

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 274/07
5079096

BETWEEN SANDRA SMILLIE

AND FORRESTER FURNITURE
 2006 LTD

Member of Authority: Janet Scott

Representatives: Kerry Single for Applicant
 No appearance for Respondent

Investigation Meeting: 21 August 2007 at Tauranga

Submissions received:

Determination: 5 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant submits she has suffered a disadvantage grievance in her employment with the respondent. She also alleges she is owed arrears of wages and holiday pay.

[2] The applicant seeks orders directing the respondent to pay the arrears of monies owing to her. She also seeks compensation pursuant to s.123 (1) (c) (i) and costs in the matter.

[3] There was no appearance at the investigation meeting by or on behalf of the respondent. I am satisfied the respondent has been served with the Statement of Problem and Notice of Investigation Meeting. The respondent's former counsel has advised the Authority he has been unable to take instructions and has withdrawn from the case.

[4] The meeting was delayed to allow for the situation that the respondent had been unavoidably detained. However, as there was neither an appearance for nor contact from the respondent to explain her absence I have proceeded to hear and determine the matter in accordance with Clause 12 of the Second Schedule of the Employment Relations Act 2000.

Background

[5] Mrs Smillie commenced employment with the respondent on 24 May 2006. She was employed as a shop assistant at the rate of \$13 per hour. Initially Mrs Smillie worked 12 hours per week – four hours on Monday and eight hours on Wednesday.

[6] On 24 July whilst Mrs Smillie was in Palmerston North she was telephoned by Mrs Waters, sole shareholder of the respondent and requested to work additional hours. By agreement Mrs Smillie started working eight hours on a Monday and Wednesday.

[7] It is Mrs Smillie's evidence that Mrs Water's offered to reimburse her for the additional hours by giving her petrol vouchers. Mrs Smillie declined to be paid for the hours she worked in this manner, and it was discussed and arranged with Mrs Waters that the additional hours worked were to be recorded as a credit and used to pay for purchases Mrs Smillie made from Forrester Furniture (2006) Ltd (Forrester Furniture). Mrs Smillie's evidence was that the agreement between the two women regarding staff purchases was that she would pay for such purchases on the basis of cost + GST + freight (if any).

[8] It was Mrs Smillie's evidence, however, that at the end of August Mrs Waters informed her of steps she had taken to deal with a previous employee following her resignation where she had unilaterally increased the cost of staff purchases and put the monies owed on purchases by that employee in the hands of debt collectors.

[9] Mrs Smillie said she was appalled that the worker had been treated that way and she terminated the credit arrangement for extra hours worked on a Monday and requested that thereafter all hours be recorded and paid as wages to her. Mrs Smillie

said that from that time, that is the beginning of September, she was paid 16 hours a week. The wage record submitted supports this.

[10] Mrs Smillie gave evidence that despite the fact that the business had been operating since January 2006, there was no proper administration system in place. She said that Mrs Waters requested she set up a system and as she had previously worked on MYOB she offered to do this on Mrs Waters' computer. This offer was declined, so Mrs Smillie then purchased a file box and a ledger book. She gave the receipts for these items to Mrs Waters (value \$79.97). Mrs Smillie said that the 12 column ledger book was then used by her to set up a comprehensive ledger and she entered rent, rates, electricity, mobile, car expenses, stamps, fees, wages, payments to suppliers, loans and deposits in that book. She went on to include all details of income deposits and expenses in the ledger. She took the records right back to the commencement of the business. However, in November she was told she was no longer required to maintain this ledger. No reason was given for the instruction that she discontinue maintaining these records.

[11] Mrs Smillie said that using the file box, she set up a system to take the invoices for each supplier along with accounts to pay and accounts paid sections. This system was still in use on the day she resigned her employment.

[12] In the week beginning 4 December 2006 Mrs Smillie was asked to work on Wednesday and Friday for that week. She agreed to this request. However, she had also decided to resign from her employment and on 6 December she resigned with effect from 8 December.

[13] It was Mrs Smillie's evidence that she was keen to have her wages and holiday pay finalised prior to her leaving the business on 8 December. To this end, Mrs Smillie prepared a record of all wages due to her. To this she added the cost of the stationery/file box and ledger book that she had purchased for the business and from this she deducted the sum of \$225 that she owed for purchases she had made from the business. This left a sum of \$62.97 owed to Mrs Smillie, excluding her holiday pay.

[14] However, Mrs Waters did not settle up in respect of Mrs Smillie's wages and holiday pay on the final day of her employment. Instead a wages cheque was given

to Mrs Smillie by Mrs Waters' brother on 10 December. It did not include payment for 8 December and no holiday pay was paid.

[15] Then on Monday 11 December the file boxes are delivered by courier to Mrs Smillie's home in Te Puna, Tauranga. Taped to this box is an undated account showing an erroneous calculation (Mrs Smillie's submission) of holiday pay. Neither was any account taken on wages owed to her for Friday 8 December or the additional hours worked by her in August 2006. All items on the schedule of purchases handed to Mrs Waters with Mrs Smillie's resignation had been listed and had been significantly increased in price (recorded as retail less 15%). This new total had been deducted from the incorrectly calculated holiday pay without any discussion with her. The account now alleged there was a balance owed to Mrs Waters of \$155.01.

[16] It was Mrs Smillie's evidence that she was aware that this scenario had been played out with two previous employees. They had also not received holiday pay and the prices of the purchases over the period of the employment had been unilaterally increased by Mrs Waters. In support of this contention Mrs Smillie introduced an affidavit from a former employee of Forrester Furniture. That employee also attested to the fact that staff purchases were allowed on the basis of cost plus GST plus freight (if any). She stated that when she left these prices were inflated and Mrs Waters claimed the staff discount was retail minus 15%. Mrs Waters had then put this false information in the hands of the debt collectors. She stated she is still being hounded by debt collectors seeking money that she does not owe Forrester Furniture.

[17] Another former employee has also provided a written statement confirming that she was told by Mrs Waters during her employment that should she wish to purchase any item from Forrester Furniture during her employment, the price to her would be the company cost price plus GST.

[18] Mrs Smillie was so concerned about the communications that she received from Mrs Waters on 10 and 11 December that she contacted Mr Single, her employment adviser. He delivered a letter to Mrs Waters on 14 December raising a personal grievance on her behalf.

[19] Following this it seems that Mrs Waters laid a complaint with the local Police and on 6 February the Police executed a search warrant on the applicant's home with a view to recovering a number of items alleged by the respondent to have been stolen from her business during the applicant's employment. This included 21 candles, 1 rimu bread board, 2 wrought iron candle holders (painted green), 5 artificial flowers, 1 glass vase and 4 jute mats. The Police took into their possession (pending the outcome of this investigation) 2 candlesticks, 1 glass vase and 4 artificial flowers.

[20] Mrs Smillie gave the following evidence in respect of the items listed in the search warrant:

- She produced evidence by way of bank statements to show that she had paid for the artificial flowers on 29 May 2006.
- She submitted that the glass vase had been given to her as a present for her birthday by Mrs Waters. She said it is extremely difficult to prove that something has been given as a present. However, she noted that at that time she was car pooling with another person and on the day she was given the glass vase Mrs Waters had walked out of the shop with her when she went to meet the Mrs Strang who was taking her home. She said she was holding the large glass vase in her arms. Mrs Smillie produced a letter from Bernadette Strang sworn in front of a local JP, in which she said she picked Mrs Smillie up on 9th Avenue shortly after 5 o'clock on 18 October 2006. Mrs Smillie had a large vase in her hand. Mrs Strang asked Mrs Smillie if she had been shopping but was told that it was her birthday and her boss had given her the vase for her birthday.
- In respect of the green candlesticks listed in the search warrant, it was Mrs Smillie's evidence that Mrs Waters had told her that she had had to purchase these items as stock as part of the business and they were offered to her at a price to clear them. In Mrs Waters' presence Mrs Smillie had placed the cash for the purchase in a small wooden box in the cupboard. At the time these candlesticks were painted black. Mrs Smillie noted that they were described on the search warrant as "candle holders - painted green". She stated that Mrs Waters had never been in her house and could only have

known they were painted green from a discussion between them after she had purchased the candlesticks.

[21] In Mrs Smillie's evidence, the other items on the list had never been in her possession and were not present in her house.

[22] The Police seized the candlesticks, flowers and vase in full view of her neighbours and are holding them pending the outcome of this investigation.

[23] It is Mrs Smillie's evidence that the stress, embarrassment and humiliation associated with this attempt by Mrs Waters to charge her with theft had been horrific and has had an ongoing effect as Mrs Waters has refused to accept that she has done anything wrong.

The issues

- Does Mrs Smillie have a personal grievance against her former employer in the nature of a disadvantage grievance as claimed?
- If she does, what remedies are appropriate in all the circumstances?
- Is Mrs Smillie owed wages and holiday pay and, if so, in what sum?
- What if any other sums are payable to Mrs Smillie.

Discussion and findings

Credibility

[24] I found the applicant to be an extremely credible witness and she had taken significant steps to gather statements from other persons who have had been employed by Mrs Waters of Forrester Furniture and who have had similar experiences i.e. not being paid their final wages and holiday pay when they left the employment and facing unilateral changes (to their financial detriment) to the arrangements agreed regarding staff purchases. On the evidence before me this seems to be a common theme.

[25] In Mrs Smillie's case she has been the subject of a police investigation on the basis of a complaint laid by Mrs Waters that she has taken items from the shop. Mrs Smillie believes this action was taken because she raised a personal grievance with Mrs Waters.

[26] Mrs Smillie's evidence was uncontested. While I have no jurisdiction in respect to the complaint laid with the police I note that I found Mrs Smillie to be a very credible witness particularly in relation to her ownership of the items removed by the police from her home.

[27] I accept Mrs Smillie's evidence in its entirety.

Findings

[28] S. 103 (1) (b) of the Act sets out the definition of a disadvantage grievance:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the workers disadvantage by some unjustifiable action by the employer.

[29] In the letter delivered to the respondent on 14 December the following were stated to be the basis for Mrs Smillie's disadvantage grievance:

- Failure to provide a written employment agreement as required by section 65 of the Employment Relations Act 2000.
- Failure to pay holiday pay as required under the Holidays Act 2003
- Failure to pay the correct amount of monies owing in wages.
- Failure to pay wages as required in an agreed manner by way of a cheque not crossed made out to wages that could be cashed. (Wages Protection Act 1983)
- Failure to act in good faith as required under section 4 of the Employment Relations Act 2000 in all dealings with our client as an employee.

[30] I note the letter raising the grievance on Mrs Smillie's behalf was written before the police executed the search warrant and it is clearly that action that has caused the real grief experienced by Mrs Smillie.

[31] There are two problems with the grievance raised on the applicant's behalf.

- The actions complained of amount to breaches of the relevant legislation e.g. Employment Relations Act 2000, Holidays Act 2003, Wages Protection Act 1983. The breaches in question give rise to valid claims for arrears of monies owing to the worker and to penalties. Remedies sought include the arrears of wages and holiday pay payable to Mrs Smillie. That remedy will be addressed by me. No penalties have been sought and as the respondent is not on notice of a claim for remedies an award of penalties are not appropriate in this case.
- The second problem is that the action that has genuinely caused much distress to the applicant - the complaint to the police and the execution of a search warrant on her home - is not an unjustifiable action that affected 1 or more conditions of the applicant's employment. The action complained of post dated the applicant's employment and had no impact whatsoever on the conditions of her employment.

[32] As a result I cannot find the applicant has a personal grievance against her former employer Forrester Furniture (2006) Ltd and I must decline to award the remedies sought under that head.

[33] The applicant has however presented to me a careful summary of arrears of wages owed to her. I have assessed that summary and find it to be correct on all the evidence before me including the wage and time record provided.

Determination

[34] The applicant's personal grievance claim is declined.

[35] I direct the respondent to pay the applicant \$623.61 gross as arrears of wages and holiday pay owed to her. PAYE is payable in this sum which is made up as follows:

\$

Wages owing for 4 hours worked on 7,14,21 & 28 August 208.00 gross

Wages owing for 8 December	104.00 gross
Holiday pay owing (6% of total earnings \$5193.50)	311.61.gross
	—————
	623.61 gross

[36] I note in respect of this award I have not allowed a deduction from wages in respect of Mrs Smillie's staff purchases. This is because there may be no deduction from wages owed without the *written* authority of the worker (S.5 Wages Protection Act 1983). Mrs Smillie accepts that she owes monies to the respondent for staff purchases and I accept her statement she will willingly settle up her account on the agreed basis on payment of the wages and holiday pay owing.

[37] I also direct the respondent to reimburse Mrs Smillie \$79.97 net for the agreed purchase by her of the file box and ledger book for the use of the business.

Costs

[38] The respondent is directed to pay to the applicant the sum of \$1000 as a contribution to her costs in bringing this matter to the Authority for resolution.

Summary of Orders

[39] The respondent is directed to pay to the applicant the sum of \$623.61 gross as arrears of wages and holiday pay owing.

[40] The respondent is directed to pay to the applicant the sum of \$79.97 net to reimburse for expenditure incurred by her by agreement with the respondent in the interests of the respondent's business.

[41] The respondent is directed to pay \$1000 net as a contribution to the applicant's costs in this matter.

Janet Scott

Member of Employment Relations Authority