

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 395
5573777

BETWEEN

JEANETTE MATTING
Applicant

AND

EVANGELOS LIMITED
trading as BLISS BY THE
BEACH
Respondent

Member of Authority: Andrew Dallas

Representatives: Applicant in person
No appearance for the Respondent

Investigation Meeting: 25 November 2015

Date of Determination 15 December 2015

DETERMINATION OF THE AUTHORITY

- A. Jeanette Matting was unjustifiably disadvantaged by her employer, Evangelos Limited trading as Bliss by the Beach (Bliss), when she had her hours of work reduced without proper notice and lost wages as a result.**
- B. Bliss failed to pay Ms Matting's final wages and holiday pay after she resigned her employment.**
- C. Bliss deducted but failed to remit employee KiwiSaver contributions.**
- D. Bliss must pay Ms Matting the following sums within fourteen (14) days of the date of this determination:**
- (i) \$1430 gross reimbursement for lost wages;**
 - (ii) \$176 gross in unpaid wages;**
 - (iii) \$682.44 gross in unpaid holiday pay; and,**
 - (iv) \$255.91 gross as deducted but not remitted KiwiSaver contributions.**
- E. There is no order for costs.**

Employment Relationship Problem

[1] Jeannette Matting was employed as a Beauty Therapist by Evangelos Ltd trading as Bliss by the Beach (Bliss). Her employment was governed by an individual employment agreement (the agreement), which was entered into on 19 April 2015. Ms Matting commenced work on 27 April 2015.

[2] Ms Matting's rostered hours of work were set out in clause 6 of the agreement. These hours were 9 am until 2 pm from Monday to Friday. Ms Matting occasionally worked additional hours on a Saturday to provide staff cover.

[3] Ms Matting claimed that Bliss varied, by reduction, her rostered hours of work without proper notice under the agreement. Ms Matting claimed this occurred on and from 30 July 2015.

[4] Ms Matting claimed reimbursement for lost wages as this action by Bliss was contrary to an express term of her employment agreement and she was, therefore, disadvantaged in her employment by Bliss.

[5] In an email to Bliss director, Yuma Evangelos on 31 July 2015, Ms Matting opposed this reduction in her rostered hours. She sought reinstatement of the agreed hours until the proper notice required for variation of these had been given.

[6] Ms Evangelos ignored Ms Matting's attempts to resolve her grievance. A statement of problem with lodged with the Authority on 9 September 2015.

[7] The employment came to end on 17 September 2015 after Ms Matting resigned her employment. She claimed that Bliss failed to pay her final week's pay and eight per cent gross of her total earnings as holiday pay. Ms Matting sought payment of these monies.

[8] Ms Matting claimed that after the employment ended her accountant discovered that Bliss had not remitted any PAYE tax, student loan repayments or KiwiSaver contributions to the Inland Revenue Department.

Issues

- [9] The following are the issues for determination:
- (i) Was Ms Matting unjustifiably disadvantaged by Bliss when she had her hours of work varied, by reduction, without a minimum of 90 days' notice?;
 - (ii) If so, should Ms Matting be awarded reimbursement for lost wages?;
 - (iii) If compensation is awarded should there be a reduction in these due to contributory behaviour by Ms Matting?;
 - (iv) Is Ms Matting owed unpaid wages by Bliss?;
 - (v) Is Ms Matting owed unpaid holiday pay by Bliss?; and
 - (vi) Has Bliss failed to remit KiwiSaver contributions for Ms Matting?

The Authority's Investigation

[10] The Authority served Ms Matting's statement of problem on the registered office of Bliss. Neither Ms Evangelos nor a representative on her behalf lodged a statement in reply.

[11] The matter proceeded to a case management conference on 16 October 2015. Ms Matting attended the call. Ms Evangelos could not be contacted.

[12] The matter was set down for an investigation meeting on 25 November 2015. A Member's Minute was issued to the parties together with a Notice of Investigation.

[13] Ms Evangelos was advised in that minute that if she or another authorised representative attended the investigation meeting, that person would have the opportunity to comment on Ms Matting's claim. The minute further advised Ms Evangelos that in the event of non-attendance, the Authority, if satisfied with Ms Matting's evidence, may proceed to make orders in her favour.

[14] Ms Evangelos was also notified of the Authority's investigation meeting by Ms Matting who told me she posted her copies of all the material she had received from the Authority.

[15] Ms Evangelos did not attend the meeting. She gave two contradictory reasons for this.

[16] First, she advised Ms Matting via text message at 7.04 pm on 24 November 2015 that she would not be attending the meeting as she was attending the funeral of her cousin. Ms Matting showed this to the Authority.

[17] Second, at or about 9.35 am on 25 November 2015, Ms Evangelos spoke via phone to an administration officer at the Auckland office of the Mediation Service. In a record of the conversation provided to the Authority, Ms Evangelos wrongly claimed to have a mediation scheduled for that day. She also claimed she could not attend, in any event, as she had to pick up her sick children from school.

[18] Setting aside for a moment the contradiction between these reasons, the credibility of the second reason was eroded by the evidence of Ms Matting who told me that Ms Evangelos had only one school aged child.

[19] Regardless of which reason Ms Evangelos ultimately chose to rely on for non-attendance, neither was sufficient excuse in the absence of further and better information from Ms Evangelos or independent corroboration.

[20] An attempt was made to contact Ms Evangelos via her mobile phone during the investigation meeting. Ms Matting provided the Authority with the phone number. The phone call went to voice mail and an *urgent* message was left by the Authority Officer requesting Ms Evangelos return the phone call. As at the date of this determination, Ms Evangelos has not responded to that phone message or otherwise made contact with the Authority.

[21] In the absence of Ms Evangelos, I heard evidence from Ms Matting. She also provided the Authority with several relevant documents. These documents included her agreement, emails which had passed between herself and Ms Evangelos and calculations for lost wages, unpaid wages, holiday pay and outstanding KiwiSaver contributions.

[22] At the close of the investigation meeting, I gave an oral indication of my preliminary findings pursuant to s 174B of the Employment Relations Act 2000 (the Act).

[23] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence, which I heard during my investigation of Ms Matting's employment relationship problem.

Was Ms Matting unjustifiably disadvantaged by Bliss?

[24] On 30 July 2015, Ms Matting found herself unwell. She told Ms Evangelos about this and advised she would be unable to work for several days.

[25] Ms Matting told me that in response to this Ms Evaneglos said: "...that's actually quite good because I was going to cut your hours anyway".

[26] When asked by Ms Matting why her hours were to being cut, Ms Evangelos told her "[t]hings have changed and I can do the work myself".

[27] This conversation was followed up by Ms Matting in an email to Ms Evangelos dated 31 July 2015, Ms Matting raised the substance of a disadvantage grievance with her employer. She disputed the variation of hours and insisted Bliss give her the proper notice of 90 days required by clause 6 of her agreement,

[28] Ms Evangelos reply to this email suggested an evolution in her justification for reducing the roster hours. The evolved justification was "situations do change unfortunately".

[29] Ms Matting's evidence was that variation to her hours of work resulted in the loss of access to 65 hours work.

[30] In order to ascertain the correctness or otherwise of Ms Matting's position it is necessary to interpret clause 6 of the agreement.

[31] The principles of contractual interpretation are well established in New Zealand.¹ It is clear from the Court of Appeal's decision in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Union* that these principles are equally applicable in this jurisdiction.²

[32] The Employment Court in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* provided a useful summary of how these principles apply to employment agreements:³

[17] ... it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, never the less, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time

[32] Ms Matting's employment agreement provided for a variation to her rostered hours of work in the following terms:

Clause 6 Hours of Work

...

The parties agree that the Employee's hours of work shall be set by the Employer in advance in accordance with a roster. Unless there are exceptional circumstances, the Employee shall be given at least 90 days' notice of a new roster.

[33] It is clear that a minimum of 90 days' notice was not given by Bliss to Ms Matting for changing her rostered hours. Nor, for that matter, was there any evidence Ms Matting agreed to vary her hours.

¹See, the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444.

²[2010] ERNZ 317.

³[2011] NZEmpC 149.

[34] These conclusions are founded on Ms Matting's evidence at the investigation meeting and corroborated by the email exchange between Ms Matting and Ms Evangelos which commenced on 31 July 2015

[35] The only lawful basis, therefore, upon which Bliss could change Ms Matting's rostered hours was if *exceptional circumstances* existed under clause 6 of the agreement. Mere circumstances were not sufficient.

[36] Applying *Vector* it is necessary to ascertain the natural and ordinary meaning of exceptional circumstances.

[37] The meaning of exceptional circumstances has been considered in this jurisdiction by the Supreme Court within the context of raising a personal grievance out of time under s 114 of the Act.

[38] In *Creedy v Commissioner of Police* [2009] ERNZ 109, the Supreme Court having reviewed an earlier decision of the Court of Appeal on the issue,⁴ accepted a formulation that exceptional circumstances meant "unusual, outside the common run".⁵

[39] Ms Evangelos's explanation to Ms Matting in justifying the variation to her hours founded on initially, "things have changed" or, evolving to, "situations do change unfortunately" without further elaboration or justification did not constitute exceptional circumstances within the meaning given to it by the Supreme Court. Consequently, whatever circumstances Bliss was ultimately acting upon they were not *exceptional* and therefore, were insufficient to enliven a right under clause 6 of agreement to give Ms Matting less notice.

[40] Bliss through its actions carried out an unjustifiable action against Ms Matting. This unjustifiable action, in turn, caused disadvantage to Ms Matting because it reduced her hours of work, and so it follows, the income she derived from those hours.

⁴*Wilkins & Field Ltd v Fortune* [1998] 2 ERNZ 70 (CA)

⁵[2009] ERNZ 109 at para [31]

[41] I conclude Ms Matting's claim of a personal grievance against Bliss is made out.

Claim for reimbursement for lost wages

[42] As a remedy for her personal grievance, Ms Matting claims reimbursement of lost wages for the 65 hours work she would have received but for the unjustifiably action by Bliss.

[43] Clause 7 of Ms Matting's agreement provided that her hourly rate of pay rate was \$22. Multiplying 65 hours by \$22 gives the gross sum of \$1430.

[44] Having regard to the evidence and the refusal by Bliss to engage at any level in the resolution of Ms Matting's personal grievance, I find her claim for reimbursement for lost wages fair and reasonable in all the circumstances.

[45] Bliss must pay Ms Matting \$1430 gross as reimbursement for lost wages under s 123(1)(b) of the Act.

Contributory behaviour by Ms Matting?

[46] Having found that Ms Matting is entitled to a remedy for a personal grievance against her employer, I am now required by s 124 of the Act to consider whether there has been any contributory behaviour by Ms Matting.

[47] I am satisfied that on the evidence before the Authority, that Ms Matting has not contributed in any way to the circumstances that she found herself in with her employment with Bliss. Consequently, there is no reduction in the award of compensation.

Claim for unpaid wages

[48] Ms Matting claimed that she is owed wages by Bliss.

[49] Ms Matting's evidence was that she was not paid wages for the 8 hours work she performed in the period leading up to her resignation taking effect on 17 September 2015.

[50] Ms Evangelos failed to produce wage and time records to assist Ms Matting in the calculation of the claim for lost wages. In the absence of any evidence to the contrary from Ms Evangelos and in reliance on s 132(2) of the Act, I accept Ms Matting's evidence about unpaid wages.

[51] Ms Matting's hourly rate of pay rate was \$22. Multiplying 8 hours by \$22 gives the gross sum of \$176.

[52] Bliss must pay Ms Matting \$176 gross in unpaid wages under s 131(1)(a) of the Act.

Claim for unpaid holiday pay

[53] Ms Matting claimed that she is owed outstanding holiday pay. She told me that default by Bliss occurred at the same time as non-payment of her final wages upon resigning her employment.

[54] Annual leave for Ms Matting was governed by clause 8.1 of her agreement. This clause relevantly provides:

8.1 Short Form Clause on Annual Leave as set out in the Holidays Act
The Employee shall be entitled to paid annual leave of four weeks per year after 12 months continuous employment with the Employer, in accordance with the Holidays Act.

...

[55] As Ms Matting's employment ended within 12 months, the calculation provided for in s 23(2) of the Holidays Act 2003 applies. This calculation is eight per cent of gross earnings during the employment less any payment for annual leave taken in advance during the employment or by any payment for annual leave on a 'pay as you go' basis.

[56] Ms Matting told me that she worked 387.75 hours for Bliss. She also told me that she did not take any paid annual leave or receive payments over and above her hourly wage from Bliss.

[57] Ms Evangelos failed to produce wage and time records to assist Ms Matting in the calculation of the claim for unpaid holiday. In the absence of any evidence to the contrary from Ms Evangelos and in reliance on s 132(2) of the Act, I accept Ms Matting's evidence about unpaid holiday pay.

[58] Ms Matting's hourly rate of pay rate was \$22. Multiplying the hours she worked (387.75) by her pay rate gives a gross sum of \$8530.50. Eight per cent of that is \$682.44.

[59] Bliss must pay Ms Matting \$682.44 gross in unpaid holiday pay.

Claim for unremitted KiwiSaver contributions

[60] Ms Matting told me that she contributed three per cent of her gross wages to her chosen KiwiSaver scheme, AMP KiwiSaver. She also told me, on the basis of advice she received from her accountant, that Bliss had not remitted any of her contributions to this scheme.

[61] Ms Matting is entitled to rely on the professional advice of her accountant.

[62] This being the only and, therefore, the best evidence before the Authority on this point. I conclude on that basis that Bliss has not remitted Ms Matting's KiwiSaver contributions to IRD.

[63] The amount claimed by Ms Matting was \$255.91 being three per cent of her gross earning \$8530.50. This was a sensible way to calculate the claim in the absence of Ms Matting's wage and time records.

[64] Bliss must pay Ms Matting \$255.91 gross as deducted but not remitted employee KiwiSaver contributions

Other issue

[65] As observed above, Ms Matting complained that Bliss had not, based on an investigation undertaken by her accountant, remitted PAYE payments or student loan repayments to IRD. The Authority lacks jurisdictional capacity to order compliance with tax legislation. Ms Matting told me that her accountant had made a complaint to IRD. Consequently, the relevant regulatory authority has been given notice of Bliss's default in these respects.

Costs

[66] As Ms Matting was not represented, there is no order for costs.

A handwritten signature in blue ink, consisting of a vertical stroke on the left and a long horizontal stroke extending to the right, with a small loop at the end.

Andrew Dallas
Member of the Employment Relations Authority