

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 628  
3283019

BETWEEN                      TAINA FERNANDA VICENTE  
   CAETANO DA SILVA  
   Applicant

AND                              AMAZING CLEANING  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle

Representatives:              Applicant in person  
   No appearance for the Respondent

Investigation Meeting:       8 October 2024 in Christchurch

Determination:                18 October 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Taina Da Silva was employed by Amazing Cleaning Limited (Amazing Cleaning) as a cleaner from on or about 20 March 2023 until 16 June 2023.

[2]     Ms Da Silva has asked the Authority to resolve several employment relationship problems.

[3]     Ms Da Silva says that she was unjustifiably dismissed from her employment on 16 June 2023. She seeks payment for three public holidays that would otherwise have been working days. Ms Da Silva seeks reimbursement of KiwiSaver deductions that she says have been withheld by Amazing Cleaning. She also wants to be reimbursed

money deducted for PAYE that has not been paid on to the Inland Revenue Department (IR).

[4] Amazing Cleaning has not participated in the Authority process. It has failed to lodge a statement in reply and comply with a notice of direction to lodge statements of evidence.<sup>1</sup>

[5] The Authority is satisfied from the administration file that the company has been served at its registered office which is also the address for service with a statement of problem, notice of direction and the investigation meeting notice.

### **The investigation process**

[6] The Authority held an investigation meeting on 8 October 2024. There was no appearance on behalf of the company. In the absence of good reasons why there was no appearance the Authority proceeded to hear evidence from Ms Da Silva.

[7] The Authority advised Ms Da Silva that the company register shows the Registrar of Companies was in the process of removing Amazing Cleaning from the register. The objection period has lapsed.

### **The issues**

[8] The Authority needs to determine the following issues in this matter:

- (a) How did the employment relationship end?
- (b) What were the reasons for the employment relationship to end?
- (c) Could a fair and reasonable employer have relied on a trial provision?
- (d) If the dismissal was unjustified what remedies are available and are there issues with contribution and mitigation?
- (e) What were Ms Da Silva's usual working days at Amazing Cleaning?
- (f) Is Ms Da Silva entitled to payment for public holidays not worked?

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<sup>1</sup> Notice of direction of the Authority dated 1 July 2024.

- (g) If there are payments owed, for public holidays, how should they be calculated?
- (h) Does the Authority have jurisdiction to order KiwiSaver deductions withheld be paid to Ms Da Silva?
- (i) Should the Authority order deductions for PAYE not paid to IR be paid to Ms Da Silva?
- (j) Did Ms Da Silva incur legal costs that should be taken into account in an assessment of costs?
- (k) If so what award should be made for costs?
- (l) Should the filing fee be reimbursed?

### **How did the employment relationship end?**

[9] One of the directors of Amazing Cleaning, Mayara Pandolfi Vicentini, telephoned Ms Da Silva on 16 June 2023 and told that she was not doing a good job and her employment would be terminated. Ms Da Silva did not think that the criticisms of her performance were correct because her clients had told her they were very happy with her cleaning. She recalled being asked if she wished to work out two weeks' notice and she told Ms Pandolfi Vicentini that she did not.

[10] The employment relationship was terminated on 16 June 2023 at the instigation of Amazing Cleaning.

### **What were the reasons for dismissal?**

[11] Ms Da Silva received an emailed letter from Ms Pandolfi Vicentini dated 16 June 2023. It confirmed Ms Da Silva was given notice of the termination of her employment in accordance with a trial provision in her employment agreement. The letter confirmed the last day of employment was 16 June 2023 as Ms Da Silva did not want to work out her notice period. She was advised that she would be paid final pay.

[12] The trial provision was relied on for the termination of employment.

### **Could a fair and reasonable employer have relied on the trial provision?**

[13] The employment agreement that Ms Da Silva signed with Amazing Cleaning two days after she commenced employment does not contain a trial provision. There may have been some difficulty in any event in relying on such a provision as the employment agreement was signed two days after Ms Da Silva commenced her employment. There was no substantive justification for the dismissal and dismissal was without any of the required elements of procedural fairness required in applying the test of justification in s 103A (3) of the Employment Relations Act 20000 (the Act).

[14] Objectively assessed the dismissal was not what a fair and reasonable employer could have done in all the circumstances at the time.

[15] Ms Da Silva was unjustifiably dismissed. She has made out her personal grievance of unjustified dismissal and is entitled to an assessment of remedies.

### **Remedies for unjustified dismissal**

#### *Lost wages*

[16] Section 128(2) of the Act provides that the Authority must if an employee has a personal grievance and has lost remuneration from that order an employer pay to the employee the lesser of a sum equal to lost remuneration or to 3 months ordinary time remuneration.

[17] Ms Da Silvia attempted to look for other employment. She concluded because of the broad non-solicitation provision in her employment agreement with Amazing Cleaning and the area in which she had worked that she needed to look for work in Christchurch. That was not unreasonable. Ms Da Silva was registered with Work and Income and was assisted to look for appropriate roles. It was difficult for her to find a role with suitable hours to fit with her children's school and other activities. Ms Da Silva did not find further employment for a considerable period but attempted to mitigate her lost wages.

[18] It is appropriate to order Amazing Cleaning pay to Ms Da Silva the sum of three months ordinary time remuneration which is the lesser amount in s 128 (2) of the Act.

[19] The employment agreement did not specify agreed hours of works. To calculate lost wages the Authority has assessed the average hours Ms Da Silva worked over the duration of her employment putting the first week to one side because the hours that week are noticeably fewer. The average hours worked over the remaining twelve weeks are 31 hours per week. 31 hours multiplied by Ms Da Silva's hourly rate of \$26 is \$806 per week. I have multiplied the sum of \$806 by 13 weeks to arrive at the sum of \$10,478 gross. Subject to any issues as to contribution, this is the award for lost wages.

#### *Compensation*

[20] Ms Da Silva believed Amazing Cleaning terminated her employment because she had raised concerns about not being paid for public holidays that were otherwise working days and concerns about PAYE and KiwiSaver contributions. Ms Pandolfi Vicentini told Ms Da Silva that she passed her concerns on to the company accountant Peter Beahan who then purported to communicate with Ms Da Silva. Having heard from Ms Da Silva, there are good reasons to suspect Mr Beahan may not be a real person.

[21] Ms Da Silva suffered humiliation, loss of dignity and injury to feelings as a result of her dismissal in these circumstances. Ms Da Silva explained the impact on her trust and confidence for future employment and that she had become much more cautious about trust and the need for clear communication. There was a significant impact on her financial stability and stress and uncertainty about her future.

[22] Consistent with similar cases I conclude a suitable award under this head is \$15,000 subject to any issues of contribution.

#### *Contribution*

[23] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance. If the actions require, then the Authority can reduce remedies that would otherwise have been awarded.

[24] I do not conclude that Ms Da Silva contributed in a blameworthy manner to the circumstances that gave rise to the personal grievance. Accordingly, there is no reduction of the amounts set out above for reimbursement and compensation.

**What were Ms Da Silva's usual working days?**

[25] Ms Da Silva explained in her evidence that she always worked Monday to Friday. The Authority accepts that evidence.

**Is Ms Da Silva entitled to payment for Good Friday, Easter Monday and Anzac Day?**

[26] The answer is yes. Although Ms Da Silva did not work on the public holidays all three fell on days that would otherwise be working days for Ms Da Silva. Good Friday was on Friday 7 April 2023. Easter Monday was on Monday 10 April 2023. ANZAC day was on Tuesday 25 April 2023.

**If there are payments owed for the three public holidays, how should they be calculated?**

[27] Section 49 of the Holidays Act 2003 provides that if an employee does not work on a public holiday that would otherwise be a working day, then the employer must pay not less than the employee's relevant daily pay or average daily pay for that day.

[28] Ms Da Silva's daily pay varies, so it is appropriate to use the average daily pay formula to calculate the public holiday payment in s 9 of the Holidays Act 2003. The formula requires the division of gross earnings for the periods before the end of the pay period immediately before the public holiday by the whole or part days during which the employee earned the gross amount.

[29] The schedule of payments made to Ms Da Silva is set out below:

**Schedule of payments**

<b>Pay Period</b>	<b>Date of Payment</b>	<b>Gross Payments</b>	<b>Net Payments</b>
20 March 2023 to 23 March 2023	23 March 2023	\$583.28	\$507.20
24 March 2023 to 30 March 2023	30 March 2023	\$910.00	\$773.50
31 March 2023 to 6 April 2023	6 April 2023	\$858.00	\$729.30
11 April 2023 to 13 April 2023	13 April 2023	\$390.00	\$331.50
14 April 2023 to 20 April 2023	20 April 2023	\$780.00	\$695.05
21 April 2023 to 27 April 2023	27 April 2023	\$702.00	\$596.70
28 April 2023 to 4 May 2023	4 May 2023	\$884.00	\$751.40
5 May 2023 to 11 May 2023	11 May 2023	\$884.00	\$751.40
12 May 2023 to 19 May 2023	19 May 2023	\$915.20	\$800.02
19 May 2023 to 25 May 2023	25 May 2023	\$884.00	\$751.40
26 May 2023 to 1 June 2023	1 June 2023	\$780.00	\$663.00
2 June 2023 to 8 June 2023	2 June 2023	\$975.00	\$828.75
12 June 2023 to 16 June 2023	16 June 2023	\$780.00	\$663.00
Total		\$10,325.48	\$8,842.22

[30] The amount of gross earnings immediately before the calculation for the public holidays on 7 and 10 April 2023 is \$2,351.28. I have divided that figure by the 14 days worked to earn that gross amount to arrive at the average daily pay for Good Friday and Easter Monday of \$167.94.

[31] The gross earnings immediately before the calculation for the Anzac Day public holiday including the two earlier public holidays that should have been paid at \$167.94 per day is \$ 4,137.96. That amount is then divided by the days worked being 26 days

which includes the two earlier public holidays.<sup>2</sup> The average daily pay for the Anzac Day public holiday is \$159.15.

[32] Ms Da Silva is owed payment of \$495.03 for three public holidays that she did not work but were days she otherwise would have worked.

**Does the Authority have jurisdiction with respect to withheld deductions for KiwiSaver contributions?**

[33] Ms Da Silva's KiwiSaver scheme shows Ms Da Silva's contributions whilst employed by Amazing Cleaning as \$328.10 and Amazing Cleaning employer contributions as \$293.64. That is a total of \$621.74. The issue for Ms Da Silva is that the final pay she was provided with by Amazing Cleaning shows KiwiSaver deductions for employee contributions of \$653.70 and for employer contributions of \$326.85 which is more than is showing as contributions to her scheme by \$358.81. In short Ms Da Silva says deducted contributions are being withheld by Amazing Cleaning.

[34] The KiwiSaver Act 2006 provides that IR is the administrator of KiwiSaver deductions and defaults.<sup>3</sup> KiwiSaver contributions and deductions are defined as tax under the Tax Administration Act 1994 (TA Act). There are some consequences set out in the TA Act if an employer knowingly withholds a deduction of contribution.

[35] The Authority is not satisfied that it has jurisdiction to make orders regarding the deductions in these circumstances. The Authority will direct a copy of this determination is sent to the Commissioner of Inland Revenue to take any action that is considered appropriate.

**Should deductions for PAYE assessed at a greater amount than the PAYE due be ordered payable to Ms Da Silva?**

[36] Ms Da Silva said that more PAYE was deducted than it should have been from her wages because it was deducted at the rate of 15 per cent rather than 10.5 per cent.

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<sup>2</sup> Holidays Act 2003 section 9A(2) that provides the number of whole or part days includes any day the employee was on a paid holiday or leave.

<sup>3</sup> KiwiSaver Act 2006 Part 3 (ss 60-114).

[37] Ms Da Silva said that she should be reimbursed the sum of \$490.27 being the difference between what was deducted for PAYE and what was actually paid to IR by Amazing Cleaning. The final payslip that Ms Da Silva was provided with shows \$1,634.26 was deducted for PAYE. The IR information provided shows that only \$1,143.99 was passed onto IR as PAYE.

[38] Any discrepancy between the PAYE deducted that was passed on to IR and the amount that was not is a matter for IR. The Authority does not normally get involved in issues of tax. The Authority has already directed that a copy of this determination be sent to the Commissioner of Inland Revenue about the KiwiSaver and the Commissioner can take any appropriate action about this matter as well.

**Did Ms Da Silva incur related legal costs that should be taken into account in an assessment of costs?**

[39] The Authority is satisfied that Ms Da Silva incurred legal costs for matters related to those the Authority has investigated before she lodged her statement of problem. The Authority was provided with three invoices in the combined amount of \$3,843.33. An eight-page letter written by Ms Da Silva's solicitor to Amazing Cleaning setting out the concerns and raising a personal grievance was attached to the statement of problem that Ms Da Silva lodged. The letter was relied on to set out the background to the employment relationship problems. A large percentage of the costs incurred by Ms Da Silva relate to that letter.

**If so, what award should be made for costs?**

[40] In assessing an award of costs I have taken into account the earlier related legal expenses. The investigation meeting took less than half a day and Ms Da Silva was not represented for the meeting but had incurred relevant costs and expenses by virtue of the involvement of her solicitor at an earlier stage. Costs are usually assessed in the Authority on the basis of the daily tariff which is \$4,500 for the first day of an investigation.

[41] In the exercise of my discretion, I consider an appropriate award in all the circumstances for costs is \$2000.

### **Should the filing fee be reimbursed?**

[42] Ms Da Silva is entitled to be reimbursed the filing fee of \$71.55

### **Findings and orders made**

[43] Ms Da Silva was unjustifiably dismissed by Amazing Cleaning and is owed payment for public holidays.

[44] The Authority directs a copy of this determination be provided to the Commissioner of Inland Revenue with respect to the withholding of KiwiSaver deductions and PAYE by Amazing Cleaning as set out in paragraphs [33] - [38] of this determination.

[45] Amazing Cleaning is ordered to pay to Taina De Silva the following:

- (a) The sum of \$10,478 gross being reimbursement of lost wages under s123(1)(b) of the Act.
- (b) The sum of \$15,000 without deduction being compensation under s 123(1)(c)(i) of the Act.
- (c) The sum of \$495.03 for payment for public holidays not worked but otherwise working days.
- (d) Costs in the sum of \$2000 and reimbursement of the filing fee of \$71.55.

Helen Doyle

Member of the Employment Relations Authority