

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 301
3024031

BETWEEN Maree Cooper
 Applicant

AND Phoenix Publishing Limited
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: G Ogilvie, Advocate for the Applicant
 L McLean, Advocate for the Respondent

Investigation Meeting: 27 September 2018 in Tauranga

Oral Determination: 27 September 2018

Record of Determination: 28 September 2018

**RECORD OF ORAL DETERMINATION
OF THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Maree Cooper was unjustifiably dismissed by Phoenix Publishing Limited.**
- B. Phoenix Publishing Limited is ordered to pay to Maree Cooper the following amounts within 14 days of the date of this determination:**
- a. \$1,884.61 gross for monies lost as a result of her personal grievance;**
 - b. \$4,000 under s 123(1)(c)(i) of the Employment Relations Act 2000;**
 - c. \$5,833.33 gross for unpaid wages;**
 - d. \$2,484.09 gross for unpaid holiday pay;**
 - e. \$989.16 for unpaid expenses.**

C. Phoenix Publishing Limited must pay \$10,000.00 by way of penalty under s 134 of the Employment Relations Act for breaching the employment agreement. 75% of that amount (\$7,500) is to be paid to Maree Cooper. The remaining 25% (\$2,500) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

D. Payment of the penalty must be paid within 28 days of the date of this determination.

E. Costs are reserved.

Employment Relationship Problem

[1] Phoenix Publishing Limited (Phoenix) is the publisher of various magazines and digital media including Ze Inspired Magazine and Ze Home. Maree Cooper was employed by Phoenix on 26 June 2017 as its Key Account Manager for Specialist Titles.

[2] On 12 November 2017 Mrs Cooper tendered her resignation. Thereafter, on 24 November 2017 she was informed by Phoenix that her employment was ending that day. She claims she was dismissed and this was unjustified. She claims unpaid wages, unpaid holiday pay entitlements, unpaid expenses, lost wages for the remainder of her notice period, compensation for hurt and humiliation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a penalty for Phoenix' breaches of her individual employment agreement.

[3] Phoenix denies unjustifiably dismissing Mrs Cooper. It says it believed Mrs Cooper did not intend to work out her notice period and it was formalising its agreement to this when it sent its letter of termination to Mrs Cooper on 24 November 2017. It denies Mrs Cooper suffered lost wages or any hurt and humiliation. It accepts it owes outstanding wages to Mrs Cooper.

[4] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- a) Was Mrs Cooper dismissed?
- b) If so, was this justified?
- c) If Mrs Cooper was unjustifiably dismissed, what remedies should be awarded?
- d) If any remedies are awarded, should they be reduced for blameworthy conduct by Mrs Cooper that contributed to the situation giving rise to her grievance?
- e) Are any wage arrears and/or holiday pay and/or Kiwisaver owing to Mrs Cooper for the period up to her termination?
- f) Did Phoenix breach the individual employment agreement? If so, should a penalty be ordered?
- g) Should either party contribute to the costs of representation of the other party?

Issue One: Dismissal?

[6] On 14 November 2017 Mrs Cooper emailed Bronwyn Rawson, the sole director of Phoenix, raising concerns that her PAYE and Kiwisaver deductions had not been paid by Phoenix to IRD.

[7] On 24 November 2017 Mrs Cooper phoned Ms Rawson. She raised concern that she had not received payment of her wages that were usually paid on or before the morning of the 24th of each month. She explained to the Authority that she was concerned that she would not be paid this sum as she was aware of other employees who had not been paid their final salary or holiday pay and had to take legal action to recover the monies owed to them. She said she told Ms Rawson that she could not expect her to keep working if she did not receive payment.

[8] At 3.04 pm that day Mrs Cooper received the following email:

This is to inform you the business is making this your last day.

The business has not had any response from yourself via email or by phone regarding your days results. There has been a lack of activity over the last two months, that is clearly identified in your numbers, emails and phone records. It is costing the business to employ you.

The only communication we have received is via email/ph, discussing your pay, which as it is due on the 26th makes it clean in terms of your exit. The business finds the above lack of responsiveness untenable and feels you have abandoned your position.

We have instructed our accountants to make full and final pay Wednesday. Which should give you time to get your laptop and phone returned to the business (this is to be couriered and all IP must be accounted for, nothing is to be deleted) and forward the business any additional expenses for approval. You will be forwarded a courier address.

Your final payment will be in accordance with your contract.

Have a lovely weekend and I am sorry it has come to this, but clearly your efforts are now being utilised elsewhere.

[9] Mrs Cooper responded by way of a two page letter on 27 November 2017 denying she had abandoned her employment and raising a personal grievance for unjustified dismissal and unjustified disadvantage. She pointed out that she had been working up to and including the time she spoke to Ms Rawson on 24 November and provided examples of the work she had undertaken. She also pointed to her phone being cut off on 14 November as Phoenix had not paid the phone bill.

[10] Having heard from the parties, I am satisfied that Mrs Cooper did not resign from her employment and Phoenix did not intend to pay Mrs Cooper in lieu of her notice period. For the reasons that shall follow I am also satisfied that she did not abandon her employment.

- a. Mrs Cooper had an application on her mobile phone that recorded her mileage between customer visits. The trip logs that I viewed show Mrs Cooper was visiting out of town customers on 20 and 22 November 2017.
- b. Mrs Cooper recorded her work activities on a google document that was accessible remotely by Phoenix. I viewed this document on Ms Rawson's laptop. This showed a daily account of the work undertaken by Mrs Cooper during the month of November 2017 including a list of the customers she had met with on 20 and 22 November 2017. The spreadsheet was last updated on 23 November 2017.

- c. Mrs Cooper was in regular contact with Ms Rawson during the period up to 24 November 2017.

[11] I find Phoenix dismissed Mrs Cooper from her employment on 24 November 2017.

Issue Two: Was the dismissal justified?

[12] The onus falls upon Phoenix to prove that its actions in dismissing Mrs Cooper on 24 November 2017 were justified.

[13] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Phoenix, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[14] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether having regard to the resources available, Phoenix sufficiently investigated the allegations, raised the concerns with Mrs Cooper, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[15] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mrs Cooper being treated unfairly.¹

[16] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

[17] I am satisfied the test of justification has not been satisfied.

[18] There were a number of serious defects in the process followed by Phoenix that resulted in Mrs Cooper being treated unfairly. Phoenix did not meet any of the mandatory considerations set out in s 103A(3). There was no investigation before

¹ Section 103A(5), Employment Relations Act 2000

dismissal. There was no rising of any concerns before dismissal. There was no opportunity afforded to Mrs Cooper to respond to any concerns before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in Mrs Cooper being treated unfairly.

[19] Phoenix' decision to terminate Mrs Cooper's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. I accordingly find that she was unjustifiably dismissed from her employment with Phoenix and is entitled to remedies.

Issue Three: Remedies

Lost wages

[20] Section 123(1)(b) of the Act provides for the reimbursement by Phoenix of the whole or any part of wages lost by Mrs Cooper as a result of her grievance. Section 128(2) provides that I must order Phoenix to pay Mrs Cooper the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration. However, I have a discretion to award greater compensation for remuneration lost than three months' equivalent.²

[21] Mrs Cooper claims wages for the period 26 November 2017 to 8 December 2017, being the remainder of her notice period. However, this period does not take into account a period of 3 days where Mrs Cooper had previously sought, and been granted, 3 days unpaid leave to attend a family commitment. Mrs Cooper acknowledged that she attended this commitment. I am satisfied that lost remuneration for this 3 day period was not attributable to the personal grievance but recovery for the remainder of her notice period is warranted.

[22] Mrs Cooper has lost 1 week and 2 days' wages. Using her salary of \$70,000 per annum this equates to a loss of \$1,888.61 gross.

[23] Phoenix is ordered to pay to Mrs Cooper the sum of \$1,888.61 gross within 14 days of the date of this decision.

² s 128(3).

Section 123(1)I(i) Compensation

[24] Mrs Cooper claims the sum of \$4,000 as compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[25] Mrs Cooper and her husband gave evidence of the distress that Mrs Cooper suffered following her termination. Mrs Cooper said she was shocked and distressed when she was unexpectedly terminated. She struggled to pay her bills and faced embarrassment having to explain this to her creditors. She suffered sleepless nights and health issues. She regularly found herself crying in the weeks following her termination and her marriage was placed under strain.

[26] I am satisfied in the foregoing circumstances that Mrs Cooper suffered humiliation, loss of dignity and injury to her feelings. I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum that she has claimed of \$4,000.

[27] Phoenix is ordered to pay to Mrs Cooper the sum of \$4,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue Four: Contribution?

[28] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.³

[29] I am satisfied that Mrs Cooper did not contribute to her personal grievance. There is no evidence before the Authority of any issues with Mrs Cooper's work performance. The raising of this today by Ms Rawson appears to me to be a belated attempt by Phoenix to justify Mrs Cooper's unjustified dismissal. I make no deduction to the remedies I have awarded.

³ s 124.

Issue Five: Are any wage arrears and/or holiday pay and/or Kiwisaver owing to Mrs Cooper for the period up to her termination?

[30] The terms of Mrs Cooper's employment were recorded in a written individual employment agreement (IEA) dated 23 August 2017. The material terms of the IEA were these:

8. Place of work and associated travel

8.3 There may be occasions when the Employee travels directly from home to a client or other location to carry out business. In those instances, the Employer will meet the costs associated with travel from home to the place of the business activity as defined in Schedule 1.

11. Remuneration

11.1.1 The Employee's base salary is set out in Schedule 1 to this Agreement.

11.1.2 The Employee's salary payments shall be paid monthly in arrears by automatic payment into a bank account nominated by the Employee.

12. Vehicle running expenses

12.1 The Employee will provide their own vehicle for work purposes. In that instance:

- The Employee shall be reimbursed for business running by monthly expense claim at the appropriate Employer rate (that the Employer may adjust from time to time based on evidence of actual running costs for vehicles similar to those approved).

15. Superannuation – Kiwisaver

15.1 The Employee agrees that their base pay includes all compulsory employer contributions to their KiwiSaver. The Employer's contribution will be deducted from their pay, as required, currently at a rate of 3%. The Employee must decide how much their own contributions will be (3%, 4% or 8%) and the Employer will also deduct this from their pay. If the Employee does not specify this, the default rate is 3%.

Schedule 1

Travel costs The \$/km reimbursement rate shall be as advised by the IRD, paid monthly, as set out in the Employer's Vehicle Policy.

Fixed

Remuneration: You will be paid an annual base salary of \$70,000.00 gross.

Wage Arrears

[31] I have viewed Mrs Cooper's bank statements and the payslips provided by Phoenix. Having viewed these documents, and taking into account Phoenix' admission that wage arrears are owing to Mrs Cooper, I am satisfied that wage arrears totalling \$5,833.33 gross are owing to Mrs Cooper for the period from 26 October 2017 to 24 November 2017.

[32] Phoenix is ordered to pay to Mrs Cooper the sum of \$5,833.33 gross for unpaid wages within 14 days of the date of this decision.

Holiday pay

[33] There is no dispute that Mrs Cooper was not paid holiday pay for the duration of her employment.

[34] Calculation of Mrs Cooper's annual leave entitlements must be made in accordance with s 23 of the Holidays Act 2003. This section applies where the employment of an employee comes to an end and the employee is not entitled to annual holidays because they have worked for less than 12 months. In such a case an employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount paid to the employee for annual holidays taken in advance.

[35] During her employment Mrs Cooper earned a sum of \$29,166.65. She did not take any holidays in advance. 8% of this sum equals \$2,333.33.

[36] Mrs Cooper also claims holiday pay on her lost wages. I have found that she is owed \$1,884.61. Multiplying this sum by 8% I reach a figure of \$150.76.

[37] Phoenix is ordered to pay to Mrs Cooper the sum of \$2,484.09 gross for unpaid holiday pay within 14 days of the date of this decision.

Expenses

[38] Mrs Cooper was not paid for the vehicle running expenses that she incurred during the months of October and November 2017. The agreed total of these expenses is \$989.16 being calculated as follows:

- a) 31.10.17 \$311.00
- b) 23.11.17 \$458.00
- c) 28.11.17 \$220.16

[39] In a payslip issued by Phoenix it records this sum as payable to Mrs Cooper. No dispute as to payment of this sum has been raised. Phoenix is ordered to pay to Mrs Cooper the sum of \$989.16 for unpaid expenses within 14 days of the date of this decision.

Kiwisaver

[40] Phoenix has now accounted to IRD for all outstanding Kiwisaver contributions. However, these payments do not include its contribution arising from the wage arrears owing to Mrs Cooper. Mrs Cooper claims recovery of these contributions.

[41] The IEA is clear that Mrs Cooper's base salary includes all of the compulsory employer contributions. I therefore decline to order Phoenix to pay any monies to Mrs Cooper for outstanding Kiwisaver.

Interest

[42] Mrs Cooper claims interest on the arrears of wages (\$5,833.33), holiday pay on the wage arrears (\$2,333.33) and expenses (\$989.16). In the circumstances I consider it appropriate to order interest is payable by Phoenix on these amounts from 24 November 2017.

[43] Phoenix is ordered to pay interest on the combined sum of \$9,155.82 from 24 November 2017 continuing until payment at the applicable rate of 5% per annum.⁴ Payment of this sum must be made within 14 days of the date of this determination.

Issue Six: Breach of IEA/Penalty

[44] Pursuant to Section 134 of the Act a party who breaches an IEA is liable to a penalty under the Act. The quantum of any penalty is to be determined using the four

⁴ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4.

step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.⁵

Step 1: Nature and number of breaches

[45] Step one is to identify the number of breaches and the maximum penalty applicable. In this case Mrs Cooper pleads that Phoenix breached Clause 11.1 of the IEA by failing to pay her the wages due to her on 24 November 2017 for the period from 26 October 2017 to 24 November 2017. This means it is liable to a maximum penalty of \$20,000.

Step 2: Severity of the Breach

[46] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[47] Factors to be taken into account when considering the first part of Step 2, aggravating factors, include whether the breach or breaches were committed knowingly and/or calculatedly, the duration of the breach or breaches, the number of persons affected adversely, the extent of any departure from the statutory requirements and any history of previous breaches. The second part of step 2 is to consider any mitigating circumstances, whether compensation has been paid and/or steps taken to mitigate the effect of the breach.

[48] I find Phoenix knowingly and/or calculatedly breached the IEA. In reaching this view I have taken into account similar cases that have come before the Authority since 2016 where similar issues of non-payment of wages and expenses have been claimed by other employees and Phoenix has been found liable. In 2017 and 2018 alone there were 5 cases before the Authority, namely:

- a) *Thompson v Phoenix Publishing Limited* - Phoenix was found to have unjustifiably dismissed and disadvantaged Ms Thompson. Wage arrears were also found to be payable to her.⁶
- b) *Amir Aghel Masjedi v Phoenix Publishing Limited* - Phoenix was found to have breached a settlement agreement by failing to make payment of

⁵ [2016] NZEmpC 143

⁶ [2018] NZERA Auckland 217

monies owing for hurt and humiliation compensation and holiday pay arrears. The Authority ordered Phoenix to pay penalties totalling \$10,000 for its two breaches.⁷

- c) *Lennon v Phoenix Publishing Limited* - Phoenix was found to owe Ms Lennon for unpaid wages and holiday pay covering the period of her employment. It also made deductions from her pay that was not paid to her KiwiSaver account.⁸
- d) *McCallum v Phoenix Publishing Limited* - Ms McCallum was not paid for her notice period. Phoenix was ordered to pay this sum together with Ms McCullum's unpaid holiday pay entitlements and her unpaid expenses.⁹
- e) *Bicknell v Phoenix Publishing Limited* - Ms Bicknell was not paid wage arrears, holiday pay and expenses. The Authority ordered the arrears and expenses to be paid.

[49] It is also noteworthy that Phoenix has accepted liability for payment of the wage arrears since November 2017 and yet has failed, without excuse, to pay the arrears to Mrs Cooper. It has expressed no remorse for its failure to pay the wages despite being afforded with an opportunity to do so during the investigation meeting. It also refused to attend mediation leaving Mrs Cooper with no choice but to pursue her claim for wage arrears through the Authority. In explanation Ms Rawson repeatedly advised the Authority today that as the Company was being sued they decided they "might as well wait as there was no upside in paying earlier".

[50] I am satisfied there are no mitigating circumstances to warrant a reduction of any potential penalty. Ms Rawson was aware of the Company's contractual and statutory obligations to pay wages and decided to ignore these. I do not find her explanation that she understood a settlement of all issues was necessary before payment of wage arrears was made credible. The Company could be under no doubt of its obligations to pay wages as they fall due especially after it had appeared before the Authority on similar issues in the past. In addition it represented, on 4 occasions between 24 November 2017 and 7 February 2018, that it intended to pay Mrs Cooper.

⁷ [2018] NZERA Auckland 161.

⁸ [2018] NZERA Wellington 48 at [17].

⁹ [2017] NZERA Auckland 171.

Its agreement to pay was not conditional on a full and final settlement. I therefore make no allowance for mitigating circumstances.

[51] I assess the degree of severity at 100%.

Step 3: Ability to pay penalty

[52] Step 3 is an assessment of Phoenix' ability to pay. Ms Rawson said the Company is solvent and will have no difficulty paying a penalty. I conclude that this stage has a neutral effect on my calculation.

Step 4: Proportionality of penalty

[53] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is \$10,000. This sum is proportionate to the breach and is sufficient to act as a deterrent to Phoenix.

[54] Adopting the approach applied by Judge Inglis in *Lumsden* I consider it appropriate that part of this penalty be paid to Mrs Cooper as she has suffered the impact of the breach and has been obliged to take steps to enforce her rights. I apply the same ratio of payment as Judge Inglis to reflect this.

[55] Phoenix is ordered to pay \$10,000 by way of penalty for its breach of the IEA. I direct that 75% of that amount (\$7,500) is to be paid to Mrs Cooper. The remaining 25% (\$2,500) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[56] Payment of the penalty is to be paid within 28 days of the date of this determination.

Costs

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[58] If they are not able to do so and an Authority determination on costs is needed Mrs Cooper may lodge, and then should serve, a memorandum on costs within 14

days of the date of issue of the written determination in this matter. From the date of service of that memorandum Phoenix will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[59] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Jenni-Maree Trotman
Member of the Employment Relations Authority

¹⁰ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].