



# New Zealand Employment Relations Authority Decisions

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## Sivula v Burrige (Christchurch) [2016] NZERA 615; [2016] NZERA Christchurch 216 (7 December 2016)

Last Updated: 12 January 2017

### IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 216  
5635444

BETWEEN EMMA-LIISA SIVULA Applicant

A N D RHONDA BURRIDGE First Respondent

PRECISE CONTRACTING LIMITED

Second Respondent

Member of Authority: Peter van Keulen

Representatives: Emma-Liisa Sivula

Rhonda Burrige for First and Second Respondent

Investigation Meeting: 3 November 2016 at Blenheim

Date of Determination: 7 December 2016

#### DETERMINATION OF THE AUTHORITY

**A. The second respondent must pay the applicant \$242.27 (gross) for wage arrears, within 14 days of the date of this determination.**

**B. The second respondent must pay the applicant \$71.56 for the filing fee on this application, within 14 days of the date of this determination. There is no further order for costs.**

#### Employment relationship problem

[1] The applicant, Ms Sivula, claims that the first respondent, Ms Burrige, owes her wages for work completed between 26 May 2016 and 12 June 2016. Ms Sivula says she worked a total of 103.75 hours during this time and Ms Burrige only paid her \$690.00 (net). Ms Sivula claims she should have been paid \$1,400.60 (net) and is therefore seeking wage arrears of \$710.60 (net).

[2] Ms Burrige says:

- a. Ms Sivula only commenced work on 7 June 2016 and worked one week completing a total of 32.5 hours.
- b. Ms Sivula was paid in two parts for this work, first at the agreed piecemeal rate and then second a top up to ensure Ms Sivula was paid for the hours of work completed at the prevailing minimum wage rate.
- c. However, as Ms Sivula failed to give one week's notice as required under her employment agreement, the second payment had the sum of

\$610.00 deducted for the cost resultant from this failure to give notice;

this also being provided for in the employment agreement.

### **Preliminary matters**

[3] Ms Sivula issued her claim against Ms Burridge. However, the employment agreement and pay slip attached to Ms Burridge's statement in reply indicate that Precise Contracting Limited (Precise) was the employer.

[4] Precise is a limited liability company and Ms Burridge is the sole shareholder and director. From the evidence I heard in the investigation meeting I am satisfied that Precise was the employer of Ms Sivula.

[5] As Ms Burridge is the sole director and shareholder and as she has actively participated in this matter I am satisfied that Precise has been aware of the claim and that the claim may well be against it rather than Ms Burridge personally. I am also satisfied that the statement in reply lodged and served by Ms Burridge is done on behalf of the employer and therefore reflects the position for Precise as the employer.

[6] In these circumstances I was satisfied that it was appropriate for me to join Precise as the second respondent and I was also satisfied that this matter could proceed on 3 November 2016 as there was no prejudice to Precise in joining it at the investigation meeting.

### **Facts**

[7] Precise is a company that provides vineyard labour services in Blenheim. It employs people on a casual basis and has a standard employment agreement that it uses.

[8] Precise employed Ms Sivula on its standard terms. Ms Sivula signed an employment agreement on 20 May 2016 (the Employment Agreement). Despite signing the Employment Agreement on 20 May 2016 Ms Sivula did not commence work until 20 June 2016.

[9] The Employment Agreement included the following terms:

12 Termination of employment

#### 12.1 General termination

The Employer may terminate this agreement by providing immediate notice to the employee within the trial period of the first 90 days. During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal.

The Employee is required to give one week's notice. If the employee fails to give one week's notice you will not receive you (sic) last week's pay.

Please I am not kidding on this one please do not challenge it just

give us one week's notice Thank you.

[10] Clause 12.1 of the Employment Agreement is set out on a separate page in the Employment Agreement. The second paragraph is in bold and large type. There is also a space for signing at the end of clause 12.1 with a statement "I understand and agree to give Precise contacting (sic) one week's notice or I will pay a penalty of losing my last week's wage." Ms Sivula has signed immediately after this statement at the end of clause 12.1.

[11] Ms Sivula worked one week for a total on 32.5 hours. Ms Sivula was confused about the number of hours she worked for Precise as she incorrectly thought it was responsible for paying her for work she undertook with another company.

[12] Ms Sivula resigned after that week because she had injured her arm at work. She did not work the one-week notice period as required. Ms Sivula did not work the one-week notice period because of her injured arm.

[13] Ms Sivula reported the injury to her supervisor at Precise, Tom Riwaka. She then gave notice of her resignation to Mr Riwaka and enquired of him if she would be required to work her week's notice, as she was unable to work.

[14] Mr Riwaka responded to Ms Sivula in a text that stated, "I have spoken to [Ms Burridge] and she is happy to let you out of your contact (sic) and wishes you a speedy recovery."

[15] Ms Burridge subsequently followed up with Ms Sivula, after the one-week period, and demanded a doctor's certificate for the notice period that was not worked. Ms Sivula was not able to provide a doctor's certificate because she did not attend the doctors when she suffered the arm injury.

[16] Precise paid Ms Sivula on 19 June 2016 for the fortnight immediately preceding. This was payment for the one week that she worked. Payment was made at the standard piecemeal rate for the work completed by Ms Sivula. The amount included holiday pay at the rate of 8%. The total paid to Ms Sivula was \$292.17 (gross).

[17] In the pay cycle for the period ending 17 July 2016 Precise calculated the shortfall of any wages payment to Ms Sivula matching payment for the hours completed by Ms Sivula at the applicable minimum wage against the piecemeal amount already paid. Precise owed Ms Sivula \$242.27 (gross) including holiday pay at the rate of 8%.

[18] Precise then deducted \$610.00 (gross) from the sum owed to Ms Sivula this being one week's work of 40 hours at the rate of \$15.25 per hour. Precise did this pursuant to clause 12.1 of the Employment Agreement. This meant Ms Sivula did not receive the amount owed to her of \$242.27 (gross).

[19] Precise says the loss it suffers if an employee does not give the required one-week notice arises because it cannot immediately replace an employee and it can take a week or more to find a new employee to cover that work. As a result the loss it suffers is in two parts:

a. First, it does not get paid for the work that employee would otherwise have completed under its contract with the vineyard as there is not an employee filling that role. This is more than the piecemeal rate paid to

an employee as the added margin allows for cost and profit but the easiest way to calculate that is to simply quantify it as the minimum weekly pay to an employee.

b. Second, having one week's notice allows it to organise not just a replacement but training of that replacement employee in a time frame that is convenient to it and in a way that incurs the least cost to it (because it can, for example, have two or more new employees trained

together thus reducing the supervisor cost).

## **Issues**

[20] I am satisfied that Ms Sivula only worked 32.5 hours for Precise. I also accept that she was paid \$292.17 (gross) for this work and Precise owed her \$242.27 (gross). The issue for me to determine is whether Precise was entitled to deduct

\$610.00 from the final payment due to Ms Sivula. [21] This issue turns on two things:

a. Did her supervisor release Ms Sivula from her obligation to work the one-week notice period?

b. If not, whether one-week's wages, which is forfeited under clause 12.1 of the Employment Agreement, is a genuine and reasonable estimate of the loss that Precise will suffer or is it merely a penalty designed to compel employees to give the requisite notice. That is, is clause 12.1 a liquidated damages clause or a penalty clause?

## **Discussion**

[22] Precise says Ms Sivula cannot rely on Mr Riwaka's consent to release her from the obligation to work her notice period. This is because the Employment Agreement provides that Ms Burrridge is the contact point for the employee and not Mr Riwaka.

[23] I do not accept this. First, Mr Riwaka was Ms Sivula's supervisor and her normal point of contact for things such as days and time of work – it was him after all that she contacted to advise of her injury and that she would not be attending work.

Second, Mr Riwaka says he has spoken to Ms Burrridge and she is happy to release her from her contract.

[24] In the circumstances, I believe Ms Sivula could rely on this to consider herself released from her obligation to work her notice period. Had she not considered herself released she may well have gone to her doctor and obtained a medical certificate as her absence was likely to extend past two days of work.

[25] Therefore, Precise could not rely on clause 12.1 of the Employment Agreement.

[26] However, even if I am wrong on this point, I do not find that clause 12.1 of the Employment Agreement is enforceable.

[27] I am not satisfied that Precise suffers a quantifiable loss if an employee does not work the required one week notice period.

[28] If there is no employee working the allocated role Precise says it does not get paid for that work. This however does not

equate to a loss. If the employee was working then that employee would be paid out of the rate paid to Precise and it would only receive the profit amount i.e. its loss can only be the profit it would make on that one week of work.

[29] But there is more to the analysis. Precise's contract with the vineyard is for a fixed price based on it undertaking a fixed amount of work. There is no variation in this. Precise must complete the work within the period. So, if it is not on schedule because employees are absent, Precise must employ further workers at the end of the contract period. The result is Precise will likely meet the output requirement under its contract for the same costs. This is so regardless of whether an employee resigns and works his or her notice period.

[30] I accept there may be some additional cost in training new employees by Precise having to use supervisors to train them. Nevertheless, it seems to me that an employee working his or her notice period will not change this. And one additional week of work will not provide Precise with an ability to coordinate the required supervision any better than if it is not worked except if, by chance, two or more employees resigned within one week of each other.

[31] If Precise suffers any loss because an employee does not work his or her notice period it is not going to be \$610.00 but rather some additional cost that might be incurred in bringing in a supervisor for an additional few days because two or more new employees could not be trained together.

[32] On this basis clause 12.1 of the Employment Agreement is a penalty clause and is not enforceable. It is notable that Precise describes the payment as a penalty. The signing provision connected to clause 12.1, drafted by Precise, states "I understand and agree to give Precise contacting (sic) one week's notice or I will pay a **penalty** of losing my last week's wage."

[33] Based on my analysis I conclude that Precise could not deduct \$610.00 from the final pay owed to Ms Sivula.

### **Determination**

[34] Precise must pay Ms Sivula \$242.27 (gross) for wage arrears, within 14 days of the date of this determination.

### **Costs**

[35] As neither party was represented, I make no order for costs except that Ms Sivula is entitled to be paid \$71.56 for the filing fee on her application. That must also be paid within 14 days of the date of this determination.

Peter van Keulen

Member of the Employment Relations Authority