

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 98
5408802

BETWEEN ALAN SMITH
 Applicant

AND KERERU INVESTMENTS
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Jenny Murphy, Advocate for the Applicant
 No appearance for the Respondent

Investigation Meeting: 16 July 2013 at Wellington

Determination: 5 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Smith was employed as a courier driver by Kereru Investments Limited (Kereru) for approximately 10½ months until his employment ended in December 2012. He reports that weekly salary payments were often underpaid or not paid at all. He claims he was not paid wages in lieu of notice or holiday entitlements, and he says he was paid at rates beneath relevant Minimum Wage Orders. Mr Smith seeks payment of all wages and monies owed to him.

[2] Mr Smith also states he was unjustifiably disadvantaged by his employer's failure to ensure; (a) his hours of work were reasonable, and (b) rest and meal breaks were available. He says he was further unjustifiably disadvantaged by a suspension and purported dismissal in November 2012 and later, unjustifiably dismissed from his

position in December 2012. He seeks reimbursement of lost wages and \$10,000 as compensation for humiliation, loss of dignity, and injury to the feelings.

The Authority's investigation

[3] The Authority convened a conference call on 11 March 2013 with Mr Smith's advocate and Mr Scott Guthrie, a director of Kereru. The parties agreed to attend mediation in the near future. An investigation meeting date was scheduled for 16 July 2013 should mediation prove unsuccessful. Timetabling for an exchange of documents was made in that event. Kereru was directed to provide wage and time records and a statement in reply within 14 days of the conference call. The above matters were recorded in a 'Notice of Direction' and 'Notice of Investigation Meeting' and sent to Kereru's registered address on 15 March 2013.

[4] The 'Notice of Investigation Meeting' advised: *"If the Respondent does not attend the Investigation Meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant"*.

[5] Despite reminders, Kereru did not comply with any of the Authority's directions.

[6] Neither Mr Guthrie nor any other representative of Kereru attended the Authority's investigation meeting on 16 July 2013. Approximately 10 minutes after the investigation meeting was due to commence Mr Guthrie was contacted by a Support Officer. He said he was in a meeting but would call back in 10 minutes. No further contact was made by Mr Guthrie. The investigation meeting proceeded at 9.30am.

Background information

[7] Mr Smith commenced his employment with Kereru on 1 February 2012, although an employment agreement was not given to him until 5 May 2013.

[8] Relevant to Mr Smith's claims, his employment agreement records the following provisions:

3. Hours

A: *The employee shall work the hours that are required to complete his or her daily duties starting at 4.30am daily.*

B: The days of the week to be worked are Monday to Saturday excluding public holidays.

4. Wages

A: The employee's weekly wages shall be based on an annual salary of \$47,000 P.A. before tax. Wages will be direct credited to the employee's nominated bank account every Wednesday night of the week.

...

8. Termination of employment

A: Six weeks written notice is required from the employee if they wish to terminate their employment. The reason for this timeframe is simply the complexity of the job and the time it takes to retrain someone else for the job.

[9] Mr Smith's work predominately involved residential deliveries. Parcels were required to be delivered on the day Kereru received them and Mr Smith says as a consequence his working hours were from 4-30am until 6pm¹.

[10] Mr Smith's evidence is that he ate lunch between "delivery drop-offs" and he was unable to take rest and meal breaks. He says that whenever he asked for assistance to conclude his daily deliveries he was told help would be available later in the day but that no support ever eventuated. By way of example, he referred to an instance in early November 2012 where he was greeted by Mr Guthrie and Kereru's Fleet Manager on return to the depot at 5.45pm, having been unable to deliver all parcels. He alleges the Fleet Manager informed him, "if someone does not go back out and deliver those parcels today then someone is not going to have a job". Mr Smith says he told Mr Guthrie that he wanted to keep his job but considered he was being underpaid for the hours he was required to work. He says Mr Guthrie was unresponsive and his concerns were ignored.

[11] On 15 November 2012 Mr Guthrie advised Mr Smith of a customer complaint. Mr Smith says he briefly told Mr Guthrie of his recollection of the matter following which Mr Guthrie told him he was suspended from work until he decided what should be done. He says four days later he received a letter signed by Mr Guthrie advising his employment had been terminated. Mr Smith reports that the following day, Mr Guthrie contacted him and asked him to return to work, which he agreed to.

¹ 4.30am to 6pm, Monday to Friday; 5 hours on Saturdays

[12] By mid-December 2012 Mr Smith says he was becoming increasingly stressed by his workload and had difficulty sleeping. He sent a text to Mr Guthrie on 12 December 2012 advising he was too fatigued to work that day.

[13] On 13 December he obtained a medical certificate from his GP which stated he would return to work on 20 December 2012. On Friday 14 December 2013 Mr Smith met with Mr Guthrie and provided him with a letter of resignation. Mr Smith sought to raise his concerns about hours of work, rate of pay, inability to take breaks and question why wages due the previous day had not been paid. Mr Smith reports that Mr Guthrie informed him that he needed to give 6 weeks' notice, and again refused to meaningfully discuss his concerns.

[14] Mr Smith attended work the following Monday on 17 December 2013. He says when Mr Guthrie arrived he approached him and said "*what are you doing here?*" Mr Smith responded stating he was "*working out the six weeks as agreed*". He says Mr Guthrie told him "*I don't require you to work today and I want your uniform returned*". Mr Smith says he took from that conversation that he was dismissed. He returned his uniform and left shortly after.

[15] Over the following three days Mr Smith contacted Mr Kereru several times to inquire why he had not been received wages from 5 December 2012 and to request wages and holiday entitlements be paid.

[16] The employment relationship problems were not resolved and on 20 December 2012 Mr Smith formally raised claims of personal grievances and arrears of wages.

Issues

[17] The Authority is required to determine the following issues:

- Is Mr Smith owed arrears of wages and holiday entitlements?
- Was Kereru in breach of Minimum Wage Orders?
- Was Mr Smith unjustifiably disadvantaged by:
 - i. the hours of work Kereru required him to work;
 - ii. Kereru's decision to suspend him on 15 November 2012

iii. Kereru's decision to dismiss him on 19 November 2012

- Was Mr Smith unjustifiably dismissed in December 2012?
- Should remedies be awarded and if so what?
- Should penalties be awarded?

Is Mr Smith owed arrears of wages and holiday entitlements?

[18] Mr Smith says he was:

- i. not paid according to the terms of his employment agreement and was underpaid. He says he is owed \$5,142.10 (net) in this regard.
- ii. not paid wages in lieu of notice and is owed \$5,423.04 (gross)
- iii. paid under Minimum Wage Orders and is owed \$2,851.40 (gross).
- iv. not paid his holiday entitlements and is owed \$3,239.36 (calculated on the basis of what he says he should have been paid between 1 February 2012 and 17 December 2012); and requests payment of \$433.84 for loss of the benefit of holiday pay associated with his notice period.

Arrears pursuant to the employment agreement

[19] Section 130 of the Act requires every employer to keep a wages and time record for each employee. Section 132 provides that an employee should not be impeded in proving claims for arrears of wages or monies owed because the employer failed to keep or produce accurate records. The Act provides that in these circumstances the Authority is entitled to accept (as I have) that claims for arrears are proved unless the employer can prove that the claims are incorrect.

[20] Mr Smith was employed for 45 weeks and 5 days. He provided copies of bank statements covering the duration of his employment. Accepting that these are the only records available to the Authority, it is immediately apparent that Mr Smith was paid sporadically, particularly in the first three months of employment, and deposit sums were variable. It is also clear that the last payment of salary was on 5 December 2012, leaving a shortfall of payment for work undertaken from that date until he was dismissed on 17 December 2012.

[21] I accept Mr Smith's calculations and find Mr Smith was underpaid the level of remuneration set out in his employment agreement. Mr Smith is owed the difference between the net pay of \$34,441.10 he should have received and the net sum of \$29,299 he actually received. Mr Smith is owed \$5,142.10 (net) as reimbursement of salary payments.

[22] I find also that Mr Smith was not paid six weeks wages in lieu of notice and that he is owed \$5,423.04 gross² for this period.

Holiday entitlements

[23] During the conference call on 11 March 2013 Mr Guthrie acknowledged that Mr Smith had not taken holidays during his employment nor had he been paid his entitlement at the conclusion of his employment. I do not accept his explanation that Kereru was entitled to withhold payment of Mr Smith's outstanding holiday pay on the basis that Mr Smith had damaged a work vehicle. Section 27(2) of the Holidays Act states that where an employee's employment has come to an end the employer must pay the annual holiday pay in the pay that relates to the employee's final period of employment.

[24] I order Kereru pay Mr Smith the sum equivalent to his holiday entitlement and accept Mr Smith's calculation of \$3,239.36 (gross).

Did Kereru Investments breach the Minimum Wage Act?

[25] The Minimum Wage Act 1983 sets out minimum terms and conditions with regard to wages. Section 6 provides the following:

6 Payment of minimum wages

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service but subject to sections 7 to 9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under the Act, shall be entitled to receive from his employer payment for his work at not less than the minimum rate.

[26] Minimum rates of pay are set by minimum wage orders. Payment by way of salary cannot be used as a mechanism to avoid the provisions of the Minimum Wage Act and/or Minimum Wage Orders.

² \$47,000 divided by 52 weeks = \$903.84. \$903.84 x 6 = \$5,423.04.

[27] Mr Smith's employment traversed Minimum Wage Orders of 2011 and 2012. In 2011 the relevant minimum rates of wages payable to an adult worker was \$520 per week and \$13 per hour for each hour exceeding 40 hours worked in a week. In 2012 the minimum rates of wages payable to an adult worker was \$540 per week and \$13.50 per hour for each hour exceeding 40 hours worked in a week. There appears to be no dispute that Mr Harding is a "worker" under the Minimum Wage Act that his work was subject to s 6 of that Act.

[28] Mr Smith says he worked 72 hours per week³. In the absence of evidence to the contrary I accept that these were the hours required to complete his duties.

[29] Mr Smith's salary of \$47,000 per annum equates to \$903.84 (gross) per week. Taking account of the hours worked, Mr Smith was paid the equivalent to approximately \$12.55 per hour. To achieve compliance with the relevant minimum wage orders, Mr Smith's weekly payments between 1 February and 31 March 2012 should have been \$936.00 (gross) per week, and between 1 April and 17 December 2012, \$972.00 (gross) per week. Mr Smith says he is owed \$2,850.40 (gross)⁴ which I accept.

The personal grievance claims

Hours of work

[30] I have previously accepted Mr Smith's evidence that his working day commenced at 4.30am and finished at 6pm. I accept also his evidence that there were no paid or unpaid breaks.

[31] While it may not be unreasonable for an employer to request a salaried employee to work extended hours from time to time, I consider Kereru's apparent expectation that Mr Smith routinely work 13 ½ hours a day, Monday to Friday, without rest or meal breaks was unreasonable. I find that the culmination of Kereru's failure to ensure that hours of work were not unreasonable, or to allow for adequate breaks, resulted in an unmanageable workload for Mr Smith and Kereru was in breach of its obligation to provide Mr Smith with a healthy and safe workplace. I accept Mr Smith's testimony that he became increasingly anxious and fatigued as a consequence of the way he was required to work by Kereru. I conclude that Kereru's actions were

³ Ibid at footnote 1.

⁴ 1 February to 31 March 2012: 45 cents x 590 hours = \$265.50 (gross); 1 April to 17 December 2012: 95 cents x 2722 hours = \$2,585.90

not, on any objective assessment, the actions of a fair and reasonable employer and were unjustified. Mr Smith was unjustifiably disadvantaged in his employment.

The suspension

[32] The law generally holds that an employer cannot suspend an employee unless there is a contractual provision within the parties' employment agreement which authorises an employer to so.⁵

[33] There are no provisions within Mr Smith's employment agreement which provide for suspension. To justify suspension in these circumstances an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue⁶. There was no evidence to suggest an exception to the general rule in this matter. I find Mr Smith was disadvantaged by Kereru's actions when he was suspended.

The first dismissal

[34] Mr Smith claims he was unjustifiably disadvantaged when he was first dismissed on 19 November 2012. Mr Smith says on 15 November 2012 he was told by Mr Guthrie of a complaint received from a client about him and informed that his conduct was regarded as serious and he could be dismissed. On 19 November he received a letter signed by Mr Guthrie which advised his employment was terminated. Without any information either to explain its position or to challenge Mr Smith's evidence I am unable to conclude that the actions Kereru took were what a fair and reasonable employer could have done at the time Mr Smith was dismissed on 19 November 2013. Section 122 of the Employment Relations Act states that nothing in the Act or an employment agreement prevents a finding that a personal grievance is of a type other than that alleged. I consider this particular claim can more fairly be described as an unjustified dismissal. However, whether Mr Smith has a claim for unjustified dismissal or unjustified disadvantage I consider the remedies are the same in this particular matter and shall return an assessment of remedies later in the determination.

Was Mr Smith unjustifiably dismissed in December 2012?

⁵ *Singh v Sherildee Holdings Ltd t/a New World Opotiki* EMC Auckland ARC 53/05, 22 September 2005

⁶ *Ibid*

[35] The employment agreement makes it clear that Mr Smith was required to give 6 weeks' notice to Kereru of his wish to terminate his employment. Mr Smith's evidence was that Mr Guthrie had insisted at the time he proffered his resignation that 6 weeks' notice was required. Equally Mr Smith was entitled to expect he would remain employed by Kereru for the duration of his notice period.

[36] In *Wellington Clerical IOUW v Greenwich*⁷ dismissal is defined as a termination of employment at the initiative of the employer. The word "dismissal" does not need to be expressly stated for a dismissal to result. I find that the combined statements by Mr Guthrie that (a) [Mr Smith] "*was not required to work that day*", and (b) "*to return [his] uniform*", were together strongly indicative of a sending away. The initiative for the ending of employment came from Kereru not Mr Smith. Mr Smith has established that he was constructively dismissed.

[37] In the absence of any information from Kereru to support a proposition that its decision to end Mr Smith's employment on 17 December 2013 was fair and reasonable I find Mr Smith was unjustifiably dismissed.

Remedies associated with personal grievance claims

Reimbursement of money lost as a result of the grievances

[38] Section 123(1)(b) provides that where the authority determines that an employee has a personal grievance it may order the employer to reimburse a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.

[39] As regards Mr Smith's personal grievance claims associated with November 2012 I find that no wages or other money was lost by Mr Smith. Mr Smith's bank statement reflects payment made on 21 November for the previous weeks' work despite the period of his suspension, and although he was purportedly dismissed on 19 November 2012 Mr Smith was invited back to work on 20th November 2012 and it appears he was paid without deduction during this period.

[40] With respect to remedies connected to Mr Smith's unjustified constructive dismissal in December, I do not accept any argument that by tendering his resignation prior to being unjustifiably dismissed Mr Smith is precluded from seeking reimbursement of wages beyond the contractual notice period on the basis that Mr

⁷ [1983] Sel Cas 95

Smith did not intend to work beyond that period. I consider Mr Smith's resignation was a direct consequence of a breach of duty by Kereru to (a) ensure Mr Smith worked safe and reasonable hours, (b) with both paid and unpaid rest and meal breaks, (c) on at least minimum wage rates. I find Mr Smith's resignation was caused by Kereru and was reasonably foreseeable⁸. There is no evidence to suggest Mr Smith contributed to the situation which led to his personal grievance. I find Mr Smith is entitled to reimbursement of \$11,748.62 (gross); the sum equal to 13 weeks' lost wages⁹.

Compensation

[41] In accordance with Mr Smith's claims for remedies I have taken a global approach to an assessment as to compensation for hurt and humiliation for his personal grievance claims. I accept Mr Smith's evidence that he was negatively impacted by Kereru's actions as regards the way he was required to work, the events of November 2012 and by the circumstances surrounding his departure from Kereru in December. I order Mr Smith be paid \$7,000 as compensation for humiliation, loss of dignity, and injury to the feelings.

Should a penalty be imposed?

[42] Mr Smith's claim for penalties was unspecified.

[43] Section 130(2) of the Act requires an employer, if requested by an employee or their authorised representative, to provide access to an employee's wage and time records.

[44] There is no dispute that Kereru did not provide Mr Smith with time and wage records despite several requests to do so¹⁰. As noted the Authority reiterated that request during a conference call and subsequent Notice of Direction. I have no doubt that Kereru's omission in this respect impeded Mr Smith's ability to quantify his claims and I find Kereru's failure was deliberate. In these circumstances I consider it appropriate to order a penalty against Kereru and conclude \$1,500 is appropriate. The Act provides that penalties are to be paid to the Crown however s. 136(2) allows the Authority to order payment of a penalty to any person. I find Mr Smith was directly affected by Kereru's failure actions and I order the whole of the penalty be paid to Mr Smith.

⁸ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

⁹ Section 128(2) Employment Relations Act

¹⁰ For example: Mr Smith's correspondence of 20 December 2012 and 14 January 2013

Interest

[45] Clause 11 of Schedule 2 of the Employment Relations Act gives the Authority power to award interest in matters involving the recovery of money at the rate prescribed under section 87(3) of the Judicature Act 1908. The prescribed rate is currently 5% per annum.

[46] Mr Smith requests interest is awarded on wage arrears. I accept that Mr Smith was deprived from the use of money he was entitled to be paid as wages during his employment. I award Kereru pay 5% interest per annum on arrears of wages calculated as \$13,416.52 from the date of his dismissal until paid in full.

Costs

[47] Mr Smith's actual costs were \$2877.56 (GST inclusive). The investigation lasted approximately two hours. I accept that Mr Smith's advocate attended the investigation meeting having undertaken appropriate preparation on an assumption that representatives of Kereru may appear at the Authority's investigation meeting. Kereru is ordered to pay Mr Smith \$1,000 as contribution towards his costs.

Summary of Orders

[48] Kereru is ordered to pay Mr Smith the following:

- (a) **\$13,416.52** as arrears of wages comprising:
 - \$5,142.10 (net) as reimbursement of unpaid salary payments,
 - \$5,423.04 (gross) as reimbursement of 6 weeks' wages in lieu of notice;
 - \$2,851.40 (gross) as reimbursement for wages owed pursuant to the Minimum Wages Act; and
- (b) interest at 5% per annum on the full sum at [48](a) calculated from 17 December 2012 until the date this sum is paid to Mr Smith in full; and
- (c) **\$3673.20** (gross) for reimbursement of holiday entitlements comprising \$3,239.36 as the sum equal to accrued holiday entitlements, and \$433.84 as compensation for the loss of

benefit¹¹ of holiday pay associated with 6 weeks' wages in lieu; and

- (d) **\$11,748.62** (gross) as reimbursement for 13 weeks lost wages pursuant to s. 128(2) of the Employment Relations Act; and
- (e) **\$7,000** as compensation pursuant to s. 123(1)(c)(i) of the Act; and
- (f) **\$1,500** as a penalty to be paid to Mr Smith for failure to provide wage and time records; and
- (g) **\$1,000** as contribution to costs.

Michele Ryan
Member of the Employment Relations Authority

¹¹ Pursuant to s. 123(c)(ii)