

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 217
3021022

BETWEEN JOY THOMPSON
 Applicant

A N D PHOENIX PUBLISHING
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: Joy Thompson, in person
 No appearance for Respondent

Investigation Meeting: 12 July 2018 at Auckland

Submissions Received: 12 July 2018 from Applicant

Date of Oral Determination: 12 July 2018

Date of Written
Determination: 13 July 2018

ORAL DETERMINATION OF THE AUTHORITY

- A. Joy Thompson has a proven personal grievance.**
- B. I order Phoenix Publishing Limited to pay the sum of \$5,000 to Joy Thompson for hurt and humiliation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Phoenix Publishing is ordered to pay Joy Thompson \$4,383.52 net wage arrears including holiday pay pursuant to s.131 of the Employment Relations Act 2000 by 19 July 2018.**
- D. I also order the payment of interest on the above wage arrears only at the rate of 5% per annum payable from 7 September 2017 continuing until the date of payment.**

E. I also order Phoenix Publishing Limited to reimburse Ms Thompson her filing fee of \$71.56.

Employment relationship problem

[1] Joy Thompson was employed by Phoenix Publishing Limited (PPL) as a digital telesales person on 6 June 2017. She did not receive a written employment agreement however she attests to a verbal agreement that she would be paid \$45,000 per annum monthly on the sixth day of each month.

[2] Ms Thompson also believes it was agreed as a condition of her employment training as a telesales person. She had previously come from sales in a different industry and believed that to be successful at her job she needed additional training in the digital telesales industry.

Underpayment of salary

[3] Ms Thompson was entitled to receive \$3,750 gross or \$2,973.32 net excluding 4% KiwiSaver and PAYE each month. Ms Thompson worked for three months and should have received \$11,250 gross or \$8,919.96 net. She produced her bank accounts. These show that she received a total of \$5,165.55 net in salary. She also received a sum for expenses that she accepts is correct and is not seeking to recover any further expenses today.

[4] Her salary was paid in the following amounts and on these dates:

- \$2,306.05 on 16 July
- \$2,306.05 on 7 August
- \$553.45 on 14 August

[5] Ms Thompson realised she had been underpaid \$3,754.41. She raised issues about the underpayment of salary with her then manager Stephen Bennison during her employment. Despite promises by PPL to meet the underpayments of salary this never occurred.

Training

[6] Ms Thompson gave evidence about meeting with Bronwyn Rawson, a PPL director at various times during her employment. Ms Rawson continued promising training but none was ever provided.

Resignation

[7] Matters came to a head on the day Ms Thompson decided to resign. Despite several requests for the training to occur Ms Rawson told her this was not going to happen. Instead Ms Rawson indicated to Ms Thompson that she should have had sufficient training to be able to undertake her role when she was employed.

[8] Given the underpayments of salary and lack of training Ms Thompson decided she would resign on 14 August 2017.

Post-employment matters

[9] Ms Thompson did not receive a final pay. As a result she continued to text and email Mr Bennison and Ms Rawson about her salary asking that PPL meet the underpayments.

[10] On 12 September 2017 she received a phone call from Ms Rawson. She states Ms Rawson was screaming and intimidating saying *“I won’t be taking any threats from you little girl! How dare you! I will make you wait months!”*

[11] Ms Thompson raised a personal grievance about her employment situation on 12 September. She says her stresses from the previous employment situation were exacerbated by this behaviour to the point she required medical assistance. She has produced a medical certificate detailing this.

[12] On 12 October 2017 she filed a statement of problem.

Non-Appearance by PPL

[13] At the start of the hearing Ms Thompson was the only party present. There has been no appearance by PPL.

[14] PPL applied by email yesterday for an adjournment. It alleged it had had no notice of the hearing due to Mr Bennison who was dealing with the file, becoming unwell.

[15] I do not accept this. There is evidence on the file that the Authority officer sent an investigation notice with the date, time and address for today's hearing to the address for service PPL had set out in its statement in reply.

[16] There is also evidence on the file showing the Authority officer spoke to a person called "Shelly" from PPL's offices about the date for this hearing. The Authority officer also emailed Bronwyn Sommerville, PPL's director advising the date for hearing. I understand from Ms Thompson, Bronwyn Sommerville is also known as Bronwyn Rawson, and Bronwyn Hunter.

[17] I advised PPL that they could attend today by telephone however PPL emailed insisting on a further adjournment due to the PPL director being unavailable as she was attending to personal issues. This was declined because there was no explanation of what those issues may be and this has occurred before where unspecified personal issues have allegedly prevented PPL from appearing. I delayed the start of today's hearing to 10.30 a.m. to accommodate an appearance by the respondent by telephone or in person. PPL has failed to appear. This was unsurprising.

[18] I am aware PPL has failed to appear before the Authority on at least five occasions¹ and before the Employment Court at least once.² All of the previous hearings involved former PPL employees seeking to recover their unpaid wages. Given the foregoing there is little excuse for PPL's non-appearance today.

[19] I am empowered to continue to hear this matter without the respondent if there is no good cause shown for its absence.³ No good cause has been shown for non-attendance at today's hearing therefore I shall continue to hear and determine this matter today in PPL's absence.

¹ *Masjedi v Phoenix Publishing Ltd* [2018] NZERA Auckland 161; *Lennon v Phoenix Publishing Ltd* [2018] NZERA Wellington 48; *McCallum v Phoenix Publishing Ltd* [2017] NZERA Auckland 171; *Bicknell v Phoenix Publishing Ltd* [2017] NZERA Auckland 42; and *Anderson v Phoenix Publishing Ltd* [2016] NZERA Auckland 373.

² *Phoenix Publishing Ltd v Lily McCallum* [2017] NZEmpC 129.

³ Clause 12 Schedule 2 Employment Relations Act 2000.

Issues

[20] The below issues for hearing were set out in an earlier Minute following a telephone conference that both parties attended:⁴

- (a) Was Ms Thompson unjustifiably dismissed and/or disadvantaged by non-payment of her wages and a failure to provide training as promised?
- (b) Was Ms Thompson owed wage arrears?
- (c) What remedies if any should be awarded for the personal grievances if proven?
- (d) Was Ms Thompson unjustifiably dismissed and/or disadvantaged by non-payment of the wages and a failure to provide training?

Was Ms Thompson unjustifiably dismissed and/or disadvantaged by non-payment of her wages and a failure to provide training as promised?

[21] There is no written employment agreement. I accept Ms Thompson's evidence there was a verbal agreement she would receive \$45,000 salary per annum to be paid on the sixth day of each month and training in digital telesales as conditions of her employment.

[22] Ms Thompson raised issues about the payment of her salary and the failure to provide training several times. The employer took no steps to remedy her concerns. Ms Thompson was therefore affected to her disadvantage by PPL's failures. They also took no steps under s.103A to justify their failures to provide training and to pay her salary in full and on time. I also find Ms Thompson was constructively dismissed due to the non-payment of salary. A reasonable employer would have foreseen such action as leading to her resignation. Joy Thompson has a proven personal grievance.

Remedies for personal grievance

[23] Ms Thompson has provided a medical certificate that shows that she was stressed by the employment situation. The subsequent phone call she received from the PPL director simply added to her stress.

⁴ Minute of the Authority dated 23 March 2018.

[24] She does not seek any lost remuneration however she does seek compensation of up to \$10,000. After considering her circumstances I am prepared to award \$5,000 for hurt and humiliation. This is because of the short duration of her employment (three months) balanced against the obviously stressful situation she found herself in by the non-payment of her wages and lost training opportunity. The toll on her was evidenced by her medical certificates and the evidence she has given to me today.

[25] Therefore I order Phoenix Publishing Limited to pay the sum of \$5,000 to Joy Thompson for hurt and humiliation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

What wage arrears are owed?

[26] I directed that the respondent file Ms Thompson's wage and leave records for the period of her employment by 29 March 2018. PPL filed payslips late on 11 April 2018.

[27] Given the evidence of the salary actually paid into Ms Thompson's bank accounts, the payslips are inaccurate. They do not record correctly the amounts that were actually paid to Ms Thompson. The amounts set out as net pay were not the amounts that were received by Ms Thompson according to her bank accounts. There is no other evidence to show PPL made the payment such as copies of their bank accounts. Therefore I set it to one side.

[28] I accept Ms Thompson's evidence she is owed wages. Using the IRD website PAYE calculator this totals \$3,754.41. Ms Thompson is also owed 8% holiday pay calculated on her gross salary of \$8,919.96 of \$714 or 629.11 net.

[29] I also have discretion to award interest. This is a case where interest is appropriate given Ms Thompson has been out of pocket from her salary and holiday pay since her final pay date of 7 September 2017.

[30] I therefore make the following orders:

- (a) Phoenix Publishing is ordered to pay Joy Thompson \$4,383.52 net wage arrears including holiday pay pursuant to s.131 of the Employment Relations Act 2000 by 19 July 2018.

(b) I also order the payment of interest on the above wage arrears only at the rate of 5% per annum payable from 7 September 2017 continuing until the date of payment.

[31] I also order Phoenix Publishing Limited to reimburse Ms Thompson her filing fee of \$71.56.

T G Tetitaha
Member of the Employment Relations Authority