

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 81
3116674

BETWEEN	HANNAH FLAVELL Applicant
AND	WALTER GRANT BULLOCK AND DIANNE HOWARD Respondents

Member of Authority: Leon Robinson

Representatives: Alex Kersjes, advocate for the Applicant
No appearance by Respondents

Investigation Meeting: 24 November 2021 by internet video conference

Determination: 8 March 2022

DETERMINATION OF THE AUTHORITY

The problem

[1] Hannah Flavell (Ms Flavell) learned that her employers Walter Grant Bullock (Mr Bullock) and Dianne Howard (Ms Howard) were not paying to the Inland Revenue Department (IRD) deductions they continued to make from her wages for PAYE, Kiwisaver contributions and student loan repayments. When Mr Bullock and Ms Howard failed to act on her repeated requests that the situation be corrected, Ms Flavell resigned. She says that her resignation amounted to a constructive dismissal and was unjustifiable.

The investigation

[2] Mr Bullock and Ms Howard did not lodge a statement in reply. They did not at any stage seek leave to respond to Ms Flavell's application out of time. They took no part in the Authority's case management conference and nor did they take any steps to meet the arrangements set in that case management conference. Having prior

notification, they did not attend the Authority's investigation meeting. There being no good cause shown for their non-attendance, the Authority proceeded to act as fully in the matter as if they had attended. Ms Flavell duly affirmed her evidence and answered questions put to her. Her affirmed evidence is unchallenged.

[3] This determination has been issued outside the timeframe set out at section 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

The issues

[4] The issues requiring investigation and determination were:-

- (a) Did the employee resign?
- (b) Was the resignation caused by a breach of duty on the part of the employer?
- (c) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach?
- (d) If the employer's actions were not justified, what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the employer that contributed to the situation giving rise to the employee's grievance?
- (f) Should either party contribute to the costs of representation of the other party?

The facts

[5] In September 2019 Ms Flavell responded to a job advertisement for a courier driver. Shortly after she received a call from Mr Bullock. She was discouraged by the early starts. A week later Mr Bullock called and told Ms Flavell they had been unable to find a suitable person. He told her she had made a good impression and asked her to reconsider. After they discussed pay, the duties of the role, and reached a compromise on the start time, Ms Flavell accepted.

[6] Ms Flavell was paired with another driver and she attended training days on 22 October 2019 and 24 October 2019. She was not provided with an employment agreement before she commenced working on 4 November 2019. Despite repeated requests, she was never provided with one.

[7] On 6 November 2019 Ms Flavell provided her bank account details, Inland Revenue Department (IRD) number, and Kiwisaver details to Mr Bullock by text message.

[8] Ms Flavell says that soon after she started, a work colleague warned her that they had not been taxed correctly. Ms Flavell checked her payslips and saw that PAYE tax, KiwiSaver, and student loan payments were being deducted from her wages. She thought nothing more of the matter.

[9] When she stopped receiving payslips in December 2019, Ms Flavell was told by Ms Howard that payslips had in fact been sent to her so the problem must have been her email.

[10] In May 2020 Ms Flavell received a student loan statement and noticed something irregular. She accessed her online IRD account and saw that payments for PAYE, KiwiSaver, and student loan had only been made for the first three weeks of her employment. However, when she checked her payslips she saw that deductions continued to be made from her pay each week.

[11] Ms Flavell raised the matter with Mr Bullock and Ms Howard. Mr Bullock blamed the error on Inland Revenue and said that it was not an error with the payroll system. Thereafter, Ms Flavell made repeated requests of Mr Bullock and Ms Howard to correct the situation. Ms Flavell's concerns were disregarded, and various excuses were offered to her.

[12] As a result of the continuing inaction by her employers, Ms Flavell began to find it increasingly difficult to get up and go to work every morning. She felt physically sick at the thought of going in and having all her concerns disregarded and facing constant excuses. She felt torn because she needed a job, but she knew that she did not need one that was stealing from her.

[13] Ms Flavell feared that she would receive a huge tax bill from IRD, that IRD would consider her at fault, and that she would not have the money to pay. She became deeply depressed and felt she had no job security. She began to feel like a robot – go in, do her job, and then leave. Going in to work knowing she was not being paid properly, seriously affected her attitude.

[14] Ms Flavell became tired of lies and excuses she was being fed by her employers. She was tired of Mr Bullock and Ms Howard shifting the blame to “technical difficulties” or other people. She felt they did not care at all about her. She felt that nothing was going to change no matter how many times or how many opportunities she gave them to fix the situation.

[15] It all became too overwhelming and Ms Flavell found herself crying every day at work. She did not want to be there anymore. She resolved that she had to put her mental health first, and even though she had no job to go to, she felt she had to leave her job. She felt she had no choice but to resign and so she tendered her resignation with her last day of work being 2 June 2020.

The result

[16] I accept Ms Flavell’s unchallenged evidence that for the duration of her thirty week employment, her employers Mr Bullock and Ms Howard made only three weeks of payments to IRD for PAYE deductions, Kiwisaver contributions and student loan repayments. It follows, that I accept Ms Flavell’s evidence that thereafter, her employers Mr Bullock and Ms Howard made deductions from her wages for PAYE, Kiwisaver and student loan repayments, but failed to pass on those deductions by way of payments to Inland Revenue for Ms Flavell’s credit.

[17] I find that Ms Flavell resigned. I further find that Ms Flavell’s resignation was caused by a breach of duty by Mr Bullock and Ms Howard. That breach of duty was Mr Bullock’s and Ms Howard’s ongoing failure to pass on to IRD deductions they continued to make from Ms Flavell’s wages. I find that a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach. I find that Ms Flavell’s resignation amounted to a constructive dismissal.

[18] I next consider whether that constructive dismissal as I have found it was justifiable in terms of the test prescribed at section 103A of the Act. I have no difficulty in finding that these employers’ actions and how they acted, were not what a fair and reasonable employer could have done in all the circumstances at the time.

[19] I find that Ms Flavell was unjustifiably constructively dismissed and she has a personal grievance for unjustifiable dismissal.

The resolution

[20] Ms Flavell is entitled to formal orders for remedies to resolve the personal grievance I have found.

[21] I must first consider whether there was any blameworthy conduct on Ms Flavell's part which contributed to the situation that led to the personal grievance I have found. I find that there was no such blameworthy conduct on Ms Flavell's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to her.

[22] Ms Flavell was unable to find alternative employment and received the job seekers benefit before she decided she would go on to study to further her education. I am satisfied that Ms Flavell appropriately mitigated her losses by actively seeking work – that being a condition of her continuing entitlement to the job seekers benefit. I order Walter Grant Bullock and Dianne Howard to pay to Hannah Flavell within 28 days of the date of this determination, the gross sum of \$6,793.00 (Six thousand seven hundred and ninety-three dollars) as reimbursement.

[23] Ms Flavell and her partner are saving for a house. She was crushed to learn her Kiwisaver contributions were not being paid to IRD and so she did not have the Government contributions she would have had and she and her partner would have to wait longer before saving enough for a deposit.

[24] Ms Flavell was humiliated to think she had been warned by the work colleague who had told her about tax problems not long after she had started. She described crying every day at work when the situation became too overwhelming for her. She felt that her mental health was suffering and she knew she had to put that first. I accept that Ms Flavell has suffered hurt and humiliation, embarrassment to her feelings, and loss of dignity as a result of the personal grievance I have found. I order Walter Grant Bullock and Dianne Howard to pay to Hannah Flavell within 28 days of the date of this determination, the sum of \$10,000.00 (Ten thousand dollars) as compensation.

[25] Ms Flavell calculates 27 weeks of payments not paid to IRD to be in the sum of \$8,826.48. ($\30.57×27 weeks Kiwisaver = \$1,742.49. $\$76.68 \times 27$ weeks student loan = \$2,070.36. $\$185.69 \times 27$ weeks PAYE tax = \$5,013.63). I order Walter Grant Bullock and Dianne Howard to pay to Hannah Flavell within 28 days of the date of this determination, the gross sum of \$8,826.48 (Eight thousand eight hundred and twenty-six dollars and forty-eight cents) by way of recovery of wages not paid to Ms Flavell for the credit of the Commissioner of Inland Revenue.

Costs

[26] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and a determination is required, Mr Kersjes may lodge serve a memorandum on costs within 14 days of the date of this

determination. From the date of service of that memorandum, Mr Bullock and Ms Howard will have 14 days to lodge any reply memorandum. A written determination on costs will follow.

[27] A copy of this determination is to be provided to the Commissioner of Inland Revenue.

Leon Robinson
Member of the Employment Relations Authority