

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 156
5389401

BETWEEN TRACEY MACKENZIE
 Applicant

AND QUICK EXPRESS LOGISTICS
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Mrs MacKenzie in person
 No appearance for the Respondent

Investigation Meeting: 30 July 2013

Determination: 6 August 2013

DETERMINATION OF THE AUTHORITY

Within 28 days Quick Express Logistics Limited is to pay Tracey MacKenzie:

- **\$1,458 unpaid wages; and**
- **\$174.96 holiday pay; and**
- **\$5,265 lost remuneration; and**
- **\$2,000 in compensation for humiliation, loss of dignity and injury to her feelings; and**
- **\$71.56 reimbursement for the filing fee.**

Employment relationship problem

[1] Tracey MacKenzie began employment with Quick Express Logistics Limited (Quick Express) on 8 May 2012 as a courier and short haul driver in Christchurch. She was a permanent employee paid at an hourly rate of \$13.50 for 30 hours per week.

[2] Mrs MacKenzie applied for the role having seen it advertised on TradeMe. She was interviewed and employed by Mark Taylor who is the director of Quick Express. She did not receive a written employment agreement although she read through one at the interview before accepting employment.

[3] Mrs MacKenzie was to be paid fortnightly; therefore her first pay was due on 23 May 2012. However, she received her first pay on 30 May 2012 and was paid for only nine days; an amount of \$613.74 net.

[4] Mrs MacKenzie continued working in the hope she would get paid again soon. However, she did not receive any more pay. She attempted to get hold of Mr Taylor a number of times to query her pay situation but was unable to contact him.

[5] Mr Taylor called Mrs MacKenzie on 14 June 2012 at 8 a.m. and asked her to meet him at work. They met at 9 a.m. that day. Mr Taylor told the applicant that the company was not making enough money to pay her. He asked her to return the car and the charger for the company tablet which Mrs MacKenzie had. He told her *that was the end*.

[6] Mr Taylor said he would pay Mrs MacKenzie half of her outstanding wages that week and half the following week. However, no payment has been made.

[7] On 19 June 2012 Quick Express advertised again on TradeMe for local courier and short haul drivers in Christchurch.

[8] Mrs MacKenzie claims that she was unjustifiably constructively dismissed on 14 June 2012 and that she was unjustifiably disadvantaged in her employment.

[9] By way of remedy, Mrs MacKenzie claims arrears of wages, lost remuneration and unpaid holiday pay. Mrs MacKenzie also claims \$10,000 for humiliation, loss of dignity and injury to feelings.

[10] Mrs MacKenzie initially claimed that the respondent had breached its duty of good faith and should pay a penalty of \$20,000 to her. At the meeting Mrs MacKenzie withdrew those claims. Mrs MacKenzie also claims legal costs and the cost of the filing fee.

[11] The issues the Authority is required to determine are:

- (i) What amount is Mrs MacKenzie owed in unpaid wages and holiday pay; and
- (ii) Whether Mrs MacKenzie was unjustifiably dismissed, whether constructively or otherwise; and
- (iii) Whether Mrs MacKenzie was unjustifiably disadvantaged in her employment; and
- (iv) What remedies Mrs MacKenzie is entitled to; and
- (v) Legal costs and the cost of the filing fee.

Procedural background

[12] Mrs MacKenzie's statement of problem was lodged with the Authority on 18 February 2013. On 28 February the statement of problem was served at the company's address for service, 33 Selwyn Street, Christchurch.

[13] The Authority's support officer made a number of telephone calls and left messages for Mark Taylor but he did not return the calls.

[14] On 2 May 2013 I held a telephone directions conference with Mrs MacKenzie. At the beginning of the directions conference the Authority's support officer rang Mr Taylor's telephone and left a voice mail message for him. However, he did not participate in the direction conference.

[15] Mr Taylor called the Authority's support officer after the directions conference. A copy of the notice of directions and notice of investigation meeting was emailed and posted to him.

[16] The notice of investigation meeting sent on 2 May 2013 notified Quick Express that the investigation meeting would take place on Tuesday, 30 July at 9.30am. The address of the premises for the investigation meeting and a map was included with the notice. In addition Quick Express was advised:

If the Applicant does not attend the investigation meeting, the matter may be dismissed and costs may be awarded against the Applicant.

[17] On 30 May 2013 Mr Taylor asked the Authority's support officer for Mrs MacKenzie's telephone and email contacts so that he could contact her. The

Authority's support officer spoke to Mrs MacKenzie and gained her permission to pass her contact details to Mr Taylor.

[18] On 28 July 2013 Mrs MacKenzie emailed the Authority's support officer that she had met with Mr Taylor but that that matter had not been resolved. She indicated that the investigation meeting would have to proceed.

[19] Mr Taylor was not at the investigation at 9.30 a.m. Therefore, I delayed the beginning of the investigation meeting until 9.45 a.m. in case a representative of Quick Express was running late for some reason. However, no Quick Express representative came to the meeting. I was satisfied that Quick Express has been notified of the meeting and proceeded to hear from Mrs MacKenzie and her husband, Stephen MacKenzie.

Determination

[20] Under s.174 of the Employment Relations Act 2000 I do not need to set out a record of all the evidence or the findings on credibility of any evidence. Having said that, it is clear that because the respondent was not represented, has not lodged a statement in reply and presented no witness evidence at the investigation meeting my findings of fact are based on Mrs and Mr MacKenzie's evidence. Both witnesses gave sworn evidence and I was able to test their evidence by questioning them.

What is Mrs MacKenzie owed by way of wages and holiday pay?

[21] Mrs MacKenzie says that she only took one day off in the period from 8 May to 14 June 2012 and that was because of a heavy snowfall. Mrs MacKenzie did not work on the Queen's Birthday statutory holiday which was on 4 June 2012.

[22] Mrs MacKenzie's last day of work was 14 June 2013. She did not work the full day but is entitled to be paid for that day as she was ready and willing to work and attended at work at 9 a.m.

[23] Mrs MacKenzie worked for a total of 26 days, and is also due pay for the Queen's Birthday statutory holiday which would ordinarily have been a working day for her. She should have been paid for 27 days and has been paid for 9 of them; leaving 18 days unpaid. \$13.50 per hour x 6 hours = \$81.00 for a day's pay. 18 days

x \$81 = \$1,458. Quick Express must pay Mrs MacKenzie \$1,458 (gross) in unpaid wages.

[24] Mrs MacKenzie is also owed holiday pay for the whole period of her employment at 8% of her total pay. Her total gross pay was \$2,187. Eight per cent of \$2,187 is \$174.96. Quick Express must pay Mrs MacKenzie \$174.96 holiday pay.

Does Mrs MacKenzie have a personal grievance for unjustified dismissal?

[25] A dismissal is the permanent sending away of an employee by an employer. Mrs MacKenzie was not constructively dismissed but was actually dismissed by Mr Taylor without notice on 14 June 2013 when he told took back the car, tablet and charger and told her that her employment was at an end.

[26] The issue I must determine is whether Mrs MacKenzie was unjustifiably dismissed. The justification for her dismissal is determined under the statutory test in s. 103A of the Employment Relations Act 2000.

[27] I must ask whether what Quick Express did was what a fair and reasonable employer could have done in all the circumstances at the time it made the decision to dismiss Mrs MacKenzie.

[28] Mrs MacKenzie was dismissed with no notice on 14 June 2013. She was apparently dismissed because Quick Express could not afford to retain her. Quick Express advertised for courier and short haul drivers only five days later, however, Mrs MacKenzie was not re-engaged by Quick Express.

[29] I have had no explanation from Quick Express for why Mrs MacKenzie was dismissed without notice and when it required more drivers only five days later. I consider Quick Express's decision to dismiss Mrs MacKenzie was not a decision that a fair and reasonable employer could have made in all the circumstances at the time. Therefore, Mrs MacKenzie was unjustifiably dismissed by Quick Express.

Does Mrs MacKenzie have a personal grievance of unjustified disadvantage?

[30] To be successful in a claim for unjustified disadvantage the employee must show:

... that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives

termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer¹

[31] There are two limbs to the test for unjustifiable disadvantage. First, any disadvantage suffered must be to the employee's employment or a condition or conditions of the employee's employment. Secondly, any action that was of disadvantage to the employee's condition/s of employment must have been unjustified.

[32] Mrs MacKenzie was economically disadvantaged by Quick Express's failure pay her what she was owed on time. I do not consider that the disadvantage affected her *employment*. However, it did however affect one or more of her conditions of employment.

[33] In assessing whether any disadvantage to Mrs MacKenzie was unjustified I need to consider the same test used for the unjustified dismissal; that in s.103A of the Employment Relations Act 2000. Was Quick Express's failure to pay wages on time an action that a fair and reasonable employer could have taken in all the circumstances at the time of each non-payment?

[34] Even if Quick Express found itself in difficult financial circumstances non-payment of wage payments on time or in full can never be justified. Therefore, Quick Express's actions were unjustified. Mrs MacKenzie does have a personal grievance for unjustified disadvantage.

Remedies

Is Mrs MacKenzie entitled to lost remuneration?

[35] Section 123(1)(b) of the Act allows me to order Quick Express to pay the whole or any part of wages Mrs MacKenzie lost as a result of her grievance.

[36] Section 128(2) of the Act provides that I must order Quick Express to pay Mrs MacKenzie the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration.

[37] Mrs MacKenzie applied for a number of roles by replying to advertisements in the newspaper and on TradeMe. She obtained two interviews between June to

¹ Section 103(1)(b) Employment Relations Act 2000

December 2012 when she was appointed to a casual, part-time position at The Warehouse which she still retains.

[38] Mrs MacKenzie had no income in the three months (or thirteen weeks) after she was dismissed from Quick Express. Therefore, I must award her actual lost remuneration. Her weekly pay was \$405 gross. $\$405 \times 13 = \$5,265$, which Quick Express must pay Mrs MacKenzie.

[39] In addition, s.128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s.128(2); that is, for more than thirteen weeks. Although Mrs MacKenzie did not have any income for more than thirteen weeks in all the circumstances, including the brief nature of her employment with Quick Express I do not consider it reasonable to award more than 13 weeks lost remuneration.

Compensation

[40] Section 123(1)(c)(i) of the Act gives the Authority to provide for compensation for humiliation, loss of dignity and injury to the feelings of an employee who has a personal grievance. Mrs MacKenzie has claimed \$10,000 in compensation.

[41] Mrs MacKenzie says that she was shocked and upset by her unexpected dismissal and that upset was increased when she saw what she considered to be her job advertised again only five days later.

[42] Mr MacKenzie says that Mrs MacKenzie rang him at work in tears when she had been dismissed and that she was *pretty upset* for some weeks.

[43] I consider \$2,000 compensation to be reasonable in all the circumstances.

Costs

[44] Mrs MacKenzie paid the \$71.56 filing fee to lodge her statement of problem with the Authority. She has had legal advice but was not represented by her lawyer at the telephone directions conference or at the investigation meeting.

[45] I have seen a copy of Mrs MacKenzie's bill for legal services. All the charges are for the point leading up to and including mediation. Generally, a successful party

can be reimbursed for costs of their legal representation at the investigation meeting or for legal advice given and/or submissions prepared by their lawyer after mediation and for the investigation meeting. However, it is a well-established principle in the Authority that parties bear their own costs related to mediation. That is based on the policy that there is some public good in attempting to resolve matters by way of agreement relatively early and inexpensively. Therefore, I decline to order Quick Express to pay Mrs MacKenzie's legal expenses.

Christine Hickey

Member of the Employment Relations Authority