

Attention is drawn to the order prohibiting publication of certain information in this Determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 189
3036616

BETWEEN DAMIAN STONE
Applicant

AND AURA FX (NZ) LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Guido Ballara, counsel for the Applicant
No appearance by the Respondent

Investigation Meeting: 27 March 2019 at Auckland

Submissions Received: 27 March 2019 from the Applicant
No submissions received from the Respondent

Date of Determination: 1 April 2019

DETERMINATION OF THE AUTHORITY

- A. Within 14 days of the date of this determination the Respondent, Aura FX (NZ) Limited (Aura) is ordered to pay the Applicant, Mr Damian Stone, the sum of \$16,666.60 gross being the balance of the 2 month notice period owing to him as at the date of the termination of his employment.**
- B. Within 14 days of the date of this determination Aura is ordered to pay Mr Stone, the following sums:**
- (i) \$5,407.17 gross being unpaid annual leave as at the date of termination, (ii) \$1333.33 gross being holiday pay which accrued due during the balance of the 2 months' notice period, and (iii) \$769.23 gross for unpaid statutory holidays.**

- C. An order pursuant to clause 11, Schedule 2 of the Act for interest on the judgment sums set out in A and B above at the rate of 5 per cent per annum calculated from 26 January 2017 until payment.**
- D. Within 14 days of the date of this determination, Aura is to reimburse Mr Stone the sum of \$71.56 being the filing fee.**
- E. Costs are reserved.**

Failure by Aura to comply with Authority's directions

[1] Mr Stone filed a statement of problem in the Authority on 21 August 2018. The respondent, Aura, filed its statement in reply on 7 September 2018. On 15 November 2018 a conference management call was held with counsel for Mr Stone and with Kevin Mayne, Director of Aura.

[2] It was agreed between the parties that an investigation meeting would be held on 27 March 2019. Alternatively, if the Authority decided that the respondent's witnesses were required to attend the investigation meeting in person, the date of Wednesday, 19 June 2019 was set aside.

[3] Immediately following the conference management call, the Authority issued its directions. The Authority directed that Aura was to provide Mr Stone all the documents it was relying on by 11 January 2019. Mr Stone was directed to prepare a common bundle of documents by 25 January 2019. Mr Stone's witness statements were directed to be lodged in the Authority by 31 January 2019, and Aura's witness statements were directed to be lodged in the Authority by 28 February 2019.

[4] The Authority's directions were sent by email to both parties by the Authority on 15 November 2018.

[5] Mr Stone provided his documents and witness statements, as agreed with the Authority.

[6] Aura failed to comply with the Authority's directions and failed to provide its documents. On 23 January 2019, Mr Mayne, for Aura, sent an email to the Authority confirming that he had hired a lawyer to take over the preparation of the bundle of

documents. Mr Mayne was requested to urgently provide his lawyer's details so that the Authority could communicate directly with him or her. Mr Mayne failed to provide details as requested.

[7] On 1 February 2019, the Authority communicated with both parties that it intended holding the investigation on 27 March 2019. Mr Stone agreed to the date. Aura did not respond.

[8] As at the date of the investigation meeting on 27 March 2019, Aura has failed to provide its documents and has failed to provide its witness statements in accordance with the Authority's directions.

Non-appearance by Aura at the Authority's investigation meeting

[9] There was no appearance on behalf of Aura at the Authority's investigation meeting.

[10] The Authority has the power to proceed if a party fails to attend an investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

12. Power to proceed if any party fails to attend

If, without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented.

[11] No good cause has been shown for the failure to attend the Authority's investigation meeting today. Aura has failed to comply with the Authority's directions and has not contacted the Authority to explain its absence from the investigation meeting today.

[12] In view of the above efforts to contact Aura and its failure to file documents, as agreed, or attend the investigation meeting today, the Authority is satisfied it may continue to investigate the matter.

Employment relationship problem

[13] Mr Stone was employed by Aura in the full-time role of Senior Trader, Dealing Desk. Mr Stone resigned on 12 October 2016 giving three months' notice of resignation, with effect on 26 January 2017. The parties exchanged emails and engaged in discussions about Mr

Stone's resignation and the period of notice. Mr Stone says Aura agreed to pay him three months' salary. He was not required to work out his period of notice.

[14] Aura failed to pay Mr Stone the period of three months' salary as agreed. It paid him one month's salary in lieu of notice. Mr Stone seeks payment of the balance, totalling \$16,666.60 gross.

[15] Mr Stone also seeks unpaid holiday pay, which he has calculated as \$5,407.17 gross owing as at 14 December 2017 together with payment of statutory holidays falling on Auckland Anniversary Day and Waitangi Day, 2017.

[16] Mr Stone seeks the payment of interest by Aura on all sums owing to him.

[17] Mr Stone requests that the Authority exercise its discretion and impose a penalty on Aura under s134A of the Act for its failure to engage in the investigation.

Statement in reply

[18] The statement in reply filed by Aura claims that Mr Stone abandoned his position. It claims that he is therefore not entitled to the payments he is seeking. There was no evidence advanced by Aura in support of this claim. Various other claims were made by Aura in its statement in reply. These claims are not made out in the evidence available to the Authority and are accordingly dismissed.

Order prohibiting publication of certain information in this determination

[19] At the commencement of the investigation meeting, counsel for Mr Stone requested the Authority issue an order prohibiting publication of the name of the Director- trading , Mr X, to whom Mr Stone initially reported, as he was not directly involved in the employment relationship problem being investigated. There was no opposition by Aura to this application. I am satisfied that an order permanently prohibiting the publication of the name of Mr X or any details identifying him be made and so order.

The investigation meeting

[20] The investigation meeting took half a day in the Authority. Mr Stone filed a witness statement, as did Mr Simon Lance, a barrister who represented Mr Stone in respect of his employment by Aura. There was no appearance on behalf of the respondent and no witness statements were filed by it.

[21] Mr Stone and Mr Lance each gave evidence before the Authority and affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional information and comments and did so.

[22] As permitted under s 174 of the Act, this determination does not set out all the evidence and submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matter.

Issues

[23] The issues for determination by the Authority are as follows:

- (a) Is Mr Stone entitled to payment by Aura of the balance of his three month notice period?
- (b) Is Mr Stone entitled to the payment of holiday pay and statutory holidays?
- (c) If the above amounts are owing to Mr Stone, is he entitled to interest?
- (d) Is Aura liable to the imposition of a penalty under s134A(1) of the Act?

Issue (a): Is Mr Stone entitled to payment by Aura of the balance of his three month notice period?

Employment by Aura

[24] Mr Stone was employed by Aura as a Senior Trader. He was employed under an individual employment agreement dated 20 February 2016. The employment agreement was signed on behalf of Aura and by Mr Stone on 20 February 2016. Mr Stone's employment commenced on 21 March 2016.

Aura

[25] Aura is a New Zealand incorporated company with a registered office in the PWC building in Auckland. There are two directors, one of which is Mr Kevin Mayne. Aura is in the business of trading foreign exchange (FX) markets.

Mr Stone's role

[26] Mr Stone's role was to manage Aura's business relationships with existing clients, and to liaise with local banks, traders and management to facilitate the introduction of new clients. His position covered proprietary trading. Part of Mr Stone's job involved trading FX

markets to generate a profit for Aura. In his role he had access to Bloomberg, a global provider of 24 hour financial news and information in order to obtain price feeds, charting and general market data.¹

[27] Mr Stone worked out of Aura's Auckland office in the PWC building from Tuesday to Thursday each week. On Mondays and Fridays he worked from his home in Wellington. This was an arrangement agreed to by the Director to whom Mr Stone reported, and Mr Mayne. The arrangement also included that during school holidays Mr Stone was able to work from Wellington rather than travel to Auckland, which is what he did. While working from home, it was agreed that Mr Stone could complete work tasks using his laptop and his Bloomberg security access.

[28] During his employment, Mr Stone provided the Director to whom he reported, Mr X, with twice daily updates in relation to the work he was performing.

[29] On 4 October 2016, Mr X's employment ended. From that time, Mr Stone reported to Mr Sean Martin, business development manager. Mr Stone continued to provide twice daily updates via email, as he had previously, but now to Mr Martin. Mr Stone worked entirely from his home in Wellington during this time.

Events leading to Mr Stone's resignation

[30] On 12 October 2016, Mr Stone received a notification from Bloomberg that his account was to be transferred to another person. This meant the main tool used by Mr Stone to perform his work for Aura would no longer be available to him. Mr Stone immediately sent an email to Mr Martin, asking what had happened. Mr Martin responded that he and Mr Mayne wished to meet with him to discuss the matter. Mr Stone asked Mr Martin and Mr Mayne for an agenda before meeting and for details of what the meeting was to be about.

[31] Mr Mayne's response was that they wished to discuss his "absenteeism from work in the last three weeks". The meeting was described by Mr Mayne to be an investigation meeting. Mr Stone became concerned about the allegations by Mr Mayne and became concerned that

¹ Bloomberg L.P. provides financial software tools such as an analytics and equity platform, data services and used for financial companies and organisations through the Bloomberg terminal (via its Bloomberg professional service), its core revenue generating product. ... In 2014, Bloomberg L.P. launched Bloomberg Politics, a multi-platform media property that merged the company's political news teams ... https://en.wikipedia.org/wiki/bloomberg_L.P.

Mr Mayne was attempting to push him out of his job. Mr Stone sought representation from Mr Lance, barrister.

Resignation

[32] On 26 October 2016, Mr Lance sent a letter to Mr Mayne on behalf of Mr Stone. In the letter to Mr Mayne, Mr Lance referred to Mr Stone's concerns about the way in which he had been treated. Mr Lance stated that in view of this treatment, Mr Stone was of the view that he had no option but to resign pursuant to clause 17 of his employment agreement. Mr Lance's letter to Mr Mayne confirmed that Mr Stone was giving three months' notice of resignation from his employment by Aura. Mr Lance asked Mr Mayne whether he wished Mr Stone to work the three month notice period out or whether Aura wished to pay Ms Stone three months' salary in lieu of notice.

Notice period

[33] On 31 October 2016, Mr Lance received a response from Aura's then solicitors, Holland Beckett, claiming among other things that Mr Stone had abandoned his employment. The letter went on to state that Aura accepted Mr Stone's resignation but only on the basis of a shorter period of one month's notice. The letter went on to state that if this was not acceptable to Mr Stone, Aura would continue its "employment investigation".

[34] Mr Lance responded to the letter from Holland Beckett, refuting claims that Mr Stone had abandoned his employment and confirming that Mr Stone would not accept a payment of less than three months' notice and that Mr Stone's notice period was three months.

[35] On 30 November 2016 at 11:17am Mr Mayne sent an email to Mr Lance accepting Mr Stone's resignation and agreeing to pay him three months' salary. The letter stated:

We are in agreement to accept his resignation and pay him three months. We will require the following to process his final pay:

1. The company computer is returned to the office unaltered.
2. The office key card and key in his possession are returned.
3. The trading programme will be successfully transferred to the office computer (this can be done remotely via Team Viewer). We intend to make his final pay December 30th but will be willing to process the final payment sooner when we have received the above items.

[36] Mr Lance responded to Mr Mayne by email on 11 December 2016 at 3:01pm. He confirmed his understanding that the computer, office key card and key had been couriered to Mr Mayne's office. The email concluded as follows:

We propose that the agreed three month payment (26 October through to 26 January "plus holiday pay") be paid into my instructing solicitor's trust account. Upon receipt of those funds I undertake to release the laptop, access card and key. Please advise.
Regards,
Simon Lance

[37] Mr Mayne did not reply following this exchange of emails. On 18 January 2017, Mr Mayne responded by email. He claimed that Mr Stone had abandoned his position, effective 29 November 2016. There were further email exchanges but the parties were unable to resolve issues between themselves. Mr Stone was not paid the balance of his notice period.

[38] On 12 May 2017 the parties attended mediation, but this did not resolve the matter. A statement of problem was finally filed when the parties were unable to resolve matters between them.

[39] Mr Stone says that there was an agreement reached with Mr Mayne that he would be paid out his three months' notice. Aura paid Mr Stone one month of his three months' notice on 1 December 2016. Therefore, Mr Stone says he is owed the balance of two months pay. Mr Stone's salary was \$100,000 gross per annum, paid monthly. Two months equates to \$16,666.60 gross. On the evidence available, I consider that Aura owes Mr Stone the unpaid balance of the notice period totalling \$16,666.60 gross. The answer to issue (a), is "yes".

Order

[40] I order Aura to pay Mr Stone the sum of \$16,666.60 gross within 14 days of the date of this determination.

Issue (b): Is Mr Stone entitled to the payment of holiday pay and statutory holidays?

Holiday pay

[41] Mr Stone claims that he was not paid holiday pay owed to him. Mr Stone requested employment records from Aura to assist with the calculation of holiday pay. The records were not provided. On 5 December 2017, Mr Stone's counsel wrote to Aura's directors and

asked them to disclose "...as a matter of urgency, a complete set of wage and time records, and holiday and leave records.... These were not provided.

[42] The Authority's directions of 15 November 2018 requested "... relevant evidence and "...wages and time records...financial, business and tax records..."

[43] Mr Mayne did not comply with the Authority's directions to file these employment records, none were provided to the Authority.

[44] Mr Stone provided the Authority with a payslip from payroll showing annual leave owing to him as at 14 December 2017 as being \$5,407.17 gross.

[45] Mr Stone is entitled to holiday pay which accrued due during the balance of the 2 months' notice period. Mr Stone is entitled to holiday pay calculated at the rate of 8% of his salary of 2 months (being \$16,666.60 gross a month). Holiday pay for that period amounts to \$1333.33 gross.

Order

[46] I order Aura to pay Mr Stone the sums of \$5,407.17 gross and \$1333.33 gross within 14 days of the date of this determination.

Statutory holidays

[47] Auckland Anniversary Day and Waitangi Day statutory holidays fell within a period in which Mr Stone was entitled to holiday pay. Mr Stone is entitled to payment of both statutory holidays. Mr Stone has calculated the entitlement to be \$769.23 for both days.

Order

[48] I order Aura to pay Mr Stone the sum of \$769.23 gross for statutory holidays within 14 days of the date of this determination.

[49] The answer to issue (b) is "yes".

Issue (c): If the above amounts are owing to Mr Stone, is he entitled to interest?

Interest

[50] Mr Stone seeks interest on all amounts due and payments owing to him. Section 84 of the Holidays Act 2003 confers a power on the Authority to award interest on unpaid holiday pay or leave pay.

[51] Clause 11, Schedule 2 of the Act confers a power on the Authority to award interest, at the rate prescribed by the Judicature Act 1908 in respect of any judgment given.

[52] The answer to issue (c) is “yes”. I order interest at the rate of five per cent (5%) per annum on the entire amount owing in respect of unpaid salary for the balance of the notice period and on the holidays and public holidays from 26 January 2017 until payment.

Issue (d): Is Aura liable to the imposition of a penalty under s134A(1) of the Act?

[53] S134A confers a power on the Authority to impose a penalty, in circumstances where a party has, without sufficient cause, obstructed or delayed an Authority investigation including failing to attend an investigation meeting.

[54] The details of Aura’s failure to engage in the Authority’s process has been set out in detail earlier in this determination. The Authority will consider whether it is appropriate to impose a penalty of its own volition, in the circumstances.

[55] Before considering this, the Authority seeks a memorandum to be lodged by Mr Stone addressing the issue of penalty under s134A. Aura has 14 days from receipt of the memorandum in which to respond.

Compliance orders and a penalty by the Authority under s134A of the Act

[56] Counsel for Mr Stone has requested the Authority to make compliance orders in respect of the payments due to Mr Stone. The Statement of problem did not seek compliance orders against Aura and in my view it is not appropriate for the Authority to issue compliance orders at this juncture. Under s137 of the Act, if a person has not “observed or complied with (b) any order, determination...made by the Authority”, the Authority may by order require compliance by a party.

[57] If Aura fails to comply with this determination, Mr Stone may seek compliance orders against it. Counsel for Mr Stone has signalled to the Authority that any such application for compliance will include an application against the directors of Aura, Mr Kevin Mayne and Mr Aadil Basha Akbar, to ensure the payments are made. Any such application is to be on notice and the directors will have the opportunity to respond to it in the normal way.

Costs

[58] Mr Stone has 14 days in which to file a memorandum as to costs. Aura has 14 days in which to file a memorandum as to costs in reply.

Certificate of determination

[59] I direct that pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Mr Stone be provided with a certificate of determination, sealed with the seal of the Authority, recording respectively that Aura is ordered within 14 days of the date of this determination to pay Mr Stone the following sums:

- (a) \$16,666.60 gross being the unpaid notice period;
- (b) \$5,407.17 gross and \$1,333.33 gross in holiday pay;
- (c) \$769.23 gross for unpaid statutory holidays.

[60] Interest is to be paid by Aura at the rate of 5 percent per annum on the judgment sums above from 26 January 2017 to the date of payment.

[61] Aura is to reimburse Mr Stone within 14 days of the date of this determination the sum of \$71.56 being the filing fee.

Anna Fitzgibbon
Member of the Employment Relations Authority