

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 442
3125420

BETWEEN ANDIE O'LEARY
 Applicant

AND UMBRELLA MULTIMEDIA
 LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Bede Laracy, advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 8 October 2021 at Wellington

Submissions Received: At the Investigation Meeting

Record of Determination: 8 October 2021

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Andie O'Leary, claims she was unjustifiably dismissed, albeit constructively, by Umbrella Multimedia Limited (Umbrella). Ms O'Leary also claims she is due unpaid wages, holiday pay and commissions.

[2] Umbrella's position is unknown, with its participation in the process being less than fulsome. Umbrella failed to respond to letters sent on Ms O'Leary's behalf and notwithstanding contact with the Authority there is no substantive response to the statement of problem. Umbrella then failed to attend the investigation without notice or explanation though that did raise the question of whether or not I proceed.

[3] The answer is yes.

[4] While Umbrella failed to participate in a telephone conference held to schedule the investigation meeting its sole director, Kevin Laulu (also known as Vika Tao'llu), telephoned the Authority soon thereafter. During the call he gave an e-mail address to which he asked all documents be served. That subsequently occurred and included therein has been a Notice of Investigation Meeting. In the notice is advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.¹ I am therefore satisfied Umbrella is, or at least should be, aware of the investigation and the consequences of non-attendance.

[5] Here I also note Regulation 8(3) of the Employment Authority Regulations 2000. There is no statement in reply and no application for leave to defend Ms O'Leary's claims.

[6] Mr Laulu asked that copies of the documents also be emailed to a Samson Samasoni as, according to Mr Laulu, it is Mr Samasoni who *really runs the business*. That Mr Samasoni ran the business was also alleged by Ms O'Leary who identified him as both the Owner and Managing Director² and there is further evidence that is so in an e-mail he sent on 23 October 2020 (refer [16] below).

[7] While the documents were, as requested, sent to Mr Samasoni there has been no response and I have some concerns about the evidence suggesting he actually runs Umbrella. That is because Mr Samasoni is a current bankrupt and had been so for nearly a year when the events canvassed here occurred. I also note there are indications Mr Samasoni might retain a significant interest in Umbrella, albeit via an intermediary company, Pasifika Network Limited, which has been removed from the register but is still recorded as owning nearly half of Umbrella. I will order a copy of this determination be sent to the Official Assignee and leave these issues to the proper authority to deal with.

Background

[8] In January 2020 Ms O'Leary was engaged as a Sales Manager at Beach FM, a radio station owned by Umbrella, after being approached by Mr Samasoni. Initially Ms O'Leary was engaged as a contractor while also employed elsewhere but this

¹ Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

² Brief of evidence at [5] and letter of grievance dated 10 November 2020

changed with effect 1 May 2020 when she was offered, and accepted, the role as a full time employee.

[9] Ms O’Leary says that in August she was surprised to be told at a management meeting that Umbrella wanted to separate Beach FM from their other day to day operations and have it become ... *a stand-alone entity with no help from Umbrella if there was a short-term cash flow [deficiency] while this happened.*

[10] Ms O’Leary goes on to say:

We were only given 1 weeks' notice, and within that time they wanted all clients to change their monthly payment dates to the 7th of the month instead of the 20th. It was made clear that if this did not happen and at least 60% of outstanding monies billed from the previous month were not received by this date that we would not be paid.³

[11] Ms O’Leary says that while she considered this blackmail and bullying, she and her colleagues did their best to contact clients and change payment dates where possible. Ms O’Leary says that as a result, and at the beginning of September 2020, her updating of the debtor register along with knowledge of an expense budget she and Mr Samsoni had prepared, she concluded there were *sufficient funds received to pay salaries and wages owed for the first fortnight of the pay run for that month.*

[12] Ms O’Leary says she received a full fortnightly salary payment on 9 September. In late September she received *token payments* of \$300 and \$400 instead of what should have been salary and commission payments of \$1646 and \$1200.

[13] Ms O’Leary says her attempts to raise this with either Mr Samasoni or Mr Laulu, who she believed to be the 2nd in charge, were rarely responded to and when they were the response, especially when given by Mr Samosoni, was bullying and abusive. That said she also accepts there were promises of payment from both Messrs Samasoni and Laulu and it was those which caused her, along with other staff, to continue working.

[14] Umbrella again failed to pay Ms O’Leary on the first pay day of October and as a result she and seven others sought legal advice and formally raised their concerns on 19 October 2020. The letter demanded payment by 5.00pm the following day.

³ Brief of evidence at [9]

[15] Having had no response by the stipulated time Ms O’Leary decided enough was enough and sent an email advising her resignation with immediate effect at 11.38am on 21 October 2020. Contained therein is the statement *As you have persistently failed to pay my wages as per my employment contract states, I now deem you have repudiated that employment agreement.*

[16] For completeness two further points should be noted. The first is an e-mail sent by Mr Samasoni to another of those affected by the non-payments. In it he outlines Beach FM’s financial situation and says that while there had been cashflow issues in the past the future looked brighter with a forecast break even for October and long term contracts in place which meant Beach FM would be in a much better position. That said, the letter also advised Umbrella would divest itself of Beach FM and asked if staff might be interested in taking control before another interested party was spoken to. The reason for the divestment was stated to be that Umbrella’s involvement had grown to a point neither envisaged nor desired and that *we’re fully involved with our TV/Video work and cannot continue to be involved with Beach.*

[17] The second point is that Ms O’Leary also says that while Umbrella failed to pay her it apparently continued to forward PAYE and Kiwi Saver on her supposed earnings to the Inland Revenue Department between 9 September and 1st November. She states Inland Revenue are now investigating this.

Discussion

[18] As already said Ms O’Leary claims she was constructively dismissed.

[19] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*⁴ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign. There must be a causal link between the employer’s conduct and the tendering of the resignation⁵ and the possibility of resignation in response to that conduct should be foreseeable.⁶

[20] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a

⁴ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

⁵ *Z v A* [1993] 2 ERNZ 469

⁶ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

subsequently proffered resignation. The onus falls on Ms O'Leary to establish, prima facie, there was such a breach.

[21] Having heard her evidence, and in the absence of any input or challenge from Umbrella, I am satisfied she has done so.

[22] At its simplest an employment agreement can be considered an exchange of labour for remuneration. A failure on the part of one party to provide its consideration (in this case the remuneration) in a timely and proper manner can, I conclude, be considered a breach. To do so for three consecutive pay periods as occurred here can be considered significant and repudiatory. I also consider it foreseeable an employee might react negatively to such conduct and note the content of Ms O'Leary's resignation letter attributes it to the failure to pay which confirms the causal link.

[23] Having established she was constructively dismissed it now falls to Umbrella to justify its actions. Its absence means it has failed to do so. The dismissal is therefore unjustified which raises the question of remedies.

[24] Ms O'Leary seeks three months lost wages minus \$2,983.99 earned during that period and a compensatory payment of \$20,000.⁷

[25] With respect to lost wages s 128(2) of the Act requires the payment of three months wages or actual loss whichever is the lesser. Three months loss is what has been claimed here and s 128(2) means it is payable.

[26] In support of her claim for compensation Ms O'Leary gave evidence of both physical and mental manifestations of the dismissal which required medical assistance and counselling. She also spoke of the hurt she felt and damage to her professional reputation and personal life.

[27] Having considered the evidence and current trends with respect to awards under s 123(1)(c)(i) of the Act I consider the amount sought in the bounds of reason and suggest it should not be reduced simply because a reasonable claim was made.

[28] Ms O'Leary also seeks payment of the unpaid wages, holiday pay and commission. She quantifies the amount owing as \$8,448.91 and supports this with a

⁷ Section 123(1)(c)(i) of the Employment Relations Act 2000

detailed breakdown. Here comment should be made about the commission. The evidence is Ms O’Leary earned a consistent amount each month which in my view means it too is payable as claimed.

[29] Having heard her evidence and viewed the contemporaneous documents I have no qualms in accepting Ms O’Leary’s claim regarding unpaid wages. In doing so I also note the evidence strongly suggests Mr Samasoni actually ran this business and he has a known propensity for failing to pay moneys due. In making this last comment I note the bankruptcy was attributable to a creditor’s application and that Mr Samasoni is already known to me having failed to honour a promise he repay money he improperly sourced from a previous employer.⁸

[30] Ms O’Leary also seeks reimbursement of costs for one day at the daily tariff.⁹ The investigation was scheduled for a day and while it was truncated as a result of the respondent’s absence it still had to be prepared for on the basis Umbrella might attend and additional costs were generated as a result of having to second guess a possible defence. Actual costs exceeded the amount sought and having discussed the claim with Mr Laracy I consider it appropriate I award the amount sought.

Conclusion and Orders

[31] For the above reasons I conclude Ms O’Leary has a personal grievance in that she was unjustifiably dismissed and is due unpaid wages and holiday pay. As a result I order the respondent, Umbrella Multimedia Limited, pay Andie O’Leary:

- a. \$12,458.93 (twelve thousand, four hundred and fifty eight dollars and ninety three cents) gross as recompense for wages lost as a result of the dismissal; and
- b. A further \$20,000.00 (twenty thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- c. A further \$8,448.91 (eight thousand, four hundred and forty eight dollars and ninety one cents) being unpaid wages, holiday pay and commission; and

⁸ *Insurance Council of New Zealand Inc v Samasoni* [2016] NZERA Wellington 67

- d. A further \$4,500.00 (four thousand, five hundred dollars) being a contribution toward the costs Ms O'Leary incurred pursuing her claims.

[32] The amounts ordered in [31] above are to be paid no later than 4.00pm on Friday 29 October 2021.

[33] A copy of this determination is to be sent to the officer responsible for managing Mr Samasoni's bankruptcy.

[34] In closing I caution Mr Lauulu that should the above not be paid he may find himself personally liable for at least the amount specified in [31](c) pursuant to ss 142W and 142Y of the Employment Relations Act 2000.

Michael Loftus
Member of the Employment Relations Authority

⁹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135