



New Zealand Employment Relations Authority Decisions

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Wall v Strategic Health Ltd WA 165/06 (Wellington) [2006] NZERA 865 (23 November 2006)

Last Updated: 8 December 2021

Determination Number: WA 165/06

File Number: 5039799

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON OFFICE

BETWEEN Megan Wall (Applicant)

AND Strategic Health Limited (Respondent)

REPRESENTATIVES David McLeod for the Applicant

No Appearance for the Respondent

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Napier, 14 November 2006

DATE OF DETERMINATION 23 November 2006

DETERMINATION OF THE AUTHORITY

1. Employment relationship problem

- Megan Wall has raised an employment relationship problem in regard to her dismissal and made an allegation that her employer made unauthorised deductions from her wages. She is seeking lost wages, compensation, holiday pay and wages she says were unlawfully deducted.

3. Background

- Megan Wall's employer was Strategic Health Limited (SHL), and she had two roles, one as a medical receptionist at SHL's premises, and another role, as a community mental health support worker at premises controlled by another company, CCT Services Limited (CCT).
- Pauline Milne and Lloyd Hudson are directors of SHL and Pauline Milne is a director of CCT.
- Ms Wall's employment was consolidated with SHL in April 2005. She was presented with an agreement in May 2005 but says that she refused to sign it because she had at least one issue about the amount of pay she was receiving. She says it was less than she was entitled to but SHL referred to her being overpaid in its replies about the complaint.
- Ms Wall signed off a written employment agreement with SHL in May 2006.
- Ms Wall had an injury and had to take time off work in early 2006. She was cleared to return to work from 15 May 2006

and her financial support from ACC ceased on 28 May 2006. Lloyd Hudson was concerned that she put CCT at risk under the Health and Safety in Employment Act and would not have her back at CCT until a second opinion could be obtained. Ms Wall agreed to a second opinion. It was not obtained before Ms Wall was dismissed.

9. On 13 July 2006 Ms Wall was advised of SHL's wish to consult her on a restructuring proposal in regard to her role at SHL and CCT for operational and financial reasons. SHL decided to consult her through its representative, a Napier lawyer. The applicant obtained her own advice.
10. On 17 July 2006 SHL's lawyer put a proposal to Ms Wall in writing about her employment.
11. On 19 July Mr Hudson took issue about Ms Wall's performance/conduct and raised his concerns with her and put her on notice of his expectations of what was required. She was surprised and upset over what she thought was an unjustified final warning. No other issue has been taken over this matter, except as background to the redundancy.
12. Ms Wall took issue with SHL's 17 July proposal and requested further details and documents. She asked to discuss the proposal directly with her employer. There was no response to her request.
13. On 27 July, in a letter, her employment was terminated and she was paid 2 weeks wages in lieu of notice and holiday pay. The decision that her employment was terminated due to redundancy took effect immediately.
14. SHL has relied in the statement in reply and correspondence upon the following:

The Justification:

- There was no fulltime role available due to operational and financial reasons.
- The role at CCT was affected by Mr Hudson's unwillingness to take Ms Wall back and putting CCT at risk under the Health and Safety in Employment Act because of her injury.
- A Restructuring Proposal involving funding arrangements between CCT and SHL was put forward.
- Correspondence from SHL's lawyer on the reasoning for the proposal that referred to operational, financial and funding and a report from the Royal College of New Zealand and Australian Psychiatrists in regard to the restructure.
- SHL could not afford to carry Ms Wall for her full hours and pay when it was not being reimbursed for her pay and she was not working at CCT.

The Procedure

- Consulting Ms Wall on the proposal, the underlying reasons for it and pointing out the possibility of redundancy and her entitlements, through SHL's lawyer.
- Making a decision and having it conveyed by letter through SHL's lawyer.

The Respondent's Conduct

15. The Respondent, by its agents (Pauline Milne and Lloyd Hudson) have not appeared or been represented at the Authority's investigation meeting. SHL was on proper notice. SHL has been represented throughout these proceedings by the same representative who has not sought leave to withdraw. SHL's lawyer was very much aware of the arrangements for the Authority's investigation and participated in putting them in place. I am therefore satisfied that it is entirely reasonable to believe that SHL and its agents knew about the Authority's investigation meeting. Indeed I am supported by the contact that the Authority's support officer has had with SHL's lawyer and the knowledge that SHL was aware of the investigation meeting, and that the lawyer has had no instructions, at least the day before the investigation meeting.
16. On 14 November 2006 the Authority's support officer had to make contact with SHL's lawyer to check if any one was going to turn up on the day of the investigation meeting. SHL's lawyer informed the support officer that she had received a message late the previous day, from Lloyd Hudson, that "*Pauline had to go a family funeral, and can't make it*". No other details were provided.
17. The Authority has also been informed by letter from SHL's lawyer that the directors of SHL cannot act without the permission of the Chairperson of CCT because of some authority relating to a health provider activity. SHL was requested by the Authority to provide an affidavit from the Chairperson or directors, to support this contention, but none was provided. The information provided by SHL's lawyer was inadequate to satisfy me of any genuine reason for SHL not to respond, the directors' failure to attend the investigation meeting, and SHL's lawyer's absence but for the want of having instructions.
18. SHL's lawyer informed the Authority that SHL was unable to comply with the Authority's direction in regard to the preparation for its investigation and attending mediation until the CCT Chairperson returned from Greece on 31

October 2006. Ms Wall does not believe that the Chairperson was away, and upon checking with his office, that he would attend to clients on 9 October when SHL says he was meant to be overseas. Mediation services that were arranged by consent to be provided by the Department of Labour have been thwarted because SHL did not confirm its attendance. SHL took no action to be proactive and reasonably make alternative arrangements for mediation with the Department of Labour before the Authority's investigation meeting

19. No prior written statements and replies and no documents have been provided at all by the directors of SHL, except to provide a statement in reply out of time without the courtesy of asking for leave as required. SHL did not provide the wage and time records and holiday pay records for Ms Wall before any mediation, which should certainly have happened before the Authority's investigation meeting. Because mediation has not happened SHL cannot be held to be in breach of the Authority's direction, but it has failed to reasonably provide the documents for the Authority's investigation, knowing that it had been scheduled and that the availability of such documents had been raised. Indeed the notice of a claim for unauthorised deductions and the lack of details on Ms Wall's final payment made it entirely reasonable for SHL to provide them with its statement in reply or before the investigation meeting.
20. I conclude that SHL has deliberately not co-operated with the Authority's investigation. Indeed I will go further to say that its inactions may be wilful and contemptuous of the Authority and if the directors of SHL believe that they do not have to do anything but wait

for these proceedings to be seen off I would anticipate that their conduct invites a request for a good faith report.

21. I proceeded with the investigation meeting because no good cause has been shown to exist for the failure of the SHL and its directors or lawyer to turn up or be represented. Pauline Milne's situation has not been supported by sufficient details being provided given that SHL's lawyer had no instructions, at least the day before the Authority's investigation meeting. The information about Pauline Milne's unavailability was provided unreasonably late by Mr Hudson. I proceeded in the matter as fully as if SHL was present or represented (Clause 12 of Schedule 2 of the [Employment Relations Act 2000](#) applied).

Discussion

22. The nature of the employment relationship was a triangular relationship with CCT, linked through its directors with SHL and Ms Wall's role being carried out at two locations with different companies, and where Megan Wall's employer was SHL.
23. It would be a defence for an employer to rely upon the risk of putting itself in breach of the Health and Safety in Employment Act if it could support such a defence on reasonable grounds not to permit an employee to return to work and following a proper and fair process. However Ms Wall had a clearance to return to work from her GP, she was willing to get a second opinion, and ACC ceased her compensation from 28 May 2006. It is not SHL in this case asserting such a defence. Since Ms Wall worked at premises that CCT had some control and responsibility over, and CCT would not allow her to return, the responsibility rested on SHL, to take some action to support its employee. Therefore a scrutiny of the employer's action is required. The only evidence of any support is the agreement reached for Ms Wall to get a second opinion on her health and that at some point SHL agreed to pay her full wages. There is now no issue about the quantum of her pay between her return to work from injury and before the dismissal, except on the claim for unauthorised deductions being made from her pay. The directors of SHL and CCT are involved in both companies and had to be acting in concert. The fragility of their situation appears to be supported by the decision to pay Ms Wall and backdate her pay after she resumed a part time role at SHL working fewer than her full time hours because she was not allowed back at CCT.
24. The overlap of the directors' involvement in CCT and SHL suggests that the raising of redundancy was potentially a way to get around a problem, which is not what a fair and reasonable employer would do. This is supported by SHL's failure to properly consult, give Ms Wall access to the decision-maker and provide her with more information to show Ms Wall that the proposal was genuine instead of simply asserting that it was genuine given that the relationship was initially built on trust and friendship. If SHL had attended the investigation I would have required details of the funding and financial situation relied upon, and to produce the report from the Royal College of New Zealand and Australian Psychiatrists that was referred to about the restructuring proposal.
25. Also, in July 2006 Mr Hudson raised concerns about Ms Wall's performance and gave her notice of his expectations, which is within his right to manage. However, Ms Wall says she is suspicious about this given the other issues and SHL's failure to engage in the Authority's investigation.
26. I conclude that SHL has not been able to justify its decision to terminate Ms Wall's employment on the grounds of redundancy because it is clouded by other issues; being the dispute at CCT for Ms Wall to return to work and the performance matters. The decision is also affected by the failure of SHL to produce relevant documents to prove the genuineness of its decision, such as a report from the Royal College of New Zealand and Australian Psychiatrists referred to in the Proposal, and SHL's funding and financial situation. Given that SHL was dealing through a

representative to carry out its consultation a fair and reasonable employer would have responded to the request for more information. It ignored that request for some direct access to the decision maker and for more information to be provided and to discuss alternatives.

27. Ms Wall says that she did not have an opportunity to have any input into options and alternatives because SHL's lawyer was dismissive of her request to talk to the directors and obtain more information. Ms Wall conveyed to me that she had a difficulty in dealing with SHL's lawyer because she concluded that she was not being listened to. I also note there is no evidence of what SHL considered by way of a report back from its lawyer and indeed what that report from the lawyer actually consisted of. Ms Wall believes Pauline Milne had prepared her final pay cheque during the process and before going to Australia. Finally SHL has not been able to satisfy me that options were properly considered given Ms Wall disputes that she was only available for full time work as asserted by the SHL. If SHL had

co-operated and attended the Authority's investigation it might have had a defence at least on the genuineness of the need to restructure given an issue about funding of Ms Wall's CCT hours and pay having to be covered by SHL and simply not having the funds to continue. There is an absence of and rebuttal of Ms Wall's claim that the decision to dismiss her was influenced by other factors.

28. For the above reasons Ms Wall has a personal grievance and is entitled to remedies to resolve her employment relationship problem. Her claim for reinstatement was withdrawn.
29. Her lost wages are for 10 weeks based on \$20 per hour for 35 hours per week: \$7,000 gross. Less her earnings of \$1,389 and \$723, her claim constitutes \$4,888 gross. There is no contribution by Ms Wall to the situation and she has mitigated her loss. I order Strategic Health Limited to pay Megan Wall \$4,888 gross lost wages.
30. She has claimed \$25,000 compensation. Her evidence of being hurt and there being some financial cost has been established. She paid for professional medical help and says she had to hide when she was in the supermarket and saw patients she knew to avoid them. She gave evidence of being "guttled". I accept her evidence. She had a professional relationship based on trust and friendship with the directors, her evidence supports that she was hurt, which could have been avoided with better care from her employer about its procedure and handling relationships. Indeed the inadequate behaviour of her employer is supported by its dismissive conduct. Although Ms Wall was employed by SHL from April 2006, she had an involvement with SHL and CCT and their directors for some time, before the arrangement was entered into. Her compensation has to relate to her employer's actions and omissions, which I put at \$10,000 for dismissing her without providing adequate justification and being procedurally unfair. In this situation there is no question that Ms Wall has contributed to the situation. She is entitled to the full amount. I order that Strategic Health Limited pay Megan Wall \$10,000 compensation for humiliation, loss of dignity and injury to feelings.
31. I turn to the claim for unauthorised deductions. This is a claim that goes back many weeks and was not raised until 1 August 2006. It is hardly a matter for a personal grievance, given the dates, and is outside the 90 day time required for an unjustified action. Even as an on going breach Ms Wall signed an employment agreement in May 2006 that effectively waived or signalled her acceptance of the situation.
32. It is, however, entirely proper to consider the claim as an enforcement matter but I am not satisfied that Ms Wall has sufficiently established her claim given her delay in pursuing the claim, the various net pay figures she has produced from bank statements and differences in her hours of pay from time to time. The absence of gross and taxable figures has not assisted me. There could be a range of reasons for such differences, including tax differentials, to explain the change and any over payment. The employer has relied upon saying that Ms Wall was overpaid. However, SHL has been absolutely unhelpful in this matter given a failure to explain why it was considered she was overpaid and not producing any wage and time records, pay slips and other details and not attending the Authority's investigation to explain itself. Normally, and in law, I could accept Ms Wall's evidence but SHL was never asked by Ms Wall's representative to produce wage and time records. Indeed her representative told the Authority that this part of the claim was always going to be difficult. I would have expected in such a situation that such a claim would not have been pursued. I note that Ms Wall's claim for lost wages for her personal grievance was based on the net figure she was paid following the deduction. This reinforces my view that she waived any claim or accepted the situation upon signing her employment agreement. On balance I find that she has not established that her wages were reduced as an unauthorised reduction. I certainly do not accept the claim as a personal grievance.
33. I will accept her evidence on the holiday pay to bring closure to that matter. In the absence of the wage and time records and any proper explanation of how the final calculations on the pay were made I award her the amount of \$1,244.48 net holiday pay on the basis of her representative's calculations. I order Strategic Health Limited to pay Ms Wall the sum of \$1,244.48 for holiday pay.

34. I now turn to costs. Ms Wall has claimed \$2,990. This is an entirely reasonable sum of costs given the details provided and for the work she and her representative have put into this matter with the barest of co-operation and assistance from SHL, and notwithstanding the acknowledgement by Ms Wall's representative, that the claim for the wages

deduction, was always going to be difficult. Not much more time was taken up with that issue because I quickly narrowed the scope of it and I note that the work done on it was of Ms Wall's making. Ms Wall has been put to expense including providing a written statement and prepared a bundle of documents that without which this investigation would have been more difficult.

35. I order Strategic Health Limited to contribute 85% of the reasonable costs in the sum of \$2,541.50 for preparation and attendances plus the \$70 filing fee to Ms Wall for her use.

36. I order Strategic Health Limited to pay Megan Wall the following:

- \$4,888 gross wages lost due to her personal grievance.
- \$10,000 compensation for humiliation, loss of dignity and injury to feelings.
- \$1,244.48 for holiday pay.
- \$2,541.50 costs for preparation and attendances plus the \$70 filing fee.

P R Stapp

Member of the Authority

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