

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 102/09  
5150500

BETWEEN                      KATRINA BURGESS  
   Applicant  
  
AND                              RUSTLING LEAVES  
   LIMITED t/a HEFFS HOTEL  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:            Meghan Zedko, Advocate for Applicant  
   Hinekura Lawson-Candelaria, Advocate for Respondent  
  
Investigation Meeting:    25 June 2009 at Dunedin  
  
Determination:              14 July 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      The applicant (Ms Burgess), alleges that the respondent (Rustling Leaves), has failed to honour an agreement made in December 2008 to pay her four weeks' wages, that as a consequence she has lost access to that money and because of the unreasonable delay, is entitled to a penalty against Rustling Leaves payable to Ms Burgess and/or compensation.

[2]      Rustling Leaves filed no statement in reply but after a long period of failing to engage with the Authority in its process, finally contacted the Authority's senior support officer in Christchurch and sought a delay in the start of the investigation meeting to enable the company to be present. This was agreed, and the matter proceeded an hour later than the appointed time by agreement with both parties.

[3]      At the investigation meeting, Ms Burgess, through her representative, confirmed that she sought the honouring of the agreement originally made together with compensation for the delay.

[4] Ms Lawson-Candelaria, for Rustling Leaves, claimed that Rustling Leaves had paid half of the moneys owed (that is, two weeks' wages), and that she understood that the claim was for another four weeks on top of that rather than another two weeks on top of that. Ms Burgess was absolutely satisfied that she had not received the two weeks' wages and Ms Lawson-Candelaria undertook to establish that the first two weeks' payment had in fact been made to Ms Burgess. Ms Lawson-Candelaria claimed that it had been made electronically direct to Ms Burgess' bank account.

[5] Ms Lawson-Candelaria said she would attend to checking that matter within 24 hours and advise Ms Zetko, Ms Burgess' representative, of the existence or otherwise of evidence that that payment had been made and that, once that happened, Ms Zetko would then advise me one way or the other.

[6] I indicated to the parties that once it was clear if in fact there had been any payment at all (as Ms Lawson-Candelaria alleged), I would then consider my decision.

[7] Ms Burgess had worked for Rustling Leaves as a cook. She had been inherited by Rustling Leaves when it took over the management of the premises where she had been employed. Continuity of employment was offered and was accepted by Ms Burgess.

[8] At the end of August 2008, a restructuring of Rustling Leaves appears to have been undertaken, the effect of which was to reduce the labour requirement and there were redundancies.

[9] The Authority heard no evidence in relation to those matters; nor should it. The claim before the Authority is for the enforcement of an agreement reached as a consequence of the alleged restructure and the actual nature of the restructure and what took place is not a matter which falls for determination.

[10] There were exchanges between the parties after the restructure and by an email exchange on 4 December 2008, agreement was reached that Ms Burgess' personal grievance, which had been raised on 15 October 2008, would be resolved by the payment of four weeks' wages at the rate of \$400 per week gross.

[11] Ms Burgess says that that money was never paid whereas Ms Lawson-Candelaria maintains that she paid half of it but not the other half.

[12] Since the investigation meeting, and before this determination was completed, Ms Zetko helpfully advised the Authority that Rustling Leaves Limited had committed to making a net payment of \$1328.36 to Ms Burgess being the amount owed to her by way of the original settlement. However as at the date of this determination, that commitment has not been honoured. Further it is clear that there was no part payment of two weeks wages as Rustling Leaves alleged.

### **Determination**

[13] I am satisfied that there was a concluded agreement between the parties completed by email on 4 December 2008, the effect of which was that Rustling Leaves was to pay to Ms Burgess a sum of \$1,600 gross.

[14] It is appropriate to reflect the Authority's displeasure at the thoroughly unreasonable delay in attending to this matter by the employer. The fact that the employer thought that there had been a partial payment made is neither here nor there; even if that were true, the balance of the payment clearly had not been made and the employer knew that that was the position and has known that for months. The employer could have sought advice from the Otago/Southland Employers' Association which clearly was acting for the employer up until the end of calendar 2008. The employer chose not to do that and chose, in effect, to sit on its hands and do nothing.

[15] Ms Burgess claims a \$10,000 penalty from Rustling Leaves on the footing that she has suffered loss because of the delay in payment and Rustling Leaves, as a limited liability company, ought to pay the maximum that the Authority may levy in matters of this kind.

[16] This is not a case where the maximum penalty ought to apply. However, it is, in my considered opinion, a case where there ought to be a penalty and the penalty ought to be payable to the applicant rather than to the Crown. I think a penalty in the order of \$2,000 would be appropriate and an order for that sum will be made.

[17] To conclude this matter and resolve the employment relationship problem between the parties, I make the following orders:

- (a) Pursuant to s.137 of the Employment Relations Act 2000, I direct that Rustling Leaves Limited is to pay to Ms Burgess the sum of four

weeks' wages being a net amount of \$1,328.36 and that that payment be made to the Dunedin Community Law Centre on behalf of Ms Burgess within seven days of the date of this determination.

- (b) I also direct that, to remedy the unreasonable default in completing that agreement and delaying the matter for six months while Ms Burgess pursued her remedies through the Authority, that Rustling Leaves Limited pay to Ms Burgess a further sum of \$2,000 as a penalty for its quite unreasonable default in failing to meet its obligations pursuant to the original agreement, that amount being payable not to the Crown but to Ms Burgess and to be paid by Rustling Leaves Limited to the Dunedin Community Law Centre for Ms Burgess' use, such sum to be paid within four weeks of the date of this determination.

### **Costs**

[18] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority