

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 298  
5430713

BETWEEN SHIRLENE NITA TAYLOR  
Applicant

AND TAMAKI LEGAL LIMITED  
Respondent

Member of Authority: R A Monaghan  
Representatives: S Taylor in person  
D Naden, counsel for respondent  
Investigation meeting: 26 May 2014  
Supplementary submissions received: 30 May 2014  
Determination: 11 July 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. The parties' employment relationship ended by Mrs Taylor's constructive dismissal.**
- B. The dismissal was unjustified.**
- C. Tamaki Legal is ordered to pay to Mrs Taylor:**
  - a. Four weeks' salary;**
  - b. A further \$1,250 in respect of lost remuneration; and**
  - c. \$3,500 as compensation for injury to her feelings.**
- D. Tamaki Legal is ordered to pay to Mrs Taylor arrears of wages from 18 July 2013 to the date of her resignation, less an amount paid subsequently.**
- E. Costs are reserved.**

## **Employment relationship problem**

[1] Shirlene Taylor was employed as a solicitor in a practice operated by Tamaki Legal Limited (Tamaki Legal). This was her first position since being admitted to the bar. Her employment began on 2 April 2013.

[2] A substantial proportion of Tamaki Legal's income came from grants of legal aid from the Ministry of Justice. The work centred on matters within the jurisdiction of the Waitangi Tribunal.

[3] On 3 July 2013 Tamaki Legal's managing director, Darrell Naden, advised the staff of difficulties with the firm's legal aid provider status. As a result its legal aid work was not being paid for. Mr Naden had applied to the Ministry of Justice for the lead provider status he required, but was advised on 21 May 2013 that his application was declined and his existing status as lead provider was terminated.

[4] On 8 July 2013 Mr Naden obtained temporary lead provider status. Full lead provider status was subsequently obtained. Work continued, and payments for work done on legal aid resumed. However Tamaki Legal also owed a relatively large sum to the IRD, and attempts to resolve that matter were continuing. For that reason and because it was concerned about the future of Tamaki Legal's lead provider status, on 19 July Tamaki Legal's bank took control of Tamaki Legal's income including the resumed legal aid payments. Mr Naden says the bank acted unlawfully. I am unable to comment on the lawfulness of the bank's action, but the result was that Tamaki Legal says it was unable to access funds to pay the staff.

[5] On 1 August 2013 Mr Naden advised the staff, including Mrs Taylor, that he could not pay their salary and wages. Payment for work done from 18 July was owed. Mr Naden explained the reason for the difficulty and expressed confidence that it could be overcome. According to Mrs Taylor, Mr Naden advised her and her colleagues that they should 'down tools' until he was in a financial position to pay them. According to Mr Naden, he assured the employees they still had their jobs and that they would eventually be paid. He asked them to continue working but they declined.

[6] An arrangement under which funds could be released was eventually reached with the bank on 18 September 2013.

[7] Meanwhile Mrs Taylor began looking for another job. When, during a further meeting on 6 August, Mr Naden attempted to encourage her to return to work she declined to do so without pay. On 16 August 2013 she gave four weeks' written notice of her resignation, and began her new employment at the end of that time. She says the circumstances amounted to a constructive dismissal.

[8] Mrs Taylor also alleged several breaches of express terms of the parties' employment agreement - particularly in respect of her rate of pay and her professional development - as well as breach of good faith. Some of the alleged breaches support her claims for the payment of wages underpaid. No remedies were sought in respect of the remaining alleged breaches.

[9] Tamaki Legal relied initially on an argument that the employment agreement was terminated by frustration as a result of its bank's actions. Mr Naden argued belatedly in submissions that Tamaki Legal suspended - but did not terminate - the employment relationship as it was entitled to do under the employment agreement. By her resignation, Mrs Taylor ended the relationship of her own volition. There was no dismissal.

[10] Tamaki Legal denied any breaches of the employment agreement.

[11] Finally, the statement of problem contained a broadly-stated request for penalties for 'all breaches of legislation' by the respondent. That claim should have been framed with reference to particular legislative provisions, where the provision in question provides for a penalty.<sup>1</sup> Although a breach of good faith was alleged there was no reference to the additional requirements of s 4A of the Employment Relations Act 2000, which concerns penalties for breach of good faith. Overall the claim was too broadly-stated to pursue.

[12] There was no claim for penalties for breach of the employment agreement.

[13] The issues are:

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<sup>1</sup> Employment Relations Act 2000 s 133

- a. was Mrs Taylor dismissed;
- b. if so, was the dismissal justified;
- c. if not, what is the remedy; and
- d. is Mrs Taylor owed any unpaid wages.

### **Was Mrs Taylor dismissed**

[14] Two further issues arise in respect of the existence of a dismissal. They are:

- (i) did Mrs Taylor's employment end by her resignation or was she constructively dismissed; and
- (ii) did the agreement terminate by its frustration.

#### **1. Was there a constructive dismissal**

[15] There are three well-recognised grounds on which a resignation may be found to be a constructive dismissal. They are that: the resignation was coerced; the employer engaged on a course of conduct with the intention of obtaining a resignation; or a breach of duty by the employer caused the resignation.<sup>2</sup> The third was relied on here.

[16] The particular breach of duty relied on was the failure to pay wages. I accept that the failure to pay caused Mrs Taylor's resignation, and that it is reasonably foreseeable that such a failure would lead to a resignation.

[17] I also consider it plain that, on the face of the matter, a failure to pay wages in full and when they are due is a breach of duty. However Tamaki Legal has sought in effect to argue that there was no breach of duty because the failure to pay was associated with a suspension of the relationship reached by agreement. Alternatively, the circumstances amounted to a suspension which was imposed following a fair and reasonable procedure, and was justified.

[18] There was no express agreement between the parties that Mrs Taylor would continue the employment relationship but would remain off work and without pay

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<sup>2</sup> *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [1985] 2 NZLR 372

until Tamaki Legal was in a position to pay her. Nor was there any evidence from which her agreement could be implied. At most she said she would not agree to report for work without being paid.

[19] Mr Naden's attempt to keep the employment relationship on foot may have amounted to a suspension. However I do not accept that the obligation to pay wages can be circumvented by asserting there was a suspension, and in turn that the suspension was raised with the employee in accordance with the requirements of s 103A of the Employment Relations Act. There was no personal grievance in respect of a suspension, and s 103A does not apply.

[20] Nor does any of this prevent the employees concerned from taking the view that the failure to pay was repudiatory of the agreement. Precisely that difficulty led to legislation which allowed for the suspension of striking and non-striking workers without terminating the employment relationship<sup>3</sup>. Parental leave legislation similarly expressly preserved the employment relationship during an employee's unpaid absence from work.

[21] Finally Mr Naden submitted that, by signing the employment agreement, Mrs Taylor agreed to comply with clause 17. That clause provided for suspension as follows:

*17. Suspension*

*If a serious problem arises, the employer may suspend you from work until the problem is resolved. While suspension is usually on pay, the employer has the right to suspend without pay if it decides that to be appropriate.*

[22] Mr Naden submitted that a 'serious problem' arose in the form of the difficulties with legal aid provider status and the debt to the IRD, and more directly with the bank's taking control of its income. In those circumstances he had reasonable grounds for deciding it was 'appropriate' to suspend Mrs Taylor from work without pay. The suspension was therefore imposed in accordance with the clause, and was lawful.

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<sup>3</sup> Commencing with the Industrial Relations Act 1973 and continued in succeeding employment relations legislation

[23] The suspension of an employee without pay is draconian, not least because the primary bargain between an employer and an employee is that the employee carries out work in return for payment from the employer. Failing to pay destroys the essence of the bargain.

[24] I do not accept that clause 17 can be interpreted so widely as to apply to any 'serious problem' experienced by the employer, in particular as distinguished from a serious problem between the employer and the employee. The failure to pay is too fundamental a breach of the employment agreement.

[25] For these reasons I find there was no lawful suspension, and there was a breach of duty in the form of the failure to pay. The criteria for the existence of a constructive dismissal were met, so that there was a dismissal.

## 2. Did the agreement terminate by its frustration

[26] A contract may be frustrated when, -

- without default of either party,
- the contractual obligation has become incapable of being performed,
- by reason of a change in the relevant circumstances,
- which makes the performance radically different from what had been undertaken.

[27] The place of the doctrine of frustration in employment law was addressed most recently by the Court of Appeal in *A Worker v A Farmer*.<sup>4</sup> The Court began by accepting the position that: the doctrine will not easily be invoked by an employer because of its drastic effect on the rights of vulnerable employees; it is not to be lightly invoked; and it must be kept within very narrow limits.<sup>5</sup> In considering whether what occurred in that case made the performance of the contract radically different from what had been undertaken, it also said '*it is only if the employment contract did not make sufficient provision for what occurred that the doctrine of frustration will apply.*'<sup>6</sup> 'What occurred' in that case was an incident which the employer said led to such a destruction of trust in the employee that the relationship

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<sup>4</sup> [2010] NZCA 547

<sup>5</sup> [17]

<sup>6</sup> [21]

could not continue. The court found there were statutory and contractual provisions capable of addressing the matter and the doctrine did not apply.

[28] Here there was a breach of the obligation to pay, said to be a result of the bank's action in refusing to make funds available.

[29] The failure to pay was capable of being dealt with under existing statutory and contractual provisions. Mrs Taylor could bring a claim for arrears of wages or otherwise seek to enforce the obligation to pay, or to treat the breach as repudiatory (as she did). It was open to the parties to negotiate an alternative arrangement to cover the immediate difficulty, as happened in effect with some of the other affected employees. As well as the procedures available under the Employment Relations Act, the Wages Protection Act 1983 is relevant.

[30] For those reasons I do not accept that the performance of the agreement became radically different from what had been undertaken. I do not accept, either, that there was no default on the part of Tamaki Legal. It was in default of its obligation to Mrs Taylor to pay her. Even if its view of the lawfulness of the bank's action is correct, that is a matter between it and the bank. Any associated dispute does not mean it is excused from its obligations under the employment relationship.

[31] I would not find the employment relationship was terminated by its frustration.

### **Was the dismissal justified**

[32] It is inherently difficult for an employer to show a constructive dismissal was justified, because by their nature the circumstances of such dismissals tend not to include key elements required under s 103A.

[33] Mr Naden's submissions concerning the fairness of the suspension are more relevant to the fairness of the dismissal. I accept that at a series of meetings he informed Mrs Taylor and other affected employees of Tamaki Legal's financial circumstances, but the circumstances meant that inevitably there was a failure to raise the possibility of termination of employment. In turn, there was no opportunity for employees to provide feedback on that possibility or for that feedback to be considered.

[34] For that reason Mrs Taylor's dismissal was not justified.

### **Remedies for unjustified dismissal**

[35] Mrs Taylor sought a number of remedies which are not within the scope of the remedies for a personal grievance under s 123 of the Employment Relations Act. The remedies were associated with costs of a residential tenancy in Auckland and its termination, and her moving to take up new employment in another town. She sought subsequently to rely in support on s 128, but that section concerns the reimbursement of lost remuneration. The items claimed for were not 'remuneration'.

[36] The Authority has no jurisdiction to make the orders sought in respect of those items.

[37] Of the remedies which are available to her, Mrs Taylor sought:

- (i) reimbursement of remuneration lost as a result of her personal grievance; and
- (ii) compensation for the injury to her feelings caused by the grievance.

#### **1.Reimbursement of lost remuneration**

[38] Mrs Taylor's claim for the reimbursement of lost remuneration covers in part the same period as her claim for 4 weeks' payment in lieu of notice. She was not paid for her notice period, but cannot claim payment twice for that period. However she is entitled to four weeks' payment and I order accordingly.

[39] A further claim for lost remuneration was within the scope of s 123, namely the difference between the salary she earned in her new position and the salary at Tamaki Legal. For reasons I discuss below, the applicable salary at Tamaki Legal was \$40,000 pa. This was \$5,000 pa more than her new salary.

[40] I apply s 128 and conclude that Mrs Taylor is entitled to payment in respect of the first three months of that loss.

[41] The amount is \$1,250. Payment is ordered accordingly.

## 2. Compensation for injury to feelings

[42] While the circumstances were worrying for Mrs Taylor for personal financial reasons, beyond that there was no evidence of injury to her feelings.

[43] Tamaki Legal is ordered to compensate Mrs Taylor for injury to her feelings in the sum of \$3,500.

### **Are unpaid wages owed**

[44] Tamaki Legal owed Mrs Taylor wages for work done from 18 July 2013 to the date of her resignation. Payment based on a salary of \$40,000 pa is ordered accordingly, together with holiday pay on the amount owed.

[45] A payment of \$1,412.72 was made in October 2013. Tamaki Legal may deduct that amount from the sum awarded.

[46] In support of her further claims Mrs Taylor says Tamaki Legal breached:

- (i) its duty of good faith;
- (ii) cl 7.2 of her employment agreement by failing to do all it could to assist her to achieve 'supervised provider' status for legal aid purposes;
- (iii) cl 7.3 of her employment agreement by failing to increase her salary to \$45,000 pa;
- (iv) cl 8.4 of her employment agreement by failing to pay incentive payments; and
- (v) cl 9 of her employment agreement by failing to advance her professional development.

### 1. The duty of good faith

[47] The allegation of breach of good faith was based on the breaches discussed in this section, together with other exchanges which I do not consider capable of amounting to breaches of good faith. Moreover, no remedy was sought in respect of the alleged breach.

[48] I turn to the remaining breaches.

## 2. Clause 7.2

[49] Clause 7.2 read:

*The employer will do all they can to assist the employee with achieving supervised provider status with the Ministry of Justice*

[50] The most relevant aspect of Mrs Taylor's allegation of breach of clause 7.2 concerns the procedure for obtaining supervised provider status.

[51] In May 2013, Mrs Taylor began the steps required to complete her part of her application for supervised provider status. Mr Naden did not complete his part of the application form at that time. He said it was too soon to complete the questions concerning Mrs Taylor's knowledge and competence, that he was waiting for her to provide him with a copy of the second and independent reference required in support of the application, and that the firm had a practice of waiting at least 3 months before proceeding with such applications.

[52] If Tamaki Legal observed the practice Mr Naden described, this was not made clear to Mrs Taylor. The parties also disagreed about whether a second reference from an external practitioner was necessary, or whether a member or associate of Tamaki Legal would be suitable.

[53] However no remedy for the alleged breach was sought, and I do not take these matters any further.

## 3. Clause 7.3

[54] Clause 7.3 read:

*At the end of the 90 day trial period and in the event that you achieve supervised provider status with the Ministry of Justice, the employer and the employee agree that the employee will be engaged on a full time basis with the employer. You shall be paid an annual salary of \$45,000 being an all inclusive rate covering all hours worked.*

[55] Mrs Taylor's starting salary was \$40,000 pa. She sought the difference between payment at that rate and payment at the rate of \$45,000 pa commencing on the 91<sup>st</sup> day of her employment. She said she was entitled to the increase at the end of the 90 day trial period, but did not address what should be made of the fact that she did not achieve supervised provider status.

[56] For his part Mr Naden said the provision meant, in effect, that that salary increase applied at the end of the 90 day period or when supervised provider status was achieved, whichever was the later. In the light of Tamaki Legal's practice on the matter, achieving supervised provider status was expected to come later.

[57] The provision is not worded well, but the question of interpretation is moot as Mrs Taylor did not achieve supervised provider status. There is no entitlement to payment under the clause.

#### 4. Clause 8.4

[58] Clause 8.4 read:

*Once the employee has achieved supervised provider status with the Ministry of Justice, the employee will be remunerated at \$20.00 per hour for any chargeable hour or part hour thereof completed over and above the minimum 6.5 chargeable hours per day) ("the incentive payment") For the sake of clarity, the incentive payment will only be paid in the event that any work completed by the employee is remunerated for by the Ministry of Justice and/or by private clients.*

[59] Again Mrs Taylor did not address the relevance of the requirement that supervised provider status be achieved. She sought the additional payment for the chargeable hours she worked as if the requirement was not there.

[60] Mr Naden did not dispute the amount Mrs Taylor identified, rather he said no payment was owed as supervised provider status was not achieved.

[61] I cannot read more into the clause than is contained in it. Mrs Taylor did not qualify for the payment under the clause, and is not entitled to the payment claimed.

#### 5. Clause 9

[62] Clause 9 read:

*At the end of the trial period and in the event that your position becomes full-time the employer agrees to advance your professional development in areas of the law including but not necessarily limited to Treaty, Maori land, criminal, family and employment.*

[63] Mrs Taylor believes her professional development was not advanced at the end of her trial period, in breach of this clause.

[64] Mrs Taylor raised concerns about the nature of the work made available to her, the limited nature of the training she received under an arrangement with the Otago Community Law Centre, and a significantly less than expected input from a senior practitioner from outside Tamaki Legal. These appeared to be more relevant to a breach of clause 9 rather than of any other clause. Whether or not that is so, Mrs Taylor's evidence amounted to a list of complaints and there was no supporting legal analysis. Not all complaints are justiciable, so that the provision of a list of complaints in this way is not helpful.

[65] For my part I find that Tamaki Legal made such efforts as it could in the circumstances to provide Mrs Taylor with meaningful work and to assist in her professional development.

[66] No remedy was sought in respect of the alleged breach and little is to be gained by taking it any further.

### **Costs**

[67] Costs are reserved. The parties are invited to resolve the matter.

[68] If either party seeks an order the party shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days from the date of receipt of that account in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority