

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 122
3003732

BETWEEN JEANETTE RILEY
 Applicant

A N D MR SALAD LIMITED
 Respondent

Member of Authority: Vicki Campbell
Representatives: Torn Castle for Applicant
 No appearance by or on behalf of Respondent
Investigation Meeting: 21 April 2017 at Tauranga
Submissions Received: 21 April 2017 from Applicant
Date of Oral
Determination: 21 April 2017
Date of written
determination: 26 April 2017

RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

- A. Mr Salad Limited is ordered to pay to Ms Riley under section 131 of the Employment Relations Act 2000 arrears of wages within 28 days of the date of this determination as follows:
- (i) \$12,600.72 gross for unpaid wages;
- (ii) \$760 gross for underpayment of work undertaken on a public holiday.
- B. One or more conditions of Ms Riley's employment were affected to her disadvantage by the unjustified actions of Mr Salad

Limited.

- C. Mr Salad Limited is ordered to pay Ms Riley the sum of \$5,000 under section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

Employment relationship problem

[1] Ms Jeanette Riley claims she is owed arrears of wages and holiday pay and that one or more conditions of her employment have been affected to her disadvantage by the unjustifiable actions of her employer, Mr Salad Limited (Mr Salad).

[2] As permitted by section 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all of the evidence and submissions received from Ms Riley but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders as a result.

Procedural background

[3] Ms Riley lodged her statement of problem with the Authority on 23 February 2017. The Authority served the statement of problem on the address for service for Mr Salad as listed on the Companies Register. That was signed for by the company at 12.31pm on Saturday, 25 February 2017. Mr Salad failed to lodge a statement in reply within the required 14 days.

[4] On 27 March 2017, I issued a Notice of Direction setting out a proposal to progress the investigation of this matter. The Notice of Direction together with a Notice of Investigation Meeting was served on the company's address for service and signed for by "Mr Salad" at 1.47pm on Monday, 3 April 2017. I am satisfied Mr Salad has been served with both the Notice of Direction and the Notice of Investigation Meeting.

[5] No representative from Mr Salad attended at the commencement time of the investigation meeting. I delayed the commencement time for 15 minutes to allow a representative from Mr Salad to attend in case they were stuck in traffic or otherwise running late. Mr Salad has not engaged in the Authority's process and has not shown good cause for its failure to attend the investigation meeting.

[6] As provided in clause 12 of Schedule 2 of the Act, I have proceeded to act fully in the matter as if Mr Salad had engaged in the process or was represented.

Background

[7] Ms Riley started employment with Mr Salad on 30 September 2013 as an office executive/assistant. Ms Riley's duties include ordering, debt collection, banking, deliveries and other general tasks from time to time.

[8] There was no written employment agreement however I have established that the relevant terms of Ms Riley's employment include:

- (a) permanent part time employment;
- (b) hours of work up to 28.3 hours each week worked over five days of the week;
- (c) at the beginning of the employment relationship, Ms Riley was paid a fortnightly salary of \$851.40 gross. This changed on 1 April 2016 to a fortnightly salary of \$879.78 gross and then in June 2016 to \$908.16 gross;
- (d) provision of onsite accommodation, power and a telephone line.

[9] The employment relationship between Ms Riley and Mr Salad is a continuing relationship and Ms Riley is a 17.5% shareholder of the company. Mr Wayne Revell, the sole director and major shareholder of Mr Salad, is her brother. Ms Riley reports to Mr Revell on a day-to-day basis. A third minor shareholder is Mr Revell's son who has a 5% shareholding.

[10] Ms Riley invested heavily in the business from the outset and between 29 October 2013 and 5 November 2015 loaned the company \$111,000 which was to have been repaid with interest by 6 November 2015. The loan has not been repaid.

[11] Throughout the employment relationship, Mr Salad has either paid Ms Riley's wages late or not at all. On 27 January 2017, Ms Riley sought payment for arrears of wages and raised a personal grievance based on allegations that she was subject to conduct by Mr Revell that amounted to harassment and/or bullying.

The issues

[12] The issues for my determination are:

- (a) Is Ms Riley owed arrears of wages and if so how much?

- (b) Have one or more conditions of Ms Riley's employment been affected to her disadvantage by the unjustifiable actions of Mr Salad and if so what if any remedies should be awarded?

Arrears of wages

[13] Ms Riley claims she is owed unpaid wages plus payment for public holidays and alternative holidays under the Holidays Act 2003 (the Holidays Act). I will deal with the unpaid wages first.

[7] Ms Riley claims she is owed wage payments for time worked in 2014, 2015, 2016 and 2017. Ms Riley has provided the Authority with copies of her bank statements and the pay advice slips which she has received during her employment. A review of these documents has satisfied me that Ms Riley has not received payment of all wages due to her.

[8] My analysis shows that for the calendar years 2014 and 2015, Ms Riley was underpaid each year by one fortnightly period, most likely for the fortnights ending 28 August 2014 and 1 October 2015. Ms Riley's rate of pay at that time was \$851.40 gross per fortnight making a total of \$1,702.80 gross outstanding.

[9] For the calendar year 2016, Mr Salad has failed to pay fortnightly salary payments on eight occasions being twice in July, twice in September, once in each of October and November and twice in December. Ms Riley's rate of pay from June 2016 was \$908.16 gross making a total of \$7,265.28 gross outstanding.

[10] From 1 July 2017 to the date of this determination, Mr Salad has failed to pay Ms Riley's fortnightly salary on four occasions, once each in January and February and twice in March. Ms Riley's current rate of pay is \$908.16 gross making a total of \$3,632.64 gross outstanding.

[11] I am satisfied that Ms Riley has established she is owed arrears of wages for unpaid salary payments totalling \$12,600.72 gross.

[12] Mr Salad Limited is ordered to pay to Ms Riley under s.131 of the Act arrears of wages amounting to \$12,600.72 gross within 28 days of the date of this determination.

Public holidays

[20] Ms Riley claims that between 28 October 2013 and 26 October 2015 she was required to attend work on a total of 15 public holidays. Ms Riley claims she was not paid for all hours worked at time and a half and her employment records do not record any alternate holidays she has become entitled to under the Holidays Act.

[1] Section 50 of the Holidays Act requires Mr Salad to pay its employees time and a half for all hours worked on a public holiday. Section 56 of the Holidays Act entitles an employee to another day off in lieu if the public holiday falls on a day that would otherwise be a working day for that employee and where the employee works on that public holiday.

[22] Ms Riley says she worked the following public holidays:

| Public Holiday | Date | Hours worked |
|--------------------------|------------------|--------------|
| Labour Day | 28 October 2013 | 6.5 |
| New Years' Day | 1 January 2014 | 6 |
| Auckland Anniversary Day | 27 January 2014 | 6 |
| Waitangi Day | 6 February 2014 | 5.5 |
| Good Friday | 18 April 2014 | 8.5 |
| Easter Monday | 21 April 2014 | 8 |
| Queens' Birthday | 2 June 2014 | 5.5 |
| Labour Day | 27 October 2014 | 8 |
| Boxing Day | 26 December 2014 | 5.75 |
| Day after New Years' Day | 2 January 2015 | 6.75 |
| Auckland Anniversary Day | 26 January 2015 | 6.5 |
| Waitangi Day | 6 February 2015 | 7.5 |
| Good Friday | 3 April 2015 | 7 |
| Queens' Birthday | 1 June 2015 | 6 |
| Labour Day | 26 October 2015 | 6.5 |

[23] In total Ms Riley worked 100 hours on public holidays between October 2013 and October 2015. Ms Riley was paid her ordinary rate for all time worked and is entitled to half the ordinary rate for each hour worked. Ms Riley's half rate is \$7.60

gross per hour. Extrapolated out over the 100 hours, Ms Riley is entitled to an additional \$760 gross in holiday pay for public holidays.

[24] Ms Riley worked 15 public holidays and is entitled to have her holiday and leave record amended to include these alternate holidays pursuant to section 56 of the Holidays Act.

[25] Mr Salad Limited is ordered to pay to Ms Riley the sum of \$760 gross being the half rate payment for working on 15 public holidays under section 131 of the Act and to record her entitlement to 15 alternate holidays as required under section 56 of the Holidays Act within 28 days of the date of this determination.

Interest

[26] Ms Riley has claimed interest on the outstanding amounts and I am satisfied it is appropriate that interest be calculated and paid on all the arrears of wages including the holiday pay.

[27] For ease of calculation I have globalised the calculation of interest for the underpayments. Mr Salad Limited is ordered to pay 5% interest calculated and paid as set out in the following paragraphs.

[28] The 5% interest on the arrears of wages is to be calculated on the total amount of arrears owed for each year as follows:

- (e) For the 2014 arrears of \$851.40 from 31 December 2014 until the amount is paid in full;
- (f) 2015 arrears of \$851.40 from 31 December 2015 until the amount is paid in full;
- (g) 2016 arrears of \$7,265.28 from 31 December 2016 until the amount is paid in full;
- (h) 2017 arrears of \$3,632.64 from 31 March 2017 until the amount is paid in full.

[29] The 5% interest on the unpaid holiday shall be calculated at the rate of 5% from 26 October 2015 until the amount is paid in full.

Unjustified disadvantage

[30] Ms Riley claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of Mr Salad.

[1] Ms Riley bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If Ms Riley discharges that onus, then the burden of proof moves to Mr Salad to establish on the balance of probabilities that any disadvantage Ms Riley may have suffered was justified.

[2] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Mr Salad's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[3] Ms Riley alleges she was subject to bullying and harassment by Mr Revell, sometimes in front of other employees, and also alleges that she has made a number of requests that Mr Salad attend to various issues relating to her employer-provided accommodation which have been ignored.

[4] Ms Riley has provided the following examples of the conduct she says was harassment and/or bullying. In November 2014, Ms Riley approached Mr Revell in his office and asked for a pay rise. Mr Revell told her that if Ms Riley received a pay rise he would have to charge her rent for her accommodation. He then got out of his chair and made a fist in front of her face in a threatening manner.

[5] **On** or about 18 December 2015, after completing a task at her computer, Ms Riley developed numbness from her neck upwards including her face, head and throat. Ms Riley informed Mr Revell of the symptoms and stopped working in order to rest. Ms Riley subsequently sought medical assistance. Ms Riley provided Mr Revell with a copy of her medical information which included a recommendation for light duties. Mr Revell made no inquiries as to her health and did not provide the alternative duties as recommended. Instead he raised the matter in front of family members and complained that Ms Riley could not handle doing the invoicing.

[36] Ms Riley told me she is not allowed to access the company computer system. Ms Riley works from her onsite apartment and says that Mr Revell has refused her access to ensure she does not know what is going on in the business.

[6] Ms Riley says Mr Revell frequently tells her that he does not consider her to be a key person in the business and that she is easily replaceable. Ms Riley says Mr Revell has yelled at her, sometimes in front of other employees, which has left her feeling degraded and belittled.

[7] Ms Riley told me Mr Revell regularly blames her for mistakes made by other employees even where she has nothing to do with the matters in question. She told me Mr Revell tells her she wastes time when she walks from her department and then down to processing and has told her she is too slow at doing the telephone orders.

[8] The family relationship and Ms Riley's relationship as a shareholder in the business have been an impediment to her raising concerns with her employer. On 27 January 2017, Ms Riley decided enough was enough and formally raised her concerns with Mr Revell regarding his conduct towards her.

[9] No action has been taken by Mr Salad to address the concerns raised by Ms Riley and in fact no response to Ms Riley's letter has been made at all by Mr Salad or Mr Revell. Instead, on 10 April 2017 and consistently with the conduct complained of by Ms Riley, Mr Revell demanded Ms Riley withdraw her proceedings from the Authority and threatened to place the company in liquidation if she proceeded. Mr Revell told Ms Riley if this happened she would lose her investment.

[10] Mr Salad has failed to address Ms Riley's concerns regarding the security of her property and other matters relating to the employer-provided accommodation.

[11] I am satisfied Ms Riley's employment has been affected to her disadvantage, not only by Mr Revell's conduct toward her but also through the late payment and the non-payment of her wages.

[12] Ms Riley seeks payment of \$20,000 for loss of dignity, hurt feelings and humiliation. Ms Riley gave compelling evidence that her job is her livelihood and at her age (she is over 60) she believes she does not have an option other than staying in the employment relationship. Ms Riley has sold her property and her investment is in

the business. She relies on her employment for her accommodation as well as her income.

[44] Based on the evidence I have heard and given the familial relationships between Ms Riley and Mr Salad, an appropriate award for distress and humiliation is \$5,000.

[13] Mr Salad Limited is ordered to pay to Ms Riley the sum of \$5,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Costs

[14] Costs are reserved. The parties are invited to resolve the matter of costs. If they are unable to do so, Ms Riley shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[15] Ms Riley could expect the Authority to determine costs, if asked to do so, on its usual daily tariff basis unless particular circumstances or factors require adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority