

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 5
5534497

BETWEEN ANN RODGERS
 Applicant

AND TARANAKI RECRUITMENT
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Steve Ebert, Counsel for Applicant
 No appearance by or on behalf of the Respondent

Investigation Meeting: 28 July 2015 at New Plymouth

Submissions Received: At the investigation meeting from the Applicant

Determination: 13 January 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Ann Rodgers alleges she was constructively dismissed by Taranaki Recruitment Limited (TRL). She says also that she was paid beneath the applicable minimum wage for nine weeks at the beginning of her employment. She seeks reimbursement of wages corresponding both to her period of employment and following her dismissal, and compensation and costs.

[2] Mr Stacey Reid is the sole director of TRL. TRL denies Ms Rodgers was constructively dismissed. Rather, it says Ms Rodgers resigned from her employment. It denies any wages are owed.

The Authority's investigation

[3] Ms Rodgers' statement of problem was initially lodged on 11 December 2014. TRL eventually provided a statement to the Authority on 9 March 2014. A case management call was scheduled for 8 May 2015 but TRL did not attend. Ms Rodgers, via her representative, lodged an amended her statement of problem on 8 June 2015.

[4] At a second case management call on 30 June 2014 Mr Reid and Ms Rodgers' representative were present. Mr Reid advised that TRL was in the process of instructing counsel on the matter. With the agreement of the parties an investigation meeting was scheduled for 28 July 2015 and arrangements were made for the exchange of documentation.

[5] No further information was received from TRL nor did it attend the Authority's investigation meeting on 28 July 2015. An Authority Officer spoke with Mr Reid at approximately 9.30am on the day the investigation was scheduled to commence. He advised he was unaware of the scheduled meeting. I am not satisfied that TRL has shown good cause for its failure to attend the Authority's investigation or be represented given the content of the second conference call and automatic electronic confirmation dated 6 July 2015 that TRL had received and read the Authority's Notice of Investigation Meeting and attachment, each setting out the date, time and location of the investigation meeting.

[6] I determined the investigation meeting should proceed.¹ I have not recorded all the information provided and have confined this determination to stating findings of fact and law necessary to dispose of the matter.

Summary of relevant information

[7] TRL was incorporated on 12 March 2014. TRL's statement advises that Mr Reid became aware through an associate that Ms Rodgers might be suitable for a position at TRL as Office Manager. The parties met in February and again on 20 March 2014. At the time Ms Rodgers was in receipt of a Work & Income New Zealand (WINZ) benefit although Mr Reid did not become aware of this fact until a month (or thereabouts) later. Mr Reid informed Ms Rodgers that TRL was not in a position to immediately pay wages but that she would be paid market rates when the

¹ Pursuant to clause 12, Schedule 2 of the Employment Relations Act

business generated income. No specific quantum of pay was agreed nor was an employment agreement signed.

[8] Ms Rodgers commenced her position on 24 March 2014. She says on 7 April 2014 Mr Reid canvassed with her a future pay-rate between \$16-18 per hour. Ms Rodgers reports there were ongoing discussions about remuneration over the following month but that Mr Reid asked her to be patient while the business was in a start-up phase.

[9] There is evidence that on 30 April 2014 a WINZ work broker advised Mr Reid that a flexi-wage subsidy of \$3,350 (\$185 x 13 weeks plus a further lump sum pay at week 14) would be available to TRL if Ms Rodgers was employed by it for a minimum of 20 or more hours per week. Ms Rodgers says after Mr Reid's contact with WINZ he informed her that even with a subsidy TRL could not afford to pay her as envisaged. It appears that TRL did not pursue a subsidy at the time².

[10] Sometime in May 2015 Ms Rodgers sought advice from her WINZ case manager who informed her that she was entitled to at least \$100 (gross) for her work and recommended she seek that sum from TRL. Ms Rodgers reduced her hours of to 20 per week. In mid-May 2014 TRL agreed to back-pay Ms Rodgers \$100 for each week she had been employed. That sum was paid by instalments until 1 June 2014. Going forward, Ms Rodgers says she relied on Mr Reid's continued promises that she would be paid at market rates as soon as TRL was able.

[11] Ms Rodgers says in the first week of June 2014 whilst training a temporary replacement in anticipation of a pre-planned holiday she became aware that her substitute was receiving \$18 per hour. She left the office and called Mr Reid later that day. She told him she had taken up employment with TRL on the understanding that she would be paid market rates for work performed. She told him she was dissatisfied with the current arrangement and that she was resigning. She says Mr Reid accepted her resignation at that time.

[12] In contrast TRL's statement reports that Ms Rodgers abruptly left the office without notification whilst training a temporary replacement. No mention is made as to whether Ms Rodgers resigned.

² WINZ records 18/06/2014

[13] However there is no dispute that Mr Reid contacted Ms Rodgers in mid-June and they met on 17 June 2014. Mr Reid asked Ms Rodgers to return to the workplace and offered her \$28 per hour for 30 hours per week. Ms Rodgers says she accepted the offer and asked for it to be put in writing.

[14] On 20 June 2014 Mr Reid furnished a letter addressed "To whom it may concern" stating Ms Rodgers would work a minimum of 30 hours per week at an hourly rate of \$18, plus a monthly payment of \$400. The letter advised that the rate of pay would be reassessed after three months. Ms Rodgers' evidence is she was yet again disappointed that Mr Reid had altered terms she considered had previously been agreed but says she was grateful for work. Ms Rodgers returned to work in the last week of June 2014.

[15] Ms Rodgers alleges that on 16 July 2014 the pair drank socially together. She says she raised with Mr Reid her disappointment with how TRL had remunerated her. She says Mr Reid acknowledged that she had been paid beneath the minimum wage.

[16] The following week, on Wednesday 23 July 2014 Ms Rodgers received an email message sent at 10.07pm from Mr Reid advising he had missed the cut off time to transfer scheduled wages and that he would need to make manual payments the following day. Ms Rodgers replied. She remonstrated with Mr Reid over his attitude towards paying workers on time and said her goodwill had too often been taken advantage of. She stated she had insufficient funds for food, or transport to work the following day, and would not be in. She advised "*I've had enough and yeah I think you'll need to need to find someone else to help going forward*".

[17] Mr Reid replied with the two emails sent in relatively quick succession between midnight and 12.30am. The first of these stated "*I accept your resignation*".

[18] At 7.15am the following morning Ms Rodgers sent an email stating:

"I sent you that message last night because I was upset that paying us wasn't a priority for you yesterday and I am very rude when I feel undervalued. I apologise its not the right way to communicate with you and its something I need to work on.

...

I would be willing to discuss things face to face as I would like to continue working at Taranaki recruitment, but if you would prefer we terminated my employment then I can understand that.

[19] Mr Reid replied at 9.30am. He said he had been hurt by her [first] message and inquired who she banked with so that he could make a manual payment.

[20] Ms Rodgers says there was a brief telephone discussion between the parties on Friday 25 July 2014 where she asked Mr Reid if she could return to work on Monday. She says Mr Reid advised that TRL would pay out her entitlements.

The issues

[21] The Authority is required to determine:

- (a) whether Ms Rodgers owed arrears of wages;
- (b) whether Ms Rodgers resigned from her employment or whether she was dismissed either actually or constructively;
- (c) if Ms Rodgers was dismissed, what remedies should she be awarded.

Is Ms Rodgers owed arrears of wages?

[22] There is no dispute that Ms Rodgers received \$900 in total for the period of her employment between 24 March and 1 June 2014 (10 weeks) inclusive. TSL says Ms Rodgers worked no more than 16 hours a week and was not entitled to receive wages above \$100 per week whilst in receipt of a benefit.

[23] I do not accept TRL's assessment of Ms Rodgers' hours of work. A letter signed by Mr Reid dated 7 April 2014 states "*the hours of [Ms Rodgers'] role are 9am to 2.45pm Monday to Friday*". This evidence leads me to conclude that Ms Rodgers' hours of work were 28 and 3/4 per week, although, as noted, Ms Rodgers advised these were reduced to 20 per week on or about 5 May 2014. Based on this information I calculate that between 24 March 2014 and 31 May 2014 Ms Rodgers worked a total of 252.5 hours.³

[24] Nor do I accept TRL's view as to Ms Rodgers' entitlement to wages whilst in receipt of a benefit. The Minimum Wage Act 1983 ("MWA") provides:

³ For the period 24 March 2014 to 3 May 2014 (six weeks) I conclude Ms Rodgers worked 172.5 hours. From 5 May until 31 May 2014 (four weeks) she worked 80 hours (20 hours a week).

6 Payment of minimum wages

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract for service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than the minimum rate.

[25] Ms Rodgers was a class of worker entitled to receive minimum wages⁴. TRL was an employer as defined by MWA⁵.

[26] TRL was not lawfully able to avoid the requirements of the Minimum Wage Act by seeking to set off its obligation to pay wages against whatever sum Ms Rodgers received via WINZ. I find TRL was in breach of the Minimum Wage Act by its approach to Ms Rodgers' remuneration in this way. Clearly Ms Rodgers needed to declare her income but that was a matter between her and WINZ. The Authority was provided with file notes from WINZ which indicates Ms Rodgers was transparent with her case manager. I reject any inference made by TRL that Ms Rodgers was engaged in fraudulent conduct.

[27] I am satisfied that Ms Rodgers was paid below the relevant 2013 minimum wage order and the 2014 minimum wage order for the period 24 March 2014 to 31 May 2014 inclusive. Ms Rodgers is entitled to be paid the difference between what she received and the relevant minimum wage rate for that period. I calculate this sum to be \$2,682.74⁶ Ms Rodgers is also entitled to have \$214.61 as outstanding holiday pay against these wages.

[28] I am unwilling to make an order that Ms Rodgers should be paid the difference between the verbal offer of \$28 per hour she says was made to her on 17 June 2014 by Mr Reid and the remuneration of \$18 per hour plus a monthly payment of \$400 as recorded in a letter dated 18 June 2014. It is apparent that the parties were engaged in wage negotiations and Ms Rodgers agrees she did not dispute the amount recorded in the letter. I find she must be taken to have accepted the sum offered and note she returned to work soon after.

⁴ Section 4 of the Minimum Wages Act

⁵ As defined at s 2 Minimum Wages Act

⁶ \$395.31 (28 hours and 45 minutes at 2013 Adult Minimum Wage Order of \$13.75 per hour) plus \$3,187.43 (223 hours and 45 minutes at 2014 Adult Minimum Wage Order of 14.25 per hour) minus \$900 in wages paid.

Did Ms Rodgers resign or was she dismissed either actually or constructively?

[29] In *Boobyer v Good Health Wanganui Ltd*⁷ Chief Judge Goddard set out a range of circumstances where “*an employee is, against his or her will, treated by an employer as having resigned*” including as follows:

‘That is where an employer...takes advantage of words or resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee’s communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once “the heat of the moment” had passed...’

[30] The Chief Judge further observed:

“Each case turns on its own facts but it is at least clear that ‘[a]n apparent resignation can also amount, notwithstanding the words used, to a dismissal’.”

[31] Given the content of Ms Rodgers’ email sent late in the evening of 23 July 2014, and where it is objectively clear she was angry at learning she would not be paid as anticipated, I consider a fair and reasonable employer would have treated the message with caution and allowed either for a cooling off period or sought to clarify with Ms Rodgers her intentions. TRL took neither of those actions and instead simply accepted Ms Rodgers’ resignation. TRL’s acceptance of Ms Rodgers’ ostensible resignation in these circumstances was not the action of a fair and reasonable employer given it is now well established law that an employer should ensure an employee genuinely intends to resign and has not acted impulsively.

[32] Further, s 4(1A)(c) of the Employment Relations Act provides that where an employer contemplates taking action that may have an adverse effect on an employee’s continued employment, the employer must provide the employee with both information relevant to the continuation of the employee’s employment and an opportunity for the employee to comment before the decision is made.

⁷ *Boobyer v Good Health Wanganui Ltd* EMC Wellington WEC3/94

[33] There is no evidence to suggest that at 9.30am the following morning when TRL became aware that Ms Rodgers did not intend to resign, that it; sought to clarify the status of the relationship; discuss its view that Ms Rodgers had resigned; or provide Ms Rodgers an opportunity to comment on the matter.

[34] TRL's decision to progress the termination of Ms Rodgers' employment in these circumstances was, in effect, an actual dismissal at TRL's instigation and not the action of a fair and reasonable employer in all the circumstances. Ms Rodgers was dismissed by TRL and her dismissal was unjustifiable.

[35] Given my findings above I consider it unnecessary to determine whether TLR constructively dismissed Ms Rodger.

Remedies

Lost wages

[36] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost "*as a result of the grievance*". That section is qualified by s 128(2) which, subject to any reduction that the Authority may make under s 124 for contributory behaviour, provides that the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration, or 3 months' ordinary time remuneration.

[37] I am satisfied that Ms Rodgers did not contribute to the situation which gave rise to her personal grievance in a way that is blameworthy and causative.

[38] Ms Rodgers evidence is that she found alternative work 7 weeks and two days later on 17 September 2014. I find she appropriately sought to mitigate her losses. She is entitled to wages for the period between her dismissal and that date. I calculate this sum as \$4,844.⁸

Compensation

[39] Ms Rodgers sought \$5,000 in compensation. I have reviewed the email Ms Rodgers sent to a friend on 24 July 2014. I am satisfied that she was distressed and humiliated by the way TRL dismissed her.

⁸ At \$18 per hour, 30 hours a week for 7 weeks and 2 days plus \$740.00 (37 working days of bonuses)

Orders

[40] Taranaki Recruitment Limited is ordered to pay Ms Ann Rodgers the following:

- (i) \$2,897.35 in arrears of wages (including holiday pay); and
- (ii) \$4,844 pursuant to s 123(1)(b) as reimbursement of lost wages following dismissal; and
- (iii) \$5,000 pursuant to s 123(1)(c)(i) as compensation for distress and humiliation; and
- (iv) \$71.56 to reimburse the cost of the filing fee.

Costs

[41] Ms Rodgers seeks costs. I consider it appropriate that costs are reserved. The parties are encouraged at first instance to reach agreement as to these.

Michele Ryan
Member of the Employment Relations Authority