

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 137  
3234479

BETWEEN

BETHANY PALMER  
Applicant

AND

ANTONIO CANDERLE  
Respondent

Member of Authority: Rowan Anderson

Representatives: Neil Ulrich, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting: 7 March 2024 in Palmerston North

Submissions received: At the investigation meeting from the Applicant  
No submissions from the Respondent

Determination: 8 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Bethany Palmer was employed as a café supervisor at Antonio’s Café in Palmerston North, commencing her employment on 7 November 2022. Ms Palmer’s individual employment agreement (IEA) recorded “Antonio’s Café” as being the employer, although she claims her employer was Antonio Canderle.

[2] Ms Palmer claims that she was unjustifiably constructively dismissed from her employment resulting from an ongoing failure by Mr Canderle to pay wages due, that she was unjustifiably disadvantaged in her employment for the same reasons, and that she is entitled to unpaid wages and entitlements including for a two-week notice period. Ms Palmer seeks compensation for humiliation, loss of dignity, and injury to feelings. She also seeks payment of unpaid wages and holiday pay.

## **Issues**

[3] The issues identified for investigation and determination, are:

- (a) Was Ms Palmer employed by Mr Canderle?
- (b) Was Ms Palmer unjustifiably disadvantaged in her employment, including having regard to any failure by Mr Canderle to pay wages or entitlements?
- (c) Was Ms Palmer unjustifiably (constructively) dismissed from her employment?
- (d) If Mr Canderle's actions were not justified (as to the dismissal or disadvantage) what remedies should be awarded?
- (e) Is Ms Palmer entitled to any arrears of wages and payment for annual holidays?
- (f) Should either party contribute to the costs of representation (if any) of the other party?

## **The Authority's Investigation**

[4] Mr Canderle did not lodge a statement in reply responding to Ms Palmer's claims. Mr Canderle did not otherwise meaningfully engage in the Authority's process, nor did he attend the investigation meeting.

[5] On 25 September 2023, I issued a Minute that included a direction as to service in respect of Mr Canderle providing for Mr Canderle to be served documents and notices by email.

[6] The Authority received emails from Mr Canderle, including on 25 June 2023, 10 October 2023, and 17 October 2023. Those emails referred in general terms to sickness, being in hospital, and having no money. The Authority sought further detail from Mr Canderle as to whether an adjournment was being sought on medical grounds, directing that further information be provided if that were the case, and inviting comment on any arrangements that might facilitate his participation if there were any issues impacting the same. No substantive response was provided by Mr Canderle and the matter has proceed.

[7] I am satisfied that Mr Canderle was served with the statement of problem, notice of investigation meeting, and other relevant documents relating to the Authority's investigation.

[8] A case management conference was held on 6 November 2023. There was no appearance by Mr Canderle. Written directions were issued, and an investigation meeting scheduled for 7 March 2024 in Palmerston North. The written directions issued provided a timeframe within which any objections should be made as to the proposed timetable. No objection was received.

[9] An investigation meeting was held on 7 March 2024. Ms Palmer and her mother, Deborah Dickson, were the only witnesses, both having earlier provided a written statements in accordance with the directions issued. They answered questions under affirmation at the investigation meeting.

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

#### **Was Ms Palmer employed by Mr Canderle?**

[11] Ms Palmer claims that Mr Canderle was her employer. Although the café ran under the name “Antonio’s Café”, that being the same name as used in the IEA, Ms Palmer claims that Mr Canderle was the person she dealt with in relation to her employment. “Antonio’s Café” is not registered with the Companies Office.

[12] Ms Palmer’s evidence is that she engaged with Mr Canderle in relation to her work at the café, her hours of work, the IEA, her wages, and ultimately her resignation which she claims was a result of Mr Canderle’s failure to pay her full wages.

[13] Ms Palmer was interviewed, engaged, and ultimately dismissed under Mr Canderle’s control and I find that he was Ms Palmer’s employer. Mr Canderle has not contested that.

[14] I conclude that Ms Palmer was employed by Mr Canderle in his personal capacity.

### **Was Ms Palmer unjustifiably disadvantaged in her employment?**

[15] Ms Palmer claims that she was unjustifiably disadvantaged in her employment on the basis that Mr Canderle failed to pay her full wages when due throughout her employment.

[16] The IEA states that Ms Palmer would be paid \$24.00 per hour for a minimum of 30 hours per week. Clause 7.2 of the IEA provided that Ms Palmer would be paid weekly. Ms Palmer was entitled to payment of her full wages on a weekly basis. Ms Palmer gave evidence that she sought payment of her full wages from Mr Canderle on several occasions to no avail.

[17] Ms Palmer provided the Authority the payslips that were given to her by Mr Canderle. Her evidence was that the payslips did not reflect the payments that were actually made, but that they did reflect her hours of work. She said that she was paid a total of \$2,040.43, whereas the payslips reflect she was entitled to a total of \$4,570.63 for the relevant period. Ms Palmer's evidence is that, for that period from 7 November 2022 to 1 January 2023, she was underpaid by a total of \$2,530.20. I am satisfied, based on that evidence, that Ms Palmer was not paid her full wages when due in accordance with the terms and conditions of her employment.

[18] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Mr Canderle's actions, and how Mr Canderle acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.<sup>1</sup>

[19] Justification requires the consideration of both substantive and procedural fairness. The onus is on Mr Canderle to justify his actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

[20] Mr Canderle has not responded to Ms Palmer's claims and no justification has been put forward. I am not satisfied that Mr Canderle has discharged the onus of proving there was a justification for his actions.

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<sup>1</sup> Employment Relations Act 2000, s 103A.

[21] I find that Ms Palmer was unjustifiably disadvantaged in her employment.

**Was Ms Palmer unjustifiably dismissed?**

[22] Ms Palmer claims that she was constructively dismissed from her employment. Ms Palmer advised Mr Canderle that she was resigning from her employment, providing two weeks' notice, on 31 January 2023.

[23] The first question is whether the resignation was caused by a breach of duty on the part of Mr Canderle having regard to all of the circumstances and not just the communication of the resignation. If there was a breach of duty by Mr Canderle, the Authority must determine whether it was of sufficient seriousness such as to make resignation reasonably foreseeable.<sup>2</sup> The onus is on Ms Palmer to show that the resignation was a dismissal.

[24] Ms Palmer, through her representative, raised a personal grievance with Mr Canderle in writing by letter dated 17 January 2023. That letter recorded that Ms Palmer had not been appropriately paid her full wages. That letter also noted that Ms Palmer had previously demanded payment of outstanding sums due and that there had been no notice or consultation as to the employment ending.

[25] As of 17 January 2023, there was apparent confusion as to whether Ms Palmer's employment had been terminated or not. The letter noted that the business premises had closed on 24 December 2022. Ms Palmer said that Mr Canderle had indicated that the location of the business might change, but that the business was not operational in January 2023 and there was no consultation at all about the matter.

[26] Significantly, the letter of 17 January 2023 referred to the ongoing pay issues and the impact on Ms Palmer. It was explicitly noted that, if the issue was not resolved, Ms Palmer would have no choice but to resign. That eventuated on 31 January 2023 when Ms Palmer sent a text message to Mr Palmer advising that she was resigning on notice. That occurred in the very clear context that Mr Canderle had, on an ongoing basis, failed to make full payment to Ms Palmer of her wages.

[27] Mr Canderle had a duty to make payment to Ms Palmer of her wages on a weekly basis in accordance with the terms and conditions of employment recorded in

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<sup>2</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

the IEA. I also find that Mr Canderle also breached his implied obligations not to act in a manner calculated to destroy or damage the relationship of confidence and trust in the employment relationship and of good faith. He did so by failing to address Ms Palmer's concerns about payment in a timely manner.

[28] The breaches by Mr Canderle were not trivial and they were serious. The obligation to make payment of wages is fundamental to the employment relationship. Ms Palmer's resignation was foreseeable, and it had been expressly noted in writing as a likely outcome of any ongoing failure to pay wages. Despite that, Mr Canderle did not rectify the situation.

[29] I have already referred to the test of justification at s 103A of the Act. Mr Canderle has not responded to Ms Palmer's claims and no justification has been put forward. I am not satisfied that Mr Canderle has discharged the onus of proving there was a justification for the dismissal.

[30] I find that Ms Palmer was constructively dismissed from her employment. I am not satisfied that the dismissal was substantively or procedurally justified, and I conclude that Ms Palmer was unjustifiably dismissed from her employment.

### **Is Ms Palmer entitled to remedies?**

*Is Ms Palmer entitled to compensation for lost wages?*

[31] Ms Palmer does not claim compensation for lost wages beyond the relevant notice period. She gave evidence that she found alternative employment and did not lose wages because of the dismissal. Ms Palmer's representative confirmed at the investigation meeting that Ms Palmer was not claiming compensation for lost wages. On that basis, I make no order for lost wages.

*Is Ms Palmer entitled to compensation for humiliation, loss of dignity and injury to feelings?*

[32] Ms Palmer seeks a total award of \$15,000, as compensation for humiliation, loss of dignity and injury to feelings.

[33] Ms Palmer's evidence is that Mr Canderle made various commitments as to making full payment of her wages, but that he did not meet those commitments. She struggled financially throughout her employment and had to rely on her mother to support her. She said that that caused her embarrassment, that she fell behind on payments, and that she was not able to help her mother financially because of Mr Canderle's actions.

[34] Ms Palmer also gave evidence that she felt helpless, angry, and humiliated by Mr Canderle's failure to pay her wages and the lack of communication from him relating to her ongoing employment. She was embarrassed, ashamed when she could not pay her bills, and her self-confidence was impacted.

[35] Ms Dickson's evidence was that Ms Palmer was living with her at the time and that she observed the impacts of Mr Canderle's actions both during the employment and afterwards. She said that Ms Palmer became withdrawn, and that the experience impacted her confidence and self-belief.

[36] I am satisfied that Ms Palmer was negatively impacted by Mr Canderle's actions, both in relation to the issues with payment of wages and as to the dismissal. I consider the sum sought as compensation to be modest in the circumstances.

#### *Contribution*

[37] Section 124 of the Act requires that the Authority consider the extent to which Ms Palmer's actions contributed towards the situation that gave rise to her personal grievances, and if those actions so require, that the Authority reduce the remedies that would otherwise have been awarded accordingly.<sup>3</sup>

[38] I do not consider there is any basis on which Ms Palmer's actions could be said to have contributed to the situation that gave rise to her personal grievances. I decline to make any reduction on account of contribution.

[39] I order Mr Canderle make payment to Ms Palmer, within 28 days, of \$15,000 as compensation for humiliation, loss of dignity and injury to feelings relating to her unjustified dismissal and disadvantage claims.

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<sup>3</sup> Employment Relations Act 2000, s 124.

**Is Ms Palmer entitled to any arrears of wages and payment for annual holidays?**

[40] Ms Palmer claims that, starting in November 2022, Mr Canderle failed to pay her wages when due and that she is owed \$2,530.20. Ms Palmer listed the payments received and gave evidence as to her hours of work.

[41] Ms Palmer's hourly rate of pay was \$24.00. She was paid a total of \$2,040.43 gross, but based on the hours she worked she was entitled to \$4,570.63 gross for the period up to 1 January 2023. I accept Ms Palmer's evidence and the calculations provided, and she is entitled to payment of \$2,530.20 for that period.

[42] I also accept that Ms Palmer was entitled to payment up to the end of the notice period given. Ms Palmer was not provided work between 2 January 2023 and the date on which the notice period ended, that being 14 February 2023.

[43] I find that Ms Palmer, in addition to the wages not paid up to 1 January 2023, is entitled to payment for a period of six weeks between 2 January 2023 to 14 February 2023. She is entitled to payment for that period based on 30 hours per week at the rate of \$24.00 per hour, that being \$4,320. The total wages due to Ms Palmer are therefore \$6,850.20.

[44] Ms Palmer is also entitled to payment of annual holidays and her evidence was that she did not take any leave during her employment. Ms Palmer was entitled to be paid for annual holidays when her employment ended in accordance with s 27(1)(b) of the Holidays Act 2003. I find that Ms Palmer is entitled to \$711.25<sup>4</sup> in unpaid annual holidays<sup>5</sup>.

[45] Ms Palmer is also entitled to payment of the 3 percent KiwiSaver employer contribution on her gross wages, to the extent that has not already been paid.

[46] I order that Mr Canderle pay Ms Palmer, within 28 days of the date of this determination:

- (a) \$6,850.20 in unpaid wages, including the notice period; and
- (b) \$711.25 for annual holidays not paid.

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<sup>4</sup> On the basis of her gross wages having been a total of \$8,890.63, that being comprised of \$4,320 for the six weeks she was not paid together with the \$4,570.63 she should have been paid for hours worked.

<sup>5</sup> Calculated on the basis of 8 percent of gross earnings in accordance with s 23 of the Holidays Act 2003.

## Summary of orders

[47] Antonio Canderle is ordered, within 28 days of the date of this determination, to make payment to Bethany Palmer of:

- (a) \$15,000 as compensation for humiliation, loss of dignity, and injury to feelings relating to her unjustified dismissal claim;
- (b) \$6,850.20 in unpaid wages, including the notice period;
- (c) \$711.25 for annual holidays not paid; and
- (d) 3 percent KiwiSaver employer contribution on her gross wages, to the extent that has not already been paid.

## Costs

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

[49] If they are not able to do so and an Authority determination on costs is needed Ms Palmer may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Canderle 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.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>6</sup>

Rowan Anderson  
Member of the Employment Relations Authority

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<sup>6</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).