

[2] ICL has not filed a statement in reply in response to Ms De Chavez's statement of problem which she filed with the Authority on 7 December 2021. Neither has the company participated in the Authority process which includes a case management conference held on 19 May 2022.

The Authority's investigation

[3] While ICL has not engaged with the process, I am satisfied that the company was served with the statement of problem because this was personally served on Oliver Evans, ICL's sole director, at 12.51 pm on 15 March 2022 by a licensed private investigator working for The Investigators New Zealand Limited. A statement in reply was due to be lodged on 29 March 2022 but none was filed.

[4] While a case management conference was held, there was no appearance by a representative of ICL. Prior to the teleconference, the Authority Officer telephoned Mr Evans (his mobile contact number was provided by Ms De Chavez) but he did not pick up. A voicemail message was left for him and the teleconference proceeded in his and ICL's absence.

[5] Time tabling directions for the filing of written statements were made. ICL has not responded to the Authority's minute or provided any further comment. For completeness, the parties have not been to mediation because Mr Evans has not responded to the mediator's emails and telephone messages inviting him to attend mediation.

[6] The investigation meeting was by audio-visual link via Zoom the details of which were emailed to the parties. Prior to the investigation meeting, a reminder email was sent to the parties and when there was no appearance by anyone for ICL, the start of the investigation meeting was delayed by a further 15 minutes in the off chance that Mr Evans might be running late. However, he did not attend.

[7] Ms De Chavez attended the investigation meeting remotely which commenced at approximately at 10.15 am. When there was no appearance for ICL, the investigation meeting proceeded pursuant to clause 12 of the Second Schedule of the Employment Relations Act 2000 (the Act) which enables the Authority to act fully in the matter before it as if ICL had duly attended or been represented.

[8] As permitted by s 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. It has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination were:

- (a) Is Ms De Chavez owed wages?
- (b) Was she also unjustifiably and constructively dismissed?

Background

[10] On 26 April 2019 Ms De Chavez signed her individual employment agreement with ICL, a company that audits other businesses in terms of quality, safety and efficiency of their products, services and systems.

[11] Ms De Chavez was employed as a certification administrator and she worked full-time (40 hours per week) Monday to Friday from 8.30 am to 5 pm. She was paid a salary of \$55,000 (gross) per annum which was paid on a monthly basis on the 15th of each month. Clause 7.3 of the employment agreement required ICL to reimburse Ms De Chavez for all expenses reasonably and properly incurred during her duties.

[12] Ms De Chavez started to notice delays in the payment of her salary when ICL's accountant departed the business in July 2020. However, those delays were in the order of one to two weeks and payment was nevertheless made.

[13] When Ms De Chavez did not receive her salary payment for July 2021, she considered that it would be paid eventually. An email from Mr Evans of 19 July 2021 referred to him getting his finances and accounts up to date. A subsequent email from Mr Evans purported that he was having issues with a finance company and his bank. Ms De Chavez accepted that he had "a lot on his plate" including problems with his marriage.

[14] On 23 July 2021, Ms De Chavez emailed Mr Evans a reminder about the non-payment of her salary but she received no response from him. Believing that he would pay her eventually, she continued to work for ICL throughout August and September 2021.

[15] It appears that ICL lost clients during this period as a result of its accreditation being suspended by JAS-ANZ (Joint Accreditation System of Australia and New Zealand). While Ms De Chavez is not aware of all the details, she understands that the suspension was the result of a few non-conformities with some of ICL's audits which the company had not rectified in time.

[16] Despite these difficulties, Ms De Chavez believed that Mr Evans could turn things around for ICL and that she wanted to be part of the new and improved ICL going forward. Moreover, she saw herself working for ICL for the indefinite future because she enjoyed her job and the people with whom she worked.

[17] However, Ms De Chavez's optimism did not manifest. Screen shots of her bank account record several instances from 17 July 2020 to 18 June 2021 where the payment of her salary was increasingly delayed from two days to two weeks. In addition to not receiving her salary from July to October 2021, Ms De Chavez noticed that ICL had stopped contributing to her KiwiSaver since July 2020. Screenshots of the missing employer contributions were also provided to the Authority.

[18] In response to a request for further information by the Authority, Ms De Chavez provided an email (4 August 2021) from a former colleague which stated:

Morning Shey,

I'll be working from home at this stage as I can't afford the needless travel back and forward as like yourself I haven't been paid.

[19] It is noted that Ms De Chavez worked from home from 8 August 2021 onwards. She started to worry about the non-payment of her salary around this period but understood that Mr Evans was going through a difficult time. Even so, the non-payment of her salary created significant financial difficulties for her and her husband. While not wishing to leave ICL, the situation could not continue and, on 22 September 2021, she submitted her resignation by email which stated:

However, not getting paid for 3 consecutive months since July 2021 has made a big impact, a negative one at that, on my family's financial situation. We have expenses and bills that have now been compromised and hence, can't really afford to lose more. I'm so sorry it has to end like this but I hope you understand where I'm coming from and that a decision had to be made.

[20] Ms De Chavez did not get a response from Mr Evans concerning her resignation but he did email staff on 29 September 2021 that he would be arranging the payment of unpaid salaries but no salaries, including Ms De Chavez's, were paid in the end. She used most of her annual leave in October 2021 and finished working for ICL later that month.

Discussion

[21] Based on the information and evidence before the Authority, I find that Ms De Chavez is owed four months of salary payments from ICL. Ms De Chavez was paid a salary of \$55,000 per year which did not change during the period of her employment. As stated above, her salary was to be paid on a monthly basis which equates to \$4,583.33 (gross) per month. Four months of Ms De Chavez's salary amounts to \$18,333.33 (gross).

[22] In accordance with cl 7.3 of Ms De Chavez's individual employment agreement, she is entitled to be reimbursed for expenses reasonably and properly incurred. To that end, she claims expenses of \$440.56 for the use of Adobe software from March 2020 to September 2021.

[23] Ms De Chavez had three days of annual leave remaining for which she seeks payment of \$634.62 (gross) ($\$55,000$ (gross salary) / 52 weeks / 5 days per week x 3 days' annual leave owing).

[24] Finally, Ms De Chavez seeks KiwiSaver employer contributions from July 2020 to October 2021 of \$4,016.48 ($\$113.53 + \137.50) x 16).

[25] The total amount of Ms De Chavez's wage arrears' claim (rounding up to the nearest dollar) is therefore \$23,425.

Interest owed

[26] I find that Ms De Chavez is owed total wage arrears of \$23,425. Pursuant to cl 11 of the Second Schedule to the Act, the Authority may, if it thinks fit, order interest on any judgment amount. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. As Ms De Chavez has been deprived of the use of what is owed to her, the Authority orders that ICL pay interest on \$23,425

from 31 October 2021 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made no later than 4 pm Friday 5 August 2022.¹

Filing fee

[27] ICL is to pay Ms De Chavez \$71.56 being the filing fee for the statement of problem lodged with the Authority.

Constructive dismissal?

[28] At the end of the investigation meeting, I indicated to Ms De Chavez that I was willing to find that she had also been unjustifiably and constructively dismissed as a result of ICL's breach of duty with respect to the payment of her salary. It was apparent that she never wanted to leave the company but found herself with no other choice after not being paid for four months.

[29] However, with the benefit of further reflection on this matter, it would be harsh to make a finding of unjustified constructive dismissal for two reasons. First, constructive dismissal was never pleaded in the statement of problem and while ICL has not engaged with the Authority's investigation, the company has not been made aware of this additional claim. Second, the claim of unjustified constructive dismissal is potentially out of time as a worker has 90 days to raise a personal grievance with their employer (s 114 of the Act).

[30] While a claim of constructive dismissal does not appear available on the present facts, I have awarded Ms De Chavez interest on the amount owed to her and the filing fee as a contribution towards the costs she has incurred in this matter.

Summary of Orders

[31] Being satisfied that there has been a default in payment by ICL to Ms De Chavez under her employment agreement, and pursuant to s 131 of the Act, the Authority makes the following orders which are to be met no later than 4 pm Friday 5 August 2022:

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator.

- (i) International Certifications Limited to pay Sheryl Calma De Chavez \$23,425 (gross) in wage arrears;
- (ii) International Certifications Limited to pay Sheryl Calma De Chavez interest on the sum of \$23,425 from 31 October 2021 to the date of payment using the Ministry of Justice civil debt interest calculator to calculate interest; and
- (iii) International Certifications Limited to pay Sheryl Calma De Chavez the filing fee of \$71.56.

Peter Fuiava
Member of the Employment Relations Authority