

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 61
5411576

BETWEEN	SAMARA ANN MEADS Applicant
AND	KERERU INVESTMENTS LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Mr Philip Meads for Applicant No attendance and no appearance for Respondent
Investigation Meeting:	28 May 2013 at Palmerton North
Oral determination delivered:	28 May 2013
Date of written determination:	28 May 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem is about the nature of the applicant's employment with her employer (to be identified) and how the employment relationship problem should be resolved. The applicant is seeking unpaid wages and holiday pay and lost wages and compensation.

[2] There has been no reply filed by the respondent at any stage, the respondent was not available for a telephone conference with the Authority and Mr Mead, and there has been no attendance and appearance for the respondent at today's investigation meeting. However, a document produced by the applicant from Kereru (letter dated 20 January) says that Ms Meads was employed by it.

[3] There has been no good cause shown for the non-attendance of the respondent today. I considered:

- i. That the applicant had no knowledge of any reasons for the respondent's absence.
- ii. That there has been no reply and response filed by the respondent in the Authority.
- iii. That the respondent has been properly served with the hearing notice and the documents on notice.
- iv. That an attempt by the support office to contact the respondent by email today was not fruitful.
- v. That the respondent was given time to contact the Authority's support officer and did not do so before the investigation meeting started.
- vi. That the start of the Authority's investigation meeting was delayed to give the respondent time to appear.

[4] I decided to proceed fully in the matter as if the respondent was present and represented (applying clause 12 of Schedule 2 of the Employment Relations Act).

Issues

[5] Who was the applicant's employer: Mr Scott Guthrie, company director, personally, or Kereru Investments Limited?

[6] What was the nature of the applicant's engagement with her employer?

[7] How did the engagement between the applicant and her employer end?

[8] What is the employment relationship problem?

[9] Is Ms Meads entitled to the remedies she has claimed to resolve the employment relationship problem?

The facts

[10] Kereru Investments Limited is a courier business. It has two directors, Mr Scott Guthrie and Ms Michelle Guthrie. I note that this is a small employer and its resources amount to two directors and there are no further details available of any accountants and/or lawyers and/or professional business advisers involved.

[11] Samara Meads had an unsigned individual employment agreement with Kereru Investments Limited to sort and deliver parcels and letters for Courier Post. She was given her individual employment agreement by Mr Guthrie at her home on 30 December 2012. She accepted that her wages were \$700 per week after tax under the agreement. Indeed it emerges that there were at least two issues about the employment agreement that Ms Meads asked to discuss with Scott Guthrie, before she signed it. No discussions occurred during the employment relationship. She commenced work with Kereru on 12 December 2012.

[12] I hold that Kereru Investments was Ms Meads' employer. My reasons are:

- i. That Ms Meads confirmed that she was employed with Kereru in a letter dated 12 January 2013.
- ii. That the employment agreement includes Kereru Investments Limited as the name of the employer.
- iii. That the issue of who the employer is has been raised late by the applicant.
- iv. That the proceedings in the Employment Relations Authority involved only Kereru Investments Limited, until the request was made by Mr Meads for Mr Guthrie to be joined as a party. I will return to the request later, but confirm that I decided not to join him because of the lack of any adequate notice and that there was no amended statement of problem filed.

- v. That much of Ms Meads' correspondence referred to the company and was sent to the company.

[13] Because of these factors it is more likely than not that Kereru Investments Limited was the employer, and thus I have not accepted the undisclosed principle that Mr Guthrie held himself out as the employer without identifying the existence of the company. Also I do not accept Mr Meads' submission that Ms Meads did not know and/or understand that the company was the employer.

[14] Ms Meads says that she was informed by Mr Guthrie that she was not wanted by Courier Post and consequently concluded that she could no longer work at Kereru. She says that she was available for work. Indeed she made this clear to Mr Guthrie, supported by her correspondence requesting to return to work immediately. Mr Meads gave evidence of his knowledge that it was not Courier Post that was preventing Ms Meads working, but Mr Guthrie's decision not to have her at work. He says he learnt this from a contact at Courier Post. Mr Meads' evidence has not been contradicted and/or challenged. In Mr Guthrie's absence I have accepted Mr Meads' evidence.

[15] On 13 January 2013 Kereru wrote to Ms Meads and informed her that there were two incidents serious enough to suspend her from work without pay. She was requested to provide a written reply by 16 January 2013. However the first incident had occurred before Ms Meads was handed her employment agreement by Mr Guthrie. This makes it more likely than not that the first incident had been disposed of as Ms Meads believed at the time.

[16] Ms Meads did reply in writing as requested, with her explanations about the two matters. She requested to remain on pay while she was suspended and an investigation was completed. She requested to be paid. She asked that her employment agreement and position be clarified and she stated that she was available to work (letter dated 14 January 2013).

[17] Mr Guthrie replied that the first incident had not been dealt with and was still outstanding as there were different versions about an accident, and that in the second incident, there were also different versions about what was involved and Ms Meads was requested to provide any further correspondence. In her reply Ms Meads

indicated her willingness to cooperate in any investigation and challenged her suspension without pay and that she was ready to return to work. Mr Guthrie pointed out his rights to apply the unsigned employment agreement in regard to termination and her use of a vehicle involved serious misconduct offences.

[18] Next Ms Meads proposed mediation to help them. There was no reply from Mr Guthrie and contact from him ceased at the latest with effect from 13 February 2013.

Determination

[19] I hold that Ms Meads raised a personal grievance with Kereru by filing a statement of problem in the Authority that provided details of her personal grievance and the remedies she is claiming. Although this is not the correct way of dealing with such matters in the first instance, it is entirely understandable that the grievance was raised by filing a claim in the Authority first given that the contact with her employer had ceased, that there had been no replies to her most recent correspondence with Kereru, and that she was represented by her father without any input from a professional representative. Indeed it was entirely understandable for Mr Meads to file in the Authority because Kereru was not replying and not being responsive. I am satisfied that the statement of problem was served on Kereru and that that the personal grievance was raised with the employer in 90 days.

[20] Next I hold that Ms Meads' suspension was unlawful and without good cause because there was no provision allowing for it in the employment agreement, it is not lawful to withhold wages even while on suspension and the issues that Kereru purports to rely on are arguable. Kereru failed to follow proper procedures in suspending Ms Meads. It failed to sufficiently investigate the allegations, and failed to give Ms Meads a reasonable opportunity to respond to the concerns. Ms Meads has never been given any findings reached by the employer. There has been no evidence that the employer genuinely considered the employee's explanation before reaching a decision to suspend her. Indeed the employer's unjustified action is not assisted by a failure to respond to Ms Meads' request to resume work, be paid and to attend mediation. Even although this is a small employer such consideration are important,

achievable and indeed expected of an employer under the law. I hold that the defects are not minor and/or technical.

[21] Kereru is responsible for the employment coming to an end and it was entirely reasonable for Ms Meads to believe that she had been dismissed by 13 January when her employer failed to reply to her and failed to pay outstanding wages and holiday pay to Ms Meads. I hold that any failure for Ms Meads to resume work was at the initiative of the employer, and not Ms Meads. It follows that Kereru's actions were unjustified and were not what a fair and reasonable employer could have done in all the circumstances at the time the suspension and dismissal occurred.

[22] Ms Meads has a personal grievance because the employer has failed to justify its actions.

[23] Kereru has failed to comply with an order from the Authority to produce wage time and holiday records (Minute dated 12 April 2013). I accept Ms Meads' calculations of her gross salary as best as she has been able to calculate with her father's help.

[24] Ms Meads is entitled to her unpaid wages for 7 and 8 January 2012 in the sum of \$316. Also she is entitled to pay for the week ended 6 January 2012 in the sum of \$843 and her holiday pay in the sum of \$272. Her total claim for wage arrears and holiday pay amounts to \$1,431. I accept the claims in the employer's absence and the employer not complying with the request to produce wage time and holiday records.

[25] Ms Meads started to look for another job using Trade Me after filing her claim in the Authority. She had up until then reasonably hoped something could have been worked out. This was supported by her attempts to explain her situation in writing as she had been requested to do so, informed her employer that she was available to work and that she suggested and proposed mediation the help, but all to no avail.

[26] She has used Trade Me to look for opportunities but to no avail and has not fully explained the detail of her attempts to apply for any jobs. She is supported financially by her family.

[27] She could have expected at least 6 weeks written notice under the terms of the employer's individual agreement given to her. In addition I assess her loss as a

further two weeks because of her failure to mitigate her loss properly and fully. There is no deduction because the employer has failed to mount any case to support her being blameworthy and contributing to the personal grievance. Her eight weeks lost wages amounts to \$6,744. Furthermore no wage and time records have been provided and which were requested.

[28] She is entitled to a very small sum of compensation. This is for hurt and humiliation and she was supported about the impact of the employer's actions on her from Mr Mead's and his observations of her during the time. He explained that this was her first job after leaving school and that Kereru's actions had an impact on her.

[29] I assess her evidence for \$1,000 compensation for hurt and humiliation under s 123 (1) (c) (i) of the Act.

[30] Finally I have been asked to join Mr Guthrie personally because of a possibility that the business is being disposed of and the possibility of liquidation. It would not be proper to do that now without Mr Guthrie being put on notice and given an opportunity to reply. Prior to the investigation meeting the applicant could have amended her statement of problem to join him on notice. That was not done. Since Mr Meads has identified the possibility of enforcement issues arising later and which could relate to Mr Guthrie's behaviour and motives in the matter I am prepared to reserve leave to join him on further application in these proceedings to keep the employment relationship problem open. In doing so if an application is further advanced for joining Mr Guthrie personally he can be put on notice. This would solely relate to enforcement, but in the meantime other causes of action can be pursued by compliance and/or in the District Court with a certificate of determination for the money owed by Kereru Investments Limited.

Orders of the Authority

[31] I order Kereru Investments Limited to pay Ms Samara Meads:

- a. \$1,431 arrears of wages and holiday pay;
- b. \$6,744 lost wages under s 123 of the Act;
- c. \$1,000 compensation under s 123 (1) (c) (i) of the Act;
- d. \$71.56 filing fee under clause 15 of Schedule 2 of the Act.

[32] A certificate of determination on the itemised remedies is to be provided by the support officer.

P R Stapp
Member of the Employment Relations Authority