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Permark Industries Limited v Te Kawa (Auckland) [2018] NZERA 22; [2018] NZERA Auckland 22 (22 January 2018)

Last Updated: 2 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 22
3022832

BETWEEN PERMARK INDUSTRIES LIMITED

Applicant

AND STACEY TE KAWA Respondent

Member of Authority: Vicki Campbell

Representatives: Kent Duffy for Applicant

No appearance for Respondent

Investigation Meeting: 22 January 2018

Oral Determination: 22 January 2018

Record of Oral

Determination:

22 January 2018

DETERMINATION OF THE AUTHORITY

A. Ms Te Kawa is ordered to pay Permark Industries Limited the following sums within 14 days of the date of this determination:

- a) \$1,650 being reimbursement of a salary advance;
- b) \$766.49 being overpayment of salary.

B. Permark Industries Limited's application for penalties for breaches of the employment agreement and good faith are declined.

C. Ms Te Kawa is ordered to pay to Permark Industries Limited the sum of \$2,250 as a contribution to costs within 14 days of the date of this determination.

Procedural history

[1] Permark Industries Limited lodged its statement of problem in the Authority on 27 November 2017. The statement of problem was served on Ms Te Kawa at 2.33 pm on 29 November. No statement in reply was received.

[2] On 19 December, in order to progress this matter, I proposed to the parties that this matter be progressed to an investigation meeting and made directions accordingly. The Notice of Direction was emailed to the parties at about 8.50 am on

19 December. On receipt of the Notice of Direction Ms Te Kawa contacted the Authority and indicated she was happy to discuss settlement of the problem with Permark.

[3] A hard copy of the Notice of Direction and Notice of Investigation Meeting were served on Ms Te Kawa and signed for by "Brooklyn Te Kawa" at 4.16 pm on 21

December. Included in the Notice of Direction was a direction to Ms Te Kawa that any correspondence to the Authority must include an application for leave to respond to the matter.¹

[4] To date no statement in reply has been received from Ms Te Kawa. With the exception of her email on 19 December, Ms Te Kawa has not engaged in the Authority's process.

[5] At the start time of the investigation meeting the Authority Officer managing this matter attempted to contact Ms Te Kawa. No response was received to the message left for her. The investigation meeting was delayed 15 minutes to allow Ms Te Kawa time to respond to the message or to attend at the Authority. She did neither.

[6] As provided in clause 12 of Schedule 2 of the [Employment Relations Act 2000](#) (the Act) I have proceeded to act fully in the matter as if Ms Te Kawa had engaged in

the process or was represented.

¹ See Employment Relations Regulations 2000, Regulation 8(3).

Employment relationship problem

[7] Permark designs and manufactures plastics, metals and specialty adhesives. Ms Te Kawa was employed in the position of Customer Service Co-ordinator. The terms and conditions of her employment were set out in an individual employment agreement dated 20 June 2016.

[8] Ms Te Kawa left the employment relationship on 3 September 2017. Permark claims Ms Te Kawa had been received a salary advance in July and had been overpaid in August. It seeks reimbursement of the advance and the overpaid amount plus interest.

[9] Permark also claims Ms Te Kawa has breached the notice requirements of the employment agreement as well as her statutory duty of good faith and seeks the imposition of penalties for the breaches.

Issue

[10] In order to resolve Permark's applications I must determine the following questions:

- a) Is Ms Te Kawa liable for the outstanding salary advance?
- b) Is Ms Te Kawa liable for overpayment of salary?
- c) Did Ms Te Kawa breach the terms of the employment agreement and if so, what if any penalty should be imposed?
- d) Did Ms Te Kawa breach her statutory duty of good faith and if so, what if any penalty should be imposed?

[11] 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 Permark and Ms Te Kawa but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Salary advance

[12] On 19 February 2017 Ms Te Kara suffered a non-work related injury which required time off work. While she returned to work on 6 March she needed further time off from 26 June until 10 July for surgery.

[13] During her period of absence in June and July Ms Te Kawa experienced difficulties receiving payments from ACC. When Permark learned of the difficulties it offered to advance Ms Te Kawa her salary to assist. The arrangement was offered on the basis that the salary advance would be deducted from Ms Te Kawa's next salary payment following her return to work.

[14] Ms Te Kawa accepted the offer of an advance of \$2,000 and agreed to pay back the money in the following month or when she received her payments from ACC.

[15] Ms Te Kawa returned to work on or about 15 July 2017. This date coincided with her monthly pay date and was the date

she received the \$2,000 advance.

[16] Following her return to work she requested and was granted approval to pay off the salary advance over several months, rather than one lump sum in August. In accordance with that agreement \$350 was deducted from Ms Te Kawa's pay on 15

August. No further payments have been made as Ms Te Kawa left her employment on 3 September.

[17] Permark is entitled to recover the outstanding salary advance which amounts to \$1,650. Ms Te Kawa is ordered to pay that amount to Permark within 14 days of the date of this determination.

Overpayment of salary

[18] Ms Te Kawa is paid an annual salary in equal monthly instalments. Salary is paid two weeks in arrears and two weeks in advance. Ms Te Kawa was paid her August salary on 15 August. This payment covered the first two weeks of August which Ms Te Kawa had worked plus two weeks to the end of August.

[19] Ms Te Kawa was on unpaid sick leave on 24 and 25 August. On 28 August she resigned from her employment giving notice to 22 September. She commenced a period of sick leave on 30 August and did not return to work.

[20] Ms Te Kawa had exhausted her paid sick leave entitlement and therefore the time she took off work during August was unpaid. Mr Lloyd Mearns, Managing Director of Permark, told me the usual process for employees who take time off without pay, after salary payments have been made on 15th of the month have their salary payments in the following month adjusted to take the leave without pay into account.

[21] Because Ms Te Kawa left her employment with no further monthly payments of salary no adjustment could be made to take Ms Te Kawa's leave without pay into account. Ms Te Kawa was overpaid her August salary for the four days being 24, 25, 30 and 31 August.

[22] Permark is entitled to recover the overpayment of salary amounting to

\$766.49. Ms Te Kawa is ordered to pay to Permark the sum \$766.49 within 14 days of the date of this determination.

Interest

[23] Permark seeks interest on the salary advance and salary overpayment reimbursements. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.²

[24] Permark and Ms Te Kawa agreed the salary advance would be repaid over a period of six months at the rate of \$350 per month. If Ms Te Kawa had remained in employment the final payment of \$350 would have been due this month.

[25] I consider it reasonable and fair that Ms Te Kawa pay interest on the sums ordered in paragraphs [17] and [22] above from the date of this determination at 5% per annum until the sums have been paid in full.

Breach of employment agreement

[26] Permark claims Ms Te Kawa breached the terms of the employment agreement by not giving the required amount of notice. Clause 16 of the employment

agreement required Ms Te Kawa to give at least 20 working days' notice.

2 [Judicature \(Prescribed Rate of Interest\) Order 2011](#).

[27] Ms Te Kawa resigned on 28 August 2017 giving 20 working days' notice noting her final day of work would be 22 September 2017.

[28] On 3 September Ms Te Kawa emailed Mr Mearns and explained that due to her health and after discussions with her health professional she wanted to end the employment relationship effective immediately. In his response Mr Mearns expressed some sympathy with Ms Te Kawa's health issues and wished her a speedy recovery.

[29] In October Mr Mearns caused a letter to be written to Ms Te Kawa expressing for the first time his unhappiness that she had not worked out a full notice period.

[30] At the time of her resignation Ms Te Kawa provided the contractual period of notice. She then determined she was not fit to continue working. While Ms Te Kawa did not expressly request that the notice period be waived, the effect of her advice that her employment should end immediately left it open for Mr Mearns to immediately require she work out the notice

period or face the consequences set out in the employment agreement. He did not do that despite there being further email communications between the two.

[31] I have concluded that there was an agreement for Ms Te Kawa to end the employment relationship immediately on 3 September and the requirement that she work out a notice period was waived.

[32] Ms Te Kawa did not breach the terms of the employment agreement and

Permark's application for a penalty is declined.

Breach of good faith

[33] Permark seeks the imposition of a penalty for alleged breaches of good faith on the part of Ms Te Kawa. Permark says Ms Te Kawa took deliberate steps to avoid repaying the salary advance and salary overpayment.

[34] The deliberate steps include:

a) On 5 September Ms Te Kawa attended Permark's offices to return company property and uplift her personal property. During her attendance Mr Mearns asked to discuss with her the repayment of the salary advance. Ms Te Kawa

told Mr Mearns she wouldn't discuss it then but would communicate via

email;

b) Despite email correspondence and letters Ms Te Kawa took no steps to repay the salary advance or the salary overpayment.

[35] The employment relationship ended on 3 September. All of the communications with Ms Te Kawa seeking payment of the salary advance and salary overpayments occurred after the employment relationship ended.

[36] The statutory duty of good faith applies to parties in an employment relationship. After 3 September no employment relationship existed and therefore no breaches of the duty of good faith can be found.

[37] Permark Industries Limited's application for a penalty for breach of good faith

is declined.

Costs

[38] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Employment Court has held that the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Court.³ As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁴ awards in the Authority will be

modest taking into account conduct which increases costs unnecessarily.

[39] In *Stevens v Hapag Lloyd* the Court reiterated that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non- technical.⁵

[40] The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

³ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

⁴ [2005] NZEmpC 144; (2006) 7 NZELC 98,128; [2005] ERNZ 808; (2005) 3 NZELR 1 (EMC).

⁵ [2015] NZEmpC 28 at [94].

[41] The investigation meeting took less than half a day. Applying the daily tariff would see the award of a contribution in the order of \$2,250. Taking into account all of the circumstances I consider an appropriate contribution to costs be \$2,250.

[42] Ms Te Kawa is ordered to pay to Permark Industries Limited the sum of

\$2,250 as a contribution to costs within 14 days of the date of this determination.

Vicki Campbell

Member of the Employment Relations Authority
