

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 110
5387263

BETWEEN

AIMEE VICKERMAN
Applicant

AND

BISMILLAH INVESTMENTS
LIMITED AND JIMMY AND
SHARIFA ISAAKO TRADING
AS METROPOLITAN BAR
Respondent

Member of Authority: P R Stapp

Representatives: Aimee Vickerman in person
Sharifa Isaako for Respondents

Investigation Meeting: 25 September 2012 at Wellington

Determination: 26 September 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The investigation meeting was delayed because there was no attendance and appearance for the respondents. The support officer's contact with the respondents by telephone indicated that there would be no attendance or appearance. However, Sharifa Isaako did advise the Authority's support officer that she had decided to attend and asked for the start of the hearing to be delayed until she arrived. The investigation meeting was delayed until her arrival.

[2] Ms Vickerman's employment relationship problem is a claim for holiday pay, one week's notice, and 3.5 hours for a day in lieu for Anzac Day. Until the Authority's investigation meeting there was no statement in reply and/or a response received from the respondents.

[3] The respondents at the investigation meeting denied that Ms Vickerman was entitled to any money. A statement in reply was tabled by Sharifa Isaako. Bismillah Investments Limited says that since there was no contract between the parties it was the employer's discretion as to whether to pay Ms Vickerman the 8% of gross earnings. Ms Vickerman was not required to give any notice. Sharifa Isaako was not prepared to let Ms Vickerman work out her notice for reasons that I do not have to go in to suffice to conclude that the decision was made for the convenience of the business.

Issues

[4] The issues in the employment relationship problem are as follows:

- a. Who was Ms Vickerman's employer and who is responsible to pay any money owed?
- b. How much, if any is Ms Vickerman owed?
- c. Is there any defence for the non payment of the sums claimed?

The facts

[5] Ms Vickerman started work at the Metropolitan Bar in Porirua as a duty manager. The business is owned by Bismillah Investments Limited. Ms Vickerman says she asked for an employment agreement about a month after starting work, but was told not to worry about it. An employment agreement was never given to Ms Vickerman. Ms Vickerman obtained another job during the latter period of her employment and handed in her resignation on 5 June 2012 with two weeks' notice, making her final day 19 June 2012. She says she has not been paid any money owing.

[6] Sharifa Isaako accepted that the applicant's statement of problem and the notice of investigation meeting had been served on Bismillah Investments Limited, and her and Jimmy Isaako personally. She was representing the respondents.

Determination

[7] The employer is Bismillah Investments Limited. My reasons for this finding are as follows:

- a. Ms Vickerman produced a document prepared by Sharifa Isaako identifying the name of the company in a schedule of payments attached to the statement of problem.
- b. Ms Vickerman says that she received the document in and around April 2012 (while she was employed at the bar) after requesting it for tax purposes.
- c. Ms Vickerman had prior knowledge of the existence and name of the company before she resigned and when she filed the statement of problem.
- d. The registration of the company was confirmed when a printout from the companies office was obtained at the time the statement of problem was filed on 27 June 2012.
- e. The absence of an employment agreement with any names referred to, and Ms Vickerman's belief at the time of her employment that she was employed by the second respondents personally have been off set by Ms Vickerman's prior knowledge of the existence of the company.
- f. The statement in reply refers to Bismillah Investments Limited without being challenged

[8] I am satisfied that the Bismillah Investments Limited was the employer. However, I reserve leave for the applicant to return to the Authority if necessary in regard to Jimmy and Sharifa Isaako personally in this employment relationship problem.

[9] Ms Vickerman claims the following sums:

- i. \$737.16 holiday pay after tax as the calculation has been based on nett sums paid to Ms Vickerman;
- ii. \$589 notice before tax based on an hourly rate of \$15.50 per hour; and
- iii. \$54.25 for 3.5 hours work for a day in lieu for Anzac Day 25 April 2012.

[10] I am satisfied that Ms Vickerman is owed the above sums from her employer. She was entitled to a proportionate payment for holiday pay for the period that she was employed. There are no discretionary rights for employers under the Holidays Act not to pay holiday pay due when the employment ends within twelve months (section 23 of the Holidays Act). Even although there is no employment agreement the minimum provisions of the Holidays Act apply, as this was accrued leave in the period that Ms Vickerman had worked. Ms Vickerman had not taken any leave during her employment. This involves proportioning the holiday pay for the period less than 12 months. This should be calculated on the basis of 8% of Ms Vickerman's gross earnings (s 23 of the Holidays Act). However the net payments she received in her bank are the only full details available to complete any calculations in the absence of any details from the respondents.

[11] Ms Vickerman was not paid notice when her employer required her to leave immediately. There was no employment agreement in regard to any terms for notice and given that Ms Vickerman wanted to work out her notice before starting her new job, and gave it in writing, the claim for the week's wages is reasonable. This is especially so as she was paid weekly and had not worked a full year at Metropolitan. The decision that Ms Vickerman was to finish work immediately was the employer's unilateral decision and based on its convenience. In those circumstances the employer is required to pay the notice as claimed.

[12] Ms Vickerman has not been paid the day in lieu for Anzac Day (25 April 2012). I accept Ms Vickerman's evidence because Sharifa Isaako has not been able to

produce any details of the calculations for the holiday pay, and whether the day in lieu was paid. She did not reasonably have the wage time and leave records at the investigation meeting. She tried to get an email providing advice from her accountant about what she should do in regard to Ms Vickerman's claims with out any success. In addition I accept the claim because of the employer's failure to pay the lawful amount of holiday entitlement owing when the employment ended. Therefore I accept Ms Vickerman's claim that it was more likely than not that the day in lieu was not paid when the employment ended and that she had not taken any leave during the period of her employment.

The conduct of the respondents

[13] The employer failed to comply with a direction from the Authority to produce wage time and holiday records in the time required by the Authority before the Authority's investigation meeting. The respondent had been contacted about its failure to provide a statement in reply which had not been received. The respondents left it until the Authority's investigation meeting to table a statement in reply late. It would have been entirely reasonable for the wage time and leave records to be produced at the investigation meeting because of the nature of the employment relationship problem, Ms Vickerman's claims and the sums she has asked for. Another course of action would have been for me to adjourn the investigation meeting until the documents were produced. I was not prepared to do that because the applicant is entitled to certainty and an outcome having waited for the investigation meeting. Also, I had no guarantee of being provided with reliable documents given the employer's conduct to date and the delays by the respondents replying when it was reasonable to expect the documents to be produced. Also, I have noted that there was no proper reference to any wage time and leave records in the statement in reply which supports my decision to continue.

[14] This employment relationship problem was entirely of the employer's making. If it was acting on advice from an accountant, as I was told, it would seem any such advice was entirely wrong on the holiday pay and day in lieu payment. I simply find it hard to believe that an accountant would have given the advice referred to by Sharifa Isaako in the statement in reply having regard to the facts I have heard. In addition the failure to provide an employment agreement to Ms Vickerman was in

breach of the law (s 63 A (2) and s 64 of the Employment Relations Act). The failure to provide wage time and leave records when requested was a failure to comply with an order of the Authority (Minute dated 10 August 2012).

Orders of the Authority

[15] Bismillah Investments Limited is required to pay Aimee Vickerman:

- i. \$737.16 holiday pay after tax as the calculation has been based on nett sums (payments in the hand) paid to Ms Vickerman (the employer is responsible for the tax added to this sum);
- ii. \$589 (gross) notice before tax based on an hourly rate of \$15.50 per hour;
- iii. \$54.25 (gross) for a day in lieu for Anzac Day before tax for 3.5 hours work as claimed.

[16] In addition Bismillah Investments Limited is required to pay Ms Vickerman \$71.56 filing fee since she has been put to the unnecessary expense of coming before the Employment Relations Authority to get an order for the payment of the money she was entitled to be paid.

P R Stapp
Member of the Employment Relations Authority