Attention is drawn to the
non-publication order
at paragraph [5]

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2022] NZERA 85
3128195

	BETWEEN	PHC Applicant
	AND	DGJL LIMITED First Respondent
	AND	CBML LIMITED Second Respondent
	AND	WRY Third Respondent
Member of Authority:	Michael Loftus	
Representatives:	Digby Livingston and Miranda Dunn, counsel for the Applicant Matt Belesky, counsel for the Respondents	
Investigation Meeting:	19 October 2021 at Wellington	
Submissions Received:	1 November and 29 November 2021 from the Applicant 16 November 2021 from the Respondent with further information till 10 December 2021	
Date of Determination:	10 March 2022	

DETERMINATION OF THE AUTHORITY

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[1] The parties are of the view it is inappropriate they be identified given the nature of various issues discussed during this investigation, particularly those relating to domestic issues between the parties, and the fact it is inevitable there will be some comment on them in the determination. Notwithstanding PHC's desire to waive anonymity on order to "vindicate her

dismissal"[1] she reluctantly seeks a non-publication order. PHC consents but also seeks similar orders regarding the respondents.

[2] However, and despite that agreement, the underlying principle is open justice which means I must still consider whether the order is justified. In this case it is, as PHC has, albeit since her employment ended, obtained a protection order that remains in place and some of the issues commented on in this determination were part of the Family Court's deliberations.[2]

[3] The Family Court's protection order means PHC is a vulnerable person.[3] Section 11B(3) of the Family Court Act 1980 provides no one may, without leave of the Family Court, publish something which reports proceedings in that Court and/or which includes identifying information where a vulnerable person is the subject of proceedings, a party to proceedings or an applicant in proceedings. PHC fulfils all three criterial and in the absence of leave from the Family Court, which there is not, publication of something that might identify PHC is prohibited.

[4] It follows that while WRY is not a vulnerable person, identification of him would also identify PHC given their matrimonial relationship. Non-publication must therefore extend to him and the respondent companies as WRY is the sole director and shareholder so naming them could identify WRY, and therefore PHC, by simply looking at the Companies Register.

[5] Accordingly an order will be made prohibiting the publication of anything that might identify the parties in this matter.[4]

Employment Relationship Problem

[6] The applicant, PHC, claims she was unjustifiably dismissed by both the first (DGJL) and second (CBML) respondents on 10 September 2019. In the alternate, and in the event that is not accepted, she claims she was constructively dismissed by both on 10 January 2020.

[7] PHC originally claimed she worked unpaid between 1 December 2015 and 15 February 2016 and sought the wages due for that period. Here it should be noted the evidence subsequently established the non-payment actually continued till 20 March 2016 and while

[1] Closing submission at [59]
[2] Part 4 to the Family Violence Act 2018
[3] Section 11D(h) of the Family Court Act 1980
[4] Clause 10 of schedule 2 of the Employment Relations Act 2000

arrears were not originally sought for the period from 15 February 2016 till then that was amended on the basis of the evidence.

[8] I also record that when PHC originally raised her personal grievance by letter dated 24 October 2019 there were a number of allegations that she had been unjustifiably disadvantaged. Counsel advises none of those claims are being pursued and the grievance is now limited to the dismissal(s).

[9] The first and second respondents, both of which PHC worked for, deny she was dismissed on 10 September 2019. They say she was trespassed from their premises due to issues emanating from a domestic dispute issue between herself and her husband, WRY. They say their actions were justifiable in the circumstances but further argue that in any event the alleged dismissal was subsequently resolved in November 2019 thus precluding its pursuit.

[10] DGJL and CBML also deny PHC was constructively dismissed on 10 January 2020. They say the resignation she proffered that day was freely tendered and in accordance with the agreement the parties had reached in November 2019.

[11] The respondents accept PHC was not paid during the period for which wage arrears are claimed and originally defended the claim on the basis she was not then an employee. They have now resiled from that position but say the amount sought is excessive and unjustified.

Background

[12] PHC and WRY were married in mid-2015. At the time WRY was looking at business opportunities which resulted in the purchase of that which became CBML toward the end of 2015. It operated two retail outlets in Wellington.

[13] On 1 December 2015 PHC entered into an individual employment agreement with CBML. WRY says this was the result of PHC wishing to assist in the business and an employment agreement was necessary to meet certain regulatory requirements. WRY says that as a result he did not really consider PHC an employee in the normal sense though after legal advice he has now resiled from pursuing that position as a defence.

[14] Similarly PHC, while asserting she always saw herself as an employee, accepts she felt it was her duty to assist and develop the business in any way she could. She says WRY kept

telling her to "be like an owner" though Company Office records show she never had that status. In her own words she said she saw the two as a husband and wife team.

[15] Toward the end of March CBML commenced paying PHC with the first pay slip being for the week ending 27 March 2016. It apparently records that she worked 10 hours that week and the following one says five. Despite that PHC contends she was working significantly greater hours in accordance with her desire to assist her husband and claims she understood it was a case of her having to be paid something to satisfy both the Inland Revenue and regulatory requirements. That said, PHC accepts she never queried this given the duty she assist her husband and the fact the money was going to a joint account anyway. This evidence is not challenged by the respondents.

[16] PHC says by this time it was already apparent the marriage had some difficulties and while WRY does not comment on that, there is clear evidence of problems by early 2019. On 23 January 2019 the Police attended what was to be the first of five domestic violence incidents requiring their involvement between then and 31 August 2020. Also on 23 January 2019 a Police Safety Order was issued against WRY.

[17] Here comment should be made about the domestic arrangements. When first married the couple occupied rental premises. In mid-January 2016 they moved to premises attached to one of CBML's establishments but soon thereafter (March 2016) moved to the Hutt Valley.

[18] Comment should also be made about the business arrangements. Around the middle of 2018 WRY established DGJL to operate a further retail outlet on the Kapiti Coast. From that point PHC performed work at and for DGJL in addition to her duties with CBML.

[19] An additional complication arises in that PHC was attempting to get pregnant in what her evidence suggests was an attempt to address the matrimonial difficulties. With this she was successful in May 2019 although the evidence would suggest it did not improve the matrimonial difficulties.

[20] Every September WRY took an overseas business trip. By the date of commencing 2019's trip the matrimonial situation was such that WRY chose not to be at home the night before departure. The situation also gave him cause to prepare trespass notices in PHC's name given a claimed fear they might be needed to prevent her creating a scene at work that could constitute a reputational risk while WRY was away.

[21] WRY returned late on 9 September 2019 though he and PHC did not see each other till the following morning. While there are some differences in their detailed recollection of events it is agreed PHC wished to discuss their relationship. PHC is of the view WRY showed little interest in entering into the discussion saying he had to go to work. WRY accepts he wanted to go to work and there is agreement PHC raised the possibility of separation. PHC says WRY then gathered some boxes of business related documents which he put in his car and left. That is not disputed.

[22] PHC goes on to say that shortly thereafter she discovered a couple more documents she thought WRY might have inadvertently left behind. She says that as she was going to visit a friend close to one of CBML's premises she rung WRY to tell him she would drop the documents off. WRY says that was not the case and PHC said she was coming to continue the domestic discussion in the workplace.

[23] Irrespective of which is correct it is clear PHC then went to the business premises and WRY approached before she got out of her car. PHC says a verbal altercation ensued with WRY being abusive. WRY denies this but both agree he then gave PHC notices trespassing her from all three business premises for a period of two years. WRY then called the Police because, he says, PHC refused to leave. PHC claim she did leave and she had definitely done so by the time the Police arrived. They telephoned and asked she return. After separate discussions with both PHC and WRY, a five day Police Safety Order was issued to WRY purportedly to allow PHC time to approach support agencies and seek assistance.

[24] That PHC did and two days later she obtained an ex parte protection order. The same day WRY took a business owned car from the couple's residential premises which had essentially been for PHC's use. Finally WRY chose to cease paying PHC's wages with effect 10 September and PHC approached Work And Income who granted a benefit.

[25] Here comment needs be made about another factual disagreement which is the extent to which PHC had been working over the months preceding September. WRY says she did two days work in April 2019 and had not done so since. PHC says she regularly worked three or four days a week and her pay slips record that in 2019 she was paid, on average, 16.9 hours a week.

[26] PHC then sought legal assistance and after some correspondence between her representative and that of the respondents, a formal letter raising a personal grievance was sent on 24 October 2019. It raised a range of disadvantages as well as the dismissal claim.

[27] The respondents replied the following day. It is conceded WRY trespassed PHC but asserted the decision has to be viewed in light of the relevant context. In essence the argument is PHC advised WRY she would be returning to work that day after a period of absence due to medical reasons which saw her hospitalised at the end of August and that WRY had advised she could not do so. This was because she was not rostered to work and it was inappropriate she bring the domestic dispute into the workplace. The letter goes on to assert the trespass notice "was always intended to be a temporary measure to assure the safety of other staff and the reputation of the business". Accordingly, the respondents advised the trespass notice was now withdrawn with effect that day. Finally the letter expressed a willingness to engage in mediation though it was noted that would require a temporary suspension of a no contact condition in the protection order.

[28] As events transpired an employment mediation never occurred as the request to the mediation service was withdrawn. That is because PHC and WRY decided to make a final attempt at reconciling their relationship due to the imminent arrival of their child.

[29] The note from Mr Livingston to Mr Belesky recording this reads:

> I am instructed that [WRY] has apologised for his actions, asked [PHC] to put her representation on hold and to enter into a family conference to resolve the dispute. Under instructions I have cancelled the mediation. I remain available if you need to contact [PHC] about anything related to the personal grievance claim.

[30] The evidence suggests the "family conference" was in fact a discussion in a car parked at a McDonald's restaurant at which WRY's uncle was also present. This meeting has some potential significance in that WRY asserts that and subsequent discussion included resolution of PHC's personal grievances. PHC denies that and says that while there was a subsequent payment of $5,000 to her personal account that was because WRY's uncle had criticised him for removing most of the funds from their joint accounts prior to his overseas departure and that he had instructed WRY not put PHC in such a difficult position again and told him to ensure that was the case by paying the money. WRY claims the uncle's instructions were part of the rationale for the payment, it also constituted settlement of the grievance claims. He adds

that as a further part of the settlement PHC also agreed to resign her employment with both respondent companies. There is no written confirmation of the arrangement.

[31] WRY claims the agreed resignation was not forthcoming and as a result he eventually asked it be provided on 10 January 2020. He says he did so as he believed a written resignation was a "legal requirement" though there is no requirement for a written resignation in PHC's employment agreement.

[32] The resignation, of which there are two copies with one to each of DGJL and CBML, reads:

> I write to inform you of my decision to resign from the post of Duty Manager from the date of this letter. My last day with the company will be one week from this day. My final pay be kindly paid into my account …. Kind regards.

[33] Those documents are then signed by WRY below the handwritten comment "received and accepted" and dated 10 January 2020.

[34] WRY says the resignation was freely attended in accordance with the agreement the two entered into the previous November. PHC disagrees and says that while the documents were prepared on her personal laptop this was done by WRY. She says she signed under duress and in fear of further violence which took on a greater meaning given the imminent birth of her child which occurred not long thereafter.

[35] It would be fair to say the attempted reconciliation did not work and following a further incidence of domestic violence, the parties have separated and there is once again a protection order in place.

Discussion

[36] The prime claim is that PHC was unjustifiably dismissed and that occurred on 10 September 2020. There is also the alternate dismissal claim and the wage claim, which I shall consider first.

Wage arrears

[37] PHC seeks payment for the period between December 2015 and March 2016. She quantifies her claim as being for $16,822.50.

[38] The respondents say the claim is excessive and base that contention on the content of their point of sale transaction records. They also say the settlement of CBML's purchase was delayed by four days and as a result PHC simply could not have worked between 1 and 4 December 2015 as WRY did not own it. PHC denies this on the basis she was in the premises undergoing training in preparation for the acquisition. WRY accepts there was some training which had commenced as early as October but states he was the recipient and PHC was only, prior to acquisition, in the premises for a brief period.

[39] I return to the point of sale documentation which records all sales and attributes each to a staff member who allegedly actioned the sale. It would be fair to say there are a number of days where PHC processed no sales and it is the respondent's position that given her claim is for 10 or 11 hours per day on every day but those where closure was required for statutory reasons (Christmas Day):

> It would not be possible, or at the very least highly unlikely, that any staff member could have completed 10 to 11 hours of work and recorded less than 50 transactions in the POS system.

[40] PHC's position is that in accordance with what she perceived as her duty as a wife to assist and promote the business, she was readily available to assist especially once she lived behind the work premises. She also claims that notwithstanding the point of sales system attributing sales to individual staff it was common for that to be incorrectly recorded. PHC says that if someone else was already logged on and a customer wanted a product you would simply process the sale irrespective. Finally PHC notes the business was then in its infancy and therefore required additional time and effort.

[41] WRY denies that this is so and says he wanted an accurate record and told staff to do it properly. That said, he accepts he was not diligent in following that up and another witness supported PHC's view of what actually occurred. I also have to note WRY's admission when giving oral evidence that that December and January was a busy time and "most of the time she would be there". He went on to then say PHC was not necessarily required to work but did so of her own choice. He also noted PHC was free to do other things such as go for five half hour swimming lessons during that time, take walks and watch various programmes on TV.

[42] Ultimately the requirement is on the business to maintain records. It didn't and in their absence the respondent must prove the claim is inaccurate.[5] I conclude having heard the evidence and particularly noting WRY's concession that PHC was by and large present, the company has failed to do so.

[43] Here too I also have to note another significant dispute and that is whether or not PHC was working between May and September 2019. As already said, she claims she was while the respondents claim she wasn't and again they rely on the POS records to support that contention.

[44] Ultimately however I need not determine this matter to resolve the questions before me – whether or not there was a dismissal and whether PHC is owed wages for a period then well in the past? For whatever reason PHC remained on the payroll until 10 September 2019 but I am cognisant of that for another reason. It appears to support a conclusion PHC would be paid regardless which would again support her claim for recompense for the period she claims. For the above reasons I conclude the amount sought, $16,822,50, is payable.

Dismissal

[45] I turn now to the claim that PHC was dismissed on 10 September 2019. At its simplest, the employment relationship is an exchange of remuneration for labour. The respondents accept that as of 10 September they ceased paying remuneration. In other words, they ceased to provide their consideration. On the other side it is also agreed that whether a temporary measure or not, PHC was served a trespass notice. It therefore follows that as a result of an action by the respondents, PHC could no longer provide her consideration. In other words the employment effectively ceased that day and the reasons are wholly attributable to the action of the respondent's through their joint agent WRY.

[46] That state of affairs continued until at least 25 October although it is agreed PHC did not return after that date and nor was she paid. A six week period where neither party provides its consideration is, I conclude, further evidence the employment relationship has ceased.

[5] Section 132(2) of the Employment Relations Act 2000

[47] A dismissal is a sending away. In my view the fact both parties ceased to provide their consideration by virtue of an action of the employer constitutes a sending away by the employer. This is a dismissal.

[48] The very nature of the defence, namely that there was not a dismissal, means there can be no justification as it must surely be impossible to justify something you say never occurred. Having said that I have to recognise the argument WRY was forced to act as he did to protect the business from possible harm that might result from PHC continuing to pursue the domestic dispute in the workplace.

[49] While that might be considered a possible attempt at justification it is not one I can accept. Firstly, any censure that might affect the employment relationship must be proceeded by an investigation in which concerns are put, explanations sought and then considered. There is no evidence this occurred in any way, let alone a meaningful one on the morning of 10 September. Secondly, the evidence is clear the real dispute was the matrimonial one. That is a private matter and not part and parcel of the employment relationship. This once again shows the problem that arise by intertwining the two.

[50] There is then an argument that even if PHC was dismissed she is precluded from pursuing the claim as it was withdrawn. That fails. A reading of Mr Livingston's letter of 7 November 2019 states the issue is on hold. It does not say it is withdrawn. To the contrary it indicates the opposite by stating Mr Livingston remains available to advance anything relating to the personal grievance claim.

[51] Finally there is the argument PHC's grievances were resolved thus precluding their pursuit. This fails simply on the basis there is absolutely no adequate evidence that is the case. There is no documentary support and given PHC had by then instructed a representative it was incumbent on WRY to involve that representative in any resolution. This never occurred. Furthermore, and if called upon to do so, I would have rejected the claim on the basis of a clear preference for the evidence of PHC over that of WRY. She came across as a credible consistent witness who if she did not have an answer freely admitted so. On the other hand WRY's approach reeked of desperation, vacillation and contradiction.

[52] Having concluded PHC was dismissed on 10 September 2019 it is not necessary to address the alternate claim that she was constructively dismissed on 10 January 2020. If that had not been the case I would have readily accepted the claim her signature was obtained by

duress. The evidence is PHC was, at that point, feeling very vulnerable being in an unstable relationship less than a fortnight from giving birth and the Police reports provided at the investigation make the claims of fear quite understandable.

Remedies

[53] The conclusion the dismissal was unjustified raises the question of remedies. PHC seeks lost wages and $60,000 compensation.

[54] Before proceeding comment need be made about the fact there are three respondents. There is no dispute the employment arrangements were with the two companies albeit in a way that means neither is distinguishable from the other. WRY was not the employer per-se and cannot therefore be liable for the remedies which accrue as a result of the unjustifiable dismissal. He does, however, have potential personally liability for the wage arrears should the companies fail to pay and remains respondent for that purpose should it arise. With respect to the rest DGJL and CBML will be jointly and severally liable for the remedies about to be ordered.

[55] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser, though PHC seeks twelve months and the Authority has desertion to make such an order.

[56] In support of her claim PHC notes her unchallenged evidence that had she not been dismissed she would have continued working as long as she could. The three months payable pursuant to s128 would take her to 10 December which would have been likely possible given an expected birth date in late January. It is then noted that had she remained employed she would have been eligible for paid parental leave for the next 26 weeks.[6] Payment would have been from the public purse and she was deprived of this benefit solely by reason of the dismissal. The claim for the final three months is based on a submission such an increase is just given the difficulties in finding employment for a new mother.

[57] Pursuant to the Act the first three months is a given. I also consider the same applies to the following six months. Being eligible for paid parental leave PHC would not have worked during that period but would still have been paid, albeit by the public purse, and given the applicable rules would have been paid in full. It was only as a result of the respondent's actions

[6] Section 71J of the Parental Leave and Employment Protection Act 1987

she was deprived of this benefit and it follows that whether or not it is considered wages it is money lost a result of the grievance.

[58] The final three months I consider a step too far, especially as the evidence undermines a submission payment is due in order to address difficulties finding employment for a new mother. That is because I do not know if that is true in this instance as PHC's evidence is she didn't look.

[59] The final point here is recognition of PHC's receipt of a benefit though that is irrelevant with respect to the amount ordered. That is because *... liability for repayment of a benefit was a question to be determined between the individual beneficiary and the Government department concerned.*[7] That said I do however note the rationale the Court used in reaching this conclusion, namely a reliance on separating responsibility for various payments by virtue of their source, further supports the award of the six months pay PHC might have got while on parental leave as it effectively confirms this is *other money lost a result of the grievance* as opposed to lost wages per-se and therefore outside of the three months specified in s128.

[60] Nine months at PHC's average earnings during 2019, which was the amount she used when making her claims, is $11,534.25. For the above reasons that is payable.

[61] Turning now to compensation. As already said the claim was for $60,000 but I have to note precedent would not support a claim of that magnitude. I also have to note questions arise as to whether PHC's hurt was wholly attributable to WRY's actions as her employer or as her husband and note must be taken of further issues and uncertainties arising from medical issues PHC was then facing.

[62] That said, the evidence I heard while not great in volume did indicate a high level of hurt and humiliation. That some was clearly attributable to the way the employment ceased was also apparent and real hurt must emanate from having ones' employment terminated for non-employment unrelated reasons, especially when it happens unexpectedly. The hurt was also aggravated by the fact that it is clear that notwithstanding the personal issues PHC tried desperately to help her husband and support his businesses.

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[7] *Scissor Platforms (1997) Ltd v Brien* [1999] 2 ERNZ 672 at 681, line 39 to 682 line 3

[63] Standing back and considering the evidence along with current precedent I consider an award toward the higher end of the scale appropriate and will order the payment of $20,000 under s 123(1)(c)(i).

[64] Finally the conclusion PHC has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.[8] The respondents' defence that there was no dismissal but a subsequently tendered resignation means there is absolutely no evidence PHC did anything wrong, at least in an employment setting.

Conclusion and Orders

[65] For the above reasons I conclude PHC has a personal grievance in that she was unjustifiably dismissed. As a result I order the first two respondents, DGJL and CBML, pay PHC:

(a) $11,534.25 (eleven thousand, five hundred and thirty four dollars and twenty five cents) gross as recompense for wages and other benefits lost as a result of the dismissal; and

(b) A further $20,000.00 (twenty thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

(c) $16,822.50 (sixteen thousand, eight hundred and twenty two dollars and fifty cents) gross being payment of wages unpaid during the period prior to 20 March 2016.

[66] Liability for the above payments is joint and several.

[67] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

[8] Section 124 of the Employment Relations Act 2000