

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 618
3059554

BETWEEN

MARIA VARELA
Applicant

AND

ALFONSO RESTAURANTS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
Mahmood Raza and Brad Miller, representing the Respondent

Investigation Meeting: 16 October 2019 at Auckland

Determination: 30 October 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Maria Varela, claims that she was unjustifiably dismissed by the Respondent, Alfonso Restaurants Limited (ARL).

[2] Ms Varela also claims that she is owed unpaid wages, unpaid notice period, and unpaid holiday pay entitlement.

[3] ARL denies that Ms Varela is owed any monies and claims that she was paid all entitlements owing to her.

The Authority's investigation

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[5] Ms Varela's husband, Mr Alfonso Mayorga, established ARL in September 2014. ARL was a restaurant employing a number of employees which varied between 14 – 20 employees during the period September 2014 until it ceased trading in March 2018 (the Restaurant).

[6] In 2015 Mr Alistair Hutchinson was appointed a director of ARL and the increased shareholding of 50,000 shares was split between Mr Mayorga as the majority shareholder (30,000 shares) and Federal Pacific Group Limited (FPGL) as the minority shareholder (20,000 shares).

[7] Mr Mayorga was the Executive Chef. Ms Varela was the Executive Manager, responsible for various operational matters including basic bookkeeping and payroll which she completed with the ARL software.

[8] Ms Varela was employed as Executive Manager in April 2015 pursuant to an individual employment agreement which she had signed and dated on 13 April 2015 (the Employment Agreement) above a declaration which stated:

I, Maria Teresa Carrasco Varela, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

[9] The Employment Agreement provided that:

6.1 The parties agree that the Employee's hours of work shall be set by the employer in advance in accordance with a roster.

7.4 The Employee shall be paid according to an hourly rate which shall be \$25 per hour. The Employee's pay shall be paid weekly on Wednesdays into a bank account nominate by the employee.

8.1 Longer Form Clause on Annual leave reflecting the entitlements in the Holidays Act.

11.2 The Employer may terminate this Agreement for cause, by providing two months' notice in writing to the employee.

13.1 The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.

[10] Mr Mahmood Raza, Accountant, said ARL was an investment for FPGL and whilst Mr Mayorga and Ms Varela had operational control of ARL, Mr Hutchinson represented the interests of FPGL which exercised a financial overview.

[11] The Restaurant was experiencing serious financial difficulties as a result of its unsuccessful performance and Mr Raza said he had been instructed by Mr Hutchinson and FPGL to work with Mr Mayorga and Ms Varela to try to improve its financial performance.

[12] Mr Raza said that he had examined the financial records of ARL initially to examine what liabilities existed, and he noted that no liabilities had been recorded in respect of employee wages.

[13] Mr Brad Miller, Accountant, said that his role included MYOB payroll coding and GST initially but he had become increasingly involved in operational matters latterly.

[14] Ms Varela said that on occasion due to cash flow problems she and Mr Mayorga had paid employees wages from their personal funds and that she did not pay herself any wages, although she recorded the relevant wage amount due to her in the wage and time records, and paid the appropriate amount of PAYE on the wage amount that should have been paid to her.

[15] Mr Miller said that he had checked the wage and time records when he became aware that Ms Varela was claiming she had not been paid correctly for the hours she had worked, but he had been unable to identify any shortfall in such payments utilising the IRD, MYOB and pay records for Ms Varela.

[16] Ms Varela said that she had been informed by Mr Mayorga on 8 March 2018 that ARL would be no longer trading and her last day of employment would be 11 March 2018.

[17] Ms Varela said she had been aware for some time that the Restaurant was likely to close due to its poor performance. Although some new operational ideas had been tried by her and Mr Mayorga as suggested by Mr Raza, these had not proved successful.

[18] Shortly after being told that ARL was to cease trading she had been asked to attend a meeting on 13 March 2018 to witness the resignation of Mr Mayorga as director of ARL and the transfer of his shareholding in ARL to FPGL.

[19] Mr Mahmood Raza said that he had been present at a meeting between Ms Varela, Mr Mayorga, and Mr Hutchinson held on 13 March 2018 in his professional capacity of Accountant. The purpose of the meeting was to accept the resignation of Mr Mayorga as a director and to transfer his shares to FPGL.

[20] During the meeting Mr Raza said it had been agreed that Ms Varela and Mr Mayorga would:

- receive their respective salaries up until 31 March 2018 by way of a notice period;

- be paid an inclusive amount of \$30,000 and that neither would have any claims of salaries, holiday pay, fees or any other claim;
- provide log-in details for social media sites, the restaurant email account and company website;
- provide any information required to finalise the financials of the company and filing of tax returns for FY 2018; and
- Any proven claims from suppliers or employees would be deducted from the \$30,000;
- All physical company-owned assets stored in their garage and storage would be returned to the restaurant;

[21] Ms Varela said she had merely been a witness in the meeting and did not accept that the sum of \$30,000.00 applied to her.

[22] The sum of \$30,000.00 was paid in two instalments, the first on 14 March 2018 and the second on 6 April 2018. This was set out in an email dated 4 April 2018 from Mr Brad Miller of Federal Pacific Group Limited.

[23] Ms Varela denied that she had agreed to the settlement which she said had purely related to Mr Mayorga. Mr Mayorga confirmed his understanding which was that the \$30,000.00 payment related purely to him and the transfer of his shareholding in ARL.

[24] Mr Raza said that ARL had been making a loss for a significant period of time and was insolvent without the financial injections from FPGL which ensured employees, the IRD and other creditors were paid. These monetary injections by FPGL had been necessary to provide the monies to ensure that ARL met its obligations as a company. The shares in ARL were consequently considered to be of nil financial value and the payment to Mr Mayorga and Ms Varela of \$30,000.00 had been a good-will payment and made as a resolution of their employment entitlements.

[25] Mr Raza said that Ms Varela had agreed at the meeting held on 13 March 2018 to the payment of \$30,000.00 as being made to both her and Mr Mayorga in settlement of any employment related claims they might have.

[26] Mr Miller had emailed Ms Varela on 4 April 2018 confirming the final payments to her. In the email Mr Miller set out the payments as comprising:

Pay for w/ending 11/03 (average hours worked over previous 4 weeks)

Final two weeks as agreed with Alistair (double above)

[27] The payments made were confirmed by Mr Miller as \$906.25 gross for the final week of employment which ended on 11 March 2018, and \$1,812.50 gross in respect of the notice period.

[28] Mr Mayorga confirmed that the \$30,000.00 had been paid as agreed. Ms Varela said that she did not partake in this payment.

Unpaid Wages

[29] The Employment Agreement provides that payment for wages will be made every Wednesday into the employee's nominated bank account.

[30] Ms Varela claims that she was not paid in accordance with her rostered hours, and that whilst the MYOB pay records recorded the payments due to her as having been made to her and the PAYE amount was remitted to the IRD in accordance with these amounts, she did not in fact receive the net wages due to her.

[31] An email from Mr Mayorga dated 13 June 2016 states that there are outstanding wages due to employees. However the wage records which have been provided to the Authority, and which were compiled by Ms Varela, show wages being received for all weeks of Ms Varela's employment, with the exception of the weeks of pay periods 3 January 2016, 28 August 2016, 4 September 2016 and 21 June 2017.

[32] Ms Varela's evidence confirmed that PAYE had been paid in respect of all the wage amounts recorded on the pay sheets.

[33] It was the evidence of Mr Raza and Mr Miller that FPGL remitted amounts of monies to ARL when informed by Ms Varela and Mr Mayorga of an inability to pay employees as required to cover any shortfall in wages to the employees and to ensure the relevant PAYE was paid to the IRD.

[34] Wage claims need to be established to the satisfaction of the Authority and I do not find in all the circumstances and given the evidence, Ms Varela's claim for unpaid wages to have been established.

Unpaid Notice Period

[35] Ms Varela was entitled to receive two months' notice pursuant to clause 11.2 of the Employment Agreement.

[36] Ms Varela received the sum of \$1,812.50 gross as confirmed in the email from Mr Miller representing 2 weeks' notice, on the same basis of calculation Ms Varela is entitled to payment for a further 6 weeks' notice period of \$5,437.50.

Unpaid Holiday Pay Entitlement

[37] Ms Varela claims that she is owed amounts of unpaid holiday pay covering the entire period of her employment with ARL.

[38] It is agreed by the parties that Ms Varela as the payroll manager was responsible for the preparation and maintenance of the ACE payroll system.

[39] In his letter dated 23 May 2018 Mr Hutchison confirms that the ARL payroll records in respect of Ms Varela were reviewed and that there were no holiday days recorded as having been taken by Ms Varela. The records also show that a one off payment of \$400 in respect of holiday pay was made for the period 21/5/17.

[40] There is no suggestion that Ms Varela's holiday taken records were not accurate, Mr Hutchison states in a letter to Ms Varela dated 23 March that he understands that Ms Varela did take holiday leave on several occasions, however no such evidence has been produced.

[41] At the Investigation Meeting Ms Varela produced a handwritten note indicating that she did in fact take holidays on 28/12/2015 – 03/01/2016; 21/08/2016 – 01/09/2016; 07/09/2017 –15/09/2017; 14/05/2017- 21/05/2017; and also confirming that she had received a sum of \$400 as holiday pay.

[42] Section 24(2) of the Holidays Act 2003 sets out how holiday pay is to be calculated when the employee's employment ends and there is an outstanding holiday entitlement. This applies in Ms Varela's case.

[43] For the period 13 April 2015 to the last week of the notice period 11 May 2018 Ms Varela had an entitlement of 8 weeks holiday pay plus 8% of the final months' notice period less \$400.00 already paid, less any holiday taken.

[44] For the purposes of s.24(2)(b) the calculated average weekly wage is \$906.25 therefore I find Ms Varela is entitled to \$7,250.00 plus \$290.00 less \$400.00 in respect of holiday pay, a total amount of \$7,140.00.

Unjustifiable Dismissal

[45] Whilst not a director or shareholder of ARL, Ms Varela was material to the operational management of the Restaurant. She undertook operational duties including recruitment and training of employees, basic book-keeping and accounts, payroll compilation, security, hosting and assisting with service provision.

[46] Ms Varela had been fully aware of the poor financial performance of the Restaurant and worked with Mr Mayorga and Mr Raza in trying improvements in the Restaurant operation to try and uplift the financial performance and business viability.

[47] Her evidence was that she had been aware for some time before 8 March 2018 that the Restaurant was likely to cease operation and therefore the advice from Mr Mayorga on 8 March 2018 that her employment was ending could not have been a shock, and she confirmed when questioned at the Investigation Meeting that this was correct.

[48] Ms Varela denied that the payment of \$30,000.00 was intended to recompense her for the termination of her employment and in recognition of her agreement that she would make no further claim of salaries, holiday pay, fees or other expenses related to her: “involvement with Alfonso's Restaurants”.

[49] There is no signed agreement between the parties to the meeting held on 13 March 2018 and no binding agreement pursuant to s 149 of the Employment Relations Act 2000 (the Act) which ensures that any agreement signed by a mediator employed and engaged by the Chief Executive of the Ministry for Business, Innovation and Employment is final and binding on the parties, except for enforcement purposes.

[50] Accordingly Ms Varela is not subject to such an agreement and in the circumstances in which there was no process followed by ARL as her employer involving advice, consultation and consideration prior to a decision to terminate her employment, I determine that Ms Varela was unjustifiably dismissed by ARL.

Remedies

Reimbursement of Lost Wages

[51] Ms Varela said that she was engaged during the immediate period following the closure of the Restaurant in providing information to FPGL to effect the smooth closure of the financial accounts. As a consequence she did not start searching for alternative employment until May 2018.

[52] I have found that Ms Varela has a personal grievance and that she lost remuneration as a result of the personal grievance.

[53] I order that ARL pay Ms Varela the sum of \$11,781.25 gross in respect of lost wages (calculated at her ordinary weekly wage of \$906.25 per week for a period of 13 weeks) pursuant to s 128(2) of the Act.

Unpaid Notice Period

[54] Ms Varela was entitled to two months' notice period upon the termination of her employment pursuant to clause 11.2 of the Employment Agreement.

[55] Ms Varela received a payment in respect of her notice period but this consisted of a payment of two weeks' notice not two months.

[56] I acknowledge that FPGL claim that the notice period payment was made on the understanding that Ms Varela had agreed to the basis of the \$30,000.00 settlement payment, but her evidence is that she did not so agree. There is no agreement signed by her by her to verify that such an agreement was reached.

[57] In these circumstances I find that Ms Varela is entitled to the contractual notice period less any monies already paid in respect of notice.

[58] I order that ARL pay Ms Varela the sum of \$7,250.00 gross in respect of the contractual notice period less the sum of \$1,812.50 gross already paid to her.

Unpaid Holiday Pay Entitlement

[59] I have found that Ms Varela is entitled to be paid outstanding holiday pay.

[60] I order that ARL pay Ms Varela the sum of \$7,140.00 gross pursuant to s.24 (1) and s.24(2)(b) of the Holidays Act 2013.

Interest

[61] Ms Varela seeks interest on the holiday pay and notice period shortfall.

[62] I order interest to be paid, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016, on the sums of \$7,126.00 and \$5,437.50 from 11 March 2018 until the date of payment in full.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[63] Ms Varela is claiming compensation for humiliation and distress due to her: “not having been treated the same as the other employees”. There is no information available to verify how the other employees were treated upon the closure of the Restaurant, nor is there evidence that they were not paid their entitlements upon the termination of their employment.

[64] Whilst Ms Varela did not receive full payment of her outstanding holiday pay and the notice period, however I have ordered that these sums be paid to her together with interest to compensate her for that loss.

[65] As regards the closure of the Restaurant and consequent loss of her employment, I find that Ms Varela was fully aware from her involvement with the accounts, the creditors and suppliers of ARL, and her relationship with Mr Mayorga, that ARL would have been trading insolently for some considerable period of time but for the financial assistance provided by FPGL, and that closure of the business was inevitable.

[66] Accordingly I find no grounds for awarding compensation to Ms Varela under s 123(i)(c)(i) of the Act.

Contribution

[67] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[68] I am not persuaded that Ms Varela contributed to the situation which lead to the closure of ARL and the termination of her employment and there will be no reduction of the remedies awarded.

Costs

[69] Costs are reserved.

[70] While costs are reserved, I note here that, subject to her submissions, Ms Varela represented herself and, unless she incurred legal costs, it is therefore unlikely she has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority