

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 44  
3068634

BETWEEN            KIMIORA GREY  
                                 Applicant

AND                    NOSTRO VIAGGIO LIMITED  
                                 Respondent

Member of Authority:    Rachel Larmer

Representatives:        Applicant in person  
                                 No appearance by Respondent

Investigation Meeting:    On the papers

Submissions and further information:    24 November 2020 from the Applicant

Date of Determination:    31 January 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]    Ms Kimiora Grey worked for Nostro Viaggio Limited, trading as Evolve Integrated Health Specialists (Nostro Viaggio), as a junior physiotherapist from 16 January 2017 until 13 May 2018.

[2]    Ms Grey claimed she was unjustifiably disadvantaged in her employment because Nostro Viaggio breached her minimum employment entitlements. Ms Grey also claimed she is owed wage arrears because she was not paid for her last week of work and has still not been paid her final pay or annual holiday pay entitlements.

**No Appearance by Nostro Viaggio**

[3] Nostro Viaggio did not file a Statement in Reply.

[4] Nostro Viaggio has not sought leave to file a Statement in Reply out of time. It has not had any communications with the Authority.

[5] Nostro Viaggio has been in contact with its accountant, Mr Ian Stevenson of Stevenson Accounting Limited (Stevenson Accounting). Although Mr Stevenson said he is not acting for Nostro Viaggio, he has been communicating with the Authority and Nostro Viaggio about Ms Grey's proceedings.

**Removal of Nostro Viaggio from Companies Register**

[6] Nostro Viaggio is in the process of being removed from the Company Registrar.

**Nostro Viaggio's director and shareholders**

[7] Nostro Viaggio's sole director is Pasquale Monachino.

[8] On 19 April 2018 Ian Stevenson of Stevenson Accounting presented to the Company Office, on behalf of Nostro Viaggio, paperwork for the removal of Gemma Monachino as a director of Nostro Viaggio, effective from 10 April 2018.

[9] Up until then Gemma Monachino had also been a director of Nostro Viaggio, along with her husband Pasquale. That timing meant that Gemma Monachino was a director of Nostro Viaggio when Ms Grey's claims arose.

[10] Mr Monachino is a 75% shareholder, with his wife Gemma Monachino holding the other 25% shares in Nostro Viaggio.

**Stevenson Accounting Limited**

[11] From the outset of its incorporation Nostro Viaggio's accountancy firm has been Stevenson Accounting Limited (Stevenson Accounting).

[12] In August 2012 Stevenson Accounting filed Nostro Viaggio's incorporation documentation. Since then Stevenson Accounting has filed various company documentation on behalf of Nostro Viaggio with the Company Office. This has included changes to its

particulars of directors, changes to company related addresses and all of Nostro Viaggio's annual returns since it was incorporated.

[13] From 28 August 2012 to 29 October 2013 Mike Doherty of Stevenson Accounting presented documents on behalf of Nostro Viaggio for filing with the Company Office. After that Ian Stevenson is recorded as the presenter of Nostro Viaggio's company documents to the Companies Office.

### **Ian Stevenson's involvement**

[14] From 24 October 2014 Ian Stevenson, as a representative of his accounting firm Stevenson Accounting, presented documents on behalf of Nostro Viaggio for filing with the Company Office. He is recorded on the Companies Office website documentation as Ian Leslie Stevenson.

[15] Mr Stevenson is the sole director and shareholder of Stevenson Accounting.

[16] Mr Stevenson has communicated with Nostro Viaggio's directors and shareholders, Ms Grey, Mediation Services and the Authority regarding Ms Grey's claims against Nostro Viaggio.

[17] Mr Stevenson has advised the Authority that he is not acting for Nostro Viaggio and was not authorised to accept service on its behalf.

[18] Mr Stevenson, of Stevenson Accounting, presented Nostro Viaggio's updated address for service to the Company Office on 22 July 2018. The address for service was recorded by Mr Stevenson as "*13 Tauranga Road, Henderson Valley, 0612*" effective from 30 July 2018.

[19] That remains the address for service Nostro Viaggio has recorded with the Companies Office. However the address of "*13 Tauranga Road*" does not exist.

[20] The Authority informed Mr Stevenson of that error on 13 August 2019. It also advised him that service had been effected on Nostro Viaggio at "*13 Turanga Road, Henderson Valley*" instead of "*Tauranga Rd*".

[21] Neither Nostro Viaggio, Mr Stevenson, or Stevenson Accounting have updated (corrected) Nostro Viaggio's registered office or address for service with the Companies

Office. Nor have any of them advised the Authority of an alternative address for service or that 13 Turanga Road was not the correct address for service on Nostro Viaggio.

[22] Prior to registration of the “13 Tauranga Road” address for service, Stevenson Accounting had registered with the Company Office Nostro Viaggio’s address for service as “Flat 3, 13 Pemberton Avenue, Bayview, Auckland, 0629.”

[23] That was the same address that Stevenson Accounting had registered for Nostro Viaggio’s two shareholders Pasquale and Gemma Monachino.

### **Service of these Proceedings**

[24] Ms Grey lodged her Statement of Problem with the Authority on 26 July 2019.

[25] Ms Grey’s Statement of Problem and letter from the Authority was served on Nostro Viaggio by track and trace courier at “13 Turanga Road, Henderson, Valley” on 1 August 2019. Receipt of these service documents was signed for by “Nestro Ltd”.

[26] A copy of Ms Grey’s Statement of Problem was also emailed to Ian Stevenson because he had previously been dealing with Ms Grey’s personal grievance claim on behalf of Nostro Viaggio and he had also been in communications with Ms Grey and Mediation Services about her claims.

[27] The Authority advised Mr Stevenson that the documents it had emailed him had been served on Nostro Viaggio at its registered address for service that same day, by track and trace courier. The Authority also highlighted to Mr Stevenson that Nostro Viaggio’s Statement in Reply was due by 15 August 2019.

[28] Mr Stevenson emailed the Authority on 2 August 2019 and said (among other things) that service had not been effected on Nostro Viaggio because “*having checked with our client, there was no-one at home on 1/8/2019 [...]*.” (emphasis added).

[29] This shows that Mr Stevenson was in personal contact with one of Nostro Viaggio’s directors, presumably Pasquale Monachino, who is recorded as residing at that service address, about these proceedings.

[30] The Authority resent (by email) Ms Grey’s application to Mr Stevenson along with a copy of the courier record that showed service had occurred on 1 August 2019, and a

reminder that Nostro Viaggio's Statement in Reply was due by 15 August 2019. Mr Stevenson was also informed that Nostro Viaggio could seek an extension of time to file its Statement in Reply, if necessary.

[31] Mr Stevenson responded by email on 5 August 2019 and said (among other things) service had still not occurred because Nostro Viaggio's director was not at the address the documents were delivered to and no-one else was at the property on 1 August 2019. That response also shows that Mr Stevenson was in contact with the person (presumably Pasquale Manachino) who resided at Nostro Viaggio's address for service.

[32] It is also significant that Mr Stevenson did not dispute that "13 Turanga Road" was the correct service address for Nostro Viaggio.

[33] Instead, Mr Stevenson said in his email on 5 August that Nostro Viaggio's service address had a security gate to keep people out and that nothing had been left in the letterbox on 1 August, so the courier's delivery signature was "*false*".

[34] As an aside, the Authority notes that a company's registered service address should not be locked off from the public, because that makes service more difficult than it should be. This is an issue that should be raised with the Companies Office Registrar.

[35] Mr Stevenson's email on 5 August also advised that he was not authorised to accept service on behalf of Nostro Viaggio.

[36] On 13 August 2019 the Authority advised Mr Stevenson that a process server had re-served Ms Grey's Statement of Problem on Nostro Viaggio by affixing the documents to the front gate at 13 Turanga Road Henderson Valley on 9 August 2019. The Authority was provided with photos of that, and with an affidavit of service.

[37] The Authority gave Mr Stevenson a copy of the process server's affidavit of service dated 12 August 2019, as proof service had occurred.

[38] The Authority also informed Mr Stevenson that Nostro Viaggio's Statement in Reply was now due on 23 August 2019.

[39] Mr Stevenson replied to the Authority by email dated 16 August 2019 "*We will forward your email to our client to see if received or not. And confirm either way on this.*

[...]” That response showed Mr Stevenson was in contact with Nostro Viaggio and could obtain information from its director.

[40] On 5 September 2019 Mr Stevenson emailed the Authority and said (among other things) “*The client has advised [no documents etc...]*” and “*The client advises [details of property etc...]*”. “*The client has no knowledge of any stray documents and has extensively searched around the property in case they ended up somewhere [...]*.” Mr Stevenson used the information he cited from Nostro Viaggio’s director to dispute, on Nostro Viaggio’s behalf, that service had occurred.

[41] These reported communications between Mr Stevenson and Nostro Viaggio show that they were both aware of these proceedings and of the various attempts that had been made to serve Ms Grey’s claims on Nostro Viaggio.

[42] The conduct that has occurred is indicative of attempts by Nostro Viaggio to avoid service of these proceedings, because it would have been easy for Mr Stevenson to have provided Nostro Viaggio with a copy of these proceedings.

### **Order for substituted service**

[43] On 6 September 2019 the Authority made an order directing that substituted service could occur on Nostro Viaggio via service on Ian Stevenson and/or Stevenson Accounting and/or Gemma Monachino.

[44] Substituted service on Gemma Monachino was deemed appropriate because she was a 25% shareholder and up until 22 July 2018 she was one of Nostro Viaggio’s directors. She was also the wife of Nostro Viaggio’s current director Pasquale Monachino. Mr Monachino’s address was recorded with the Company Office as being the same address as Nostro Viaggio’s registered office.

[45] Substituted service on Mr Stevenson was deemed appropriate because he had repeatedly represented to the Authority that he had been in contact with Nostro Viaggio’s director to discuss service of Ms Grey’s proceedings, after Mr Stevenson had received a copy of her Statement of Problem. Mr Stevenson was therefore well placed to be able to pass a copy of Ms Grey’s proceedings to Nostro Viaggio’s director.

[46] Mr Stevenson had also been involved in advising Nostro Viaggio on Ms Grey's wage arrears claims. Mr Stevenson had also communicated with Ms Grey, Mediation Services and the Authority about her claims against Nostro Viaggio.

[47] Substituted service on Stevenson Accounting was deemed appropriate because it was Nostro Viaggio's accountant and had been involved in presenting all of its company documentation to the Company Office, including the incorrect service address. It was also the accountancy firm that Nostro Viaggio had used to calculate Ms Grey's final pay and other entitlements.

### **Original Health International Limited**

[48] Ms Grey was informed by Pasquale and Gemma Monachino on 11 May 2018 that Nostro Viaggio had sold its business to Original Health International Limited (Original Health) and that settlement of the business sale had occurred that day (11 May 2018).

[49] Original Health was incorporated on 20 November 2015.

[50] All of Original Health's documentation was presented to the Company Office by Ian Stevenson of Stevenson Accounting. Original Health's registered office and address for service is Stevenson Accounting at the same address as Stevenson Accounting's registered office and address for service – 89 Fifth Avenue, Tauranga.

[51] Gemma Monachino is Original Health's sole director. Her address is registered with the Company Office as 12 Limmer Place, Browns Bay, Auckland. That is the same address that is registered for Nostro Viaggio with the Company Office.

[52] Original Health's sole shareholder is "*M Trustees Limited*".

### **M Trustees Limited**

[53] M Trustees Limited (M Trustees) was incorporated on 9 June 2011.

[54] M Trustees' has recorded with the Company Office that its registered office and address for service is Stevenson Accounting, at 89 Fifth Avenue, Tauranga.

[55] M Trustees' sole director and shareholder is Ian Leslie Stevenson. Mr Stevenson's address in connection with M Trustees is the same as Stevenson Accounting's registered office and address for service.

**Service has occurred**

[56] The Authority is satisfied that these proceedings have been served on Nostro Viaggio and that it has elected not to participate in the Authority's investigation process.

[57] Direct service occurred on Nostro Viaggio at its registered office and address for service via track and trace courier on 1 August 2019.

[58] A second instance of direct service also occurred again on 9 August 2019, when a process server taped the documents to the locked gate at the registered address for service. This was confirmed by photos and an affidavit of service dated 12 August 2019 from the process server.

[59] Substituted service has also occurred.

[60] The first instance of substituted service occurred by email on Mr Stevenson and Stevenson Accounting on 6 September 2019. They acknowledged receipt of the service documents the Authority had emailed them on 6 September 2019.

[61] The second instance of substituted service also occurred on Stevenson Accounting at its registered service address of 89 Fifth Avenue, Tauranga by delivery of a hard copy of these proceedings, via track and trace courier on 10 September 2019. Receipt of the service documents was signed for by "*Samuel Wong*".

[62] Receipt of these hard copy service documents was also confirmed on 20 September 2019 when Mr Stevenson emailed the Authority and said (among other things) that "*I am in receipt of a courier delivered parcel last week to my office address.*" This shows that, in addition to email service, both Mr Stevenson and Stevenson Accounting also received a hard copy of these proceedings.

[63] A third instance of substituted service occurred on Gemma Monachino, by track and trace courier, on 10 September 2019 at her registered address of 12 Limmer Place, Browns Bay, Auckland. No signature was obtained as the courier had "*Authority to Leave*" documents at that address without a signature.

### **Formal proof of Ms Grey's claims**

[64] The Authority has investigated Ms Grey's claims based on the evidence available to it as at today's date. That includes consideration of Ms Grey's Statement of Problem, communications with Ms Grey and Mr Stevenson and Ms Grey's sworn affidavit dated 24 November 2019.

[65] Ms Grey's evidence was uncontested, so it has been accepted as unchallenged and therefore accurate.

[66] Ms Grey worked for Gemma Monachino, who was a senior physiotherapist and then director of Nostro Viaggio and Gemma's husband Pasquale Monachino, who is currently the sole director and 75% shareholder of Nostro Viaggio.

[67] Ms Grey was employed for 40 hours per week on a salary of \$50,000 per annum. Her employment agreement was signed on 3 November 2016.

[68] Ms Grey worked full-time between the hours of 7:00 a.m. to 3:30 p.m. Monday, Wednesdays and Fridays and from 10:30 a.m. until 7:00 p.m. Tuesdays and Thursdays.

[69] Ms Grey noted in her affidavit that she had some variation with her working hours each day but had worked a minimum of at least 42.5 hours during every week that she was employed. For the purposes of calculating her wage arrears claim the Authority has used Ms Grey's contractual hours of 40 hours per week.

[70] On the evening of 9 May 2018 Nostro Viaggio's employees received an email from Gemma Monachino saying "*we have an extremely important announcement that we need to share with all of you. This meeting is mandatory for all team members this Friday 4:30 p.m. at the clinic.*"

[71] At the staff meeting on 11 May 2018 Gemma and Pasquale Monachino announced that Nostro Viaggio had been sold and that they had not said anything to staff about the sale because of a confidentiality arrangement between themselves and the buyer of the business.

[72] Nostro Viaggio's employees were told that day (11 May 2018) was its last day of trading at its current premises at 604 Great South Road under the Evolve Integrated Health Specialist trading name that Nostro Viaggio had been using up until that point.

[73] Employees were given a two page letter which advised that the settlement for the sale of the business was that day (11 May 2018), that the business would be relocated to new premises on the North Shore by the new owners "*Original Health International*" (Original Health) and that Gemma Monachino would likely be working from those new premises from the Monday of the next week.

[74] Employees were asked to indicate whether they wanted to be considered for employment by the new owners of the business. The Monachinos told Nostro Viaggio's employees that there was no guarantee that the new owner would offer them employment. Employees who wanted to be considered for employment by Original Health needed to authorise the release of their employment records.

[75] The letter the Monachinos gave Nostro Viaggio's employees stated that the alternative default options were that in the next pay cycle they would be paid out their entitlements under their current employment agreement up to that day (11 May 2018).

[76] If employees did not accept an offer of employment by Original Health then they had to sign a form that agreed to be paid out four weeks' pay in lieu of notice. In which case, the payment of their notice pay was stated to be over an extended time period, to be agreed with Nostro Viaggio.

[77] Ms Grey in her affidavit said that Nostro Viaggio's employees were asked to either sign the form they had been given immediately (at the meeting) or over the weekend, but that the form had to be signed before Monday 13 May 2018.

[78] Ms Grey said that Gemma and Pasquale Monachino told Nostro Viaggio's employees that they (the employees) were not legally entitled to four weeks' pay in lieu of notice, because they had not been made redundant. The Monachinos told Nostro Viaggio's employees that it was offering them a favour by suggesting it would pay them four weeks' pay in lieu of notice.

[79] There was no opportunity for staff to seek legal advice because they received this information on Friday evening (after close of business) and had to make a decision before the following Monday morning.

[80] The Monachinos were unable to tell Nostro Viaggio's employees where the new Original Health business would be located or what terms and conditions it intended to offer to

those employees who wanted to transfer their employment to it. That was very surprising given Gemma Monachino was the sole director of Original Health and that she continued working for it after the sale.

[81] Ms Grey responded to Nostro Viaggio by email on 13 May 2018 asking for more time to make a decision, but she did not receive a response to that.

[82] On 15 May 2018 Ms Grey was due to receive her wages. However she did not receive her final pay or any annual holiday or notice pay. She was not told why she had not been paid her final pay.

[83] On 18 May 2018 Ms Grey formally responded to Nostro Viaggio's 11 May 2018 letter, electing to be paid four weeks' pay in lieu of notice and her final pay and annual holiday entitlements.

[84] Gemma Monachino responded to Ms Grey by email on 19 May 2018 saying that her (Ms Grey's) final pay and holiday entitlements were pending with "*the accountant*". That reference to the accountant was to Ian Stevenson of Stevenson Accounting.

[85] Ms Grey followed up with Gemma Monachino on 23 May 2018, asking to be paid her final pay. Gemma Monachino responded that day saying that Ms Grey's final pay was being calculated at the accountants, again meaning by Ian Stevenson at his firm - Stevenson Accounting.

[86] On 7 June 2018 Ms Grey emailed Gemma Monachino again asking about her final pay, but did not receive any response.

[87] Some 21 months later Ms Grey has still not received her final pay, her pay in lieu of notice or her annual holiday entitlements.

[88] Ms Grey says that she's aware that other employees had also experienced problems of either not being paid at all or being underpaid by Nostro Viaggio.

### **Attempts to resolve this matter**

[89] On 11 June 2018 Ms Grey raised a personal grievance for unjustified disadvantage. Her personal grievance letter asked Nostro Viaggio to attend mediation. She also applied directly to Mediation Services for assistance with arranging mediation.

[90] Ms Grey was advised by Mediation Services that Ian Stevenson had been communicating with it on behalf of Nostro Viaggio regarding her request to attend mediation.

[91] Mediation Services emailed Ms Grey on 10 July saying that Nostro Viaggio (via Mr Stevenson) did not believe there was a need for mediation because it considered the matter had been settled.

[92] Ms Grey denied that settlement had occurred, because she had still not been paid anything. Ms Grey told Mediation Services that if the parties entered into a written settlement agreement then she would withdraw her request for mediation.

[93] On 22 July 2018 Mr Stevenson emailed Mediation Services, copied to Pasquale Monachino and Ms Grey, a settlement offer (that has not been viewed by this Member). However Ms Grey advised that the terms of the settlement did not accurately address or resolve her claims.

[94] Mr Stevenson subsequently emailed Ms Grey on 1 August 2018. He said he was finalising Ms Grey's final pay and would then provide his calculations to Pasquale Monachino to approve. Once that had occurred it would be sent to Ms Grey for approval.

[95] Mr Stevenson emailed Ms Grey on 2 August 2018 to advise that he had forwarded Nostro Viaggio her final pay calculation for its approval.

[96] On 6 August 2018 Mr Stevenson emailed Ms Grey to say that Nostro Viaggio had responded to the pay calculations that Mr Stevenson had provided it and that their response was attached for her to review and approve. Mr Stevenson said that "*it would be good to get all those completed this week so payments can start next week to you.*"

[97] Ms Grey did not agree with Mr Stevenson's calculations. Nostro Viaggio had apparently disputed Ms Grey's contractual right to take rest breaks.

[98] Ms Grey then filed these proceedings on 26 July 2019, after having waited for more than a year for Nostro Viaggio to pay her final pay.

### **Was Ms Grey unjustifiably disadvantaged in her employment?**

[99] Nostro Viaggio unjustifiably disadvantaged Ms Grey by failing to pay her final pay in her normal pay run.

[100] Ms Grey's claim that Nostro Viaggio's failure to pay her for statutory rest breaks unjustifiably disadvantaged her in her employment also succeeds.

[101] That failure breached clause 9.2 of Ms Grey's employment agreement.

[102] Clause 9.2 of her employment agreement stated that she was entitled to two ten-minute paid rest breaks and one thirty-minute unpaid meal break if her work period was more than six hours, but not more than eight hours.

[103] Ms Grey's evidence was that all of the rest breaks she took were taken with the approval of Gemma Monachino. If Nostro Viaggio believed that Ms Grey was taking rest breaks she was not entitled to, then that should have been raised with her during her employment. No issues were ever raised with Ms Grey in her performance assessment at the end of 2017 or with her at any other time during her employment about her timekeeping.

[104] Nostro Viaggio's raising of break issues at such a late stage appears to be an attempt to avoid paying Ms Grey her final pay and entitlements.

[105] Nostro Viaggio is ordered to pay Ms Grey \$6,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered as a result of her successful unjustified disadvantage grievances.

### **Is Ms Grey owed wage arrears?**

[106] Ms Grey has discharged her onus of proving her wage arrears claim, on the balance of probabilities.

[107] There is no evidence before the Authority that Ms Grey was paid any annual holiday pay while employed by Nostro Viaggio. Her annual holiday entitlements due on termination were therefore calculated on that basis.

[108] Nostro Viaggio is ordered to pay Ms Grey wage arrears of \$9,884.63 gross being:

- (a) \$961.54 gross being her unpaid wages for the final week she worked but was not paid (being \$50,000 gross salary per annum, divided by 52 weeks);
- (b) \$3,846.16 gross pay in lieu of notice pay (being 4 weeks x \$961.54 per week);

- (c) \$5,076.93 gross annual holiday pay (being \$3,846.16 accrued annual holiday of 4 weeks' paid annual holiday x \$961.54 per week, plus \$1,230.77 being 16 weeks x \$961.54 gross per week = \$15,384.64 x 8%).

### **Wage and time records**

[109] Ms Grey sought a copy of her employment records. These have still not been provided, in breach of s 130(2) of the Act and in breach of s 82 of the Holidays Act 2003 (HA03).

[110] Within 14 days of the date of this determination, Nostro Viaggio is ordered to provide Ms Grey with a copy of her wage and time records and holiday and leave records. It is also ordered to provide a copy of these employment records to the Authority within 14 days of the date of this determination.

### **PAYE obligations**

[111] Within 28 days of the date of this determination, Nostro Viaggio is ordered to pay/remit to IRD on Ms Grey's behalf:

- (a) All of the PAYE it deducted from Ms Grey's wages while she was employed; and
- (b) The correct amount of PAYE is that due on the wage arrears it has been ordered to pay Ms Grey in this determination.

### **Costs**

[112] Although entirely successful, Ms Grey represented herself, so she is not entitled to an award of legal costs in her favour.

[113] However, Nostro Viaggio is ordered to pay Ms Grey \$71.56 to reimburse her for her filing fee.

### **Outcome**

[114] Within 14 days of the date of this determination, Nostro Viaggio is ordered to provide the Authority and Ms Grey with a copy of her wage and time records (s 130 of the Act) and her holiday and leave records (s 81 HA03).

[115] Nostro Viaggio unjustifiably disadvantaged Ms Grey. It also failed to pay Ms Grey wages (consisting of her last week's wages, notice pay and annual holiday entitlements) when they became due to her on 15 May 2018.

[116] Within 28 days of the date of this determination, Nostro Viaggio is ordered to pay Ms Grey \$15,956.19, being:

- (a) \$6,000, without deduction, distress compensation under s 123(1)(c)(i) of the Act;
- (b) \$9,884.63 gross wage arrears;
- (c) \$71.56 to reimburse her filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**