

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 455
3105492

BETWEEN JO MORROW
 Applicant

AND NZRS NATIONAL LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul McBride, counsel for the Applicant
 Shay Narayan, advocate for the Respondent

Investigation Meeting: On the papers

Submissions and/or
further evidence 25 September and 12 October 2020 from the Applicant
 9 October 2020 from the Respondent

Determination: 6 November 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Jo Morrow, claims that the Respondent, NZRS National Limited (NZRS) has breached the obligations it owed to her arising from a record of settlement entered into by the parties on 9 April 2020 and counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 15 April 2020 (the Record of Settlement).

[2] NZRS denies that it has breached the terms of the Record of Settlement.

Issues

[3] The issues requiring investigation were whether or not NZRA breached its contractual and statutory obligations towards Ms Morrow down to the date of

termination, and if it had, whether the Record of Settlement resolved any claims in relation to those breaches.

Background

[4] NZRS operates in the construction, restoration and commercial cleaning sectors in New Zealand.

[5] Ms Morrow commenced employment with NZRS on 26 August 2019 as a Health and Safety Co-ordinator. She was provided with an individual employment agreement which stated at clause 30:

The terms of the Agreement may be varied from time to time by mutual agreement in writing between the parties.

[6] Ms Morrow was paid an annual salary of \$54,000.00 per annum, equivalent to a weekly payment of \$1,038.46 gross, \$742.88 net.

[7] NZRS operated as an essential service throughout the COVID-19 lockdown. Ms Morrow worked throughout the whole of the lockdown period, but did not always work her contractual full-time hours.

[8] NZRS applied for, and was granted, the Covid-19 wage subsidy in respect of Ms Morrow.

[9] NZRS wrote to Ms Morrow by email on 24 March 2020 advising her that it had applied for the wage subsidy and employee wages would be reduced to \$585.80. The email invited employees to notify NZRS if they wished to use their annual leave to top up their wages to 80 per cent, i.e. to use the annual leave to cover the difference between \$585.80 and 80 per cent of that employee's wages.

[10] The email concluded by stating: "This is of course optional and if you wish to retain holiday earnings let us know and the minimum of \$585.80 or set allowance will be paid."

[11] Ms Morrow responded by email dated 26 March 2020 stating:

Can you please let me know what is happening about my wages? I would never just work a 15 hour week and if it happens again please make contact around hours. I'm wondering if it was affected when PSU withdrew their business information from my access?

In the case when the subsidy starts which should be this week as we have only just entered lockdown as of last night, I will need my wage topped up with annual leave.

[12] NZRS responded on 1 April 2020 advising Ms Morrow that it would not utilise her annual leave entitlements to top up her wages. NZRS advised Ms Morrow she would receive the wage subsidy of \$585.80 and that NZRS would top it up so that she received 80 per cent of wages.

[13] Ms Morrow's employment ended by way of resignation, effective 4 May 2020.

Record of Settlement

[14] On 9 April 2020 a Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by Ms Morrow and by a director of NZRS. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 15 April 2020.

[15] The Record of Settlement included the following clauses:

1. Jo hereby gives notice of resignation, with that resignation to take effect 5 working days after the lifting of New Zealand's current Level 4 COVID-19 lockdown in the Waikato Region ("Resignation Date").
4. NZRS will pay all of Jo's statutory and contractual entitlements up to Resignation Date. Those will be paid in the ordinary course as those each fall due, with final payments being made forthwith on Resignation Date.
7. The parties agree that the terms of this settlement agreement are entered into in full and final settlement of any and all claims that either party might have or have had against the other down to the date of settlement arising from Jo's employment with NZRS and her resignation.
10. In reaching this settlement, the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, and defined by the employment Relations act 2000.

[16] After her employment had ended, Ms Morrow raised a personal grievance on 20 May 2020.

Did NZRS breach the contractual and statutory obligations it owed to Ms Morrow or were these affected by the Record of Settlement?

Salary arrears

Contractual position

[17] Ms Morrow's employment with NZRS was governed by an individual employment agreement which set out her salary as being \$54,000.00 per annum. Clause 30 of that agreement allowed for variations if there was: "mutual agreement in writing between the parties."

[18] NZRS submits that Ms Morrow implicitly agreed to the variation, i.e. the reduction of her salary to 80 per cent, on the basis that after having been advised by email dated 24 March 2020 that her salary would be reduced to \$585.80 per week, she did not raise any issues about the reduction.

[19] Ms Morrow, when advised by NZRS that employee wages would be reduced to \$585.80, responded in the email dated 26 March 2020 that she would: "need my wage topped up with annual leave".

[20] Examining whether or not this could constitute a variation I observe that s63A(e) of the Employment Relations Act 2000 (the Act) states that bargaining for individual terms and conditions in an employment agreement includes variations.

[21] Section 63(2) of the Act provides a number of steps the employer must do in a variance situation:

- (a) Provide to the employee a copy of the intended agreement under discussion; and
- (b) Advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
- (c) Give the employee a reasonable opportunity to seek that advice; and
- (d) Consider any issues that the employee raises and respond to them.

[22] There is no evidence NZRS followed the steps as set out in s 63(2) of the Act and therefore I find it cannot rely upon Ms Morrow's purported implied acceptance of the change to her contractual salary.

[23] Throughout the lockdown period Ms Morrow continued in employment with NZRS, working from home. There is no evidence to support her having agreed to work less hours than those to which she was contractually bound pursuant to the Employment Agreement.

[24] Ms Morrow is claiming arrears of wages in relation to the reduction of her wages from the date of the reduction after 1 April 2020 until the date of termination on 4 May 2020.

[25] Section 131 of the Act applies to arrears and states that:

- (1) Where-
 - (a) There has been a default in payment to an employee of any wages or other money payable by an employer under an employment agreement
 - ...
 - (b) ..
- (2) Subsection (1) applies despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary.

[26] As a consequence of s 131 of the Act I find that in the absence of a written agreement NZRS could not rely on an implied acceptance of the reduction in her contractual salary of \$54,000.00 per annum by Ms Morrow.

Did the Record of Settlement alter the contractual position?

[27] The parties subsequently entered into the Record of Settlement which stated at clause 4 that: “ NZRS will pay all of Jo’s contractual and statutory entitlements up to Resignation Date.”

[28] I have found that prior to the Record of Settlement being entered into by the parties on 9 April 2020, Ms Morrow had not agreed to a unilateral reduction of her salary following the granting of the Government wage subsidy to NZRS.

[29] Therefore at the date the Record of Settlement was entered into, I have found that Ms Morrow had a contractual entitlement to her pre-April salary of \$1,038.46 gross. Clause 4 of the Record of Settlement confirmed that NZRS would pay all of Ms Morrow’s contractual and statutory entitlements up to the resignation date of 4 May 2020 as each fell due.

[30] NZRS relies upon clause 7 of the Record of Settlement which states that the terms of settlement had been entered into in full and final settlement of any and all claims arising from Ms Morrow's employment with NZRS as supporting its position that Ms Morrow is not entitled to any arrears of wages.

[31] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. "except for enforcement purposes, neither of us may seek to bring those terms before the Employment Relations Authority ..."

[32] In bringing this claim before the Authority Ms Morrow is not seeking to change a final and binding term. Rather her case is about what do those terms mean and having these terms enforced. I find that she is entitled to do so.

Remedies

Compliance Order

[33] The Record of Settlement states in clause 4 that NZRS will pay Ms Morrow's statutory and contractual entitlements up to Resignation Date. I determine that there has been a default in the agreed payment.

[34] From the evidence available to the Authority, I am satisfied that NZRS has failed to comply with clause 4 of the Record of Settlement.

[35] In order to effect compliance with the Record of Settlement, I therefore order NZRS to pay Ms Morrow, no later than 14 days from the date of this determination, the outstanding shortfall between the amounts paid to Ms Morrow as salary and the amounts that should have been paid.

[36] Ms Morrow is also entitled to be paid holiday pay on the outstanding salary arrears and any Kiwisaver contributions on the full amounts owed.

[37] I consider that the parties should be able to agree the amounts owed between them, but leave is granted to revert to the Authority for orders if necessary.

Penalties

[38] The Applicant is seeking penalties in respect of several breaches of the Holidays Act 2003 and of clause 4 of the Record of Settlement.

[39] The Applicant submits that the breaches were flagrant, deliberate breaches across the whole of the workforce and as such a deterrence effect is merited.

[40] The Respondent submits that any breaches are minor and technical in nature, and do not arise from bad faith.

[41] The Respondent submits that the following factors are relevant in support of its submission that any offending by NZRS falls at the lowest end of cases requiring a penalty:

- a. The breaches are minor and isolated;
- b. There are no aggravating factors;
- c. NZRS, like other small to medium-sized businesses in New Zealand is still recovering from the effects of the Covid-19 pandemic. This has severely impacted the Respondent's ability to earn an income and in turn pay any penalties, and
- d. Modest penalties in the range of \$500 - \$3,000 have been recently issued by the Authority for non-payment of settlement sums under a s 149 Record of Settlement.

[42] In accordance with the principles which should govern the imposition of a penalty, I note that NZRS had found itself in a difficult situation as a result of the Covid-19 pandemic, lock down and their effect upon its business.¹ In that situation it sought and relied upon professional advice in good faith.

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

[43] I also note that NZRS did not require Ms Morrow to utilise her annual leave entitlements to top up her wages.

[44] I consider that it is appropriate in the circumstances to impose a global penalty in respect of the breaches of the Record of Settlement and of the Holidays Act 2003 arising from the breach of clause 4 of the Record of Settlement, and to position this towards the lower range of penalties on NZRS.

[45] I order that NZRS is to pay a penalty of \$2000.00 to the Authority to be paid to the Crown Trust Account, and of which 50% (\$1000.00) is to be paid to Ms Morrow. Payment is to be made within 14 days of the date of this Determination.

Filing Fee

[46] NZRS must also reimburse Ms Morrow the filing fee of \$71.56 within 14 days of the date of this Determination.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[49] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority