

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 132  
5461356

BETWEEN            DONNA-MARIE KIM NGATAI  
Applicant

AND                    PARAMED AMBULANCE  
LIMITED  
Respondent

Member of Authority:    P R Stapp

Representatives:        Ruvín Pattiaratchi, Counsel for Applicant  
No appearance for the Respondent

Investigation Meeting  
(and submissions):      9 December 2014 at New Plymouth

Determination:            19 December 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Donna-Marie Kim Ngatai claims that she was disadvantaged in her employment by the unjustifiable actions of Paramed Ambulance Limited (Paramed). This relates to a unilateral change in Ms Ngatai's duties and pay. Also Ms Ngatai claims that she has been unjustifiably dismissed on 15 January 2014 when Paramed disestablished her position without proper process and failed/refused to allow her to continue in the role of Telemarketing Manager, until a new position was formally offered to her. No new position was offered to her.

[2] Paramed has not lodged a statement in reply in the Authority (reply to the applicant's statement of problem). Further Paramed has not requested leave to reply despite being on notice of what to do and that any such leave would not be unreasonably denied. Paramed had every opportunity and time to contact the Authority and to seek to reply and to raise with the Authority any good cause (with

sufficient evidence) for any problems in attending to the matter. Indeed Mr Steven Buckland, director and shareholder, and his daughter did not follow up the information that they gave to the support officers on the telephone. Paramed has simply unreasonably ignored the matter altogether. Paramed has also failed to provide a copy of wage, time and holiday records. It was requested twice to provide the required records (letter from the applicant's representative and a Minute of the Authority). I am satisfied that Paramed has been served with the statement of problem and the Authority's Minute and notice of investigation meeting. I have relied on a courier track and trace and the service record of a professional servicer engaged by the applicant as proof of service. It is clear from the Authority's support officer's file notes that Mr Buckland and his daughter have knowledge of the matter. There has been no response by Paramed. It has failed to engage in the Authority's investigation.

[3] The Authority's investigation meeting was delayed to provide Paramed or a representative time to attend the Authority's investigation meeting. The Authority's support officer did contact Mr Buckland who said he was not going to attend. Apparently he has some medical issues, but has done nothing to verify this and has not provided any evidence of his situation to satisfy me he has good cause for the investigation meeting not to proceed. I decided to act fully in the matter and continue with the investigation meeting as if the respondent or a representative had attended.

### **The facts**

[4] Paramed Limited is a registered company and has one director, Stephen Clifford Buckland. Paramed carries out business as an ambulance and event support service provider. On 28 August 2013 Ms Ngatai signed an individual employment agreement (the agreement) with Paramed and commenced work approximately two weeks later. She was hired as a Telemarketing Manager and was required to work a minimum of 40 hours per week and at a pay rate of \$25 per hour.

[5] On 27 September 2013 Ms Ngatai says that Mr Buckland informed her that he needed her to sell medical alarm units instead of the work she was engaged to do, and until he found somebody to cover the position. Although this did not form part of her job description Ms Ngatai felt she had no choice but to agree. She did do the work as instructed. This involved her pay changing to \$100 per unit sold. She continued selling medical alarms until the company shut office for the Christmas break around

20 December 2013. Ms Ngatai claims that she was not paid her usual wages during the time she was selling medical alarms. She explained that she even had difficulties in getting properly paid for the alarms she sold.

[6] Work was due to resume after Christmas 2013. However via a text message Ms Ngatai was informed that the office would not reopen until 13 January 2014. She was requested to come back into work on 14 January (a day after everybody else) and that she was to meet with Mr Buckland who wanted to talk to her about her performance when she arrived. She had no other details

[7] On 14 January 2014 Ms Ngatai attended a meeting with Mr Buckland in his office. Ms Ngatai took her mother along as a support person because Mr Buckland had mentioned her performance. She says Mr Buckland did not allow her mother to join them in the meeting. She says that Mr Buckland raised her performance in selling medical alarms. She also says that Mr Buckland accused her of bullying clients and had concerns that her units sold were being cancelled by clients. She was not provided with any details although she says that Mr Buckland had a piece of paper with names on it. She was not given it.

[8] She says she also raised an issue about not being paid for at least six sales that she had made during December 2013. Mr Buckland informed her that she owed him for cancellations and only gave her \$200 cash which he withdrew from an ATM machine.

[9] At the same time Mr Buckland went on to say that a Telemarketing Manager was no longer needed and that he would have to split the role of sales representative manager and direct marketing. She says that he said that he would give her a call once a new employment agreement was ready. She says she requested to go back to the Telemarketing Manager role until the agreement was ready. She was informed to be at the office at 9am the next day.

[10] On 15 January 2014 Ms Ngatai was told to work the telephones in a corner of the office, which she had never been previously asked to do. She left the office after working for about two hours because she says she felt humiliated in front of people she had appointed and arranged to work for Paramed. She contacted Mr Buckland at the end of the week to ask whether the new employment agreement was ready to be signed. Mr Buckland indicated that it was not ready and he never contacted her again.

[11] On 28 March 2014 she raised a personal grievance that was put in writing and sent to Mr Buckland. The letter requested wage and time records. Mr Buckland or a representative for the respondent never replied to the letter and he never provided her with her wage and time records that had been requested.

[12] Ms Ngatai is also claiming lost wages for a total of 17 weeks at \$25 per hour for 40 hours per week. She says that she wasn't given the required four weeks' notice of termination required under the employment agreement and has only been able to find temporary employment in early November 2014. This employment is due to come to an end at the end of December 2014. She went to seminars during the year to help with seeking employment, applied for jobs both on her own initiative and with the help of Work and Income. She says she attended a number of job interviews but despite her efforts only found employment earlier this month.

[13] Ms Ngatai's claim for \$12,000 for hurt, humiliation, loss of dignity and injury to feelings relates to what she says was the huge impact on her financially, emotionally and socially. She says she was struggling financially even during her employment with Paramed and by not being paid wages. She says the struggle continued after she was dismissed.

[14] She says she has been embarrassed such as when she had to tell her children that they could not go to a school camp as she had no money. She says this was stressful.

[15] An attempt was made to arrange mediation with the help of the Ministry of Business, Innovation and Employment to resolve the employment relationship problem but Mr Buckland never agreed to attend. It now falls on the Authority to determine the matter.

### **Issues**

[16] Ms Ngatai is claiming \$15,922.39 for arrears of wages. This is calculated on the following basis:

- (a) That she worked 18 weeks for Paramed for which she should have been paid \$25 per hour at a minimum of 40 hours per week. This is a total of \$18,000 gross;

- (b) That she received a total of \$911.07 (net) in wages during her employment and she has calculated this to be gross earnings of \$1,277.61. She says she also received an estimated total of \$800 in cash for medical alarms sales. She assessing her total actual gross earnings during her employment as \$2,077.61, the difference is \$15,922.39 that she is claiming she is owed.

[17] Next the onus is on Ms Ngatai to establish that there was some unjustified action disadvantaging her in her employment and that she was dismissed. If she was dismissed the onus rests on the employer to justify the dismissal and satisfy the correct procedure was followed. The test is outlined under s 103A of the Act. Section 103A (3) of the Act outlines the procedure that an employer must follow.

### **Determination**

[18] First Ms Ngatai is owed \$15,922.39 arrears of wages. I have accepted her calculation because Mr Buckland has not provided the wage time and holiday record. He has ignored two requests for the records to be provided and the time for that to be achieved. There was no formal written variation of the new terms imposed on Ms Ngatai and the respondent has failed to provide any defence, reply or response to put its side of the story.

[19] Second, Paramed's action of requiring Ms Ngatai to work in a new role selling alarms and pay her on new terms that were never part of the agreed terms they entered into, was unjustified because his request lacked proper consultation, and I accept that Ms Ngatai says she had no choice in the matter. Further I hold that Ms Ngatai was disadvantaged in her employment because her pay was less and her terms of employment altered.

[20] Third, Ms Nagtai's employment ceased at the initiative of her employer when Mr Buckland sent her to work the telephones and informed her that he had decided to split roles and he would provide a new employment agreement. I hold that the decision had been made before Ms Ngatai had any opportunity to have input and to comment and that Mr Buckland never followed up and provided the new employment agreement for the split role. In fact he made no attempt to follow up his proposal, provide an agreement as proposed and thus it was reasonable for Ms Ngatai to conclude that her employment had ceased by way of dismissal.

[21] Ms Ngatai has established that her employer's actions were unjustified. She has been disadvantaged, and dismissed unjustifiably.

[22] I now turn to remedies to resolve the employment relationship problem.

[23] As I have said Ms Ngatai is entitled to her arrears of wages as claimed. This is the sum of \$15,922.39. I note that there has been no claim for holiday pay and this would have to be a new claim since the respondent has not been put on notice of such a claim and any details suffice to say Ms Ngatai says she took no leave. Thus, her entitlement would be 8% of her total gross earnings.

[24] She is also entitled to her lost wages. She has claimed 17 weeks lost wages caused by her dismissal. She has mitigated her loss. Further I hold that she has not contributed to the situation giving rise to the personal grievance. She cannot be held responsible or blamed for the employer's failures. Her employer's failure to properly communicate with her and follow a proper and fair process to maintain her employment has meant that she has been denied the opportunity to earn her wages as agreed. There is nothing to suggest that she would not have been able to work during the 17 weeks she has claimed. In other words there is no causal link that her employment with the respondent would not have lasted for that amount of time. She is entitled to \$17,000.

[25] I also hold that Ms Ngatai has established that she was hurt, humiliated and suffered a loss of dignity. There was a financial impact on her and an impact in regard to her relationships with other colleagues and people. She is entitled to \$5,000 compensation without deduction.

### **Costs**

[26] Costs follow the event. Ms Ngatai has legal aid. Ms Ngatai has been successful. The employer's deliberate behaviour not to engage in the Authority's investigation and failure to provide wage time and holiday records has added to the costs for the applicant. It was entirely reasonable for Ms Ngatai to obtain a professional representative for assistance in regard to enforcing her rights. That has involved costs for preparation, attendances and submissions. Also, Mr Buckland or a representative for the respondent failed to reply to Ms Ngatai's personal grievance letter, failed to take up an opportunity to attend mediation and made no attempt to engage properly with the Authority, despite having time to do so. Costs are not to

penalise the respondent, but to reimburse the applicant for the costs that she has been unreasonably put to by the conduct of the respondent.

[27] The applicant has asked for a total of \$2,761.11 costs including disbursements and accounting for the legal aid grant. I assess that costs are within the range of the Authority's tariff for the time it took for the investigation meeting and the preparation needed. I award Ms Ngatai \$2,488 costs plus the filing fee of \$71.56 and \$160 for the cost of the professional process server.

### **Summary of orders**

[28] Paramed Ambulance Limited is to pay Donna-Marie Kim Ngatai the following:

- [1] \$15,922.39 arrears of wages; and
- [2] \$17,000 lost wages; and
- [3] \$5,000 compensation under s 123 (1) (c) (i) of the Act without deduction; and
- [4] \$2,488 costs plus the filing fee of \$71.56 and the fee for the professional process server of \$160.

P R Stapp  
Member of the Employment Relations Authority