

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 194/08
5114552

BETWEEN MIGHTY RIVER POWER
 LIMITED
 Applicant

AND ERANA PALMER
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Amy Garden, advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 27 May 2008

Determination: 27 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mighty River Power Limited (MRP) seeks an order from the Authority requiring Ms Erana Palmer, a former employee, to repay \$1,276.23 to the company.

[2] That sum was directly credited by MRP to Ms Palmer's bank account in mid-December 2007 as part of a larger amount of salary due to her for that month. MRP's claim is that as Ms Palmer had terminated her employment with effect from 7 December 2007, salary was mistakenly paid to her for the rest of that month after that date.

[3] After MRP lodged its claim in the Authority there was no co-operation by Ms Palmer in any way towards resolving the employment relationship problem. Consequently mediation has not been able to take place. Ms Palmer did not attend the investigation meeting, although I am satisfied from CourierPost records that she was served with the Statement of Problem and with a Notice of Investigation Meeting at a

proper address for that purpose, being her last known residential address as supplied by her to MRP upon engagement in July 2007.

[4] I am satisfied that the Notice was served on 17 May 2008, a date that allowed Ms Palmer at least seven clear days notice of the investigation meeting to be held on 27 May 2008.

[5] It is reasonable to assume that Ms Palmer, having been served with the notice, read the advice given in it that if a respondent (as she is named as being) does not attend the investigation meeting the Authority may, without hearing evidence from that party, issue a determination in favour of an applicant (as MRP is in this case).

[6] I am satisfied from what I was told by Ms Amy Garden, the HR coordinator for MRP, that Ms Palmer was engaged by MRP in July 2007, under an employment agreement, as a Customer Service Representative. The terms of her appointment provided that her salary of \$35,000 per annum was to be paid by direct credit to her nominated bank account on the 15th of each month for the full calendar month. This was her remuneration for 40 hours work per week.

[7] Under the employment agreement Ms Palmer was also expressly subject to a probation period of two months, and she was required to give notice of not less than one month if terminating the employment.

[8] I am satisfied that from Saturday 8 December 2007, Ms Palmer was absent from work without authorisation. On Monday 10 December she left a message with her supervisor to say that she had been absent from work on 8 December due to bereavement and would be away for some further time. In a subsequent conversation with her supervisor Ms Palmer advised that she would be back at work on 17 December. However, she made no further contact and did not return to work at any time. Attempts were made by her supervisor to contact her, including having letters couriered to her home address requesting her to get in touch with her workplace and to attend a meeting about her unauthorised absence. Messages were left by phone with relatives at her address, and voicemail and text messages were also left on her mobile phone.

[9] MRP wrote to Ms Palmer on 21 December 2007 advising that as she had failed to attend the meetings and had failed to attend work or telephone to explain her

continued absence, MRP had concluded that she had terminated her employment with effect from 7 December 2007, the last day she worked.

[10] That was a reasonable conclusion in the circumstances.

[11] On 15 December her pay for that month was direct credited in the normal way to Ms Palmer's account. MRP therefore wrote to her on 8 January 2008 requiring that she pay back \$1,276.23, being the salary mistakenly paid from 7 December for the rest of that month when she was no longer employed. Ms Palmer was advised in the letter from MRP of the possibility that legal action might be taken to recover the money if it remained unpaid.

[12] There may be more than one way of recovering money due in these circumstances. The law in my view would readily imply a term into an employment agreement that money paid by mistake to an employee or former employee is to be repaid under a debt due to the employer.

[13] On the application of the employer, or by the Authority of its own motion, compliance with the implied term of the employment agreement could be ordered under s 137 of the Employment Relations Act 2000 as a means of recovery. Proceedings in debt following an unsatisfied demand notice may also be available in the Authority, through its jurisdiction as expanded by s 162 of the Act.

[14] Alternatively, s 162 of the Act enables the Authority to consider this application as a claim to recover money had and received. Under a rule of law, the High Court or District Court has jurisdiction to make orders for the recovery of money mistakenly paid, whether paid under statute or, as in this case, under contract. The judgment of the court of Appeal in *OPC Managed Rehab Limited v. Accident Compensation Corporation*, unreported, CA 149/04, 4 October 2005, contains some discussion about the remedy generally.

[15] Section 162 does not require that the remedy exercised by the Authority is to be an action "in" contract as a particular branch of law, only that the remedy is one "relating to" contracts. In this case the remedy is to be exercised in relation to a contract of employment under which monies have been mistakenly paid. Therefore I am satisfied that a civil action to recover money had and received can be determined on its merits by the Authority under s 162 of the Act.

[16] I am satisfied that the amount claimed was mistakenly paid to Ms Palmer and has not been repaid to MRP despite demand made to her. Accordingly, the Authority orders Ms Palmer to pay \$1,276.23 to MRP.

[17] Payment is to be made within 14 days of the date of service of this determination on Ms Palmer at her address for service, 133 Tennessee Avenue, Mangere, Auckland 2024.

[18] Leave is reserved to MRP to seek further orders from the Authority in the event the money is not paid as directed above. Those orders may include a compliance order under s 137 of the Act, which as mentioned above is a remedy the Authority may give of its own motion in the course of disposing of other actions such as this claim.

[19] Should compliance be ordered and should Ms Palmer not observe that order within the time limit which is required to be specified for compliance with such orders, MRP is able to apply to the Employment Court for further orders. Under s 139(6) of the Act they may include orders that the person in default be sentenced to imprisonment for a term not exceeding three months, or that the person in default be fined a sum not exceeding \$40,000, or that the property of the person in default be seized and sold to pay the amount due.

[20] The amount owed by Ms Palmer is not large and MRP would seem to be approachable with any reasonable request she might make for payment by instalment. Continued failure to repay the amount may be met with penalty or punishment, causing Ms Palmer to regret not doing what was reasonably asked of her by MRP and has now been ordered by the Authority.

[21] Ms Palmer is also to pay \$70 to MRP in reimbursement of the fee paid to commence this action in the Authority.