

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 104
5340259

BETWEEN SORA COWLES
 Applicant

A N D KSG CORP LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Stephanie Moses, Advocate for Applicant
 Karl Gill, Advocate for Respondent

Investigation Meeting: 7 July 2011

Date of Determination: 15 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sora Cowles was employed by KSG Corp Limited (KSG) as a part-time cleaner at Countdown Blenheim. Her duties involved cleaning, a supervisory role in relation to two and later one staff member and providing timesheets of hours worked by staff to the employer. Ms Cowles said that she was party to a written employment agreement with KSG although she did not have a copy of that. At the same time as investigating Ms Cowles claim I also investigated that of another cleaner at Countdown Blenheim employed by KSG who Ms Cowles supervised, Alexander Reed Thomson. Ms Cowles said that her employment agreement was essentially the same as his but that she worked 3 hours each day from Monday to Sunday between 4.00am and 7.00am cleaning at the supermarket. Ms Cowles was paid an hourly rate of \$15.50.

[2] On 13 December 2009 Ms Cowles gave two weeks written notice by email to KSG Corp commencing on 14 December 2009. She advised in her email that her last day of employment would be Sunday 27 December 2009 and she asked KSG to

ensure her accrued annual leave was included in her final pay that was due on 31 December 2009.

[3] Ms Cowles said that she did not get a response from KSG to her written resignation but she continued to work as usual for the notice period. She did not work on Christmas Day but did on Boxing Day. She forwarded the hours that she worked to KSG over the notice period. Ms Cowles was paid for working three hours on Monday 14 December 2009 but did not receive payment for the other days she worked and was not paid her holiday pay.

[4] Ms Cowles went to see Ms Moses at the Marlborough Community Law Centre. Ms Moses wrote to KSG on two occasions, on 12 January and 1 February 2010, requesting payment for Ms Cowles. She recorded in a third letter to KSG dated 23 February 2010 that on 16 February 2010 someone telephoned her from KSG and said that KSG had lost the contract to clean Countdown Blenheim on 14 December and that therefore KSG were not required to pay Ms Cowles for the hours she worked for the remainder of the notice period or holiday pay.

[5] Ms Moses referred the matter to a Labour Inspector in Palmerston North as KSG's registered office was in Palmerston North.

[6] On 16 February 2011 the Labour Inspector wrote to Ms Moses and advised that because there was a dispute about Ms Cowles' employer that would need to be determined by the Employment Relations Authority.

[7] A statement of problem was duly lodged on Ms Cowles behalf with the Employment Relations Authority. KSG lodged a statement in reply that was received by the Authority on 27 April 2011. KSG said in its reply that it had fulfilled all its obligations to Ms Cowles up to 14 December 2009 after which time Ms Cowles was then employed by another employer as KSG had suddenly lost its contract and she should look to that employer for payment. It was not clear from the reply who KSG considered the employer was.

[8] The Authority held two telephone conferences with Ms Moses and Karl Gill the Managing Director of KSG Limited. The first telephone conference was on

13 May 2011. There was a discussion about the claim and it was agreed that Mr Gill would make some enquiries to see if Ms Cowles could simply be paid what she was owed for working after 14 December 2009 and holiday pay. Mr Gill also agreed that the company would pay holiday pay owing to Ms Cowles up to 14 December 2009 and that he would provide some other information to Ms Moses. A further telephone conference was scheduled for 30 May 2011 in the event that the matter could not be resolved.

[9] On 30 May 2011 the Authority was advised that the matter was not resolved although holiday pay had been paid up to 14 December 2009. An investigation meeting date was set by agreement for 7 July 2011 in Blenheim and a timetable was advised to the parties for an exchange of statements of evidence.

[10] The Authority received statements of evidence from Ms Cowles, Mr Gill and Jason Aylward who was Manager for KSG for the South Island stores but now owns his own cleaning business. Mr Gill indicated in his statement that there was nothing more that he could add by being present at the investigation meeting but that he could be available by telephone. There was therefore no attendance at the investigation meeting by any person on behalf of KSG. The Authority heard evidence from Ms Cowles.

[11] Given the nature of the problem, the statements from Mr Gill and Mr Aylward and the considerable amount of documentation the Authority did not consider telephone contact with Mr Gill would assist it in investigating and determining this employment relationship problem. Mr Aylward did not attend at the investigation meeting.

[12] Ms Cowles confirmed that her claim was for \$753.30 gross made up as follows:

- Unpaid wages for hours worked from 15–18 December 2009 at 3 hours per day being $12 \times \$15.50 = \186.00 .
- Unpaid wages for hours worked from 19–20 December 2009 at 3.5 hours per day being $7 \times \$15.50 = \108.50 .

- Unpaid wages for hours worked from 21-24 December 2009 at 3 hours per day being 12 hours x \$15.50 = \$186.00.
- Unpaid wages for hours worked on 26 December 2009 at time and a half being 3 x \$23.25 = \$69.75.
- Unpaid wages for hours worked on 27 December 2009 being 3.5 hours x \$15.50 = \$54.25
- Payment for Christmas day as a day Ms Cowles would have worked but for it being a statutory holiday in the sum of \$46.50 being 3 x \$15.50 = \$46.50.
- One lieu day for working on Boxing Day being 3 hours x \$15.50 = \$46.50
- Holiday pay on the above gross amounts being 8% of \$697.50 = \$55.80.

[13] There was no dispute as to the amounts claimed. I accept that Ms Cowles is owed wages for working for twelve days including payment for one statutory day that she would otherwise have worked and holiday pay on gross pay for what she should have received over that period.

[14] The issue for the Authority is who employed Ms Cowles whilst she was working out her notice.

Who employed Ms Cowles after 14 December 2009?

[15] Ms Cowles used to undertake the cleaning at Blenheim Countdown as an employee of Spotless. On 25 August 2009 she received notice from Spotless that another cleaning company called OCS would provide the cleaning services as of 20 September 2009. She was given information about an election to transfer to OCS and indicated that she would agree to the transfer.

[16] On Friday 18 September 2009 Ms Cowles was contacted by someone from KSG asking if she was interested in transferring her employment to them. Ms Cowles advised that she was interested and she was interviewed at the Manhattan Dairy in Blenheim by two representatives from KSG on Sunday 20 September 2009 and it was agreed that she would start work the following day. She was provided with a copy of an employment agreement at some stage during her first week that she signed and returned.

[17] Aside from a few days at the start of employment Mr Cowles never saw anyone from KSG and has never met Mr Gill. Ms Cowles said that she would ask for cleaning products but no-one would get back to her and she felt that things were not professional.

[18] After Ms Cowles gave notice of her resignation and was working out her two weeks a man came into the store and told her that he was *Warren the new worker*. Mr Gill in his statement of evidence pointed out the words used in Ms Cowles statement of problem *someone said they were taking over the cleaning*. I accept that there could have been an exchange of that nature. Ms Cowles recalled Warren came into the Countdown supermarket on a couple of other occasions whilst she was working out her notice but that he never stayed for the full three hours. Importantly Ms Cowles was clear that she was never informed by Warren that he was her new employer and Warren took no details from Ms Cowles. All that Ms Cowles knew about Warren was his first name.

[19] Mr Gill and Mr Aylward suggested in their statements of evidence that telephone calls had been made to Ms Cowles advising her of the change of employer. Ms Cowles categorically denies that any such call was made to her. Ms Cowles said that neither of the two telephone numbers circled in the Telecom account attached to Mr Gill's statement were hers. Ms Moses said that the second number circled in the Telecom account was a number supplied to her by Mr Gill following a telephone conference with the Authority as the number of a person who could have been Ms Cowles' employer and therefore responsible for payment.

[20] Ms Cowles' said that no-one from KSG contacted her about any change of employer and Ms Cowles said that she would not have wanted to transfer her employment in any event as she was simply working out her notice.

Conclusion

[21] There was no evidence that Ms Cowles employment was terminated by KSG during her notice period and there was no evidence to support that the man *Warren* ever offered her employment and that Ms Cowles agreed to such employment. The

questions that Mr Gill puts as requiring to be considered by the Authority do not address these fundamental matters but rather are commercial matters about which Ms Cowles had no knowledge and control. Ms Cowles I find was not advised that her employer was no longer KSG and she did not agree to a change to her employer from 14 December 2009 from KSG to a man called *Warren*.

[22] Mr Gill referred both in telephone conferences and in his statements of evidence to the unfairness of having to pay money when KSG was not paid for Ms Cowles' work because it suddenly lost its contract to clean Countdown Blenheim. KSG had an employment agreement with Ms Cowles. It had obligations to treat her fairly in accordance with that employment agreement. Such fairness would have involved talking to Ms Cowles and advising her that KSG had lost the contract. I am not satisfied anyone from KSG ever talked to Ms Cowles about what had occurred and therefore in accordance with her written notice of resignation Ms Cowles continued to work her notice out. Ms Cowles I find remained employed by KSG as she did so and KSG was therefore her employer and responsible for payment for work performed during the notice period.

Determination

[23] I find in conclusion that Ms Cowles was employed by KSG whilst she worked out her two week notice period. KSG is liable for the payment to Ms Cowles for her unpaid wages, payment for one statutory holiday, payment for one lieu day and holiday pay.

Orders

[24] I order that KSG Corp Limited pay \$753.30 gross to Sora Cowles for the following:

- Unpaid Wages \$604.50 gross
- Payment for Statutory Day \$46.50 gross
- Payment for one lieu day \$46.50 gross
- Holiday Pay of \$55.80 gross

Interest

[25] It is fair in the circumstances of this case that there be an award of interest on the sum of \$753.30 gross that Ms Cowles should have been paid. I find that interest should run from the date Ms Moses sent her first letter to KSG on 12 January 2010 seeking payment.

[26] I order interest be payable on the sum of \$753.30 gross from 12 January 2010 until the date of payment at the rate of 5% being the rate prescribed under section 87 (3) of the Judicature Act 1908.

Costs

[27] Ms Cowles is entitled to reimbursement for her filing fee of \$71.56 and I so order.

Helen Doyle
Member of the Employment Relations Authority