**This determination includes an order prohibiting publication of certain evidence**

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2014] NZERA Auckland 415
5463557

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| | BETWEEN | JENNIFER CROOKES<br>Applicant |
| | AND | PHOENIX ROSE LIMITED<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Applicant in person<br>Rosemary Hunt for the Respondent |
| Investigation Meeting: | 7 October 2014 |
| Determination: | 9 October 2014 |

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## DETERMINATION OF THE AUTHORITY

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**A. By operation of s28 of the Holidays Act 2003 Jennifer Crookes became entitled to payment for annual holidays although Phoenix Rose Limited (PRL) considered such payments were included in her hourly rate of pay. Ms Crookes was also entitled to more pay for work on public holidays than she received and to be paid for alternative holidays she was not given.**

**B. The manner in which PRL ended Ms Crookes' employment did not meet the statutory test of justification.**

**C. Within 28 days of the date of this determination, PRL must pay Ms Crookes the following sums in settlement of her personal grievance and her outstanding pay entitlements:**

**(i) $864.00 as wage arrears for notice; and**

**(ii) $3,000.00 as compensation for humiliation, loss of dignity and injury to feelings; and**

**(iii) $4,998.69 as wage arrears for holiday pay; and**

**(iv) $1,143.00 as wage arrears for public holidays and alternative holidays; and**

**(v) $71.56 in reimbursement of the fee she paid to lodge this matter in the Authority.**

**Employment relationship problem**

[1] Jennifer Crookes worked from mid-October 2011 to April 2014 as a sales assistant in a women's clothing store operated by Phoenix Rose Limited (PRL). The Authority has investigated her claim that she was dismissed without notice and without reasons and had not received her minimum entitlements to pay for holidays and public holidays.

[2] In its statement in reply PRL denied Ms Crookes was dismissed. It said she was employed on a casual basis and was told that her hours were reduced because the business was very quiet. It also said Ms Crookes' pay rate of $18 an hour included pay for annual leave, public holidays and sick leave.

**Order prohibiting publication of some evidence**

[3] By Minute of 25 August 2014 I made an order prohibiting publication of information from copies of a work 'day book' or diary PRL provided as part of the evidence for the investigation of this matter. The diary pages included customer names, values of orders made, stock purchased and the record of daily takings of PRL's business so was commercial information that should be protected from potential use for purposes other than the proceeding before the Authority. The order remains in place and is confirmed by this determination.

**Investigation and issues**

[4] Ms Crookes, PRL's director Rosemary Hunt and PRL's accountant Roger Street each gave oral evidence under oath at the Authority's investigation meeting.

They had each lodged a number of documents providing background information and their views on various events. Those documents included pay records and copies of text exchanges on relevant dates between Ms Crookes and Ms Hunt.

[5] In preparing this determination I considered all the information provided but, as permitted by s174 of the Employment Relations Act 2000 (the Act), have not set out a record of all the evidence received. Instead this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[6] The matters for determination were:

(i) Whether Ms Crookes' employment was on a casual or on-going basis; and

(ii) Whether her hourly pay rate included any entitlements to pay for annual leave and public holidays; and

(iii) Whether Ms Crookes' employment was terminated by PRL (during or after April 2014) and, if so, whether that occurred on a basis that was justified or unjustified; and

(iv) What remedies, if any, were required or appropriate as a result of conclusions reached on those matters.

**Employment status**

[7] The evidence from Ms Crookes, Ms Hunt and the pay records established the nature of Ms Crookes' employment was on an on-going, part-time basis rather than truly casual. She regularly worked two full days and two half days each week with some additional days or hours when the demands of the business required it (such as on some Sundays). She was sent home early on some days when the shop was quiet but was happy to do that on the basis that she would work longer during busier parts of the shopping seasons. There was no formal roster but she knew which days to come in. Those days were adjusted by discussion and agreement from time to time over the two-and-a-half year period she worked in the store. Her two full days were arranged so that the store's other sales assistant, who worked full-time, could have two days off each week.

**The hourly pay rate and holiday entitlements**

[8] The evidence of Ms Hunt and Mr Street was starkly different from that of Ms Crookes about whether she was told at the outset of her employment that her hourly pay rate of $18 was intended to, and would, cover any entitlement she might accrue for annual leave and for public holidays. Ms Hunt insisted she had made that clear in 2011 when she rehired Ms Crookes (who had worked in the store some years previously). Mr Street said he also recalled having twice discussed that topic with Ms Crookes during her employment, including on one occasion asking her whether she understood that her pay rate did cover holiday entitlements. He could not recall when those two discussions happened.

[9] Ms Crookes accepted she had talked with Mr Street about whether she should be paid more than her usual $18 an hour for work on public holidays but was equally adamant that neither Mr Street nor Ms Hunt had told her that the rate covered all holiday entitlements. She said Mr Street had first told her that in a telephone call on 4 June 2014 (which was after she lodged her claim in the Authority).

[10] In Ms Crookes' account Ms Hunt made no mention of not paying holiday pay until January 2014. She said that when she asked to take two days annual leave in mid-January to celebrate her seventieth birthday, Ms Hunt agreed but said that Ms Crookes would not get holiday pay for those days off.

[11] The conflict of evidence could have been easily resolved if the disputed term were recorded in a written employment agreement, of the kind required by the Act.[1] Mr Street had recommended some years earlier that PRL provide written employment agreements but, as she emphasised in her oral evidence, Ms Hunt had made the decision not to do so as she considered she should be able to operate on a basis of trust rather written terms.

[12] The operation and effect of s28 of the Holidays Act 2003 (the HA) made it unnecessary to resolve the conflict of evidence about whether there was any oral agreement on what the hourly rate paid to Ms Crookes covered. The HA sets certain

[1] Section 63A(2) and 64(1) and 65(1) of the Employment Relations Act 2000 (the Act).

limits on the circumstances in which the value of annual holiday pay may be included with a worker's regular pay. The relevant criteria in this matter were whether Ms Crookes worked on such an intermittent or irregular basis that providing annual leave would be impractical, whether she had agreed to such an arrangement in her employment agreement, and whether such annual holiday pay was an identifiable component of her regular pay. As Mr Street fairly conceded, the evidence showed Ms Crookes' work was regular not intermittent, there was no written employment agreement showing what arrangement was made about the pay rate, and the pay records and her pay slips showed no separate, identified component for annual holiday pay.

[13] As a result of those circumstances, the provisions of s28(4) of the HA had to be applied to Ms Crookes' claim. PRL had incorrectly paid annual holiday with her pay (because it did not meet the criteria already noted) and Ms Crookes' employment had continued for 12 or more months so she was entitled to annual holidays despite PRL already having made payments that it considered included holiday pay. Because the HA provides statutory minimum entitlements, and its provisions allowing variation of how those entitlements were paid had not been properly followed by PRL, Ms Crookes' entitlement to holiday pay on top of her hourly rate of $18 had to be confirmed.

[14] PRL pay records showed Ms Crookes earned $62,483.70 during her employment from the weeks ending 16 October 2011 to 20 April 2014. She received no paid annual leave in that period. Her holiday pay entitlement on those earnings, calculated on the basis of eight per cent of her gross earnings, was $4998.69.

[15] Mr Street also confirmed Ms Crookes worked on seven public holidays during her employment. She received her ordinary hourly rate for those days of work and no paid alternative holiday. The pay record information was not sufficiently detailed to identify the exact hours for which she was entitled to an extra 50 per cent loading for work on those public holidays or the hours she should have been paid on alternative holidays earned but not provided. I have taken six hours as the basis (averaging across some full-time and some part-time days) for making those calculations. As a result Ms Crookes, if paid correctly at the time, would have received $378 more for

work on public holidays and $765 when taking alternative holidays – that is a total of $1143.

**The end of the employment**

[16] The last day Ms Crookes worked in the store was Tuesday, 15 April 2014. Before the end of the week Ms Hunt left her a phone message saying that Ms Hunt would work in the store over the upcoming Easter weekend, including the two public holidays of Good Friday and Easter Monday. In that message, and possibly on another day in the following week, Ms Hunt had told Ms Crookes that the business was in a bad state and so quiet that Ms Hunt could not afford to pay the wages and felt she needed to work more hours in the store herself.

[17] As a result Ms Crookes did not work in the following two weeks. She contacted Ms Hunt on 24 April about arrangements to pay her wages for the previous week into her bank account. She next sought contact with Ms Hunt on 5 May to ask whether the shop was "*picking up*" and "*am I still working at phoenix rose*". On 9 May Ms Crookes went to the store to pick up some personal belongings but did not see Ms Hunt in the hour or so that she stayed there talking with the other sales assistant. On 14 May Ms Crookes sent a text asking for written notice if she was no longer working for PRL. In a text in reply Ms Hunt wrote the following: "*The business unfortunately requires me to step in & do the hours. This is a very slow time.*" In another text shortly after she said she would arrange for Mr Street to email written notice to Ms Crookes (although that was not subsequently done).

[18] In the course of answering questions at the Authority investigation Ms Hunt gave very frank evidence about her decision at that time and the basis for it. She referred to an incident either one or two weeks before the Easter weekend where she confronted Ms Crookes over a concern that Ms Crookes had contacted a regular customer with a suggestion that the customer could find and buy a coat she wanted at another store. Ms Hunt was annoyed that Ms Crookes appeared to be directing potential revenue for the store elsewhere. She also had some other concerns about whether Ms Crookes was sufficiently attentive to her work.

[19] Ms Hunt's evidence established that she had genuine business reasons to reduce the store's wage bill by doing more work herself and ending Ms Crookes' employment – that is Ms Crookes' position had become surplus to PRL's requirements or, in short, redundant while the trading conditions at that particular time continued. However Ms Hunt's evidence about her other concerns over Ms Crookes' work meant she also had what have been described in the case law as 'mixed motives' for her decision to end Ms Crookes' employment.[2] And her evidence did not establish Ms Hunt had openly addressed those concerns with Ms Crookes earlier in a way that set clear criteria or targets and provided Ms Crookes with an opportunity to improve before any further decisions about her employment were made.[3] In that sense Ms Hunt's actions did not meet the good faith requirements of the Act to be active and constructive in maintaining a productive employment relationship.[4] Instead, as Ms Hunt candidly stated in her oral evidence, she had lost trust in Ms Crookes and decided the employment had to end. In reaching that decision, however, Ms Hunt's action failed the test of justification set by s103A of the Act because that test asks whether an employer has given a worker a reasonable opportunity to respond to the employer's concerns before dismissing the worker. Ms Hunt had not met the statutory standard for what a fair and reasonable employer could have done in all the circumstances at the time and, for that reason, Ms Crookes had a personal grievance for which the Authority had to consider remedies.

**Remedies**

[20] I considered whether PRL should be ordered to reimburse Ms Crookes for around 11 weeks wages she lost from when her employment with PRL ended, the week after Easter 2014, through to when she started a new job as a sales assistant at a nearby clothing store on 7 July 2014. She provided evidence of having searched for work in that period where she had no other income, apart from her superannuation.

[21] In assessing the period of loss I also had to consider what have been called the 'contingencies of life' and whether, had Ms Hunt followed a fair process in making

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[2] *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw) at 7.
[3] *Trotter v Telecom* [1993] 2 ERNZ 659 (EC) at 681.
[4] Section 4(1A) of the Act.

her decision, Ms Crookes may have been dismissed in any event.[5] Ms Crookes fairly acknowledged how quiet the business was and, at the time of being told not to work the Easter weekend, accepted Ms Hunt could replace her to save wages. In that sense her position was genuinely redundant, at least in the short term. Accordingly, and without considering whether Ms Hunt might otherwise have been able (if carried out fairly) to dismiss Ms Crookes for other performance concerns, I could not say Ms Crookes would not have lost those wages anyway. On that basis I have made no award for reimbursement of lost wages.

[22] If the termination of her employment had been carried out fairly however Ms Crookes would have been entitled to either work out or be paid a notice period. With no written employment agreement setting the notice period, a reasonable period of notice is implied. Commonly such an implied notice period is the length of the pay period, which in Ms Crookes' case was fortnightly. Accordingly, as an award of wage arrears, I concluded she was entitled to a further two weeks' pay as notice, which allowing for some weekly variations as evidenced in the pay records, I have taken as being the sum of $864.

[23] Ms Crookes was also entitled to an award of compensation under s123(1)(c)(i) of the Act for the effect on her of how her dismissal was carried out. She found out from two customers, who she encountered by chance, that they were told she was not coming back to work at the store. It was only at that point that Ms Crookes had gone to the store on 9 May to collect her personal belongings. While Ms Crookes was aware of Ms Hunt's anger over telling a regular customer where she could buy a coat elsewhere, that and other concerns were not addressed squarely with Ms Crookes in a proper disciplinary process and she was left 'in limbo' for at least two weeks before Ms Hunt had confirmed the employment was effectively at an end. In all the circumstances I considered $3000 was the appropriate, modest level of award Ms Crookes should receive as compensation for humiliation, loss of dignity and injury to her feelings from the manner of her dismissal.

[24] I concluded no reduction of the compensation award to Ms Crookes was required under s124 of the Act for actions by her contributing to the situation that

[5] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 (CA) at [81].

gave rise to her personal grievance. While there may have been some fault in Ms Crookes' work, as Ms Hunt alleged, it was not dealt with in the way that the law required of a fair and reasonable employer and no firm conclusions could be drawn in the Authority investigation that Ms Crookes' actions were sufficiently blameworthy to require a reduction of her remedy.

**Other matters**

[25] Ms Crookes had questioned a deduction of $125.09 from her wages for Employer Superannuation Contribution Tax. Mr Street gave evidence that the deduction was made in error and had since been credited to IRD and Ms Crookes should have the benefit of that amount in her Kiwisaver account. In that light no order regarding that amount was necessary.

[26] No order for costs was sought but Ms Crookes was entitled, having succeeded in her claim, to have PRL reimburse her for the filing fee of $71.56 paid to lodge her application in the Authority.

Robin Arthur
Member of the Employment Relations Authority