

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Rachel Tan (Applicant)
AND United Media (NZ) Limited (Respondent)
REPRESENTATIVES Applicant in person
Brian Spong for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 1 March 2007
DATE OF DETERMINATION 14 March 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant worked as a graphic designer for the respondent under the terms of an employment agreement in force from 19 April 2004. The respondent sells and promotes an on-line business and trade directory for New Zealand and other South Pacific nations. The applicant's duties included the development and administration of the directory webpage.

[2] From July 2006 her fortnightly wages and expenses were not paid in full. By November 2006 the applicant believed she was owed back pay totalling \$11,450. She requested urgent payment.

[3] She lodged a statement of problem in the Authority on 21 November 2006.

[4] The respondent did not file a statement in reply within the required statutory period. Following contact from a Support Officer of the Authority, a director of the respondent company wrote to the Authority stating that the matter had been settled.

[5] Shortly thereafter the applicant contacted the Authority to advise that two cheques provided by the respondent had "bounced". She advised that the matter was not settled and she wanted the Authority's investigation to proceed.

[6] The respondent subsequently engaged an advocate. Following a telephone conference with the parties, a statement in reply was lodged on 27 February 2007.

[7] The statement acknowledged arrears of wages to the applicant totalling \$17,550.64 to 24 January 2007 but disputed some expenses and a penalty claimed by the applicant.

[8] Since filing her claim the applicant has ceased working for the respondent. The respondent claims that the applicant has deliberately prevented its access to the company website that she was developing. The respondent says this has affected its business. It also seeks return of files and computer equipment in the applicant's possession.

[9] In view of the respondent's delayed response and apparent failure to make good on an earlier statement that the matter was settled, I considered that mediation would not contribute

constructively to resolving this matter and promptly scheduled an investigation meeting. At the investigation meeting I heard sworn evidence from the applicant, and the respondent's directors, Mr Ivan Sulusulumaivasa and Mrs Katie Sulusulumaivasa.

The wage claim

[10] The applicant says she is now owed \$22,662.12. This includes an additional seven fortnightly wage payments due between 1 November 2006 and 24 January 2007 at an agreed increased rate of \$2173.17. This total includes the disputed expense and penalty claims.

[11] The respondent says that the applicant has not accounted for some cash payments of arrears made to the applicant between October 2006 and January 2007.

[12] It says four cash payments totalling \$8000 were either paid directly to the applicant in cash or as a cash deposit to her bank account. It did not produce any evidence confirming such payments – such as entries in cash books, deposit slip stubs or bank account entries.

[13] The applicant was able to produce an envelope with a handwritten note Mrs Sulusulumaivasa confirmed making, said to record a \$1000 cash payment on 21 January 2007. A table produced by the company suggests there was a \$2000 payment in that month.

[14] In light of the unsatisfactory documentary evidence of the respondent on whether an additional \$8000 in cash payments was made, I prefer the evidence of the applicant that such payments were not made.

[15] Similarly I prefer the applicant's evidence that an agreed increase in her fortnightly pay was to apply from November 2006 rather than December 2006.

[16] However I do not accept the applicant's claim for fortnightly wages during January 2007. Although the respondent accepted liability for those payments in its calculation of total arrears due, it emerged during the investigation meeting that the applicant had effectively stopped working for the respondent by late November 2006 when her long standing concerns about the level of wages arrears came to a head and she lodged her application in the Authority. She was away in Malaysia on holiday in December 2006. That was a period of annual leave for which she was entitled to be paid. In October and November 2006 she was still working actively on the on-line directory website, adding more than 100 clients' information. However in January she did, by her own account, only "a little bit" of work for the respondent and accepted on further questioning that there was not an employment relationship by that point. I find that the applicant effectively resigned by the end of November. Accordingly the amount of \$4346.32 is to be deducted from the applicant's claim, being the amounts sought for fortnightly payments otherwise due on 10 and 24 January 2007.

The expenses and penalty claim

[17] The respondent accepts that wages arrears owed to the applicant properly included expenses of \$200 a month for five months from June to October 2006 totalling \$1000 and a further \$1000 expenses incurred during a visit by the applicant to Malaysia.

[18] However it disputes an expenses claim of \$3928 for two airlines tickets to Malaysia. The applicant says this is payment for a holiday she was offered as a bonus. Mr Sulusulumaivasa accepts that he agreed to a request from the applicant to pay for a holiday in Christchurch. The applicant later decided she would prefer to go to Malaysia. I do not accept there was any offer or agreement for the respondent to meet the cost of airfares to Malaysia, which accordingly must be deducted from the total of the applicant's claim.

[19] She has also claimed \$704 as a "10% penalty" on wage arrears accrued to October 2006. Mr Sulusulumaivasa told me that he had agreed to pay that amount. Accordingly I accept it as part of the total amount owed to the applicant.

[20] Initially in the investigation meeting the respondent disputed expenses for computer and printing equipment purchased on the company's behalf by the applicant and totalling \$900. However Mr Sulusulumaivasa then accepted that these were legitimate costs and I have not deducted them from the applicant's claim.

The website issues

[21] The respondent seeks an enquiry into damages and a penalty for breach of good faith for what it says were deliberate actions by the applicant to block access to the company's website. Mr Sulusulumaivasa alleges that such actions were to pressure the respondent to pay its wages arrears. He says that the applicant told him this by using words to the effect of "*no wages, no website*". He says that it was embarrassing to him and damaging to his business for clients and potential clients to visit the website and find not an on-line business directory as promised but instead a notice saying "*Under constructions (sic). Sorry out of service until further notice*".

[22] Such a notice was on the webpage as of 8 February 2007 and the applicant accepts she posted that notice. By 28 February 2007, following correspondence to the applicant by the respondent's advocate, the webpage was restored. The applicant told me that she had restored the webpage as it was in 2006 but the respondent complains that links to client websites are not in place. On accessing the website myself, shortly after the investigation meeting, I found there were operating links to some client entries but not others, although it was not clear that all clients had websites to link to in any event.

[23] The applicant also produced evidence from the company payment records showing that the respondent had considerable delays in paying the invoices of its web service provider. However Mrs Sulusulumaivasa, who was responsible for paying the invoices and accepted they were paid late through 2006 and early 2007, denies that late payment would have any effect on access to the website.

[24] During the meeting the applicant confirmed that the respondent had the current required user name and password for its directors or agents to access the website for the purpose of administration and continued development.

[25] On balance, I accept that it is possible that the applicant did deliberately 'take down' the respondent's website in recent months, using her role as website administrator and developer to do so. However, the respondent has not substantiated what those actions were and has not provided any evidence that any actual damage resulted. In all the circumstances I decline to require any further enquiry into damages or to order the penalty payment sought.

The computer, files and company materials

[26] The applicant did her work for the respondent from her home. She acknowledged that had in her possession company equipment and files. This included paper files; compact discs of company information, files and software; a computer; an additional external hard drive; screen, keyboard, printer and scanner.

[27] I now record the oral order I made at the conclusion of the investigation meeting for the applicant to return this material to the respondent. The applicant was ordered to ensure that all material and equipment belonging to the company and held by her was in good order and made available for collection by the respondent within seven days of the investigation meeting. The applicant was to prepare a list of the material and equipment she was returning. This list was to be checked and signed by a neutral party that the respondent was to arrange to collect the equipment and material from the applicant's home.

[28] The applicant confirmed to me that she was able to meet the terms of this order and undertook to do so. I have had enquiries made since then and understand that while neither party has complied precisely with the requirements of this order, the applicant has delivered the materials and equipment to a third party for collection by the respondent.

Determination

[29] For the reasons set out above I find that the applicant is entitled to arrears of wages and expenses totalling \$14,388 (net). This includes reimbursements for expenses comprising one expense claim of \$1000 accepted by the respondent for "Malaysian expenses", an additional \$1000 expenses at \$200 a month for the months of June to October 2006, and \$900 for computer equipment and accessories purchased by the applicant on behalf of the respondent. It also includes the payment of the \$704 accepted by Mr Sulusulumaivasa as a penalty owed on arrears to October 2006. The remainder of \$10,784 (net) comprises arrears of wages.

[30] The respondent, through its representative Mr Spong, applied for an order under s131(1A) of the Act that payment of these amounts be made by instalments of \$2000 a month. His instructions were that the company had cash flow problems. No verified information on the company's current income, outgoings and overall financial position was presented. Mr Sulusulumaivasa told me this information was "*with the accountant*".

[31] On the information available to me I am not satisfied that the financial position of the company requires an order for payment by instalments. Even if an order for instalments were to be made, fairness would require this include an order for interest at commercial rates throughout the payment period. That would leave the company in little better position than immediately borrowing the money commercially to pay its debt to the applicant. The money owed to the applicant spans the period from July to November last year and she is entitled to that money without further delay.

[32] Further I consider that the applicant is entitled to interest on the amount owed through the three months of December 2006 to February 2007 when there has been no real dispute that she was owed a considerable amount. I exclude the earlier agreed 'penalty' payment of \$704 from the calculation for this purpose. Under Schedule 2 clause 11 of the Act I have calculated interest on the 90-day bill rate plus one per cent. Accordingly I award interest on the amount of \$13,684 at the rate of 8.88 per cent for three months, which I calculate to be the amount of \$303.

[33] The applicant should be paid all amounts confirmed or awarded to her within 28 days of this determination.

[34] During the investigation meeting the applicant sought to amend her claim to include a payment for compensation for the distress of delay in having her wages and expenses paid. On the basis that her claim was filed as a wage recovery action and not a personal grievance, I am not able to award such a remedy.

Costs

[35] The applicant represented herself in this matter so there is no order for costs. However she is entitled to reimbursement of her filing fee of \$70.

Summary of orders

[36] Within 28 days of the date of this determination, the respondent is to pay to the applicant the following amounts in full:

- (i) \$13,684 for accrued wages and expenses; and
- (ii) an agreed 'penalty' of \$704 on wages owed to October 2006;
- (iii) \$303 in interest for the period December 2006 to February 2007; and
- (iv) \$70 in reimbursement of her filing fee.

