

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 182  
3000135

BETWEEN

SUSANNE MORNING  
Applicant

AND

FINISHING TOUCHES &  
CURTAIN DESIGNERS  
LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Katrina Skipworth for Applicant  
No appearance for Respondent

Investigation Meeting: 19 April 2017

Determination: 27 June 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. Finishing Touches & Curtain Designers Limited is ordered to pay to Ms Morning the following arrears of wages including holiday pay under section 131 of the Employment Relations Act 2000 within 14 days of the date of this determination:**
- a) wages of 2,247 gross;**
  - b) wages of \$63.45 net;**
  - c) holiday pay of \$458 gross;**
  - d) alternative holidays of \$1,064 gross; and**
  - e) sick leave of \$133 gross.**
- B. Interest on the arrears of wages is to be calculated at the rate of 5% from 3 August 2015 until paid in full.**

**C. Ms Morning was unjustifiably dismissed. Finishing Touches & Curtain Designers Limited is ordered to pay remedies as follows within 28 days of the date of this determination:**

**a) reimbursement of lost wages of \$3,458 gross under section 123(1)(b) of the Employment Relations Act 2000; and**

**b) compensation of \$10,000 under section 123(1)(c)(i) of the Employment Relations Act 2000.**

**D. The application for the imposition of a penalty is declined.**

**E. Costs are reserved.**

#### **Employment relationship problem**

[1] Ms Susanne Morning claims arrears of wages being unpaid wages including sick leave and holiday pay, that she was unjustifiably dismissed, and that Finishing Touches & Curtain Designers Limited (Finishing Touches) breached its statutory obligations of good faith.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Morning but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

#### **Procedural background**

[3] Ms Morning lodged her statement of problem with the Authority on 18 November 2016. The Authority served the statement of problem on the address for service for Finishing Touches listed on the Companies Register. The statement of problem was signed for by the company at 11.33am on Tuesday, 22 November 2016.

[4] Finishing Touches failed to lodge a statement in reply within the required 14 days so the Authority Officer managing this matter contacted Ms Melissa Davies the sole director and shareholder of Finishing Touches. Ms Davies advised the Authority that despite the statement of problem being served on the registered service address

she had not seen it. The Authority Officer was requested to resend the documents to a retail address provided by Ms Davies.

[5] As requested by Ms Davies, the statement of problem was served on the retail address at 11.07am on Friday, 16 December 2016. No statement in reply was received by the Authority.

[6] On 25 January 2017 I issued a Notice of Direction setting out a proposal to progress the investigation of this matter and directed that the parties use mediation and attempt in good faith, to reach an agreed settlement of their differences.

[7] The Notices of Direction and of Investigation Meeting were served on Ms Morning and were emailed to Ms Davies' email address. Hard copies of the documents were also sent to the service address for Finishing Touches. The Authority was unable to effect service on Finishing Touches at its registered address for service and the documents were returned to the Authority. Ms Morning was then directed to arrange for personal service of the Notices of Direction and of Investigation Meeting.

[8] Despite the difficulties the Authority was experiencing in getting documents served on Finishing Touches, Ms Davies was communicating with the Mediation Service and was aware of the direction to attend mediation. A date for mediation was confirmed to take place on 14 March 2017. The respondent failed to attend or be represented at the mediation.

[9] On 16 March 2017 the Companies Register was amended and the address for service for Finishing Touches was changed to an address in Cable Bay. Ms Morning attempted to personally serve the documents at that address but on arrival discovered it was an empty section in a new subdivision.

[10] Section 12(2) of the Companies Act 1993 requires directors to provide their residential address. A residential address is an address at which a person lives or resides. I have seen photos taken at the address for service and which has also been registered by Ms Davies as her residential address on the Companies Register. The photos show an empty section with no dwelling or other structure in which a person could reside.

[11] On 29 March 2017 Constable Reynolds from the Mangonui Police Station attended the registered address for service, placed a large wooden stake in the ground and stapled a zip lock bag containing the Notice of Direction and the Notice of Investigation to the wooden stake.

[12] I am satisfied Finishing Touches has been served with both the Notices of Direction and of Investigation Meeting. Prior to the commencement of the investigation meeting the Authority Officer managing this matter emailed Ms Davies and reminded her of the investigation meeting and the consequences of non-attendance.

[13] At the commencement time for the hearing I allowed a further 15 minutes to allow Ms Davies or another representative from Finishing Touches to attend in case they were stuck in traffic or otherwise running late. Finishing Touches did not appear at the investigation meeting.

[14] Finishing Touches has not engaged in the Authority's process and has not shown good cause for its failure to attend the investigation meeting. As provided for in clause 12 of Schedule 2 of the Employment Relations Act 2000 I have proceeded to act fully in the matter as if Finishing Touches had engaged in the process or was represented.

### **Issues**

[15] The issues for determination are whether:

- a) Ms Morning is owed arrears of wages and if so, how much is owed;
- b) Ms Morning was unjustifiably dismissed and if so what, if any, remedies should be awarded;
- c) Finishing Touches breached its statutory obligations of good faith toward Ms Morning and if so what, if any penalties should be imposed.

### **Arrears of wages**

[16] Ms Morning claims that Finishing Touches regularly failed to pay her all wages due for the hours she had worked despite making requests for payment. She also claims payment for sick leave, alternative holidays and annual holidays continue to be outstanding.

### ***Unpaid wages***

[17] Ms Morning claims payment of \$2,247 gross in unpaid wages plus \$63.45 net in underpayment of wages. I am satisfied Ms Morning has established her claim for outstanding wages.

[18] Finishing Touches & Curtain Designers Limited is ordered to pay to Ms Morning the sums of \$2,247 gross plus \$63.45 net under section 131 of the Act within 14 days of the date of this determination.

### ***Annual holiday pay***

[19] Ms Morning claims she is owed \$458.28 gross for unpaid holiday pay. Having reviewed Ms Morning's calculations I am satisfied she has established that she is owed outstanding holiday pay.

[20] Under section 131 of the Act Finishing Touches & Curtain Designers Limited is ordered to pay to Ms Morning the sum of \$458 gross being unpaid holiday pay within 14 days of the date of this determination.

### ***Public Holidays***

[21] Ms Morning claims she worked the following public holidays and is entitled to payment for the alternative days amounting to \$1,064.00 gross:

#### **2014**

21 April	Easter Monday
25 April	ANZAC Day
2 June	Queens Birthday
27 October	Labour Day

## **2015**

26 January	Auckland Anniversary day
6 April	Easter Monday
27 April	ANZAC Day (observed)
1 June	Queens Birthday

[22] That Ms Morning worked on these dates was confirmed in an email from Ms Lynne Cook to Ms Morning dated 22 July 2015. Ms Cook maintained the wages and time records as well as the holiday and leave records for Finishing Touches. I am satisfied Ms Morning has not received payment for the alternative holidays which she became entitled to by working on each of the public holidays listed.

[23] Under section 131 of the Act Finishing Touches & Curtain Designers Limited is ordered to pay to Ms Morning the sum of \$1,064 gross being unpaid holiday pay within 14 days of the date of this determination.

### ***Sick Leave***

[24] Ms Morning was sick on 19 and 20 January 2015. Ms Morning was entitled to take sick leave on pay and was paid for 19 January but not 20 January 2015.

[25] Under section 131 of the Act Finishing Touches & Curtain Designers Limited is ordered to pay to Ms Morning the sum of \$133 gross being unpaid sick leave within 14 days of the date of this determination.

### ***Interest***

[26] Ms Morning has asked the Authority to award interest on the outstanding arrears of wages and holiday pay. It is appropriate that Ms Morning receive interest on the money she should have been paid. I order that interest is paid on the arrears of wages at the rate of 5% per annum from 3 August 2015 until the amounts have been paid in full.

### **Unjustified dismissal**

[27] Ms Morning claims she was unjustifiably dismissed from her employment on 3 August 2015.

[28] The Authority must consider the four procedural fairness factors set out in section 103A(3) of the Act. These are whether allegations against Ms Morning were sufficiently investigated, whether concerns were raised with her, whether she had a reasonable opportunity to respond to the concerns and whether such explanation was considered genuinely by Finishing Touches.

[29] The Authority may take into account other factors as it thinks appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[30] The Court of Appeal has confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.<sup>1</sup>

[31] There may be a range of responses open to a fair and reasonable employer. The Authority's task is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer<sup>2</sup>.

[32] Finishing Touches is a gift, furniture, and homeware store servicing the Rodney District. Ms Morning was employed as a sales assistant from 9 March 2014 until her employment terminated on 3 August 2015.

[33] Ms Morning made jewellery in her leisure time. Ms Davies had agreed that Ms Morning could sell her jewellery through the store. In addition to making Jewellery Ms Morning operated her own business as an image consultant and with the agreement of Ms Davies, offered her services to clients of Finishing Touches.

[34] A written employment agreement was offered to Ms Morning but was never fully executed by Finishing Touches. The reason why Finishing Touches did not complete the employment agreement is not known.

[35] In the absence of a fully executed employment agreement I have established that the parties had agreed initially that Ms Morning would work Friday, Saturday,

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<sup>1</sup> *A Ltd v H* [2016] NZCA 419 at [46].

<sup>2</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

Sunday, and Monday each week from 9.30am to 5.00pm on each of those days. This was later changed by agreement due to the demands of Ms Morning's developing business. The change to days of work was confirmed in an email from Ms Morning to Ms Davies dated 9 November 2014. That email confirmed the agreement that Ms Morning would cease working weekends on 17 November 2014 and would work Monday and Tuesday only.

[36] In accordance with the agreed change to her hours of work from 17 November 2014 Ms Morning worked each Monday and Tuesday from 9.30am to 5.00pm and filled in for other employees when they were sick, unavailable for work, and during the busy Christmas trading period. While not officially working on a Saturday, when Ms Morning's business allowed she did undertake some Saturday afternoon work from 3.00pm on a casual basis.

[37] Ms Davies sent a text message to Ms Morning on 3 June 2015 asking Ms Morning to be available to work on Tuesday and Wednesday the following week. Ms Morning was unable to work on the Wednesday due to prior work commitments and advised Ms Davies of this. In response Ms Davies advised Ms Morning that her new hours of work would be Tuesday and Wednesday and if she was unable to work on the Wednesday she would need to take the day off as a holiday.

[38] Ms Morning advised Ms Davies that she did not agree to change her days of work from Monday and Tuesday. In response Ms Davies indicated that she wanted to embark on a business change which would involve a change to Ms Morning's days of work.

[39] By email dated 15 June 2015 Ms Morning accepted a change to her days of work to Tuesdays and Wednesdays and requested that the change take effect from 28 July 2015. Ms Morning also confirmed, following Ms Davies' request, that she would no longer hand out her business cards promoting her business.

[40] On 19 July 2015 Ms Davies emailed Ms Morning and advised her that she was not happy that the changed hours would not take effect until 28 July 2015 and advised her that she found this unreasonable and instructed Ms Morning to take the following day off. Ms Davies told Ms Morning that she would arrange a meeting to discuss the issues raised by Ms Morning in an email sent to Ms Davies, which included a further request for payment of outstanding wages.

[41] Ms Morning responded advising Ms Davies that she did not think it was necessary to take a day off the following day and unless Ms Davies confirmed that she would pay for the day off she would attend work at her usual time.

[42] The conflict between Ms Morning and Ms Davies continued to escalate. Ms Davies made allegations against Ms Morning regarding lack of sales and the use of business equipment for promoting her own business during working hours. Ms Davies also raised a customer complaint and advised Ms Morning that the alarm codes had been changed and access would now only be with her permission.

[43] Ms Morning responded to the allegations and then advised Ms Davies that given recent events and her understanding that Saturday was not a contracted day of work she would no longer be available to work on Saturday afternoons.

[44] On Sunday, 26 July 2015 Ms Davies emailed Ms Morning and advised her that her refusal to work on Saturdays constituted a resignation from her employment with Finishing Touches. Ms Morning responded by advising Ms Davies that she was not resigning and would be present for work the following Tuesday.

[45] On 31 July 2015 Ms Davies sent Ms Morning a formal letter inviting her to a meeting to discuss a proposed restructuring. Ms Davies listed two events which had affected sales and forced her to return to her business on a full time basis. The events were the resignation of key personnel in December 2014 and a drop in sales at Pop Up, requiring it to be closed due to a lack of weekend staffing.

[46] Ms Morning confirmed she would attend the meeting and requested that at the meeting Ms Davies also answer her previous questions regarding outstanding wages and shop access. Ms Morning asked where the meeting would take place and what time the meeting would start.

[47] The meeting took place as scheduled on 31 July 2015. Ms Morning was represented by an advocate at the meeting. At the outset Ms Davies asked Ms Morning if she was prepared to work Saturdays. When Ms Morning's advocate attempted to answer on Ms Morning's behalf she was ignored and Ms Davies insisted that Ms Morning answer her question. Ms Morning advised Ms Davies that she was no longer prepared to work on Saturdays. Ms Davies ended the meeting abruptly by

insisting Ms Morning and her advocate remove themselves from the premises and refused to discuss anything further.

[48] On 2 August 2015 Ms Morning instructed her advocate to write to Ms Davies raising concerns about the conduct of the meeting on 31 July and requesting payment of outstanding wages as well as payment for jewellery which had been sold by Finishing Touches according to the in-house sales system (Vend). Ms Morning had provided her advocate with a screen shot of the “Vend” page which recorded the sales of Ms Morning’s jewellery through the store. The document was appended to the letter sent to Ms Davies. Through the letter Ms Morning asked to take time off in lieu and advised Ms Davies that she was feeling very stressed about the situation.

[49] On 3 August 2015, despite requesting all further communication be through her advocate, Ms Morning received an email from Ms Davies giving notice that her employment was terminated for a breach of confidentiality. The breach of confidentiality was related to information Ms Morning had provided to her advocate in order to assist the advocate pursue claims against Finishing Touches for money owed to Ms Morning for the sale of her jewellery through the store. The information was contained on a Vend database. Ms Morning had taken a screen shot of the database which contained the jewellery sale information.

### ***Conclusion***

[50] The meeting on 31 July 2015 was to discuss a proposal to restructure the business. Ms Morning was dismissed for a breach of the employment agreement which was not related to the purpose of the meeting. I am satisfied that on balance Finishing Touches has failed to undertake a sufficient investigation into the allegation that Ms Morning had breached confidentiality and failed to provide Ms Morning with a reasonable opportunity to respond to this allegation.

[51] The decision to dismiss Ms Morning in such circumstances was not a decision an employer acting fairly and reasonably could make. Ms Morning was unjustifiably dismissed and is entitled to a consideration of remedies.

### **Remedies**

[52] Ms Morning claims remedies for lost remuneration, compensation and costs.

### ***Lost wages***

[53] Having established that she was dismissed unjustifiably Ms Morning is entitled to a minimum of three months' remuneration which was lost as a consequence of her dismissal, or if her actual loss was more, the lesser of these two figures.<sup>3</sup> In addition, the Authority has the discretion to award greater compensation for remuneration lost than three months' equivalent.<sup>4</sup>

[54] At the investigation meeting Ms Morning told me that since her dismissal she had been working on her business.

[55] Ms Morning should be compensated for the three month period starting on 3 August 2015. I have calculated Ms Morning's lost earnings on the basis of \$266 gross per week for two days work each week. Extrapolated out this equates to \$3,458 gross.

[56] Finishing Touches & Curtain Designers Limited is ordered to pay to Ms Morning the sum of \$3,458 gross under section 123(1)(b) of the Act within 28 days of the date of this determination.

### ***Compensation***

[57] Ms Morning claims \$15,000 compensation for humiliation, loss of dignity and injury to her feelings.

[58] Ms Morning told me that her dismissal had an impact on her health. When giving evidence about the impact of the dismissal Ms Morning was reduced to tears. She told me she loved the job and was good at it and misses it. Following her dismissal she has had to rent out part of her house in order to bring in additional income and had to ask for family support.

[59] Ms Morning is entitled to be compensated for the effects of the dismissal on her. Finishing Touches & Curtain Designers Limited is ordered to pay to Ms Morning the sum of \$10,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

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<sup>3</sup> Employment Relations Act 2000, section 128(2).

<sup>4</sup> Ibid sections 123(1)(b) and 128.

### ***Contribution***

[60] Section 124 of the Act requires me to consider the extent to which Ms Morning's actions contributed towards the situation that gave rise to the personal grievance of unjustified dismissal.

[61] There is no evidence that Ms Morning contributed in any blameworthy way to the situation leading to her personal grievance. Accordingly, there is to be no reduction in remedies.

### **Breach of good faith**

[62] Ms Morning claims Finishing Touches has breached its statutory obligations of good faith toward her and seeks the imposition of penalties. I am satisfied Ms Davies has been responsible for a number of breaches of good faith in this employment relationship including the locking out of Ms Morning by changing the alarm codes, the failure to follow any processes with respect to the allegation that Ms Morning had breached confidentiality and the attempt by Ms Davies to unilaterally alter Ms Morning's days of work.

[63] However, section 135(5) of the Act requires actions for the recovery of a penalty to be commenced within 12 months of the date the cause of action giving rise to the penalty occurred. At the latest this would have been 3 August 2015. Ms Morning commenced her proceedings when she lodged her statement of problem with the Authority on 17 November 2016. The application for the imposition of penalty is outside the requisite 12 month period.

### **Costs**

[64] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Morning shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Finishing Touches shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[65] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

***Service of determination***

Ms Morning is directed to personally serve a copy of this determination at the registered office for service of Finishing Touches & Curtain Design Limited.

Vicki Campbell  
Member of the Employment Relations Authority