

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 567
3140162

BETWEEN LEAH ELIZABETH ELLEN
MCDONALD
Applicant

AND DAVID DRYDEN MCBRIDE
Respondent

Member of Authority: Philip Cheyne

Representatives: The Applicant in person
The Respondent in person

Investigation Meeting: 24 November 2021 at Timaru

Further Information: 14 December 2021 from the Applicant

Date of Determination: 17 December 2021

DETERMINATION OF THE AUTHORITY

- A. David McBride is to pay Leah Elizabeth Ellen McDonald arrears of \$1,323.39 (gross), by Friday 14 January 2022.**
- B. David McBride is to pay Leah Elizabeth Ellen McDonald costs of \$71.56 (without deduction), by Friday 14 January 2022.**

Employment relationship problem

[1] David McBride operates a business as an Architect. Mr McBride employed Leah McDonald for less than a year. Ms McDonald gave notice of resignation. Ms McDonald's claim is for holiday pay payable on termination and some Kiwisaver entitlements, which she says were not paid after the termination of her employment.

[2] In reply, Mr McBride says he paid everything that was due.

[3] During the investigation meeting, Ms McDonald was requested to check payments to her Kiwisaver account from Mr McBride and report back to the Authority. Mr McBride was also given an opportunity to reconcile his Kiwisaver payments to IRD for Ms McDonald's benefit if need be. Mr McBride had not done that before the investigation meeting. He had regarded the Kiwisaver matter as a personal grievance claim. It had not been raised within 90 days and he did not consent to it being raised out of time.¹ However, I explained to Mr McBride that it was an arrears claim,² so was properly before the Authority for investigation and determination.

[4] On 14 December 2021 Ms McDonald confirmed that all her Kiwisaver entitlements from the employment with Mr McBride were recorded in her Kiwisaver account. It is not necessary to investigate and determine that aspect of the problem.

What happened?

[5] Ms McDonald was employed fulltime, working Monday to Friday, starting Monday 14 January 2019. Salary was paid fortnightly by direct credit.

[6] There was a written employment agreement. Clause I(1) provided for termination of the agreement on four weeks' notice in writing.

[7] Ms McDonald gave notice on Monday 1 July 2019, with the last day of her employment as Friday 26 July.

[8] Mr McBride spoke to Ms McDonald on Friday 5 July. He said he wanted Ms McDonald to finish up on Friday 12 July, instead of Friday 26 July.

¹ Employment Relations Act 2000 s 114.

² Employment Relations Act 2000 s 131 and s 142.

[9] There was an email exchange between Ms McDonald and Mr McBride on 6 and 7 July. Ms McDonald referred to the notice clause in her employment agreement, what had been said to her the previous day and asked Mr McBride to confirm that she would be paid for the two weeks not worked, together with her accumulated holiday pay. Mr McBride said (correctly) that the clause only applied if the employer gave notice. Mr McBride explained why he wanted Ms McDonald to finish work on Friday 12 July.

[10] Mr McBride's email concluded:

As employer I am agreeable to you ceasing employment after just 2 weeks notice, on full pay plus any and all holiday pay owing. I raised this matter with you on 5 July, having received your notice of resignation on 1 July 2019.

[11] Ms McDonald finished work on Friday 12 July. The last payment into Ms McDonald's bank account was on 29 July.

[12] Ms McDonald thought she had not been paid holiday pay correctly so contacted Mr McBride. Mr McBride responded in an email on 26 August 2019. His response included the contention that the two weeks paid to Ms McDonald, when she did not work, adequately covered holiday pay for the period of her employment.

[13] Ms McDonald in reply referred to s 23 of the Holidays Act 2003 and her recollection of having taken one full day and two half days holidays in advance, by agreement. Ms McDonald repeated her claim.

[14] There was a mediation, but matters were not resolved.

[15] Ms McDonald lodged these proceedings in May 2021. Mr McBride did not lodge a reply within time. However, I grant leave to Mr McBride to respond and will have regard to the position he advanced in writing to the Authority and presented at the investigation meeting.

The claim

[16] The effect of Ms McDonald giving notice on 1 July 2019 was to bring the employment relationship to an end as at 26 July, in accordance with the contract.

[17] At issue is whether the exchange between Mr McBride and Ms McDonald on 5, 6 and 7 July varied the contractual certainty that otherwise flowed from Ms McDonald's unilateral action.

[18] Ms McDonald set out her understanding, given that Mr McBride told her on 5 July that he wanted her last day of work to be Friday 12 July:

...I assume I will be paid out for the two weeks I will not be working (15th to 26th July), and then paid out my accumulated holiday pay?

[19] Mr McBride responded:

Rather than have you attending each day, but simply allowing time to pass without any particular achievements until the 4 weeks have expired, I consider it beneficial all round to terminate after 2 weeks from handing in your notice of resignation.

As employer I am agreeable to you ceasing employment after just 2 weeks notice, on full pay plus any and all holiday pay owing. I raised this matter with you on 5 July, having received your notice of resignation on 1 July 2019.

[20] Ms McDonald took Mr McBride's response as confirmation that she would receive full pay for the notice period she had given, plus all holiday pay. Mr McBride's words do convey that meaning.

[21] Mr McBride's position is that his words reflected a mutual arrangement to vary the notice period from four weeks to two weeks, ending Ms McDonald's contractual right to receive "full pay" as at Friday 12 July. However, Ms McDonald did not ask or offer to terminate her employment two weeks before the end of her notice. To the contrary, Ms McDonald was just checking she would be paid throughout and reasonably understood from the response that she would.

[22] Mr McBride did not require Ms McDonald to attend work for the last two weeks, so she did not. However, I find that Ms McDonald did not agree to extinguish or relinquish her right to be paid to 26 July 2019.

[23] Ms McDonald is entitled to "full pay" to 26 July, together with holiday pay.

Other matters raised by Mr McBride

[24] Mr McBride referred to the claim in the Authority as amounting to “double-jeopardy”, so unable to proceed. I take Mr McBride as referencing principles about the finality of litigation and that no one should be proceeded against twice for the same cause.

[25] Ms McDonald had sought mediation before these proceedings. Mr McBride set out his view of what happened regarding mediation, but those matters would be subject to confidentiality, in accordance with s 148 of the Employment Relations Act 2000. As the problem was not resolved in mediation, Ms McDonald was legally entitled to commence an action in the Authority, seeking first instance judicial intervention by way of investigation and determination of her claims by the Authority. The steps taken by Ms McDonald to resolve her employment relationship problem were in accordance with Part 10 of the Employment Relations Act 2000. No issue about “double-jeopardy” applies.

[26] Mr McBride produced some information from the website www.employment.govt.nz. It includes a statement that the employer can agree with the employee that they do not have to work out their notice period. There is a second statement that the employer can choose to agree with the employee to waive some or all of their notice period and “In this situation the employee won’t be paid for the portion of notice they don’t work”. A second option is putting the employee on “garden leave”. It finishes by recommending “Any agreement should be in writing and signed by the employer and the employee”. Mr McBride’s view is that he followed the “advice” set out by the Ministry of Business Innovation and Employment.

[27] As explained above, Mr McBride’s exchanges with Ms McDonald did not get to the point of a mutual agreement. Ms McDonald never agreed to end the employment relationship on 12 July, rather than 26 July. Her understanding, given the approach from Mr McBride, was that she was not required to work but would be paid for the last two weeks.

Arrears

[28] Fortnightly salary was \$1,438.46 (gross). Fourteen payments are shown in the records, matching the 14 deposits shown in Ms McDonald’s bank statement. The last

payment received by Ms McDonald on 29 July is properly treated as payment of the balance of her notice period.

[29] Section 23 of the Holidays Act 2003 applies, as Ms McDonald was employed for less than 12 months. Mr McBride was required to pay Ms McDonald 8% of her gross earnings, less any amount paid for annual holidays taken in advance.

[30] Wage records show that Ms McDonald's gross earnings since her employment commenced were \$20,138.44. Applying s 23 of the Act, Ms McDonald was entitled to \$1,611.08 in holiday pay, less what was paid for holidays in advance.

[31] The wage records and email exchanges show that paid holidays in advance were taken on 15 March (half day), 10 May (half day) and 19 June (1 day). Two days holiday in advance totals \$287.69. Mr McBride was entitled to deduct that sum from the 8% holiday pay, leaving \$1,323.39 to be paid in holiday pay.

[32] Ms McDonald is also entitled to recover from Mr McBride the lodgement fee of \$71.56, as costs.

Philip Cheyne
Member of the Employment Relations Authority