



# New Zealand Employment Relations Authority Decisions

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## **Blyde v Six Sense Messages NZ Limited (Auckland) [2017] NZERA 379; [2017] NZERA Auckland 379 (7 December 2017)**

Last Updated: 15 March 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 379

3013774

BETWEEN JOLINE BLYDE

Applicant

AND SIX SENSE MESSAGES NZ LIMITED

First Respondent

AND KRISHNEIL REDDY

Second Respondent

Member of Authority: Vicki Campbell Representatives: Dushan Delic for Applicant

No appearance for Respondent Investigation Meeting: 7 December 2017

Oral Determination: 7 December 2017

Record of Oral Determination:

7 December 2017

### **RECORD OF ORAL DETERMINATION OF THE AUTHORITY**

- A. **Six Sense Messages NZ Limited is ordered to pay to Ms Blyde the sum of \$439.73 net plus outstanding holiday pay of \$622.00 gross under [section 131](#) of the [Employment Relations Act 2000](#) within 14 days of the date of this determination.**
  - B. Ms Blyde was unjustifiably constructively dismissed.
- C. **Six Sense Messages NZ Limited is ordered to pay to Ms Blyde the following amounts in resolution of her personal grievance within 14 days of the date of this determination:**
  - a. Lost wages of \$5,183.36 under [s 123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#); and
  - b. Compensation of \$7,000 under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).
- D. **Six Sense Messages NZ Limited is ordered to pay a contribution to Ms Blyde's costs of \$4,000 within 14 days of the date of this determination.**

### **Proceedings**

[1] Ms Blyde lodged a statement of problem in the Authority on 15 June 2017. On 14 August Ms Blyde applied to

join Mr Krishneil Reddy, the sole director and shareholder of Six Sense as the second respondent to the proceedings. The application was granted by Member Trotman on 23 August.

[2] An amended statement of problem was lodged on 19 September reflecting the addition of Mr Reddy as a respondent. On 12 October the amended statement of problem was served on Six Sense Massages NZ Ltd at the address for service as notified on the Companies Register and on Mr Reddy who resides at the same address.

[3] No statement in reply was received and on 6 November Member Trotman issued a Notice of Direction setting out a proposal that the matter be dealt with by way of investigation meeting today. Included with the Notice of Direction was a direction to Six Sense and Mr Reddy that any correspondence to the Authority must include an application for leave to respond to the matter.<sup>1</sup> The parties were advised that any objections to the proposal must be lodged within 7 days. No objections were received.

[4] The Notice of Direction and a Notice of Investigation Meeting was served on the registered address for service on 20 November. Neither Six Sense nor Mr Reddy have engaged in the Authority's process and as provided in clause 12 of schedule 2 of the [Employment Relations Act 2000](#) I have proceeded to act fully in the matter as if the respondent had engaged.

<sup>1</sup> See Employment Relations Regulations 2000, Regulation 8(3).

### **Employment relationship problem**

[5] Ms Blyde is a qualified Massage Therapist and worked for Six Sense as a Massage Therapist from 10 May 2016. The terms and conditions of her employment were set out in an individual employment agreement dated 17 May.

[6] During her employment Ms Blyde was asked to train new employees and entered into discussions with Mr Reddy regarding a managerial role. The discussions did not result in an agreement and Ms Blyde says the relationship between her and Mr Reddy deteriorated after she raised concerns about the lack of progress on the promotion and issues relating to health and safety.

[7] Ms Blyde had a pre-existing medical condition which also began to deteriorate. Ultimately Ms Blyde resigned from her employment. She says the resignation was in fact a dismissal, which was unjustified.

[8] Ms Blyde also says she has not been paid in accordance with the employment agreement and seeks payment of the arrears of wages including holiday pay and other money.

### **Issues**

[9] In order to resolve Ms Blyde's employment relationship problems I must determine the following questions:

- a. Has there been a default in payment of wages and other monies payable to Ms Blyde under the employment agreement and if so, what payments remain outstanding?
- b. Was Ms Blyde constructively dismissed and if so, what if any remedies should be awarded?

[10] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received from Ms Blyde but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

### **Arrears of wages**

[11] Ms Blyde claims she has not been paid correctly and is concerned about whether Six Sense has met its obligations in respect of payment of Ms Blyde's PAYE tax. She claims arrears of wages, unpaid holiday pay and other monies owed to her.

### **Outstanding wages**

[12] The employment agreement sets Ms Blyde's hourly rate at \$25 per hour for a minimum of 20 hours each week. At the investigation meeting Ms Blyde accepted that both her and Mr Reddy operated under an oral variation to the employment agreement whereby she would be paid on a piece rate basis of \$25 per massage with a minimum of 20 massages per week. Each massage takes about an hour.

[13] Ms Blyde kept a diary record of all massages she completed while working for Six Sense. Each week she would report to Mr Reddy the total number of massages completed for the week so that payment of her wages could be made.

[14] Based on the diary records and figures provided by Ms Blyde's accountant Ms Blyde claims unpaid wages of \$206.48 net. In the absence of any evidence to the contrary I am satisfied Ms Blyde has established her claim and is entitled to recover unpaid wages in the sum of \$206.48 net.

#### Other monies owed

[15] Ms Blyde claims reimbursement of \$233.25 which was deducted from her wages payments as KiwiSaver contributions. Despite taking the money from Ms Blyde's pay, the money has not been deposited in her KiwiSaver account. The money belongs to Ms Blyde. It was to go to her personal account for her use on her retirement.

[16] It is appropriate for the KiwiSaver contributions of \$233.25 to be reimbursed to Ms Blyde so that she can arrange for the money to be deposited into her KiwiSaver account.

#### Outstanding holiday pay

[17] During the term of her employment Ms Blyde did not take any paid holidays and was not paid 8% of her gross earnings at the end of her employment as required by the [Holidays Act 2003](#).

[18] Ms Blyde is entitled to be paid her holiday pay which amounts to \$622.00 gross.

#### Conclusion

[19] Six Sense Massages NZ Limited is ordered to pay to Ms Blyde the sum of \$439.73 net plus outstanding holiday pay of \$622.00 gross under section 131 of the Act within 14 days of the date of this determination.

#### Unjustified dismissal

[20] Ms Blyde says that while she resigned from her employment, in reality the resignation was a dismissal because she had no option but to resign. Ms Blyde claims a constructive dismissal.

[21] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [2](#) the Court of Appeal listed three situations in which a constructive dismissal might occur, although the Court noted that these were not exhaustive. The three situations are:

- a. Where the employee is given a choice of resignation or dismissal;
- b. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c. Where a breach of duty leads a worker to resign.

[22] Ms Blyde bears the onus of establishing on the balance of probabilities that she did not freely or voluntarily resign. Ms Blyde relies on the second and third situations set out above to support her claim that her resignation was not voluntary. In her letter of resignation Ms Blyde told Mr Reddy that she no longer held the requisite trust and confidence in him, was no longer enjoying her job and felt stressed when she walked in the door at the beginning of a day.

Was there a course of conduct designed to coerce resignation or breaches of duty owed by Six Sense?

*2 Wellington Clerical Workers IUOW v Greenwich* [\[1985\] 2 NZLR 372](#).

[23] I must assess whether there was a course of conduct that crossed the line to become dismissive or repudiatory conduct sufficient to justify the termination of the employment relationship.[3](#) Or whether Six Sense breached any duty owed to Ms Blyde.

#### Managerial role

[24] Ms Blyde says she entered into a discussion with Mr Reddy about her taking on a managerial role. They discussed a potential salary for the role of between

\$45,000 and \$48,000 per annum. She says Six Sense reneged on its offer.

[25] In a letter responding to the personal grievance raised by Ms Blyde, Six Sense acknowledged there was a discussion and exploration about a future role for Ms Blyde but that a salary still needed to be determined.

[26] Ms Blyde was excited by the prospect of the new role and was disappointed when it did not come to fruition. Ms Blyde was already undertaking a significant part of the role, she was training new therapists, managing bookings, and ensuring the premises were opened each morning but received no additional income as compensation for the hours worked.

[27] Mr Reddy reneged on his promise to promote Ms Blyde to a managerial position.

#### Reduction of massages

[28] Ms Blyde was required by Mr Reddy to train new massage therapists. When she was training the new staff she was unable to complete the number of massages needed to ensure she received the minimum payment of \$25 for 20 massages, each week. This led to a reduction in her take home pay.

#### Towels

[29] When Ms Blyde started working for Six Sense she raised health and safety concerns regarding the use of the towels in the clinic. Each massage would use at least four towels. Mr Reddy required the massage therapists to rotate the towels but

3 (1983) ERNZ Sel Casual 95 at 104.

did not provide a method for washing or otherwise ensuring the towels were clean and sanitary for use on clients.

[30] The situation resulted in Ms Blyde having to take the towels she was using on a daily basis home to wash and dry at the end of each day. Ms Blyde says she raised concerns about having to take the towels home and the time it took to ensure all of the towels were washed and dry and ready for use the following day.

[31] Ms Blyde told me that some nights she would arrive home from work as late as 10 pm and still need to wash and dry the towels. Added to this, she was required to return the office key early the next morning.

[32] Ms Blyde described the additional work and the consequent hours as draining and stressful. Despite raising her concerns on a number of occasions nothing was done about it.

[33] In its letter of response to Ms Blyde's personal grievance Six Sense acknowledges that the washing and drying of the towels was the responsibility of each of the technicians.

#### Conclusion

[34] The conduct of Mr Reddy in reneging on the promotion had the effect of not rewarding Ms Blyde for the time she spent training other staff. As mentioned earlier having to train staff meant Ms Blyde's wages were reduced.

[35] Six Sense benefited from the work Ms Blyde did in washing and drying the towels she used each day. Six Sense did not have to pay for an external washing service and could rely on having only one set of towels for each massage table. Further because of the way it paid Ms Blyde Six Sense did not have to pay for the additional time worked by Ms Blyde when washing and drying the towels.

[36] Ms Blyde's evidence at the investigation meeting was that she worked each day at the clinic from 9 am to 9 pm then a further three hours at home washing and drying towels.

[37] I raised a question at the investigation meeting about a possible failure by Six Sense to pay at least the minimum wage for all hours worked by Ms Blyde. Ms Blyde told me she had made the decision not to pursue a minimum wage claim.

[38] The actions set out above together with the failure to pay all wages when due establishes breaches of Six Sense's duty as an employer. I am satisfied the conduct crosses the line to become dismissive or repudiatory conduct sufficient to justify the termination of the employment relationship. Six Sense has failed to act in a way that an employer acting fairly and reasonably could act.

[39] In all the circumstances, it is my view that Ms Blyde's resignation did amount to a constructive dismissal. She has a personal grievance for unjustified dismissal and she is entitled to a consideration of remedies.

## Remedies

[40] Ms Blyde seeks reimbursement of lost wages and compensation for distress and injury to feelings.

[41] Ms Blyde has made significant attempts to mitigate her loss and was successful in gaining a new position which she started on 11 October 2016. Her lost wages amounts to 8 weeks. Ms Blyde's average gross earnings per week over the period of her employment was \$647.92. Ms Blyde is entitled to be reimbursed her lost earnings of \$5,183.36.

[42] Ms Blyde showed signs and symptoms of stress as a result of the failure of Six Sense to pay her full wages on time and the additional hours worked without reward to ensure the towels were clean and dry for each day. This resulted in her medical condition to become progressively worse.

[43] I consider an award of \$7,000 under s 123(1)(c)(i) of the Act is appropriate in the circumstances.

[44] Six Sense Massage NZ Limited is ordered to pay to Ms Blyde the following amounts in resolution of her personal grievance within 14 days of the date of this determination:

- c. Lost wages of \$5,183.36 under s 123(1)(b) of the Act; and
- d. Compensation of \$7,000 under s 123(1)(c)(i) of the Act.

## Contribution

[45] Having determined Ms Blyde has a personal grievance I must consider the extent to which her actions contributed towards the situation that gave rise to the personal grievance. I must reduce the remedies if Ms Blyde's actions contributed in some blameworthy way.<sup>4</sup>

[46] I am not satisfied Ms Blyde contributed in any blameworthy way to the situation giving rise to her personal grievance. The remedies will not be reduced.

## Costs

[47] Ms Blyde was represented during these proceedings. Ms Blyde's costs in this matter equate to approximately \$9,066 plus \$71.56 for the filing fee for this application.

[48] Ms Blyde is entitled to a contribution of her costs. The investigation meeting took about 1 hour in total including delivery of the oral determination. Taking a liberal approach to the usual daily tariff Ms Blyde is entitled to a contribution of at least \$2,250 for a half day investigation meeting.

[49] The Authority may uplift costs where the conduct of one party increases the costs of another. Lack of engagement by Six Sense in this matter means the parties were unable to participate in mediation. This resulted in Ms Blyde having no option but to bring her claim to the Authority for determination which has resulted in increased costs. More than half of the costs incurred by Ms Blyde were incurred after the Authority progressed the matter to an investigation meeting.

[50] In the circumstances of this case an appropriate contribution to costs is \$4,000. Six Sense Massages NZ Limited is ordered to pay a contribution to Ms Blyde's costs of \$4,000 within 14 days of the date of this determination.

## Certificate of determination

[51] I direct, pursuant to Regulation 26 of the [Employment Relations Authority Regulations 2000](#) that Ms Blyde be provided with a certificate of determination,

<sup>4</sup> [Employment Relations Act 2000 s 124](#).

sealed with the seal of the Authority recording that within fourteen (14) days of the date of this determination, Six Sense Massage NZ Limited is to pay Ms Blyde:

- \$439.73 net under [s 131](#) of the [Employment Relations Act](#);
- \$622.00 gross under [s 131](#) of the [Employment Relations Act](#);
- \$5,183.36 gross under [section 123\(1\)\(b\)](#) of the [Employment Relations Act](#);
- \$7,000 compensation under [section 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act](#); and

- \$4,000 in costs.

Vicki Campbell

Member of the Employment Relations Authority

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