

and its director for a period of 28 days to enable a challenge.² A challenge was lodged about the non-publication aspect within the 28 day period and the interim order was extended in a second determination of the Authority until further order of the Employment Court.³

[2] The permanent and interim orders for non-publication continue for the purposes of this determination.

Employment Relationship Problem

[1] WFW was successful in her personal grievance. The Authority in its substantive determination reserved two issues that will be the subject of this determination.

[2] The first is the quantum of lost wages. The nature of the employment and whether it was casual or permanent part-time needs to be resolved in order to determine lost wages. The second is the issue of costs. The Authority timetabled for submissions about these matters to come in at the same time. Submissions have now been received from both parties. There is also an application by ZUW under s 123(2) of the Employment Relations Act 2000 (the Act) for payment to WFW of orders made under s 123(b) or (c)(i) by instalments.

The issues

[3] The Authority needs to determine the following issues:

- (a) Was WFW a casual or a permanent part-time employee?
- (b) What amount should be ordered for reimbursement of lost wages?
- (c) Should there be any award for holiday pay?
- (d) What costs award should be made?
- (e) Does the financial situation of ZUW require an order of payment to WFW by instalment.
- (f) If so, what should be paid by instalment.

² Above n [1].

³ *WFW v ZUW* [2024] NZERA 365.

Was the employment relationship between WFW and ZUW casual or permanent part time?

The employment agreement

[4] WFW and ZUW entered into a written employment agreement (the employment agreement) in which WFW's position was described as a Takeaway Food Assistant.

[5] Under the heading "type of employment agreement" the employment agreement states that the employee will work part-time (2-10hrs/week). It then states it is the obligation of ZUW to provide reasonable notice when asking the employee to work and the employee may choose whether to accept or decline the work. The employment agreement provides that each time the employee accepts an offer of work it is considered a new period of employment. It provides under annual leave that the employee will get pay-as-you-go leave and will be paid at a rate of 8% on top of the employee's gross earnings. Some of these clauses may be suggestive of a casual relationship.

[6] Under the heading hours of work it provides there is no obligation on the employer to offer work or the employee to accept offered work. It then states the employer will offer 2-10 hours per week based on weekly roster which seems inconsistent with the first part of the clause because it is an agreement to provide minimum guaranteed hours of at least 2 hours per week.

[7] There are other clauses in the employment agreement that would not normally be found in a casual employment relationship. There is a requirement to give notice of two weeks if the relationship ends. There is an abandonment clause and a restructuring provision. There is a requirement in the event of sickness that the employee tell their manager they are going to be on sick leave as soon as they can and a requirement for the provision of medical certificates.

[8] The employment agreement is not clear as to the nature of the employment relationship. It is necessary to consider how the relationship operated in practice.

Offering of work

[9] The director of ZUW would send a text message to WFW at the start of each week with the shifts for that week. There are some text messages from WFW to the director advising that

she is unwell and from the director to WFW asking about her intentions about work attendance. These messages support an expectation that WFW either attend shifts or provide a reason for not attending.

Regularity or pattern to shifts worked

[10] The employment relationship commenced on 5 April 2022 and ended on 20 October 2022. The payslips establish that initially the hours worked were fewer in number and the days of the week less predictable. From late June 2022 the hours worked almost doubled and there was usually work undertaken on Mondays, Fridays and often Saturdays and/or Sunday's.

[11] I conclude that overall the hours and pattern of days worked by WFW became reasonably predictable and in particular usually included shifts on a Monday and Friday.

Conclusion

[12] The employment agreement provides little guidance as to the nature of the employment relationship. In practice there was a change after an initial period of work to WFW working fairly regular and consistent hours and her days of work usually including Mondays and Fridays. Guaranteed hours of a minimum of two hours each week were always provided.

[13] The payslips do not show that WFW was paid an additional 8% each week for pay-as-you-go-leave but rather record "annual leave accrued." The final pay slip for the period 17 October – 23 October 2022 shows a payment for "leave liability" of \$559.68 gross. Leave liability is defined in the pay slip as "the value of entitled and accrued leave liability." WFW was required to provide a reason for any absence from a rostered shift. I conclude objectively assessed that there was a mutual expectation of continuity of employment with mutual obligations between periods of work.⁴

[14] I find that the nature of the employment relationship WFW had with ZUW was permanent part time employment.

⁴ *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225.

What amount should be ordered for reimbursement of lost wages?

[15] WFW having been successful in her personal grievance of unjustified constructive dismissal seeks reimbursement of lost wages for the period from 20 October 2022 to 7 February 2024.

[16] WFW worked for ZUW whilst in year 10 at high school until her resignation on 20 October 2022. She did not obtain further after school and weekend employment and there was no evidence of mitigation. WFW says that the impact on her from the sexual harassment in her employment with ZUW was such her mental health declined and she lost the ability to trust future employers. She had at the time of the investigation meeting recently seen a doctor for depression and anxiety. In February 2024 she commenced alternative training.

[17] Section 123(1)(b) of the Act provides that the Authority may order the reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employer as part of the grievance.

[18] Section 128(2) of the Act provides that where the employee has lost remuneration as a result of the personal grievance the Authority must whether or not it provides for any of the other remedies order the employer to pay to the employee the lesser of a sum equal to lost remuneration or to 3 months ordinary time remuneration. Section 128(3) provides that the Authority may, in its discretion, order an employer pay for lost remuneration a sum greater than that specified in s 128(2) of the Act.

[19] WFW asks that the Authority to exercise its discretion and award about 16 months lost wages.

[20] In the substantive determination it was accepted when assessing a compensation award that the sexual harassment had an impact on WFW and her confidence and loss of trust in future employers. However, in the absence of medical evidence, I did not conclude that the sexual harassment was the only cause of anxiety and depression.

[21] I conclude that the impact of the sexual harassment and the age of WFW when it occurred was causative of the failure to look for other work for a period. It justifies the exercise

of the Authority discretion to order a greater sum by way of compensation for lost remuneration that that under s 123(2) of the Act.

[22] I do not have medical evidence to conclude that the difficulties for WFW to look for other work continued for the significant period for which a claim is made. I have also taken into account contingencies that may have, but for the sexual harassment, resulted in the employment ending before February 2024. I cannot conclude with any certainty that the employment relationship would have remained on foot until February 2024 but for the sexual harassment. WFW was young and she had not been employed for long. Working with other young people she liked was important to her. The evidence supported those that she had formed relationships with at ZUW moved on from time to time. WFW could have as well. She may have wanted to explore other employment options. There is no automatic right to full compensation for lost wages.

[23] An appropriate award under this head is six months lost wages.

[24] For the last three months of WFW's employment, she averaged 14.7 hours per week and was paid \$21.20 per hour. That is \$311.64 gross per week.

[25] Subject to any issues of contribution WFW is entitled to reimbursement of lost wages in the sum of \$8,102.64 gross (\$311.64 multiplied by 26 weeks).

Contribution

[26] I do not find that WFW contributed to her personal grievance and the above amount is not reduced as a result.

Holiday pay

[27] The submissions on behalf of WFW referred to a claim for accrued holiday pay from 5 April 2022 to 20 October 2022.

[28] As set out earlier the final pay slip appeared to indicate this had been paid.

[29] If not, or if less was paid than is owed, I am sure counsel can resolve this matter. Leave is reserved for either party to return to the Authority if this is not possible.

[30] For completeness there is no claim in the statement of problem for holiday pay to be paid on any lost wage amount.

Costs

[31] There was a one-day investigation meeting and then a further investigation meeting to hear from a witness by audio visual means. The second meeting was less than one hour in duration.

[32] Ms Thomas submits a \$1000 uplift is appropriate to the daily tariff of \$4,500. There is no particular objection to that on behalf of the respondent. I accept that such an award is reasonable and appropriate in the exercise of my discretion as to costs.

[33] WFW is entitled to a costs award in the sum of \$5,500 and reimbursement of her filing fee of \$71.55.

Application for payment by instalment

[34] The respondent asks the Authority to order payment of the awards made by instalment.

[35] Section 123 (2) of the Act provides:

Where making an order under subsection 1(b) or (c), the Authority or the court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[36] The focus for the Authority is on whether the financial position of the respondent requires an order for payment by instalment.

[37] The Authority in *Stein v Garrard's (NZ) Limited* considered the meaning of the word *requires* and the threshold needed before the Authority could be satisfied an order should be made in an application under s 138(4A) of the Act for payment by instalment of a sum of money. Section 138(4A) of the Act is a provision relating to compliance orders but it has the same wording about the financial position of the employer requiring payment by instalment.⁵

⁵ *Stein v Garrard's (NZ) Limited* AA 287/08 Auckland

[38] Whilst of the view in *Stein* that the threshold was high the Member did not in the absence of submission, or some clear guidance from a dictionary definition define the threshold required. The Member did state:

However, I do consider the appropriate test is more than one of the employer's convenience or preference even when the employer's financial position is not strong.

[39] I have been provided with a detailed overall budget by ZUW of income, cost of sales (food and wages), operating expenses and overheads and net profit for June 2024 projecting through to May 2025. The Authority has not received accounts for the business. It is not in a position to assess whether assets could be realised, or loans obtained over other assets to satisfy the full amount. There is reference by Mr Abdollahi in an email to Mr Jones to a mortgage payment reducing the net profit but it is not clear what this pertains to as the budget refers to rent payments for the business premises. There is also reference to a business loan and miscellaneous expenses in the same email taken from the net profit award. I would have expected both to have been reflected in the overall budget document rather than shown as taken from the net profit.

[40] The Authority does not have information as to whether there is the ability for ZUW to obtain a bank loan or whether ZUW's shareholder would be willing to provide a loan to the company for payment of the amounts ordered.

[41] There are very few determinations of the Authority in which an order for payment by instalment under s 123(2) of the Act has been made. This likely reflects that the threshold required for such an order is reasonably high. Such an order displaces normal enforcement options available to a successful party for payment of an award.

[42] In an Authority determination where payment by instalment was ordered the end of year accounts and draft account for the material period showed the business was operating at a loss and it had been affected by the Christchurch earthquakes. There was no shareholder source of funds to loan to the business.⁶

⁶ *Dallimore v Wholesale Buying Limited* [2012] NZERA Christchurch 172.

[43] I accept that there will likely be some difficulties for ZUW in making a lump sum payment. It is a small business and the profit margins are quite tight. I am not persuaded that is sufficient to meet the threshold required to meet an order for payment by instalment under s 123(2) of the Act. I do not make an order for payment by instalments.

Finding and orders made

[44] The Authority has found that WFW was a permanent part time employee of ZUW.

[45] The Authority orders payment by ZUW to WFW of the following amounts in addition to the earlier award for compensation:

- (a) The sum of \$8,102.64 gross being reimbursement of lost wages under s 123(1)(b) of the Act.
- (b) Costs in the sum of \$5,500 together with reimbursement of the filing fee of \$71.55.
- (c) Payment by instalment has not been ordered.

Helen Doyle
Member of the Employment Relations Authority