

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 329
3016011**

BETWEEN FIORELLA GRANADOS
 Applicant

AND FIGUREX FRANCHISING
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Ben Hinchcliffe,, Advocate or Counsel for Applicant
 Wendy Peters, Representing the Respondent

Investigation Meeting: 17 October 2017 at Auckland

Submissions received: 17 October 2017 from Applicant and from Respondent

Determination: 20 October 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Fiorella Granados, is claiming unpaid wages from the Respondent, Figurex Franchising Limited (FFL).

[2] Ms Granados further claims that she was constructively dismissed by FFL.

[3] FFL admits that monies are owed to Ms Granados in respect of unpaid wages, but claims that the employer is not FFL but CE Gym Management Limited (CE Gym).

Issues

[4] The issues for determination are:

- Which company employed Ms Granados
- Whether or not Ms Granados is owed unpaid wages
- Whether or not Ms Granados was constructively dismissed.

Background Facts

[5] FFL, formerly known as Configure Express Limited, is a franchise operation of which the main business is the operation of gym companies. Ms Wendy Mackay is the sole director, appointed in 11 October 2016, and Mr Greg Peters was a director until 20 January 2016. Mr Peters and Mrs Mackay are married.

[6] CE Gym is in the process of being removed from the Companies Register. Mr Peters is the sole director and the sole shareholder is FFL.

[7] Ms Granados commenced employment at Configure Express Limited in central Auckland where she was employed in accordance with a holiday working visa.

Employment Agreements

[8] Ms Granados said that in July 2016 she was promoted by Mr Peters, transferred to work at the FFL Head Office, and was issued with individual employment agreements with CE Gym which had been signed by Mr Peters, and with FFL which had been signed by Mrs Mackay.

[9] Ms Granados said she had signed the CE Gym employment agreement but the company accountant advised her to request the employment agreement be reissued and the employment agreement with FFL had been issued to reflect the name of her employer as FFL (the Employment Agreement 1).

[10] The Employment Agreement dated 13 July 2016 had been signed by Ms Granados by Mrs Mackay-Peters on behalf of FFL and included the following terms and conditions of employment as set out in the first Schedule:

Position: Sales, Marketing and Social Media Consultant

Commencement date; **13th July 2016**
Remuneration: **\$30.00 per hour to be paid monthly for the
previous month**

[11] The employment agreement had been reissued to Ms Granados in February 2017. She had requested Employment Agreement 1 be reissued upon the advice of the company accountant due to the change in name of Configure Express Limited being changed to FFL. It had again been signed by Ms Granados and by Mrs Mackay-Peters, and as the company name on the employment agreement had not altered and it contained the same terms and conditions as Employment Agreement 1, with the salary now being expressed as an annual figure, namely \$62,400.00 (Employment Agreement 2). Clause 29 set out that this agreement replaces any previous agreements between the parties.

Work Visas

[12] Whilst Ms Granados had initially been employed on a holiday working visa, she was subsequently issued with a work visa effective from 10 September 2016 to 10 September 2017. This specified that she was only allowed to work in the position of Sales Marketing and Social Media Manager for Configure Express Limited.

[13] In February 2017, due to the change of name of Configure Express Limited to FFL, a new visa was issued for the period 22 February 2017 until 10 September 2017 which specified that Ms Granados was only allowed in the position of Sales Marketing and Social Media Manager for FFL.

Remuneration payment issues

[14] From virtually the commencement of her employment Ms Granados experienced late or missed salary payments. This is not disputed by FFL.

[15] During her employment Ms Granados reported primarily to Mr Peters who continued to have managerial responsibilities for FFL after he ceased being a director. Ms Granados said she had threatened to resign verbally from her employment to Mr Peters on a number of occasions prior to March 2017, but did not actually do so because her work visa was limited to her employment at FFL.

[16] Moreover she had trusted Mr Peters when he reassured her that she would be paid and she would receive some, but not all, of the wage payments she was owed.

[17] During October 2016 Mr Granados said she had bought an air ticket to return home to Chile, in reliance upon Mr Peters' assurance that she would receive the wages she was owed. However she did not receive the promised payment and she cancelled her air tickets.

[18] On or about 10 December 2016 Ms Granados rebooked air tickets based upon an assurance by Mr Peters that she would receive the wage payments owed to her and he would contribute \$2,000.00 towards the air ticket cost and she returned home.

[19] Ms Granados said that upon her return to New Zealand she did not however receive the promised back pay of wages or the contribution of \$2,000.00 from Mr Peters towards her air tickers.

[20] During March 2017 Ms Granados resigned, confirming her resignation in an email dated 9 March 2017 which stated:

As we spoke on this last Monday March 6th, Im sending you as an attached file my resignation letter from Configure Express – Head Office, effective one month as per the contract from March 6th, 2017.

Thank you for the opportunities you have provided me during my time with the company.

I wish you and the company all the best ...

[21] Ms Granados said she had expressed the resignation letter in a positive manner as her employment was reliant on the work visa with FFL and she did not want to leave on bad terms as she was hoping to receive the outstanding wages she was owed and to which she was entitled.

[22] Following her resignation in March 2017 Ms Granados said she had reached an agreement with Mr Peters that she would work on a reduced basis of 30 hours per week with a commensurate decrease in the salary. However despite this, wage payments had not been made and as a result she had ceased working for a two week period during April and May 2017.

[23] During that period Ms Granados said she had only received small amounts of the wages owed, not the amounts to which she was contractually entitled, and on 1 June 2017 she ceased working, confirming her decision by reissuing the resignation letter to Ms Mackay and Mr Peters by email dated 3 June 2017.

Determination

Which company employed Ms Granados?

[24] Ms Granados's evidence is that from the commencement of her employment in May 2016 she worked for Configure Express Limited.

[25] FFL was previously known as Configure Express Limited

[26] The work visas issued to Ms Granados on 10 September 2016 and 22 February 2017 allow her to work at FFL only.

[27] The bank statements provided by Ms Granados indicate that the payments were made either by Configure Express Limited, FFL or Swift Debt Collection Enforcement. Configure Swift Limited is the company now identified on the companies office website as previously having been known as Swift Debt Collection Enforcement of which Mrs Mackay is the sole director.

[28] There is one payment listed in Ms Granados' bank statements as having been made by CE Gym, but Mrs Mackay said that although the payroll account was in the name of CE Gym, CE Gym had no bank account and it had been FFL which had made the payments to Ms Granados.

[29] Based on the evidence of the work visa specifications which only permitted Ms Granados to be employed at FFL, Employment Agreement 1 and Employment Agreement 2, and the bank account payments as set out in Ms Granados' bank statements, I determine that FFL was the employer of Ms Granados.

Is Ms Granados is owed unpaid wages?

[30] The parties do not dispute that Ms Granados is owed unpaid wages.

Was Ms Granados constructively dismissed?

Constructive Dismissal

[31] An employee is usually entitled to resign from their employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required; the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:¹

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[32] There is no obligation on the employer to dissuade the employee from leaving, although he or she may choose to do so in some cases. An employee who has resigned has not been dismissed.

[33] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[34] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[35] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment

¹ 5/12/00 AC 94/100, AEC 106/00 at para 21

agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.²

[36] When wages become payable, an employer must pay the entire amount due to the employee without deduction³.

[37] FFL was fully aware and does not deny, that Ms Granados was not paid the entire amount of the wages due to her when they became payable.

[38] I find that there was a breach of duty on the part of FFL, and this was a fundamental and serious breach.

[39] FFL was also aware that Ms Granados had threatened to resign on more than one occasion due to the non-payment of wages, she had resigned on 6 March 2017, and then reconfirmed this decision on 3 June 2017.

[40] I find that the breach was sufficiently serious that it was reasonably foreseeable that Ms Granados would resign as a result of the breach.

[41] I determine that Ms Granados was unconstructively dismissed by FFL.

Remedies

[42] Ms Granados has been unjustifiably dismissed and she is entitled to remedies.

Unpaid wages

[43] Ms Granados was not paid her full wage entitlement throughout the period of her employment. This is not disputed by FFL and I accept Ms Granados' calculation.

[44] **I order that FFL pay Ms Granados the sum of \$7,777.00 gross as unpaid wages**

[45] **I order that FFL pay Ms Granados the sum of \$622.16 gross as holiday pay on that amount pursuant to s 83.4 of the Holidays Act 2003.**

² *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

³ S 4 Wages Protection Act 1983.

[46] **I order that FFL pay the sum of \$233.31 gross as the contribution owed to Ms Granados's Kiwisaver account.**

Lost wages

[47] Ms Granados said that as a result of the termination of her employment, she changed her work visa to a study visa to improve her English language skills. This permitted her to work 20 hours in paid employment. She obtained alternative employment on 28 July 2017 for 20 hours a week at the rate of \$22.00 per hour.

[48] In considering an appropriate level of award in respect of lost wages, I take into consideration the contingences of life. The evidence of Mr Peters and Mrs MacKay supports Ms Granados' experience that throughout her employment FFL struggled to meet its contractual responsibility towards her as regards payment. It is also clear that FFL is facing serious financial hurdles. However it is still listed as registered on the Companies office website and there has been no evidence submitted to support it being insolvent and unable to pay its debts.

[49] Ms Granados was unemployed from 1 June 2017 until she obtained alternative employment on 28 July 2017.

[50] **I order that FFL pay Ms Fiorella lost wages from 2 June 2017 until 28 July 2017 in the sum of \$13,400.00 gross (calculated as 13 weeks at \$62,400.00 gross per annum less the amount earned of \$2,200.00) pursuant to s 128(3) of the Act.**

[51] Ms Granados is claiming \$2,000.00 in respect of the contribution towards the cost of the air tickets she purchased in December 2016.

[52] There was no contractual entitlement to payment of that sum, nor is there any written confirmation of Mr Peters' commitment to make such a payment.

[53] Consideration of the history of non-payment and assurances of payment on Mr Peter's part which were not fulfilled leading to Mr Granados stating that she wished to

resign, I think her reliance on a promise to pay \$2,000.00 by Mr Peters was not reasonable.

[54] I make no award in respect of the \$2,000.00 claimed in respect of the air tickets.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[55] Ms Granados is seeking compensation in respect of the distress caused to her by the loss of her employment. Ms Fiorella said that the termination of her employment had resulted in her having financial difficulty in meeting her daily requirements and she moved in with a friend who offered her free accommodation apart from a contribution towards the power bill.

[56] **I order that FFL pay Ms Granados the sum of \$10,000.00, pursuant to s 123(1) (c) (i) of the Act.**

Contribution

[57] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded. Ms Granados did not contribute to the situation which resulted in the termination of her employment and there is to be no reduction in the remedies awarded.

Costs

[58] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[59] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority