

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 258  
3028651

BETWEEN ANNA GRIFFIN  
Applicant

A N D THE ORTHODONTIC  
INSTITUTE AUCKLAND CITY  
LIMITED  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Max Whitehead, Advocate for Applicant  
No appearance by, or for, the Respondent

Investigation Meeting: 16 August 2018 at Auckland

Submissions Received: 16 August 2018 from Applicant

Date of Determination: 16 August 2018

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**ORAL DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Non-appearance of Respondent**

[1] The Orthodontic Institute Auckland City Limited (the Institute) failed to file a statement in reply to the statement of problem. It also failed to be represented at the Employment Relations Authority's investigation meeting today.

[2] The Authority is satisfied that the Institute was properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting.

[3] The applicant filed a statement of problem in the Authority on 24 April 2018. The respondent was named as the Orthodontic Institute Limited (Orthodontic Institute). The registered office of the Orthodontic Institute is level 1, 5 Customs Street East, Auckland 1010. The current director and the director at the time of issues between Ms Anna Griffin and the Institute, is Mr Saad Al-Mozany who resides in Sydney. Mr David Rhind of Point Chevalier, Auckland was also a director at the relevant time until he ceased being so on 1 May 2018.

[4] The statement of problem was unable to be delivered. It was subsequently served by way of personal service at the registered office of the Orthodontic Institute on 14 June 2018.

[5] The statement of problem was subsequently amended, naming the respondent as the Orthodontic Institute Auckland City Limited (the Institute), Ms Griffin's employer. The holding company of the Institute is the Orthodontic Institute Limited (Orthodontic Institute). The registered office of the Institute is 3-13 Shortland Street, Auckland Central, Auckland 1010. The directors are Mr Al-Mozany and Mr Rhind.

[6] The amended statement of problem was served on the Institute at its registered office. The notice of investigation meeting was also served on the Institute. In order to ensure that the directors of the Institute were aware of the amended statement of problem and the investigation meeting, service of the documents was effected by courier at the registered office and at the residential address for one of the directors, Mr Rhind. The documents were also served by email on Mr Al-Mozany.

[7] Mr Al-Mozany was aware of the investigation meeting today. At 10.17 am this morning, following the commencement of the investigation meeting Mr Al-Mozany sent an email to an Authority Officer, stating he was not able to attend the investigation meeting as he resided in Sydney. Mr Al-Mozany asked for the meeting to be rescheduled to 11 September 2018. Mr Al-Mozany did not provide any other reasons for his non-appearance.

[8] I am satisfied that the Institute was aware of Ms Griffin's employment relationship problem and of the investigation meeting taking place in the Authority today. No statement of reply has ever been filed in the Authority.

**Investigation meeting**

[9] Being satisfied that the Institute was properly served with the statement of problem and its amendments and the notice of investigation meeting, I proceeded to investigate the issues as to whether or not Ms Griffin was owed wages and holiday pay by the Institute, and if so whether penalties were appropriate.

[10] I conducted my investigation in the absence of Mr Al-Mozany and Mr Rhind, or any other representative from the Institute as they failed to appear.

[11] Ms Griffin filed a witness statement and swore on oath that her evidence was true and correct. As permitted under s.174E of the Act, this determination has not set out all the evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

**Employment relationship problem**

[12] Ms Griffin was employed by the Institute as a Dental Assistant from approximately 1 September 2014. On 15 January 2018, Ms Griffin resigned. Following her resignation, Mr Al-Mozany requested that she continue working for a further two months. Ms Griffin agreed to do so on the basis that her outstanding wages were paid to her, in full, by 7 February 2018. Ms Griffin's final day of employment was 14 February 2018 at which time she was owed five weeks outstanding wages and holiday pay.

**Outstanding wages**

[13] Following her departure from the Institute, Ms Griffin sent a number of emails to the Institute, setting out her calculations of wages owing to her. Ms Griffin also requested a pay summary report so that she could calculate her outstanding wages and holiday pay. The wages and time records have never been provided to Ms Griffin. In an email to Ms Griffin's advocate on 11 July 2018, Mr Al-Mozany provided his calculation of outstanding wages owing to Ms Griffin by the Institute.

[14] Mr Al-Mozany calculated outstanding wages owing by the Institute to Ms Griffin in the sum of \$3,712. Ms Griffin requested payment of the sum of \$3,712 outstanding wages from the Institute. Payment has not been made.

**Holiday pay**

[15] The Authority has been provided with emails from Mr Al-Mozany agreeing to “settle everything” with Ms Griffin, but as at today’s date, no payments for outstanding wages and holiday pay have been made to Ms Griffin.

[16] On 24 December 2017, Ms Griffin was provided with one payslip by the Institute. The payslip calculated outstanding holidays owing to her to be 106.77 hours. Based on Ms Griffin’s hourly rate of \$29 per hour, holiday pay as at 24 December amounted to \$3,096.33.

[17] Ms Griffin has calculated holiday pay owing from 24 December 2018 to 14 February 2018 based on 314.5 hours worked by her during this period at her hourly rate of \$29. Wages earned amounted to \$9,120.50 gross. Holiday pay at the rate of 8% amounts to \$729.64.

[18] The total holiday pay owing to Ms Griffin by the Institute amounts to \$3,825.97 gross.

**Orders**

[19] I consider the Institute owes Ms Griffin the unpaid wages claimed by her. I order the Institute to pay Ms Griffin outstanding wages of \$3,712 gross. The Institute is ordered to pay Ms Griffin the sum of \$3,712 gross within 14 days of the date of this determination.

[20] I consider the Institute owes Ms Griffin outstanding holiday pay, as claimed by her. The total outstanding holiday pay amounts to \$3,825.97. I order the Institute to pay Ms Griffin the sum of \$3,825.97 gross holiday pay within 14 days of the date of this determination.

[21] The Authority may, under clause 11 of the Second Schedule to the Employment Relations Act 2000, if it thinks fit, order the payment of interest at the rate prescribed under s.87(3) of the Judicature Act 1908. I intend to do so from the time that Ms Griffin first raised the issue with the Institute on 11 February 2018 until the date of payment.

[22] I order the Institute to pay interest on the sums of \$3,712 gross outstanding wages and \$3,825.97 gross outstanding holiday pay at the rate of 5% per annum from 11 February 2018 until the date of payment.

### **Penalties**

[23] Ms Griffin is seeking penalties for breaches of the Wages Protection Act 1983 (WPA) and of the Holidays Act 2003 (HA) by the Institute. The Institute failed to pay Ms Griffin wages and holiday pay due to her.

### **The Law**

[24] The leading case on penalties in the employment jurisdiction is *Borsboom (Labour Inspector) v Preet Pvt Ltd & Others*<sup>1</sup>.

[25] In that case, a full bench of the Employment Court considered the approach to be taken by the Authority and the Court when considering penalties for breaches of minimum employment entitlements. The Court in *Borsboom* set out the objectives of penalties in employment law generally at paragraphs [61] to [63] of its decision. To summarise, they are to:

- (a) Punish those who breach a statutory obligation;
- (b) Deter deliberate breaches;
- (c) Compensate the victim of the breach;
- (d) Eliminate unfair competition in business.

[26] The Court applied a four step process to the assessment of penalties by the Authority and the Court in order to provide a “uniform, reasonably predictable result”. The four step process is to ensure that “fixing the amount of the penalty, or penalties, is consistent and transparent”.

### **Step 1 – nature and number of breaches**

[27] The Institute has failed to pay outstanding wages owing to Ms Griffin under the WPA. There has also been a breach of the HA by the Institute in failing to pay Ms Griffin holiday pay due to her. Each breach attracts penalties of \$20,000.

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<sup>1</sup> [2016] EmpC 143

*Should global penalties apply?*

[28] Multiple failures to pay Ms Griffin her wages can be regarded as a consistent pattern of breach of the WPA by the Institute. Similarly, the ongoing failure to pay Ms Griffin her holiday pay.

[29] Global penalties apply. Therefore, there are 2 breaches. The Institute faces a potential liability of up to a maximum of \$40,000 for the 2 breaches.

**Step 2 – assessment of the severity of the breach in each case to establish a provisional penalties starting point and consider both aggravating and mitigating factors**

[30] While acknowledging it owes her outstanding wages and holiday pay, the Institute has failed to pay Ms Griffin the outstanding wages and holiday pay owing to her. It appears to be deliberate and is a serious breach of minimum employment standards. Ms Griffin has been waiting for money due to her for over 6 months. A penalty acts as a deterrent to other employers to act in this way.

*Mitigating factors*

[31] As there was no appearance on behalf of the Institute, nor by its director, Mr Al-Mozany. There is no evidence of mitigating factors. The provisional penalty so far amounts to \$40,000.

**Step 3 – means and ability to pay**

[32] There is no evidence as to the Institute's financial circumstances or means and ability to pay. From the Companies Office records it appears the Institute is still trading. No evidence as to the assets or liabilities of the Institute, or of its director, has been provided to the Authority, despite ample opportunity to do so. A reduction in penalties on this ground is not appropriate in the circumstances.

**Step 4 – proportionality of outcome**

[33] Penalties imposed should be in proportion to the amounts of money unlawfully withheld<sup>2</sup>. Ms Griffin is owed a total of \$7,537.97 gross, plus interest.

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<sup>2</sup> *Borsboom* at [190]

[34] Standing back and assessing the proportionality of the outcome for the Institute, I conclude an appropriate global figure for all penalties under the Wages Protection Act and Holidays Act to be \$10,000 in the circumstances, following the four step approach and taking into account the Court's observations in *Borsboom*.<sup>3</sup> This amounts to \$5,000 for each breach and is in line with similar decisions of the Authority.

[35] The penalties of \$10,000 are to be paid by the Institute to the Authority, for transfer to the Crown account within 14 days of the date of this determination.

[36] \$5,000 of the total penalties of \$10,000 are to be paid to Ms Griffin.

### **Costs**

[37] The Authority has general power to award costs as set out in clause 15(1) of Schedule 2 to the Act as follows:

The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

[38] Ms Griffin's advocate seeks a contribution to costs in the sum of \$8,855.00. The Authority's investigation meeting, including time to prepare the oral determination took half a day.

[39] Applying the notional daily tariff in respect of costs, based on an 8-hour day, costs would total \$2,250. The filing fee of \$71.56 is also sought.

[40] I order the Institute to pay Ms Griffin within 14 days of the date of this determination, costs of \$2,250 together with the filing fee of \$71.56.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

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<sup>3</sup> Paras [190] – [194] with regard to proportionality and totality of outcome.