

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 476  
3042132

BETWEEN

DA-SOM LEE  
Applicant

AND

PETER KWON  
First Respondent

NAOMI KWON  
Second Respondent

PETER & NAOMI LIMITED  
Third Respondent

Member of Authority: Eleanor Robinson

Representatives: Cindy Kim, for the Applicant  
Peter Kwon for the Respondents

Investigation Meeting: 14 August 2019 at Auckland

Determination: 15 August 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Da-som Lee, claims that she was employed at the hairdressing salon Wave by Peter Kwon (WPK) during the period 1 May 2017 until 28 July 2018 when she left her employment on the basis that she had been constructively dismissed.

[2] Ms Lee further claims that she was unjustifiably disadvantaged in her employment by not being provided with (i) a written employment agreement, (ii) paid breaks or an unpaid lunch break; and (iii) by being paid below the minimum wage rate..

[3] Ms Lee also claims that she is owed wages and holiday pay.

[4] The First Respondent denies that he was Ms Lee's employer and claims she was a volunteer whilst working at PWK.

[5] The Second Respondent denies having any responsibility for PWK.and/or that she was responsible for handling staff wages.

[6] The second Respondent further denies that she or the third Respondent had any knowledge of the working relationship between Ms Lee and PWK.

### **The Authority's investigation**

[7] As permitted by s 174E of the Employment Relations Act 2000 (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.

### **Issues**

[8] The issues for determination are:

- The identity of the correct employer

Whether or not Ms Lee

- Was an employee or a volunteer whilst engaged at PWK
- Was constructively dismissed by PWK
- Was unjustifiably disadvantaged by PWK:
  - not being provided with a written employment agreement
  - not being provided with rest and meal breaks
  - being paid at a rate below the statutory minimum wage
- a penalty should be imposed on PWK for the failure to provide a written employment agreement
- a penalty should be imposed upon PWK for its failure to keep and provide a wage and time record?
- a penalty should be imposed upon PWK for failing to act in good faith

- a penalty should be imposed upon Ms Naomi Lee as a person involved with the breaches

## **Background**

[9] The Respondent is a hair salon trading as 'Wave by Peter Kwon' (the Salon). The Salon is owned by Peter & Naomi Limited, and Ms Naomi Kwon is the sole director and shareholder.

[10] Ms Lee completed a hairdressing course at a hairdressing academy in 2010 and subsequently obtained employment at two hairdressing businesses working for two years and one year respectively. During her time working at those businesses Ms Lee said she was provided with written employment agreements, was paid by direct credit transfer to her bank account, and PAYE was paid on her behalf.

[11] During 2017 Ms Lee said she had visited the Salon and submitted her CV for consideration. She was subsequently interviewed by Mr Peter Kwon who interviewed her and offered employment on a trial period basis for three months. Ms Lee said she was told she would be paid \$14.00 per hour during the three month period which was described as a trial period with an increase after a period of training.

[12] Ms Lee commenced at the Salon on 1 May 2017 and worked initially two days a week from 9.30 a.m. until 7.00 p.m. during the three month trial period. After the trial period ended she worked four days a week.

[13] Ms Lee said that during the first week of September 2017 Mr Kwon reduced her rate of pay to a net payment of \$10.00 per hour from which he told Ms Lee that income tax had been deducted.

[14] Mr Kwon confirmed that he had paid Ms Lee in cash which he said was his normal way of paying employees in the Salon and that the Salon did not pay income tax or ACC contributions on Ms Lee's behalf.

[15] Mr Kwon said that after the trial period had ended he had told Ms Lee that he had no available position for her, however she was welcome to come into the Salon for practise purposes to improve her hairdressing skills.

[16] Ms Lee denied that had been the basis of their ongoing relationship and said that her duties at the Salon included cleaning, shampooing, and handling client bookings. Her days of

employment had increased to four days a week and her hourly payment was reduced to \$10.00 per hour.

[17] The previous Manager of Mint Drycleaners said that for a lengthy period between 2017 and 2018 Ms Lee had delivered wet towels from the Salon to the cleaners once a week between 9 – 10 a.m. until the towels ceased to be delivered during March 2018.

[18] Mr Kwon said he had believed that he could dismiss Ms Lee during the three month trial period. He confirmed that he had not provided Ms Lee with a written employment agreement.

[19] Ms Lee said that during her employment at the Salon Mr Kwon criticised her in front of employees and customers and denigrated her hairdressing ability. He often told her she was dismissed, but he subsequently withdrew the dismissal and continued to provide her with tasks.

[20] Ms Lee said she had not resigned because Mr Kwon told her that he would spread a rumour about her, and that if she also worked at another Salon in addition to PWK she would be dismissed.

[21] Ms Lee said that occasionally Ms Naomi Kwon would telephone the Salon and ask her for information about her payments.

[22] Ms Kwon said that she did not play an active part in the operation of the Salon, other than by taking enquiries forwarding them to the Salon. Mr Kwon said that Ms Kwon was not involved in the Salon operation.

[23] On or about the end of July 2018 Ms Lee said her health had been adversely affected by her experience at the Salon and she was unable to continue in employment which ended on 3 August 2018 as confirmed in text messages between her and Mr Kwon.

**What is the identity of the correct employer ?**

[24] The Salon is owned and operated by Peter & Naomi Limited. Mr Kwon is the Manager.

[25] I determine that Peter & Naomi Limited was the correct employer of Ms Lee.

**Was Ms Lee an employee or a volunteer whilst engaged at PWK?**

[26] During her time at the Salon, I find that Ms Lee carried out duties of a nature which benefitted the Salon and which constituted work. She was paid wages by cash payments.

[27] I determine that Ms Lee was an employee at the Salon and not a volunteer.

**Was Ms Lee unjustifiably dismissed by PWK?**

*Trial Period*

[28] The Employment Relations Act 2000 (“the Act”) makes provision for trial periods at ss 67A and 67B. The Act states:

S 67A(2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –

(a) For a specified period (not exceeding 90 days), starting at the beginning of the employee’s employment, the employee is to serve a trial period

[29] Ms Lee was not provided with a written employment agreement and therefore she was not subject to a trial period pursuant to s 67A (2) of the Act since the provision was not in writing.

[30] After the three month trial period ended I find that the work Ms Lee performed in the Salon amounted to more than practise and for which she received payment.

[31] The medical evidence provided by Ms Lee supports her evidence that the experiences she had at the Salon, which included frequent criticism from Mr Kwon, adversely affected her health to the point at which she was unable to continue in employment.

[32] I determine that Ms Lee was constructively dismissed by Peter & Naomi Limited.

**Was Ms Lee unjustifiably disadvantaged by PWK?**

[33] Ms Lee is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer;

[34] The elements of s103 (1) (b) are twofold:

- An unjustifiable action by the employer, which

- Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[35] Ms Lee must therefore establish that there was some unjustifiable action by Peter & Naomi Limited which affected her terms and conditions of employment to her disadvantage.

(i) *By not being provided with a written employment agreement?*

[36] Employers are required to provide employees with a copy of a written employment agreement as set out in s 65 of the Act. Ms Lee was not provided with a written employment agreement by Peter & Naomi Limited.

[37] As a result, Ms Lee had no written confirmation of her terms and conditions of employment and I find that this disadvantaged her.

[38] I determine that Ms Lee was unjustifiably disadvantaged by not being provided with a written employment agreement.

(ii) *By not being provided with rest and meal breaks?*

[39] Mr Kwon said that rest and meal breaks were provided but not at set times due to the nature of a hairdressing salon's business.

[40] Whilst Ms Lee said that she only had a short lunch break this was for 30 minutes which is the statutory requirement.

[41] I determine that Ms Lee was not disadvantaged by not being provided with rest and meal breaks.

(iii) *By not being paid at the statutory minimum wage?*

[42] It is a requirement that employees are paid at least at the rate set out in the statutory minimum wage awards.<sup>1</sup> In the period 1 April 2017 until 31 March 2018 the minimum wage rate was \$15.75 per hour and in the period from 1 April 2018 until 31 March 2018 it was \$16.50.

[43] The cash payments to Ms Lee were not made to her following deduction of PAYE and resulted Ms Lee was paid less than the minimum wage rate during her employment at Peter & Naomi Limited. I find that this disadvantaged her.

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<sup>1</sup> Minimum Wage Act 1983

[44] I determine that Ms Lee was unjustifiably disadvantaged by not being paid at the minimum wage rate.

### **Remedies**

#### *Unpaid wages*

[45] Ms Lee should have been at the minimum wage rate during her time at Peter & Naomi Limited.

#### Period 1 August 2017 – 31 March 2018

[46] Ms Lee should have been paid at the minimum wage rate of 15.75 per hour for the 34 weeks between the period 1 August 2017 and 31 March 2018.

[47] Ms Lee worked (i) 18 hours per week during the first 13 week period and should therefore have been paid the sum of \$3,685.50 gross, and (ii) 36 hours per week during the second period of 21 weeks and should therefore have been paid the sum of \$11,907.00 gross. The total pay sum due to Ms Lee for this period was \$15,592.50.

#### Period 1 April 2018 – 31 July 2018

[48] Ms Lee should have been paid at the minimum wage rate of \$16.50 per hour for the 17 weeks between the period 1 April 2018 and 31 July 2018. Ms Lee worked 36 hours per week during this period and should therefore have been paid the sum of \$10,098.00 gross. The total pay due to Ms Lee for this period was \$10,900.00.

[49] The information provided by Ms Lee establishes that she was paid in cash a total of \$18,079.50. Therefore the difference between what should have been paid to Ms Lee in terms of the minimum wage hourly rate (\$25,690.50) and what Ms Lee received in cash (\$18,079.50) was \$7,611.00.

[50] **I order Peter & Naomi Limited to pay to Ms Lee the sum of \$7,611.00 gross in respect of unpaid wages.**

#### *Unpaid holiday pay*

[51] Ms Lee was not paid holiday pay entitlement at the termination of her employment. Ms Lee did not take any holiday entitlement and therefore Ms Lee was entitled to be paid \$2,055.24 upon the termination of her employment at WPK (calculated at 8% of the amount of gross earnings of \$25,690.50).

**[52] I order Peter & Naomi Limited to pay Ms Lee the sum of \$2,055.24 gross in respect of unpaid holiday pay. pursuant to s 23.2 of the Holidays Act 2003.**

*Lost Wages*

[53] Ms Lee is entitled to an award for lost wages pursuant to s 128 of the Act.

[54] I have discretion pursuant to s 128(3) of the Act to order a sum greater than 13 weeks lost wages and I am minded to do so in this case.

[55] Ms Lee was unable to seek alternative employment following the termination of her employment at Peter & Naomi Limited due to her health condition which resulted in her leaving the employment at WPK.

[56] In the opinion of the community mental health team Ms Lee will require extensive treatment for at least a year.

[57] As regards loss of future earnings, the Court of Appeal in *Telecom New Zealand Ltd v Nutter* considered that in assessing the period of reimbursement the contingencies of life, the possibility of alternative employment, the unemployment benefit and the need for moderation needed to be considered<sup>2</sup>.

[58] In *Telecom South Ltd v Post Office Union* the Court of Appeal stated: “awards of compensation are discretionary and that there is no automatic entitlement to an award reflecting the balance of the expected working career of the employee or any similar approach”.<sup>3</sup>

[59] Judge Travis in *Prebble v Coastline FM Ltd* indicated that in addition to giving consideration to the contingencies of life, consideration should also be given to what constituted a reasonable period.<sup>4</sup>

[60] I am satisfied that in this case it is fair and equitable to consider my making an award in respect of future earnings.

[61] Ms Lee is a young woman. Having taken into consideration the medical evidence provided to the Authority, I order that Ms Lee is to be paid 26 weeks’ salary.

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<sup>2</sup> *Telecom NZ Ltd v Nutter*[2004] 1 ERNZ 315

<sup>3</sup> *Telecom South Ltd v P O* [1992] 1 ERNZ 711

<sup>4</sup> *Prebble v Coastline FM Ltd*[1992] 3 ERNZ 294

[62] I order that Peter & Naomi Limited pay Ms Lee the sum of \$15,444.07, (calculated as \$16.50 per hour x 36 hours x 13 weeks -\$200.00 paid by WINZ ) pursuant to s 128(2) of the Act.

#### *Compensation*

[63] Ms Lee is a young person who aspired to a career in hairdressing. During her employment at Peter & Naomi Limited I find that she suffered hurt and humiliation as a result of which she is now receiving ongoing medical treatment as substantiated by evidence provided to the Authority.

[64] I am satisfied that there has been significant loss of confidence and well-being and award compensation at the level claimed by Ms Lee.

[65] Peter & Naomi is ordered to pay Ms lee the sum of \$15,000.00 as compensation pursuant to s 123(1)(c )(i) of the Act.

#### *Contribution*

[66] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[67] I find no contribution on the part of Ms Lee which would affect the level of remedies awarded.

#### **Penalties**

[68] Employers in New Zealand are expected to know and adhere to the minimum employment law standards before and during the employment of employees as set out in *Labour Inspector v Cypress Villas Ltd (Cypress Villas)*, ignorance of the law is no defence<sup>5</sup>

[69] Failure to apply the minimum employment standards renders an employer liable to incur a penalty.

*Should a penalty should be imposed on PWK for the failure to provide a written employment agreement?*

[70] Peter & Naomi Limited failed to provide Ms Lee with a written employment agreement pursuant to s 65 of the Act.

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<sup>5</sup> *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [29]

[71] Having considered the principles which should govern the imposition of a penalty, I note that the factors the Court must have regard to in determining the appropriate penalty under s.133A of the Act.<sup>6</sup>

[72] These have been summarised in the recent Employment Court case of *Lumsden v Sky City Management Ltd* as including whether the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.<sup>7</sup>

[73] I find that the decision not to provide a written employment agreement to Ms Lee breached a statutory requirement of employment law and was committed knowingly. It appears from the evidence during the Investigation Meeting that Ms Lee may not be the only employee without a written employment agreement.

**[74] I order that Peter & Naomi Limited is to pay a penalty of \$2,000.00, of which 40% is to be paid to Ms Lee and 60% to the Crown. Payment is to be made within 14 days of the date of this Determination.**

*Should a penalty be imposed upon PWK for its failure to keep and provide a wages and time record?*

[75] It is a statutory requirement that employers maintain wage and time records pursuant to s 130 of the Act. Peter & Naomi Limited have not kept wage and time records as required by the Act.

**[76] I order that Peter & Naomi Limited is to pay a penalty of \$2,000.00, to the Crown. Payment is to be made within 14 days of the date of this Determination**

*Should a penalty be imposed upon PWK for failing to act in good faith?*

[77] I have already taken into consideration the fact that Peter & Naomi Limited did not act in good faith towards Ms Lee in arriving at the decision that she had been unjustifiably dismissed.

[78] There is no separate penalty awarded therefore on this basis.

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<sup>6</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

<sup>7</sup> *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

**Should a penalty should be imposed upon Ms Naomi Kwon as a person involved with the breaches?**

[79] I find no evidence that Ms Kwon was the employer of Ms Lee. The employer was Peter & Naomi Limited.

[80] I impose no penalty upon Ms Naomi Kwon.

**Should a penalty should be imposed upon Mr Peter Lee as a person involved with the breaches?**

[81] Mr Kwon was the Manager of PWK, a business owned by Peter & Naomi Limited.

[82] I impose no penalty upon Mr Kwon.

**Costs**

[83] The parties represented themselves and unless they incurred legal costs they are unlikely to be able to claim costs.

[84] However if they wish to make a claim for costs, the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

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

[86] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>8</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>8</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].