

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 23/10  
5075939

BETWEEN ANNE MAREE MCCOMBIE  
Applicant

AND PAPWORTH ASSET  
MANAGEMENT LTD  
Respondent

Member of Authority: Paul Montgomery

Representatives: Grant Devlin, Advocate for Applicant  
Rachel Brazil, Counsel for Respondent

Investigation Meeting: 22 September 2009 at Dunedin  
2 December 2009 at Dunedin

Submissions Received: 15 and 24 December 2009 for Applicant  
14 December 2009 for Respondent

Determination: 3 February 2010

---

**DETERMINATION OF THE AUTHORITY**

---

[1] Mrs McCombie, the applicant, was originally employed by the respondent's predecessor Malcolm Papworth, who then operated as a sole trader. Mr Papworth is now the sole director and shareholder of the respondent company which was incorporated in October 1996. Initially Mrs McCombie filled the role of part-time personal assistance/office administrator, but later worked as a client services clerk for Mr Papworth and then for Papworth Asset Management Ltd.

[2] In mid December 2003 the applicant inquired of Mr Papworth why she had not been paid her entitlement to annual leave over the preceding six years. The issue of an annual bonus was also raised at this time. Mr Papworth undertook to have the matter investigated and to report his findings to Mrs McCombie in the first week of January 2004. While Mr Papworth was away with his children, Mrs McCombie tendered her resignation and after tidying the office, left her employment on 20 December 2003.

[3] At some point around this time or perhaps a little earlier, Mrs McCombie had copied the wage records and retained those copies in order to found her claims. Her evidence to the Authority was that it was at the behest of the Labour Inspector with whom she was dealing at the time that these copies were taken.

[4] In a letter dated 1st September 2004 Mr Papworth wrote to the applicant and stated:

*I will not be making any comment on the queries you make, where the information you are basing your inquiry on was obtained from the unlawful taking of information from our office.*

[5] The applicant's claims have been bedevilled by an array of factors which need not be recorded in this determination. Each party has, at various times, been represented, then unrepresented, represented again and then later unrepresented. There have been instances where the respondent has failed to comply with the Authority's directions, in particular in regard to provision of a statement in reply.

[6] All these issues gave rise to increased tension and animosity between the parties, frustrated the dedicated efforts of Mr Grills to resolve the problems in mediation and produced extensive correspondence and documentation to the Authority.

[7] As a result of initial interviews conducted with each of the parties on 22 September 2009, the Authority set out its requirements to each party, in particular to produce the documents upon which each party was relying. The Authority then conducted its investigation meeting hearing from both parties and their now representatives at a meeting on 2 December 2009. I have considered the submissions filed by the parties in coming to this determination, as well as considering the evidence and documents presented on the day.

### **The burden of proof**

[8] The situation in this case is further complicated by the absence of a written employment agreement or any written records of arrangements and/or variations made in the course of a lengthy 15 year employment relationship.

[9] The law is clear in respect of an arrears claim. The Employment Relations Act 2000 at ss.130, 131 and 132 sets out the obligation of the employer to keep accurate

time and wage records in respect to all of its employees. Where the employer's records are deficient or suspect and the employee has records which are original, the burden or proof lies with the employer to disprove the employee's claims.

[10] In this matter it is clear that the documents the applicant put before the Authority in respect of time and wages records are copies of those originally held in the offices of the respondent. For the respondent, Mr Papworth gave evidence as to why the documents he submitted to the Labour Inspector differed from those provided to Mr Henning by the applicant.

### **Credibility**

[11] Given the lack of adequate records in respect to agreements made between the parties in some matters, for example rejuvenation days, shopping days, pay rates, and in others, the *reconstruction* or *adjustments* of time and wage records by the respondent, the crux of this matter is the issue of credibility.

[12] The evidence both documentary and oral are in stark conflict on virtually every point.

[13] The respondent's position is the original arrears claims lodged related to unpaid annual leave and the applicant has expanded the claim to include other issues. The applicant says that as reconstructed records from the respondent came to light, short paid hours and other omissions came into question.

[14] For the avoidance of doubt, the Authority finds the respondent's documentation practices unacceptable as they fall well short of the required standard. Further, the respondent's explanations as to how errors, discrepancies and other changes occurred are simply not believable. An example is Mr Papworth's evidence that immediately after becoming dissatisfied with Mrs McCombie's performance and wishing to make this plain to her, he raised her hourly rate by \$2 per hour.

[15] Another is his assertion is that he needed to reconstruct records held on his computer as the system had crashed after a virus affected the data held. No evidence from an independent witness was provided to verify the system had crashed and the date the data was lost.

[16] Another was the statement that none of the respondent's staff had paid *rejuvenation days* (Mr Papworth's statement at para.20). In his oral evidence before the Authority Mr Papworth said that rejuvenation days were provided to all staff *from 2000 onward*. He referred to a *free day* leave with pay and a further *two days leave with pay*. This was additional to annual leave. Mr Papworth told the Authority Mrs McCombie resisted signing the employment agreement which contained this provision. From this it is apparent that Mr Papworth was urging the applicant to sign the agreement. Mrs McCombie says that it was she who was pressing for a written agreement but it never materialised.

[17] In the matter of the conflicting documentation, I have preferred the documents submitted by Mrs McCombie to those put before the Authority by Mr Papworth. In respect of agreements made verbally between the parties and which have not been recorded by either party, I have assessed each issue on the basis of the balance of probability.

### **The claim**

[18] The applicant's claim is summarised as follows:

- (a) Arrears (figures are gross amounts);
  - \$5,056.50 – underpayment of hourly rate
  - \$7,285.00 – unpaid annual leave (from 15.12.1999)
  - \$1,616.00 – hours worked – not recorded or paid
  - \$400.00 – 5 unpaid statutory days
  - \$659.00 – incorrectly paid annual leave
  - \$1,000.00 – unpaid bonus
  - \$240.00 – unpaid commission
  - \$1,984.00 – in respect to 6 rejuvenation days
  - \$1,240.00 – unpaid sick leave
  
- (b) Other items
  - \$2,891.22 – legal expenses up to first mediation
  - \$9,324.04 – interest at 6% compounding
  - \$10,000.00 – penalty for ongoing breach of good faith by the respondent

**Payments made by the respondent**

[19] The respondent has paid Mrs McCombie the sum of \$1,379.00 and later offered to pay a further \$1,287.53 to meet the sum indicated by the Labour Inspector's findings at the time. This was in September 2005. The total here is \$2,666.53. The applicant refused to accept these sums for her use.

[20] The respondent's evidence was he paid the applicant the following sums on 21 September 2005:

\$949.00 – unpaid wages 9 February – 10 August 2001

\$684.00 – 6 days holiday pay accrued to August 2003

\$589.00 – 5 days sick leave from 22 – 26 December 2003

\$624.30 – interest and compensation for hurt and humiliation

[21] These payments need to go the credit of the respondent regardless of other circumstances.

[22] A difficulty arising is a statement made by Mr Papworth in a letter to Mrs McCombie on 24 July 2009 in which he offered to settle all claims for \$10,000 *which includes the \$3442.50 that I paid to you on 21 September 2005*. The inconsistency in the figures is clear and indicative of poor record keeping by the respondent.

[23] For the avoidance of doubt, the applicant's application for recovery of wages, holiday pay and penalties was lodged with the Authority in late December 2005. The file was designated CEA 398/05. The number was changed to its present seven digit number to align it with the new computerised case management system employed in the Authority.

[24] Mrs McCombie resigned from her position with the respondent on 23 December 2003, so almost exactly two years elapsed before her claims were lodged. Both parties have contributed to the delays in bringing this matter to a final resolution.

[25] The applicant has applied for penalties. But for the delay in Mrs McCombie's lodging the claims with the Authority, I certainly would have seriously considered

imposing a penalty on the respondent. The statutory bar set out in s.135(5) prevents such an order as the action for recovery of penalty was not commenced within 12 months of the date of the cause of action or the date on which the action should reasonably have become known to Mrs McCombie. The Authority has no discretion in this matter.

[26] Another difficulty facing the Authority in relation to the claims for bonus, commission and hours not recorded nor paid is that no documentation, altered or otherwise, is before the Authority on which it might assess objectively, the facts surrounding any agreements made the parties and what, if any, conditions applied to those agreements.

### **Determination**

[27] In coming to my findings I have set the relevant commencement period for the claims at 15 December 1999.

#### **A. Underpaid wages**

[28] This occurred due to a mistake by the respondent. It agreed to an increase of \$1 per hour in January 2000 to bring the applicant's rate to \$17 per hour. At the time the applicant was working 50 hours per fortnight.

[29] On occasion Mrs McCombie worked over 50 hours in a fortnight so in February 2001 the parties agreed to pay her on a 62 hour fortnightly basis. An error occurred at this time when the automatic payment was lodged. While the hours were increased, the rate remained at \$16. In effect the applicant was short paid \$62 gross per fortnight from February 2001 to 24 August 2001.

[30] In June 2003 an increase of \$2 per hour was agreed bringing the rate paid to \$19 per hour. There is no dispute about this. Unfortunately, it continued to ignore the \$1 per hour agreed but unpaid but as set out above. The correct rate should have been \$20 per hour.

[31] I am satisfied on the evidence Mrs McCombie has been underpaid the sum of \$5,056.50 gross.

**B. Unpaid annual leave**

[32] While there is some debate around the unpaid annual leave, mainly regarding the six year restriction and thus the starting point of the applicant's claim, I am satisfied the applicant's claim is from 15 December 1999.

[33] I accept the applicant was granted four weeks leave in 2001 ie the last three years of her employment.

[34] The Authority is satisfied the applicant is owed the sum of \$7,285.00 gross in unpaid annual leave. It is accepted the respondent made some payment on this head of the claim in September 2005. I will address this later and how that payment and others are to be treated.

**C. Rejuvenation days**

[35] As a result of evidence put before the Authority by the respondent, the Authority accepts such days were accorded to other staff and, on the balance of probabilities, were offered to the applicant to addition to, and not as part of, her annual leave entitlement.

[36] The respondent is to pay the applicant six days gross pay at the daily rate of \$124.00 gross. That is the sum of \$744.00 gross.

**D. Sick leave**

[37] The applicant claims to be owed \$1,240.00 gross in unpaid sick leave.

[38] The evidence is that in September 2005 the respondent paid the applicant the sum of \$589.00 in respect of this part of her claim. That sum appears to have been net of tax.

[39] Given the modest evidence before the Authority, I find that payment which relates to sick leave in the period 22 – 24 December 2003 has met the respondent's obligation under this head of the applicant's claim.

**E. Unpaid statutory days**

[40] The claim relates to five days in 2000. These days were payable at the then rate of \$80.00 per day.

[41] The respondent is to pay the applicant the sum of \$400.00 gross under this head of her claim.

**F. Incorrectly paid annual leave**

[42] Having considered the documents in evidence it is clear the respondent paid Mrs McCombie \$684.00 in respect of six accrued days of annual leave up until August 2003. This payment was made in September 2005. I decline this aspect of the applicant's claim.

**G. Bonus and commission**

[43] The basis of the claim for unpaid commission and how it arises is unclear. In particular, when the claim for commission was incurred and in relation to what sales. The Authority makes no award for that reason.

[44] The bonus claimed is also unclear. In the usual course of events an annual bonus is discretionary and not infrequently hedged by a range of conditions. The Authority has no evidence before it as to any terms applying to any bonus payment and therefore declines to make an award under this head of claim.

[45] In relation to the shopping days claimed by Mrs McCombie, again there is no written record of this agreement. In considering the matter, and particularly the evidence that another employee at the same time did not receive shopping days, I decline to make an award under this section of the claim.

**H. Legal expenses**

[46] Mrs McCombie says she has incurred legal costs for advice and representation *up to the first mediation*. That mediation took place on 28 February 2005 and was undertaken with the consent of the parties rather than under direction of the Authority.

[47] In such circumstances the Authority follows Goddard CJ in *Trotter v. Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 935;

*The parties owe it to each other to put in some resource towards a genuine endeavour by way of mediation to settle the dispute between them.*

[48] Accordingly, I decline to make any award under this head of the applicant's claim.

### **I. Penalty**

[49] As noted above, the claim relating to penalty is declined and for the reasons stated.

### **J. Interest**

[50] Schedule 2, s.11(1) to the Act establishes the jurisdiction of the Authority to award interest on monies owed to a party. The maximum rate is the 90 day bill rate at the date of the order plus 2% *as the Authority sees fit*.

[51] Section 11(2) however, makes it clear *S 11 (1) does not authorise the giving of interest upon interest*. That is, the Authority cannot award compound interest on monies due to a party.

[52] Having stood back and looked at this matter as whole, I am of the view that Mrs McCombie is entitled to interest on money awarded in this determination, but not money already paid to her by the respondent.

[53] The representatives are to confer to establish the correct total paid to Mrs McCombie prior to the issue of this determination and to deduct that money from the total awards made and then to calculate the remaining balance outstanding. The interest rate to be applied to that balance is 4.65%.

### **Summary of orders**

[54] The respondent is ordered to pay the applicant the following sums:

- In respect of under-rate payments \$5,056.50 gross
- In respect of unpaid annual leave \$7,285.00 gross
- In respect to rejuvenation days \$774.00 gross
- In respect to unpaid statutory days \$400.00 gross
- Interest as set out immediately above

**Costs**

[55] Costs are discretionary.

[56] In exercising the Authority's discretion I have taken into account that Mrs McCombie was not legally represented in front of the Authority whereas the respondent was. I have considered this in the light of the offer of \$10,000 made by Mr Papworth in an attempt to settle the matter without the need for an investigation meeting. I have also considered Mr Papworth was legally represented in front of the Authority and therefore has incurred some legal costs in respect to that appearance.

[57] The Authority may have been better disposed to the respondent's situation in a costs setting had Mr Papworth complied with the Authority's direction to provide a statement in reply as set out in the Authority's direction.

[58] Standing back and looking at this matter as a whole, I think in the circumstances, it is just to allow costs to lie where they have fallen.

Paul Montgomery  
Member of the Employment Relations Authority