

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 405/08
5122646

BETWEEN AMY ROGERS
 Applicant

AND KERRY QUEENIN
 Respondent

Member of Authority: R A Monaghan

Representatives: A Taylor, advocate for Applicant
 K Queenin, in person

Investigation Meeting: 10 November 2008 at Hamilton

Additional information 19 and 24 November 2008
provided:

Determination: 27 November 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Amy Rogers seeks from her former employer, Kerry Queenin:

- a. payment of underpaid salary, in the sum of \$2,259.76;
- b. payment of outstanding holiday pay; and
- c. compensation for a personal grievance on the ground that Ms Rogers was disadvantaged in her employment by an unjustified action of her employer's.

[2] It was not clear from the statement of problem, or the accompanying documentation, which action(s), being unjustified actions, were relied on in support of the disadvantage grievance. There was a mixture of concerns including the failure to provide a written employment agreement and payslips, as well as stress associated

with workloads and Ms Queenin's unavailability in the latter part of the year of Ms Rogers' employment.

Preliminary matter

[3] Ms Queenin did not attend the investigation meeting, and did not give evidence. She was aware of the nature of the proceeding and the date of the investigation meeting. She indicated she would be unable to attend the investigation meeting because of the travel costs involved, and was offered an opportunity to file an affidavit containing the necessary evidence. She did not take that opportunity.

[4] However Ms Queenin had provided relatively detailed written responses. The responses amount to information, but not to sworn evidence. Accordingly I proceeded in Ms Queenin's absence on the basis that the information would be put to Ms Rogers for her reply, but that in the case of any conflict Ms Rogers' would be the only sworn account available.

The claim for unpaid salary

[5] Ms Queenin is a solicitor. She employed Ms Rogers as a legal executive in a legal practice which she had recently purchased. Ms Rogers' employment commenced on 14 March 2007.

[6] Ms Rogers says the agreed salary was \$40,000 pa. She did not receive a written employment agreement, but produced in support an emailed message from Ms Queenin dated 27 March 2007. The message confirmed Ms Rogers' appointment, and summarised key terms which, according to the message, would be reaffirmed in a standard employment agreement. One of the terms was:

“Remuneration to be \$40,000 per annum to begin with, paid fortnightly, and to be reviewed after a trail period of three months (just to see if we all get along)”

[7] The message went on to say the confirmation was informal and that details would be finalised once Ms Rogers had moved from Auckland to the location of the practice. I do not accept that in itself this means there was any uncertainty as to the

agreed rate of remuneration, or any contingency. In any event, it does not appear there was any further discussion about Ms Rogers' salary. Both Ms Rogers' oral evidence, and the message, indicate the agreed salary was \$40,000 pa. I find accordingly.

[8] Ms Queenin entered into an agreement to sell the practice at or about the end of 2007. Ms Rogers' employment with the practice ended on 8 February 2008. Ms Rogers was re-employed by the purchaser. On reviewing the records showing Ms Rogers' salary payments, the purchaser found Ms Rogers had been paid the sum of \$1,442.25 (gross) per fortnight, when she should have been paid \$1,538.46 (gross) per fortnight.

[9] Ms Rogers seeks the difference, quantified as a shortfall of \$48.08 per week x 47 weeks (being the period of her employment with Ms Queenin) = \$2,259.76

[10] Payment is ordered accordingly.

Holiday pay

[11] Regarding Ms Rogers' entitlement to annual leave, in the absence of a written employment agreement I rely on the provisions of the Holidays Act 2003.

[12] Section 15(d) provides that:

“... on and from 1 April 2007, when an employee next becomes entitled to annual holidays, the employee's minimum entitlement is increased from 3 weeks' annual holidays to 4 weeks' annual holidays.”

[13] The Holidays Act also provides at s 23(2) that:

“An employer must pay the employee [8%] of the employee's gross earnings since the commencement of employment less any amount –

- a. paid to the employee for annual holidays taken in advance; ...”

[14] With reference to these provisions, Ms Rogers seeks payment of holiday pay from Ms Queenin calculated as:

[\$33,894.52 paid + \$2,259.76 owed]	Gross earnings	\$36,154.28
[period prior to 1 April 2007]	6%	\$ 156.92
[remainder of employment]	8%	\$ 2,683.10
	Total entitlement	\$ 2,840.02
[11 days taken over Christmas-New Year]	less paid	\$ 1,692.33
	Balance	\$ 1,147.69
[pursuant to agreement for sale and purchase]	less 5 days	\$ 769.25
	Balance owed	\$ 378.84

[15] Ms Queenin believed Ms Rogers had no outstanding entitlement to annual leave as at the date of termination of her employment. A document she filed indicated that, as at the date of termination, Ms Rogers had received 11 days' leave over the Christmas-New Year period (excluding statutory holidays) as well as one day's leave on Dominion Day (Easter Tuesday), one day's leave in October 2007, and three days' leave in the week beginning 14 December 2007. Accordingly Ms Rogers had received 16 days' paid annual leave during her employment. Adding to this a further 5 days' leave, said in the document to be 'credit from the takeover,' meant Ms Rogers was overpaid.

[16] No dispute arose out of the period of 11 days' leave. As for the remaining days, Ms Rogers says the Dominion Day holiday is observed as a special holiday in the legal profession and is not treated as annual leave, and the absences in October and December were time off in lieu. I accept Ms Rogers' evidence about the nature of the absences and find that the absences on those days should not be treated as annual leave.

[17] I would therefore have said that, as at the date of the termination of her employment with Ms Queenin, Ms Rogers was owed \$1,147.69 as holiday pay.

[18] As at the time of the investigation meeting I had no information about whether the purchaser had agreed to honour any outstanding leave entitlements owed to the staff it re-employed, and Ms Rogers was unable to assist in relevant respects. I was told the purchaser had undertaken to allow Ms Rogers five days' leave - as accounted for in Ms Rogers' claim - but no-one was able to explain the basis for the arrangement. The same five-day period of leave was referred to as 'credit from the takeover' in Ms Queenin's document.

[19] Further enquiries indicated the agreement for sale and purchase of Ms Queenin's legal practice included a provision that employees such as Ms Rogers would have one week's (5 days') holiday treated as 'still owed and available for use after 1 June 2008.'

[20] As at the date of termination at least 5 days' annual leave was indeed still owed to Ms Rogers – but Ms Queenin did not believe that was the case at the time and the provision in the sale and purchase agreement had another purpose. Indeed Ms Queenin's explanation of the provision was that Ms Rogers was not entitled to any further annual leave, rather the further week was negotiated to address the effect of high workloads generated in the middle of the year. Ms Queenin said she had made such leave available to staff members who had been in her employ for more than 12 months, and as part of the sale and purchase she negotiated Ms Rogers' inclusion in the arrangement as 'a favour'. The purchaser has confirmed it will take responsibility for that entitlement.

[21] Otherwise Ms Queenin said she would be responsible for ensuring staff were 'paid up to the settlement date'. That appears to mean Ms Queenin retained liability for all outstanding entitlements owed as at the settlement date.

[22] When this information was put to Ms Rogers, she made no further comment and did not seek to amend her claim.

[23] I therefore adopt the calculation presented on Ms Rogers' behalf, and order Ms Queenin to pay to Ms Rogers a further \$378.84 in respect of unpaid holiday pay.

The disadvantage grievance

[24] Of the various concerns referred to in the context of the disadvantage grievance, only the concern regarding workplace stress is capable of falling within the definition in s 103(1)(b) of the Employment Relations Act 2000.

[25] Further, the way in which the grievance was framed and raised created a question about whether the grievance was raised within the 90 day period set out in s 114 of the Act. However in the circumstances I deal with the grievance as follows.

[26] I accept Ms Rogers experienced stress in the latter part of 2007 in particular, for reasons associated with: her workload; Ms Queenin's unavailability and absences from the office; and aspects of dealings with clients and their files. It would also appear that Ms Queenin managed the office poorly during this period, and was 'not coping' herself. Overall, while the period was probably difficult for all concerned, I do not consider the circumstances were sufficient to meet the definition in s 103(1)(b).

Summary of orders

[27] Ms Queenin is ordered to pay to Ms Rogers:

- a. \$2,259.76 (gross) as arrears of salary; and
- b. \$378.84 (gross) as holiday pay.

[28] Interest is to be paid on these sums at 7.8%, calculated from the date of termination of Ms Rogers' employment with Ms Queenin to the date of payment.

Costs

[29] Ms Queenin is further ordered to reimburse Ms Rogers for the filing fee of \$70.

R A Monaghan

Member of the Employment Relations Authority