

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 160
5364048**

BETWEEN RIZKY SARI
Applicant
AND BRELITA FOODS LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in person
No appearance by Respondent
Investigation Meeting: 11 May 2012 at Auckland
Determination: 11 May 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Rizky Sari, was employed by the Respondent, Brelita Foods Limited (“Brelita”), as a part-time Administrator on 12 September 2011 and her employment continued until she was dismissed without any prior warning on 27 October 2011.

[2] Ms Sari claims that she was asked to leave Brelita’s office at 12.30 p.m. and was informed that her outstanding wages would be paid, however Ms Sari claims that she had not received her last wages payment.

[3] Ms Sari claims that she is owed outstanding wages for the period between 24 October to 27 October 2011, and statutory annual leave entitlement. Ms Sari is also claiming the Authority filing fee of \$71.56.

[4] Brelita claims that Ms Sari was employed subject to a 3 month trial period, and that during the first 7 weeks of her employment, Ms Sari failed to meet its expectations. On this basis, her employment was terminated.

[5] Brelita agrees that Mrs Sari received no wages payment in respect of her final week of employment, but claims that she is not entitled to payment because of her poor performance.

Issues

[6] The issue for determination is whether Brelita can withhold outstanding wages from Ms Sari on the basis of her alleged poor performance.

Service of documents on the Respondent

[7] A Statement in Reply was filed by Ms Luciell McIlroy, Managing Director, on behalf of Brelita, but Ms McIlroy did not attend that investigation meeting, despite having been served with the Notice of Investigation on 23 April 2012 signed for by M.S.Patel.

Failure of Respondent to attend or be represented

[8] Ms McIlroy did not attend and was not represented at the Investigation Meeting.

[9] For the reasons set out above I am satisfied that Ms McIlroy had notice of the application and the date of the Investigation Meeting. Ms McIlroy has not shown good cause for her failure to attend or to be represented.

[10] I have therefore proceeded pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 to act as fully as if Ms McIlroy or Brelita had attended or been represented.

Determination

Statutory entitlement to wages

[11] The Wages Protection Act 1983 governs the payment of wages between an employer and an employee. In accordance with s 4: *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

[12] Ms Sari worked on Tuesdays, Wednesdays, Thursdays and Fridays from 9.00 a.m. until 4.30 p.m. with a half hour lunch break. During her final week of employment Ms Sari said that she had worked on Tuesday 25 October, Wednesday 26 and on Thursday 27 October 2011 until she was asked to leave at 12.30 p.m.

[13] I find that Ms Sari is entitled to payment of her wages for the two and a half days she worked, these being Tuesday 25, Wednesday 26 October, and Thursday 27 October 2011 until 12.30 p.m.

Trial period

[14] Brelita claims that Ms Sari was employed subject to a 3 month trial period. Ms Sari had been issued with an Individual Employment Agreement (“employment agreement”) two weeks prior to commencing employment; however Ms Sari said that she had not been told her employment was subject to a trial period, either at that time, or subsequently.

[15] The Employment Relations Act 2000 (“the Act”) makes provision for trial periods at ss 67A and 67B. The Act states:

*S 67A(2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –*

(a) For a specified period (not exceeding 90 days), starting at the beginning of the employee’s employment, the employee is to serve a trial period

[16] Ms Sari’s employment was not subject to a trial period pursuant to s 67A (2) of the Act since the provision was not in writing Section 67A of the Employment Relations Act 2000 (“the Act”) states that a trial period of 90 days must be in writing and agreed between the parties prior to the commencement of employment.

Contractual notice period

[17] In accordance with clause 11.1 of her employment agreement, Ms Sari was entitled to a two week notice period. Ms Sari said that no payment in respect of her contractual notice period had been provided to her.

[18] There is no provision in the employment agreement for termination without payment, except in the case of serious misconduct, and poor performance is not listed as a serious misconduct offence in the employment agreement. Moreover, I would expect a poor performance issue to be dealt with by means of performance management.

[19] I find that Ms Sari is entitled to payment of her contractual notice period of two weeks.

Remedies

[20] Brelita is to pay Ms Sari the sum of \$ 315.00 gross in respect of unpaid wages for 25 until 27 October 2011, calculated as 17.5 hours at \$18.00 per hour.

[21] Brelita is to pay Ms Sari the sum of \$267.12 gross in respect of statutory annual leave entitlement, calculated at the rate of 8% for the period from 12 September to 27 October 2011.

[22] Brelita is to pay Ms Sari the sum of \$1008.00 gross in respect of two weeks contractual notice period.

[23] Ms Sari is to be reimbursed the filing fee of \$71.50.

Costs

[24] While costs are reserved, I note here that, subject to her submissions, Ms Sari was not legally represented and, unless she incurred legal costs, it is therefore unlikely she has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority