

Determination Number: AA 164A/06
File Number: AEA 1166/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AT AUCKLAND**

BETWEEN	Karen Hormann (Applicant)
AND	Virtual Warehouse Limited (Respondent)
REPRESENTATIVES	Lewis Turner for Applicant Chris Patterson for the Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	18 October 2006
DATE OF DETERMINATION	31 October 2006

DETERMINATION OF THE AUTHORITY

[1] By determination AA164/06 (10 May 2006) the Authority rejected the applicant's claim that she was entitled to a payment of \$118,038 for unpaid salary and holiday pay accrued to 30 June 2003. However her claim also sought a further amount for salary entitlements accrued between 1 July 2003 and 25 August 2005. Determination AA 164/06 dealt with a disputed aspect of leave payments which were to be deducted from that entitlement but left the final calculation of the amount of salary owing to the parties. Leave was reserved for the parties to apply for further determination of those entitlements should that be necessary.

[2] The applicant has challenged the Authority's determination on the payment of salary and holiday pay accrued to 30 June 2003. That challenge is awaiting hearing by the Employment Court.

[3] Meanwhile the parties have not been able to agree the calculation of salary remaining unpaid for part of the period between 1 July 2003 and 25 August 2005. The applicant seeks a determination of her entitlements and an order for interest on the amount owed to her. The respondent seeks an order under s131(1A) of the Employment Relations Act 2000 ("the Act") for payment by instalments of whatever amount it is found to owe the applicant. These issues are not affected by whatever decision the Employment Court may make on the part of the Authority determination AA 164/06 that is under challenge. The parties agree that the Authority should determine the salary and leave entitlements owed for the period 1 July 2003 and 25 August 2005.

The issues

[4] In considering the present problem for resolution I have referred to the following material: memoranda of applicant's counsel filed on 4 July, 28 August 2006

and 3 October; memorandum of respondent's previous counsel filed on 24 July 2006; briefs of evidence from the respondent's majority shareholder and director Joanne Holley and finance associate Heather Hopkins filed on 26 September 2006; Authority determination AA164/06; and the answers to questions given by the applicant and Ms Holley and Ms Hopkins at the investigation meeting of 18 October. I have also reviewed documents, statements and submissions filed for the earlier investigation resulting in determination AA164/06.

[5] The issues requiring resolution are:

- (a) what leave entitlements and payments need to be allowed for in determining salary outstanding for the period July 2003 to August 2005; and
- (b) should interest be paid on the outstanding salary; and
- (c) should any outstanding salary be paid by instalments?

Background

[6] The applicant is the respondent's financial controller. As well as being an employee of the respondent, she is also its minority shareholder. Shareholding issues developed into an employment dispute which was the subject of the Authority's determination AA 164/06.

[7] As a result of the dispute the applicant has not attended work since 24 August 2005. She was paid for the period 15 August to 27 September 2005 but has not been paid since then.

[8] I was told at the investigation meeting on 18 October that the respondent has recently conducted a restructuring exercise and issued the applicant with one month's notice of redundancy.

Leave entitlements and outstanding salary

[9] The starting point for identifying salary owed to the applicant is the respondent's own analysis provided during the employment dispute which developed in the latter part of 2005.

[10] The company identified salary not paid to the applicant during the years 2001 to 2005 totalling \$183,404 gross. The applicant and Ms Holley had arranged not to draw their full salaries during this period to assist cash flow in the business. Unpaid salary owed to the applicant up to 31 June 2003 – totalling \$106,422 – was found by Authority determination AA164/06 to be foregone in an arrangement to buy shares in the business.

[11] The applicant claims the difference – the amount of \$76,982 – as salary outstanding and owed to her.

[12] The respondent accepts some salary is owed but argues it is entitled to make certain deductions resulting in a total of \$53,098 due. These deductions, which will be addressed in turn, are:

- (a) A holiday pay entitlement of \$11,596 accrued to 31 June 2003; and
- (b) The sum of \$4,673 for 13.5 days of paid leave taken by the applicant that the respondent says was in excess of her leave entitlement; and

(c) The sum of \$7,615 for salary paid to the applicant for the period of 25 August to 27 September 2005 when she was absent from work on what she said was “stress leave”.

[13] Another element to be assessed in the calculation of salary and holiday pay owed is the applicant’s claim that she is entitled to another 15 days annual leave for the period from 31 August 2005 to 1 September 2006.

Holiday leave entitlement to 31 June 2003

[14] Determination AA164/06 found that the accumulated leave entitlement to 31 June 2003 was foregone by the applicant as part of her agreement to purchase shares in the respondent business. However that does not entitle the respondent to deduct that amount from the salary owed. The leave entitlement was additional to the salary owed, not part of it. That element may not be deducted.

Residual leave entitlement

[15] Determination AA164/06 found that calculation of the applicant’s leave entitlements should be on the basis that she was entitled to 50.5 days noted on her leave form in May 2005. This finding acknowledged that Ms Hormann’s entitlement as recorded by the company have been “inflated” but that in May 2005 Ms Holley had encouraged the applicant to take additional paid leave because she having some difficulties with her return to work after taking parental leave. Ms Holley had done that in good faith and Ms Hormann had taken the leave in reliance of their mutual understanding at that time that Ms Hormann had plenty of leave owing and should take it.

[16] Subsequently close review of the company records questioned the basis of the accrued leave total taken at that time. This question resurfaced at the 18 October investigation meeting, particularly in Ms Hopkin’s evidence. The particular concern is that the leave entitlement total of 50.5 days as noted in May 2005 included 33.5 days leave accrued to 31 June 2003 with a value of \$11,596 which was found to be part of the entitlements forgone for purchase of shares in the business.

[17] There is some force in the respondent’s argument on that point. However the earlier finding on the leave entitlement total noted in May 2005 was made in relation to the mutual understanding of the parties at that time, which may not have been the accurate technical position. The earlier finding was effectively that the understanding acted on then should not be changed because an employment dispute had developed subsequently. I consider that assessment, made in equity and good conscience, accorded with the substantial merits on that particular point.

[18] However I accept respondent’s counsel submission that should the Employment Court take a different view than the Authority on whether the 33.5 days leave entitlement accrued to 31 June 2003 was ‘cancelled’ by the share agreement, that leave has already been provided to the applicant and paid for by its inclusion in the deemed total of 50.5 days as at May 2005. Should that be necessary it is a point that counsel will no doubt ask the Court to take into account. For present purposes, however, the respondent is not entitled to deduct the sum of \$11,596 from salary owed to the applicant.

Other leave deductions

[19] The additional leave, taken during the period of May to August 2005, was arranged to be for 64 days. However the applicant says that she in fact took only 51.5 days of additional paid leave as she worked nine full days and 7 half-days, totalling 12.5 days, during that 64 day period. Allowing for her deemed leave total at the time of 50.5 days, she exceeded her leave entitlement by only one day.

[20] The respondent criticises that calculation saying only the applicant worked for it on only three of those 12.5 days. Those three days were when Ms Hormann worked to cover a leave break for Ms Hopkins. It says the other 9.5 days should not be regarded as days worked because they were either days on which the applicant was in receipt of a statutory Paid Parental Leave payment (“PPL payment”) or only attended the workplace to have lunch with other staff or attended meetings in her capacity as a shareholder rather than as an employee.

[21] I find no basis for the respondent’s argument that eight days worked by the applicant while receiving the PPL payment should be regarded as days on which she was on paid leave. The respondent did not suggest that the applicant did no work of any value to it on those days. Rather I accept the applicant’s argument that she did work on those days and is entitled not to have them discounted as days on which she was on paid leave. She accepts that she must account to IRD if there is any difficulty with her being paid by the respondent for a day on which she was also receiving the PPL payment. It was her obligation to notify IRD of any return to work during a period for which she was receiving a PPL payment.

[22] I find no basis for the applicant’s argument that she should not have included as paid leave a further five days (one full day and four half-days, amounting to the equivalent of three days) on which she came in for lunch with various staff members or attended shareholder meetings. These were days when she attended at her own election or in her own interests, socially or as a shareholder. They were not for the purposes of work as an employee. The applicant gave no evidence otherwise except that “others” – which I take to be a reference to Ms Holley – were paid while attending shareholder meetings. However Ms Holley is correct in replying that this was because she was also attending work and working as an employee on those days.

[23] The net effect of these findings is that the applicant worked on 10 full days and one half day during the May to August 2005 period of intended leave so in fact took 53.5 days of additional paid leave, not the planned 64 days. Consequently she exceeded her leave entitlement of 50.5 days by three days. The respondent has already paid the applicant for those three days and may deduct it from the salary owed.

Pay for the period of 25 August to 27 September 2005

[24] The respondent says it is entitled to deduct \$7615 paid to the applicant for the period of 25 August to 27 September 2005 when she remained away from work on what she described at the time as “stress leave”. The respondent relies for that position on the earlier Authority determination finding that the applicant had not established that the cause of her absence was “work related stress” related to any

breach of duty owed to her as an employee by the respondent. Rather the evidence supported the view that the applicant found the shareholder dispute distressing and decided to stay away from work until it was resolved.

[25] The respondent cannot take that finding – which really dealt with a claim by the applicant for compensation for hurt and humiliation (which was not awarded) – to the extent of altering a decision that the respondent made at the time to keep paying the applicant’s salary. While it is correct that there was no contractual provision for “stress leave” but was rather the applicant’s own description of the basis of her absence, neither were the continued salary payments made conditional on any such subsequent finding of “work-related stress” to justify it. The respondent chose to continue paying the salary. The applicant says that she understood that the payments were made from existing sick leave entitlements and stopped once that was exhausted. Either way I find there is no basis for recouping those wage costs now from salary owed to the applicant.

Additional annual leave entitlement

[26] The applicant suggests that she is entitled under s16 of the Holidays Act 2003 to an additional year’s annual leave entitlements for the period 31 August 2005 to 1 September 2006. I understand that argument to be based on the notion that although she has not actually attended work for that period, she remains – for the moment – an employee of the respondent and qualifies on the basis that she was continuously employed in that year. Section 16(2) and (3) of the Holidays Act 2003 deals with what constitutes continuous employment. The applicant was not on paid leave, parental leave, protected voluntary service, ACC, unpaid sick leave or other unpaid leave of no more than a week. She and Ms Holley confirmed to me that there was no agreement made for a period of unpaid leave for the applicant of more than one week. Consequently I find the applicant was not, for the purposes of the annual holidays entitlement provided under s16(1) of the Holidays Act, in “continuous employment” for that period.

Determination

[27] For the reasons outlined above I find that the respondent owes the applicant the sum of \$75,943.66 gross in outstanding salary. That is the amount of outstanding salary less the three days of additional leave already paid.

Should interest be paid on the outstanding salary?

[28] The applicant seeks interest on outstanding salary unpaid as far back as 31 March 2004.

[29] The power to award interest on part or the whole of money owed is discretionary.

[30] I find that the applicant is entitled to interest on the amount now confirmed to be owing to her. However I do not consider it just to extend any requirement to pay interest back into the period in which the applicant and Ms Holley had both agreed to draw only part of their salary entitlement. That was a business decision they both freely made and the applicant must accept some responsibility for the cost of that

decision although she has more recently changed her mind. On the other hand it is clear from the respondent's earlier submissions that it has accepted since April 2006 that it owed a substantial amount of money to the applicant. This was even clearer from the date of Authority determination AA164/06. Although the respondent has since argued there were difficulties calculating the precise amount owed, it accepted in submissions on 4 April 2006 that at least \$59,741 was due. It has taken, as far as I am aware, no steps to pay even part of that amount while disputing the larger amount sought by the applicant.

[31] Balancing those considerations I consider it fit that the respondent pay the applicant the following interest on the salary owed to her:

Back interest

- (i) For the period from 11 May to 27 October 2006 (169 days) interest, at the 90-day bill rate on 30 October 2006 of 7.56 per cent plus one percent, on the amount of \$75,943.66 amounting to the sum of \$3008.20; and

Future interest

- (ii) Monthly interest on the amount outstanding on the 20th day of each month starting from 20 November 2006 until the amount owed is paid in full, such interest to be calculated at the 90-day bill rate on the 20th day of each such month plus one per cent.

[32] The respondent is to pay the interest ordered in paragraph [31](i) to the respondent by no later than 20 November 2006.

Should outstanding salary be paid in instalments?

[32] The respondent asks the Authority to exercise its discretion under section 131(1A) of the Act to order payment of the money owed to the applicant by instalments as the financial position of the employer requires it.

[33] The respondent has provided a summary of its profit and loss statements for the period ending 31 August 2006. This shows a trading profit loss for the present year. The applicant was sceptical of this statement. She noted that the previous two years' statements of financial performance of the respondent showed healthy net profits. She sought an order for the provision of an extensive range of financial and trading information from the respondent. I did not consider it necessary or helpful to require that information or engage in the level of forensic inquiry that would result.

[34] I accept Ms Holley's evidence that the respondent cannot pay the salary owed in one lump sum. There was evidence of very large legal costs arising from the present dispute and upcoming costs in re-leasing or relocating the respondent's premises. Further I accept that the dispute between the applicant and respondent has diverted attention and resources, within what was only a four-person operation, from its daily business and ability to operate profitably. The absence of the applicant has denied the business the benefit of her skills over the last year. It has also affected the level of credit available from a major supplier which will only provide credit beyond a set limit if personal guarantees were given, and such guarantees are now only available from Ms Holley and not the applicant.

[35] However I do not accept the low level of instalments proposed by the respondent. It suggested payments of only \$500 a month for 18 months followed by payments of less than \$2000 a month for at least a year after that.

[36] The applicant is entitled to the benefit of her outstanding salary earlier than that, even allowing for her earlier agreement to leave it in the business for cash flow purposes.

[37] The respondent is ordered to pay the sum owed to the applicant in 12 monthly instalments of \$6328.63 a month. Each monthly instalment to be paid on the 20th day of the month. Also to be paid with each monthly instalment is the monthly interest on the total outstanding salary as at the 20th of that month (calculated prior to the payment of that month's instalment) and calculated at the rate as set at paragraph 31(ii) above.

[38] The respondent may increase the amounts paid in each instalment or pay the full amount owing at any time within this period if it wishes to do so.

Summary of orders

[39] The respondent is to pay to the applicant:

- (i) By no later than 20 November 2006, the sum of \$3008.20 gross, being interest for the period of 11 May to 27 October 2006 (169 days) on salary owed of \$75,943.66; and**
- (ii) Monthly instalments of \$6328.63 on the 20th day of the month for the next 12 months, starting on 20 November 2006; and**
- (iii) monthly interest on the outstanding salary at the 20th day of each such month (calculated on the outstanding salary prior to the payment of that month's instalment and at an interest rate equivalent to the 90-day bill rate for that day plus one percent).**

Costs

[40] The parties are encouraged to agree between themselves any issue of costs in relation to the applications dealt with in this determination. Should they be unable to do so, either party may file a memorandum seeking a determination of costs which will be set after the other party has been provided with an opportunity to reply.

Robin Arthur
Member of the Employment Relations Authority