys were never paid leading to today's investigation meeting.

Determination

[30] As already said Ms Barr seeks to recover unpaid moneys. In particular she seeks \$11,597.75 gross. This comprises unpaid wages in the amount of \$9,953.90, \$1,170.00 holiday pay and kiwisaver contributions of \$473.85.

[31] HCVC's response is it owes nothing for the first week due to the *volunteers* agreement; a training agreement which enables it to make significant deductions from Ms Barr's earnings and a contractual permission to deduct the cost of a disciplinary investigation. There is also the issue of clause 12.2 ([9] above).

[32] Ms Barr's argument the volunteer agreement not apply is based on a submission such arrangements are frowned upon by the Court and this is supported with reference to *Salad Bowl Ltd v Howe Thornley*.¹ That is not a submission with which I agree having concluded the *Salad Bowl* situation is distinguishable. First a key issue in the *Salad Bowl* case was Ms Howe-Thornley's work produced revenue. Second it was conceded Salad Bowl intended paying Ms Howe-Thornley during the trial and that only changed when its owner formed a negative view of her conduct.²

[33] The present situation is quite different. There was no intent Ms Barr be paid with her accepting she signed the volunteers agreement. It expressly states she was a volunteer and would not be paid when so engaged. To that I add the fact Ms Barr accepts she spent that time observing how the clinic operated and did not perform revenue generating work. Having considered the evidence I conclude this situation is more akin to that considered by the Court in *Brook v MacOwn*³. This was a voluntary situation and the agreement should be applied according to its provisions. Ms Barr is

¹ [2013] ERNZ 326

² *Howe Thornley v The Salad Bowl Ltd* [2013] NZERA Christchurch 25 at [20]

³ [2014] ERNZ 639

not entitled to payment for her first week at the clinic and to which this agreement applied.

[34] Turning to the remainder of the claim. HCVC accepts the amounts claimed were not paid but tries to both justify the failure with various arguments as to why the monies are not payable and, if wrong, seek to recoup the money via its counterclaim.

[35] Its arguments as to why the money is not payable revolve around the training agreement, the cost of pursuing disciplinary action and clause 12.2.

[36] The training agreement argument fails for the following reasons. HCVC claims it is an authorised deduction. Authorised deductions require the written consent of the employee from whose wages the money is being deducted.⁴ HCVC could not produce such a document and tried to rely on the unsigned employment agreement and an argument the 90 day trial provided a definition of what comprised the training period. That faces three impediments. First the fact the agreement was unsigned means there is no written consent. Second there is nothing to link the 90 day trial period to the training period but in any event the lack of a signed agreement means there is no valid 90 day trial. Third the contemporaneous documentation indicates that even if a training period was contemplated it was waived and here I note [10] above and the lack of response.

[37] The argument Ms Barr can be billed for an investigation into her purported wrongdoing also fails. First there is no evidence of any wrongdoing and no evidence of any action let alone costs being incurred. Second there is no written authority for such a deduction. The idea she can be billed for attempts to seek redress for the alleged wrongdoing of her partner is preposterous but once again I note the absence of written authority for such a deduction or evidence any costs were incurred.

[38] Finally there is clause 12.2. It is being suggested this entitles the employer to require unpaid work during any notice period. That is totally contrary to the provisions of the Minimum Wage Act 1983. As an unlawful provision it would therefore be unenforceable even if the agreement had been signed.

⁴ Section 5(1)(a) of the Wages Protection Act 1983

[39] The arguments as to why Ms Barr's wages may be withheld are untenable and the monies claimed are payable.

[40] Ms Barr also seeks holiday pay and kiwisaver contributions that should have been paid in addition to her unpaid wages. Holiday Pay is a statutory requirement yet it is conceded this has not been paid. It should be. Kiwisaver contributions should also have been paid as a proportion of Ms Barr's salary. Once again it is clear they were not. Both remain payable but the amounts awarded shall be less than claimed due to the effect of the volunteers agreement.

[41] The evidence offered in support of the counter claim was minimal and limited to a list of Ms Barr's alleged technical deficiencies. Ms Barr denies the alleged deficiencies. I accept that denial and note that if HCVC's allegations had merit Ms Barr would never have completed her Veterinary degree. She would not have come remotely close. The evidence tended in support of the claim is totally implausible.

[42] Even if this were not the case the claim would face two further impediments which would nullify it. First the bulk of the claim is based on the repayment of training costs and such a requirement would reduce Ms Barr's earnings below those required by the Minimum Wage Act 1983. Second, and to be enforceable, such a forfeiture claim must be accompanied by a genuine assessment of damage.⁵ There is no such evidence and nor is there any evidence of the alleged business interruption.

[43] HCVC's counter claim is accordingly dismissed.

Costs

[44] In order to save time and additional expense Mr Ogilvie addressed the issue of costs should his client be successful. He seeks \$3,500.

[45] The claim is supported with an invoice which exceeds the amount sought along with reference to the Authority's normal practice of applying a daily tariff⁶ of \$3,500. While it is accepted the investigation did not last a full day it is argued an uplift of the tariff is warranted due to HCVC's various failures. It failed to comply with timelines, failed to adequately enunciate its position and failed to provide briefs along with all supporting documents until just before the investigation. It is argued

⁵ *G L Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120

⁶ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

this increased costs by requiring additional preparation as a range of possibilities had to be considered.

[46] I agree, especially in the absence of a contrary argument. Having considered the invoice, the argument and HCVC's less than helpful approach to the investigation which did, in my view, increase the applicant's costs, I accept the claim as reasonable.

Conclusion

[47] For the above reasons I conclude Ms Barr has successfully made out the bulk of her claims. As a result the respondent, Hutt City Veterinary Care Limited, is to pay the applicant, Cecilia Barr, the following sums:

- a. \$8,896.21 (eight thousand, eight hundred and ninety six dollars and twenty one cents) being unpaid salary; and
- b. A further \$1,085.38 (one thousand and eighty five dollars and thirty eight cents) being unpaid holiday pay; and
- c. A further \$442.12 (four hundred and forty two dollars and twelve cents) being unpaid kiwisaver contributions; and
- d. A further \$3,500 being a contribution toward Ms Barr's costs.

M B Loftus
Member of the Employment Relations Authority