New Zealand Employment Relations Authority Decisions

Hannah v Quality Consumables Limited (Auckland) [2017] NZERA 138; [2017] NZERA Auckland 138 (8 May 2017)

Last Updated: 20 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 138
5647066

BETWEEN NICOLE HANNAH Applicant

AND QUALITY CONSUMABLES LIMITED

First Respondent

AND ALLAN MCCORMICK Second Respondent

Member of Authority: Robin Arthur

Representatives: Garry Pollak and Jeremy Lynch, Counsel for the

Applicant

Mark Ryan, Counsel for the Respondents

Investigation Meeting: 27 February 2017

Determination: 8 May 2017

DETERMINATION OF THE AUTHORITY

A. Quality Consumables Limited (QCL) must pay Nicole Hannah

the following sums within 28 days of the date of this determination:
(i) $21,572.62 as wage arrears; and

(ii) $1,725.80 as holiday pay due on those wages; and

(iii) $899.58 as interest on the wage arrears and holiday pay for the period from 30 July 2016 to 8 May 2017.

B. If QCL does not pay Ms Hannah the amount due as wage arrears and holiday pay within 28 days of the date of this determination, it must also pay her interest on those two amounts at the annual rate of five percent from then until payment is made in full.

C. Ms Hannah's employment ended by constructive dismissal due to

a breach of her terms of employment. In settlement of her

personal grievance for unjustified dismissal QCL must pay her the following sums within 28 days of the date of this determination:
(i) $7,921.50 as lost wages; and

(ii) $8,000.00 as compensation for humiliation, loss of dignity and injury to feelings.

D. **Costs are reserved with a timetable set for memoranda.**

Employment Relationship Problem

[1] Nicole Hannah resigned from her employment with Quality Consumables Limited (QCL) in June 2016. On 21 June 2016 she told QCL director Allan McCormick he could "shove" her job during an argument with him about work matters. Over the previous two months Ms Hannah and Mr McCormick had also argued about whether she was owed wage arrears. Ms Hannah said she understood she was supposed to be paid for six hours a day, totalling 30 hours a week. However Mr McCormick considered Ms Hannah was correctly paid for 27.5 hours a week, that is on the basis of working five-and-a-half hours a day.

[2] Mr McCormick asked Ms Hannah to put her notice of resignation in writing. In a letter dated 29 June 2016 she wrote that her last day of work would be 29 July. A letter of response from Mr McCormick, dated 8 July 2016, acknowledged receipt of her letter but said he was "reluctant" to accept her resignation if it concerned her claim for wage arrears. His letter confirmed he had earlier told her he was not willing to pay wages she believed were owed to her. It suggested they meet to talk about her resignation.

[3] Ms Hannah said she did not get that letter from Mr McCormick until 19 July. Mr McCormick was present when she read it. She said "a very heated argument" then followed. Ms Hannah said she had wanted to rescind her resignation but Mr McCormick refused. She alleged he shouted at her that "if my resignation was anything to do with the wage arrears then I could forget any fucking meeting and he would see me in Court". Ms Hannah said she suggested attending mediation. Mr

McCormick did not initially agree with the suggestion but told her later that day he thought mediation would be a good idea.

[4] Ms Hannah finished work on 29 July 2016. She met with Mr McCormick on

25 August 2016 to attempt to resolve her claim for wage arrears. Her partner, Marc Johnson, accompanied her. No agreement was reached. The parties also attended mediation with a Ministry of Business employment mediator on 20 September but did not resolve the issue between them there either.

[5] In an application to the Employment Relations Authority lodged on 26

October 2016 Ms Hannah sought orders for wage arrears totalling $33,449.23 and a finding that her resignation was really a constructive dismissal. She claimed her resignation resulted from "ongoing hostility from Mr McCormick" over her arrears claim, his demand she confirm her resignation in writing, and his refusal to let her rescind her notice of resignation. She sought remedies of lost wages and distress compensation. She also sought orders requiring QCL and Mr McCormick to pay penalties for not providing her with a written employment agreement and for breaching her terms of employment by not paying her weekly wage correctly and then refusing to pay outstanding arrears, holiday pay and interest.

[6] In their statement in reply QCL and Mr McCormick said Ms Hannah's resignation was genuine, denied she had a personal grievance for constructive dismissal, and said she was not owed any wage arrears. They also sought removal of Mr McCormick as a respondent to Ms Hannah's claim on the grounds that her employment relationship was with QCL, not with him.

The Authority's investigation

[7] Ms Hannah, Mr Johnson and Mr McCormick each lodged written witness statements and attended the Authority investigation meeting. Under affirmation, they confirmed their written statements and answered questions from me and the parties' representatives. The representatives also gave closing submissions on the questions of fact and law for determination.

[8] As permitted by 174E of the Employment Relations Act 2000 (the Act) this written determination has stated findings of fact and law, expressed conclusions on

issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Context, reliability and the standard of proof

[9] The Authority determines matters on the civil standard of proof, that is the balance of probabilities. Reaching findings, about what was more likely than not to have been occurred, requires some assessment of the reliability of what witnesses say they recall about what happened. This assessment is particularly important where there is little other information, such as emails or

other notes made at the time of the relevant events, to corroborate or contradict their accounts.

[10] The result of a 'she said, he said' contest of evidence may, in the end, depend on whether one party or other should have the benefit of, or bear the burden of, any doubt about what was more or less likely to have happened. Two factors arising from the statutory obligations in the Act favoured QCL bearing that burden of any doubt on some key points in Ms Hannah's case.

[11] Firstly, QCL did not provide her with a written employment agreement. It accepted, in closing submissions, this failure was a breach of the Act and made it liable to a penalty.1 This failure also increased the burden of doubt on QCL's evidence. If it had provided and completed the formalities of a written agreement, the issue about Ms Hannah's correct pay rate and hours of work would have been more readily resolved.

[12] Secondly, the Authority must generally further the object of the Act in carrying out its role. The object includes promoting good faith in the employment relationship by acknowledging and addressing the inherent inequality of power in employment relationships.2 This factor needed to be considered in weighing any doubt raised about why, if there was a genuine shortcoming in the rate and hours for which Ms Hannah was paid, she had not pursued the issue earlier. It favoured giving her the benefit of the doubt on that point. This had the effect of shifting the burden of doubt about the likelihood of a particular point of Mr McCormick's evidence. It

concerned whether a specific action he took, discussed later in this determination,

1 Employment Relations Act 2000, s 63A, 64 and 65.

could reasonably be taken as him accepting Ms Hannah should have been paid for 30 hours a week throughout her employment.

[13] The social context of this employment relationship was also relevant to considering what happened. Ms Hannah's partner, Mr Johnson, had a 33 year long friendship with Mr McCormick. He was also friends with Mr McCormick's partner, Sheryl Hill. How close these friendships were was shown by a bail application Mr Johnson made in 2012. At the time he was awaiting trial on charges related to the manufacture and sale of methamphetamine. He had applied for, but was denied, bail

to an address that was described as the residence of Ms Hill.3

[14] Ms Hannah became the partner of Mr Johnson around 2003 and met Mr McCormack through him. She began working for Mr McCormack's business in February 2008. At the time she was on a sickness benefit, so her earnings were limited to $80 a week, which she received in cash. She worked five days a week but from May 2009 she took time off on Friday afternoons. She did so in order to visit Mr Johnson who was in prison after being convicted on charges related to methamphetamine manufacture and supply. Between 2009 and 2014 Mr Johnson spent two periods in prison for methamphetamine-related offences, totalling four

years. He had also served a previous prison term for similar offences.4

[15] From June 2009 Ms Hannah stopped receiving the sickness benefit. From then on the wages for her work for the business were paid by direct credit to her bank account. She had wanted to move to such an arrangement for some months. By inference from the social context described above, it seemed Mr McCormick had agreed to do so from June 2009 as a way of helping Ms Hannah through the difficulties caused by Mr Johnson being in prison. In his witness statement Mr McCormick said he had not provided Ms Hannah with a written employment agreement because she "was considered part of the family given the relationship between her partner, Mr Johnson, and myself".

[16] Ms Hannah said Mr McCormick told her the rate of pay for her work was to be $20 an hour. However the business pay records from this time show she was paid at the rate of $17.09 from 3 June 2009. Those records also showed she was paid for

27.5 hours a week, not 30 hours. Ms Hannah said she understood she was to be paid

3 *Johnson v New Zealand Police* [2012] NZHC 2643 at [20].

for the six hours between 9.30 am and 3.30 pm. She said this was because Mr McCormick told her around mid-June 2010 that she was not entitled to a lunch break as she worked for only six hours a day, not eight. Ms Hannah said that after that conversation she did not take a lunch break and had worked six or more hours each day. However Mr McCormick said he only told Ms Hannah she was not entitled to a paid lunch break, not that she could not have a break at all. He also disputed her account of the agreed hourly rate.

The issues

[17] The issues requiring investigation and determination were:

(i) Was Ms Hannah employed by QCL or Mr McCormick?

(ii) What were the agreed hours of work and rate of pay for Ms Hannah's

work in the period from 2009 to 2016?

(iii) If Ms Hannah was short paid, what arrears can and should be awarded? (iv) Should interest be awarded on any arrears found

due to Ms Hannah?

(v) Was Ms Hannah's resignation truly voluntary or was the end of her employment really a constructive dismissal resulting from a breach of her terms of employment?

(vi) If Ms Hannah was constructively dismissed, should she be awarded remedies of:

(a) Lost wages from 30 July 2016 (subject to evidence of reasonable endeavours by her to mitigate the loss claimed); and

(b) Compensation under s 123(1)(c)(i) of the Act?

(vii) If any remedies are awarded, was there any blameworthy conduct by Ms Hannah that contributed to the situation giving rise to her grievance and requires a reduction of remedies under s 124 of the Act?

(viii) Is QCL liable for a penalty for:

(a) Not providing Ms Hannah with a written employment agreement;

and

(b) Breaching her terms of employment by not paying her in full, on time when her wages fell due?

(ix) Should either party contribute to the costs of representation of the other party?

Who was the employer?

[18] Ms Hannah submitted that her employment relationship was really with Mr McCormack personally rather than through QCL, the limited liability company of which he was sole director and shareholder. Having raised this issue, the onus rested on her to prove Mr McCormack rather than QCL was her employer.5 On the available evidence, she had not met that onus.

[19] The pay and tax records showed Ms Hannah was, from June 2009, paid by Fern Marketing Limited. This was the previous name of QCL, changed in April 2016. Pay records for Ms Hannah after that date show the QCL name.

[20] The business, which sold cleaning and chemical products to clients in the automotive repair and marine industries, also used 'The Rag Man' as a trading name. In her work as a sale representative, Ms Hannah used email addresses incorporating that name and other names used by the business. She drove to client premises in a van painted with the company or business trading name and had a company business card. It would have been clear to her, and anyone dealing with her, that she was employed by that entity and not Mr McCormick in person.

[21] QCL, not Mr McCormick, was her employer. QCL is liable for any arrears and remedies owed to her, not Mr McCormick in his personal capacity.

What were the agreed hours and pay rate?

[22] Two elements needed to be established on Ms Hannah's wage arrears claim. Firstly, was she employed from June 2009 onwards on the basis of being paid $20 an hour? Secondly, had she and Mr McCormick agreed that QCL would pay her for 30 or 27.5 hours work each week?

The hourly pay rate

[23] Mr McCormick said he employed Ms Hannah on salary. He said he agreed to pay her the same amount each week, on the basis of working from 9.30am until

3.30pm five days a week. However if she took time off work, including to visit Mr

Johnson, she would get the same pay "no matter what". He said the pay rate of

5 *Nelson v Katavich* [2016] NZEmpC 48 at [59]

$17.09 used in the payroll records from June 2009 simply reflected an agreed total weekly pay (of $470 gross) divided by those working hours.

[24] Ms Hannah's written witness statement suggested she did not get payslips in the early years of her employment. Mr McCormick's statement insisted payslips were provided to her on a regular basis by the person who did the business pay transactions at that time. In their oral evidence both moderated those accounts somewhat. The effect was that Ms Hannah accepted she at least occasionally got pay slips but said she did not pay any attention to them. She said she did not think she needed to as she had trusted Mr McCormick.

[25] However she said she became aware by June 2010 that she was not being paid at the rate of $20 an hour. She said, when asked about this, Mr McCormick told her she was paid at the hourly rate of $20 if she also took account of the value of sometimes taking home the work van, a Kiwisaver contribution, and some personal use of her work mobile phone. She said she took the

point no further because she again trusted Mr McCormick.

[26] Mr McCormick denied any such query was raised by Ms Hannah.

[27] Ms Hannah's evidence on this issue is preferred because QCL failed to record its terms of her employment in a written agreement and the likelihood that, although aware she was being paid less than agreed, she was unable to press the point because of her reliance on the employment and her trust in Mr McCormick. Her wage arrears claim is to be calculated on the basis that she had, more likely than not, agreed to employment on the basis of a hourly rate of $20.

[28] Mr McCormick increased Ms Hannah's hourly pay rate to $21.85 an hour from the week ending 8 May 2012. He said he did so because the business was doing well and he had employed someone else to work at that higher rate, so also put up Ms Hannah's rate to the same level. He did not tell her about the change as he wanted it to be a surprise. She found out about the increase when she noticed a larger amount on her bank statement and asked Mr McCormick about it.

How many hours a week?

[29] Ms Hannah was paid for 27.5 hours a week from June 2009 to April 2016. On

14 April 2016 she told Mr McCormick she was not earning enough and thought she was not getting paid correctly. In the course of the discussion that followed Mr McCormick showed her a payslip which indicated her hourly rate at that time was

$21.85. While looking at the payslip later that day Ms Hannah said she noticed she was paid for 27.5 hours, not the 30 hours she said had been agreed.

[30] She telephoned Mr McCormick. She said he told her he had also spotted that point and said he would contact his payroll provider. In his evidence Mr McCormick agreed he did say he would contact the payroll provider but denied he accepted the correct number of hours was 30. However, as promised, he had contacted the payroll provider and asked for a change to be made to Ms Hannah's pay. That call resulted in Ms Hannah being paid for 30 hours a week, for each of the following 15 weeks. In all previous weeks her pay had been calculated on the basis of 27.5 hours.

[31] Two questions arose as decisive points in determining which of the competing accounts should be preferred as more reliable and likely. Firstly, if Ms Hannah was so sure about her entitlement to pay for 30 hours a week, and not just 27.5, why did it take her so many years to raise and pursue the point? Secondly, if Mr McCormick was so sure that the agreed hours were only 27.5 a week, why was she paid on the basis of 30 hours a week from April 2016 after she raised the issue with him?

[32] QCL submitted the length of time Ms Hannah was paid on the basis of 27.5 hours a week should be taken to imply acceptance by her of that state of affairs as a term of her employment, in the absence of a written term. The submission is rejected. QCL's failure to provide her with a written employment agreement, and the need to address the inherent inequality in the relationship, meant she got the benefit of any doubt on this point. Even if she was neglectful in not checking and raising the point sooner, she was still entitled to be paid for whatever period of hours had been agreed, up to the statutory limit of six years for such claims.

[33] On the second question, Mr McCormick's explanation as to why Ms Hannah was paid for 30 hours a week from April 2016 was not persuasive. He insisted it could not be taken as an acceptance by him that she had been entitled to be paid on that basis from the beginning of the employment. Instead he said the 30 hour

payments occurred because of a mistake or misunderstanding by his payroll provider about the change he had asked to be made. He said he asked for Ms Hannah's hourly rate to be increased, not the number of hours paid. Despite this request, she was paid at the existing hourly rate of $21.85 for 30 hours a week in the following 15 weeks. During those weeks a heated debate continued between them over whether Ms Hannah would be paid arrears for previous months and years. If Mr McCormick's explanation of a supposed error on the payslips prepared from April 2016 onwards truly described what happened, it seemed unlikely he would not have been noticed and corrected the error during those 15 weeks. On the balance of probabilities, the arrangement to pay Ms Hannah for 30 hours a week from April 2016 confirmed Mr McCormick knew those were the agreed hours for which she should be paid.

What arrears can be awarded?

[34] As a result of the findings made about the appropriate pay rate and hours, Ms Hannah had established wage arrears were due to her. Her claim was initially calculated from June 2009. However a limitation period applies to wage claims.6 Her claim was restricted to the six years prior to lodging her claim in the Authority on 28

October 2016.

[35] With the help of a friend Ms Hannah had prepared a detailed spreadsheet of payments made in each week and a calculation of what she should have been paid at the correct rate for the correct number of hours. From that information, and for the relevant period from October 2010 only, arrears due were calculated to total

$21,572.62. She was also entitled to an award of holiday pay on that amount at the rate of eight per cent, that is $1725.80.

Interest on the arrears?

[36] The arrears of wages and holiday pay totalled $23,298.42 by the end of Ms Hannah's employment on 29 July 2016. QCL's actions have denied her the use of that money. She was entitled to an award of interest on it. For the period from 30

July 2016 to the date of issue of this determination, the interest due was $899.58.[7]

6 Employment Relations Act 2000, s 142.

7 Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4.

[37] In the event that payment of the arrears is not made by 6 June 2017, being 28 days after the date of this determination, interest on the amount due is to continue to accrue at the same rate (that is $3.19 a day) from then until it is paid in full.

Did Ms Hannah really resign or was she constructively dismissed?

[38] A resignation may amount to constructive dismissal where it really resulted from a breach by the employer of a term of the employment, sufficiently serious that it was reasonably foreseeable the employee would resign rather than put up with the breach.

[39] Mr McCormick disputed Ms Hannah's account of what sparked her to tell him to "shove" her job on 21 June. He said she got upset when he pointed out that she was not providing all the necessary details in her records of sales, which had been an ongoing problem. He also denied he had later refused to allow her to rescind her verbal resignation. However he accepted he had asked Ms Hannah to provide a written notice to confirm it. He said he was simply asking her to "follow procedure". He said he did so because Ms Hannah had given verbal notice of resignation on previous occasions but then not left the job. He also denied swearing at her during their discussion on 19 July when he gave her his letter dated 8 July.

[40] Ms Hannah had returned to work on 22 June after the heated conversation on

21 June. She said that, while out in the van working that day, she got a call from Mr McCormick asking for her resignation letter. She said she told him she was not sure she wanted to resign but he told her it was "too late" and asked her to put it in writing.

[41] Ms Hannah denied she had resigned verbally on previous occasions. She believed Mr McCormick was referring to a time she had talked about moving to Wellington, for personal reasons. This occurred shortly before she got the pay rise in May 2012.

[42] Her evidence of asking Mr McCormick to let her take back her resignation appeared to undermine her argument that her resignation was motivated by QCL not paying her properly. However other evidence confirmed the wage arrears issue was, more likely than not, the real cause of her resignation.

[43] When Mr McCormick agreed, on 14 April 2016, to make changes to what Ms

Hannah was paid, he also agreed to meet later with her to talk about back pay.

[44] On 22 April 2016 Ms Hannah met with Mr McCormick to talk about arrears for the period before 1 April 2016. Mr McCormick had suggested the shortfall occurred after her pay rise in May 2012. On that basis Ms Hannah calculated she was owed around $9,000. She offered to accept $4,500 to settle the matter because she believed the shortfall had occurred from an error. Mr McCormick asked for time to think about her proposal. When Ms Hannah checked with him in the following week he said he would answer her request for back pay within the next seven days. Ms Hannah recorded his comment in her diary. In his oral evidence Mr McCormick accepted her note was correct.

[45] Ms Hannah said she asked twice more about the issue, on 10 and 13 May, before Mr McCormick told her on 15 May that he would not pay her any back pay.

[46] Ms Hannah's letter of 29 June did not state the reason for her resignation. Mr McCormick's reply made it clear he was in no real doubt about the motivation for it. Although the dates referring to some earlier discussions with Ms Hannah vary from her account, the following extract from Mr McCormick's letter dated 8 July confirmed he understood the real reason was the back pay issue:

I write to you confirming receipt of your letter dated 29 June 2016 tendering your resignation.

As you are aware you have recently made a claim in relation to wages you believed were owing to you. As you know, I informed you on 27/05/2016 that I am not willing to make this payment as I do not accept you are entitled to it. You then verbally resigned on 07/06/2016 and confirmed this in writing on 29 June 2016.

Under these circumstances I am reluctant to accept your resignation and would like you to give your full consideration to your decision. It would be my preference to meet with you to discuss your resignation. ...

If however your resignation is unrelated to this issue, then naturally I must

respect your decision and with regret will accept your resignation. ...

[47] Mr McCormick had taken care in preparing that letter. He said it was drafted with advice from a lawyer and he amended it

several times until he was happy with it. The letter was strong evidence of his considered view, prepared close to the time of the relevant events. It confirmed QCL had no intention of remedying what this

determination has found was the breach of a term of Ms Hannah's employment (by not paying her any arrears). It also confirmed as reasonably foreseeable to QCL that Ms Hannah would go ahead and leave the business as a result. If there was still any doubt that this was the cause of the resignation, it was removed by the heated argument that occurred once Ms Hannah was given the letter and read it on 19 July.

[48] The elements to establish that Ms Hannah's resignation was really a constructive dismissal were clearly made out. As a result she had a personal grievance for unjustified dismissal and was entitled to an assessment of remedies.

Remedies for the constructive dismissal

Lost wages

[49] Ms Hannah sought an award of lost wages from 30 July 2016. She had not gained full-time employment but earned around $1,200 from some part-time office work and, since November 2016, $600 for some part-time reception work. She had looked into training as a real estate agent but meanwhile was on a sickness benefit following a diagnosis of depression. Her evidence regarding the extent of her loss, her job search and her current ability to work was not sufficient to award any more

than three months' ordinary time remuneration.8 Calculated on the basis of $21.85 an

hour for 30 hours a week, the total amount for three months was $8,521.50. Ms Hannah's evidence did not specify what portion of her part-time earnings were made during that three month period from 30 July. Given at least some likely were, one third of those earnings ($600) has been deducted from the lost wages award. The resulting total was $7,921.50 that QCL must pay Ms Hannah to reimburse wages lost as a result of her grievance.

Compensation for humiliation, injury to feelings and loss of dignity

[50] Ms Hannah said the dispute about her back pay and her employment ending in the way it had was extremely stressful. She said she initially "felt awful" for Mr McCormick when she raised the arrears issue, because there was a big bill to pay, but was upset once she came to feel he had lied to her about how it happened. Her evidence, as a whole, warranted an award of $8000 as compensation under s

123(1)(c)(i) of the Act.

8 Employment Relations Act 2000, s 123(1)(b) and s 128(2).

Any required reduction of remedies due to blameworthy contributory conduct?

[51] The Authority must consider the extent to which any actions by Ms Hannah contributed to the situation giving rise to her grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.9

There was nothing she did that amounted to blameworthy conduct requiring such a reduction.

Penalties?

[52] Two grounds were established for the imposition of penalties. QCL accepted liability to a penalty for not providing Ms Hannah with a written employment agreement. This determination has also established QCL breached Ms Hannah's terms of employment rendering it liable for a penalty. However the other remedies awarded, totalling $40,119.28, were sufficient to punish and deter the type of conduct found in this case. In those circumstances I considered exercise of the discretion to impose penalties as well was unnecessary.

Costs

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Hannah may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum QCL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs on its usual notional daily rate unless particular circumstances or factors

required an upward or downward adjustment of that tariff.10

Robin Arthur

Member of the Employment Relations Authority

9 Employment Relations Act 2000, s 124.

10 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at

[106]- [108].
