

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 91/07
5047763**

BETWEEN ANNETTE JEAN SIATAGA
 Applicant

AND McKELLAR PROPERTY
 SERVICES WELLINGTON
 LIMITED (in liquidation)
 Respondent

Member of Authority: Helen Doyle

Representatives: Phillipa Shaw, counsel for Applicant
 No appearance for Respondent

Investigation Meeting: 18 July 2007 at Christchurch

Determination: 6 August 2007

DETERMINATION OF THE AUTHORITY

Identity of the employer

[1] At the start of the investigation meeting, the applicant, Annette Siataga said that she may not have been employed by the respondent company but by another company, McKellar Property Services Limited. Ms Siataga said that she had had a written employment agreement but had not retained a copy of it and could not recall the description of her employer in the agreement.

[2] It became clear from questioning that the proceedings had been lodged against McKellar Property Services Wellington Limited because the Labour Inspectors in Christchurch and Wellington, who had been attempting to ascertain what Ms Siataga

was owed by way of holiday pay, were of the view that Ms Siataga was employed by that company. Inland Revenue Department records do support that Ms Siataga was employed by McKellar Property Services Wellington Limited. Surprisingly the records from Inland Revenue only reflect a small portion of Ms Siataga's actual earnings whilst employed. Ms Shaw wrote to the director of McKellar Property Services Wellington Limited, Greg Thomas, about this matter but there was no reply as to why the records were incomplete.

[3] The limited evidence with respect to the identity of Ms Siataga's employer shows that Ms Siataga was employed by McKellar Property Services Wellington Limited (McKellar Property) rather than McKellar Property Services Limited. It is not thought that McKellar Property Services Limited is still trading, although unlike the other McKellar Property Services companies, it is not in liquidation.

Employment Relationship Problem

[4] McKellar Property carried on the business of commercial cleaning. Ms Siataga says she was unjustifiably dismissed from her employment with McKellar Property on 6 July 2006 and also claims unpaid wages and holiday pay.

[5] I am satisfied that the respondent company was served with Ms Siataga's statement of problem. The respondent lodged no statement in reply, failed to attend on a telephone conference with the Authority, failed to comply with the timetabling in the notice of direction and, despite being served with a notice of investigation meeting, did not attend the investigation meeting on 18 July 2007. The respondent company has taken no steps at all with respect to the employment relationship problem and did not agree to attend mediation. Ms Shaw advised that she received a call from Mr Thomas before the investigation meeting that the company was to be placed in liquidation.

[6] I decided to proceed with my investigation on 18 July 2007 and heard evidence from the applicant, Ms Siataga, her sister, Lorraine Siataga, and Vicki Tatterton who had worked at the respondent company for a period whilst Ms Siataga was area manager.

[7] After the investigation meeting had taken place but before the matter had been determined, McKellar Property Services Wellington Limited was placed in

liquidation. The liquidation of the company commenced on 20 July 2007 when the liquidator, Robert Elms, was appointed at 11.10 am that day.

[8] The effect of commencement of a liquidation of a company on legal proceedings is set out in s.248(c) of the Companies Act 1993. Section 248(c) provides with respect to legal proceedings:

- (c) *Unless the liquidator agrees or the Court orders otherwise, the person must not –*
 - (i) *Commence or continue legal proceedings against the company or in relation to its property; or*
 - (ii) *Exercise or enforce, or continue to exercise or enforce, a right or remedy over or against the property of the company.*

[9] Following my consideration of that provision, and relevant commercial judgements, I was of the view that I could not continue to determine the matter without the agreement of the liquidator. I organised a telephone conference with Ms Shaw and the liquidator of the respondent company, Mr Elms. During the telephone conference, Mr Elms advised, in the circumstances, the Authority could proceed to determine the matter.

Background

[10] Ms Siataga commenced working for the respondent on 16 August 2004 as Area Manager for Canterbury and the West Coast. She was interviewed for her position by the National Operations manager of McKellar Property, Lisa Ewart, and Cathy Scott who was at that time the South Island manager.

[11] Ms Siataga understood the position to involve the employing of staff, training, payroll and meeting with the managers of the cleaning contracts to complete quality assurance reports monthly.

[12] Shortly after Ms Siataga commenced employment, Ms Scott and another sales manager, Darren Brown, left their employment with McKellar Property Services Limited. Another person was brought in for a short time after this but then Ms Siataga was left to carry on the operation by herself.

[13] Ms Siataga was required to cover the area for Canterbury and the West Coast. Her role expanded to also include the organising and delivery of all stock, maintenance of machinery and rubbish collection and dumping. Ms Siataga described

having to drive to the West Coast from Christchurch if a replacement vacuum cleaner or other item was required on top of regular monthly trips to take over stock as directed by Mr Thomas. Ms Siataga would also find herself driving to various locations and having to complete the cleaning herself when replacement cleaners could not be found. This was all in addition to her Area Manager duties. Ms Siataga's hourly rate for Area Manager was \$13.46 and if she undertook cleaning she was paid at the rate of \$10.60 per hour.

[14] Ms Siataga employed Ms Tatterton to assist her in supervising the Rangi Ruru High School contract and to help her out in the office. Ms Siataga felt that she was taking on more and more and it began to take a toll on her health. Ms Siataga raised with the company the need to organise replacements to cover the cleaning duties which she was undertaking as she was desperately short of staff and struggled to organise replacements while covering the cleaning duties herself. Ms Siataga did not feel assistance from the company was forthcoming and her personal time and time with friends and family began to suffer.

[15] Ms Siataga reached a point on 15 February 2006 when she felt she had finally had enough. She emailed Lisa Ewart on 15 February 2006 and said, amongst other matters, in her email that if matters did not get fixed then she would be giving four weeks' notice as of 14 February 2006 and her last day would be 17 March 2006.

[16] Ms Siataga received no satisfaction from that email and followed it up with a further email of 27 February 2006 which confirmed that she had given notice of resignation with effect from 17 March 2006. Ms Ewart responded at this point and indicated that she would like Ms Siataga to stay on with the respondent until the contracts for cleaning the Post Shops were finished. Ms Siataga described the situation from that point on as her resignation not having been accepted, being put to one side and that she carried on working. Ms Ewart did ask Ms Siataga whether she would take a cut in the Area Manager hours and take over supervising the Rangi Ruru High School contract. Ms Siataga did not agree to that because the cut in pay would not have been viable for her. The hourly rate for a supervisor was \$11.75.

[17] After the discussion with Ms Ewart, Ms Siataga continued her ordinary work which included cleaning, hiring employees and supervising at the Rangi Ruru School. During that period Ms Siataga had several visits from Wellington management including Ms Ewart and Mr Thomas but there was no further discussion about her

resignation. Ms Tatterton said in her evidence that from conversations she overheard and from emails she saw at that time from management of McKellars, Ms Siataga's resignation was not accepted.

[18] The Post Shop contract's came to an end in mid-June 2006 in Christchurch and at the end of June 2006 for the West Coast and Ashburton. Ms Siataga carried on performing her role as usual. There was an unusual record in Ms Siataga's pay slip dated 16 June 2006. The pay slip indicated that Ms Siataga had worked 20 hours ordinary time and had taken 60 hours annual leave. Ms Siataga contacted Mr Thomas to complain that she had not taken any annual leave and that there was also an issue as to whether she had been paid for cleaning performed earlier. Ms Siataga was advised that Mr Thomas considered the pay was correct and so she approached the Labour Department for assistance to deal with the matter. That matter was not resolved.

[19] On 19 June, Ms Siataga received an email from Ms Ewart with respect to a cancelled contract. Ms Ewart said in her email amongst other matter: *this does not go in your favour.*

[20] On 6 July 2006 which was Ms Siataga's birthday, Ms Ewart arrived at Christchurch from Wellington. Ms Siataga picked her up in the morning in the company van from the airport and took her around all the sites. As Ms Ewart and Ms Siataga were driving in the van, Ms Ewart was receiving telephone calls from Mr Thomas. Ms Ewart offered to buy Ms Siataga lunch for her birthday. After lunch, Ms Siataga had to pick up a worker to clean at Rangī Ruru together with her partner at the time so that he could fill in for Ms Siataga while she was taking Ms Ewart around sites. After the workers had been dropped at the school, Ms Ewart said she would like to go to the McKellar Property offices in Christchurch.

[21] At the office, Ms Ewart asked Ms Siataga if she had changed her mind about the dropping of her Area Manager hours. Ms Siataga replied that she had not. Ms Ewart then said that Ms Siataga's resignation of February was now effective and immediately so. Ms Ewart confirmed that that was what the calls from Mr Thomas had been about. Ms Siataga asked Ms Ewart to drop her off home. Her cell phone and the company van were no longer available to her so she could not pick up her partner from the Rangī Ruru school. Ms Siataga's sister Lorraine was at her house when Ms Siataga was dropped off by Ms Ewart and gave compelling evidence about Ms Siataga's shock and distress at that time.

[22] Ms Siataga said that she was unable to leave the house for many weeks after her termination of employment on 6 July 2006. Her family encouraged her to seek advice and to write to McKellar Property requesting a month's pay in lieu of notice. Mr Thomas wrote back to Ms Siataga and advised that he was surprised at Ms Siataga's comments as her resignation had been accepted and replied to by letter on 3 March. Ms Siataga said, and I accept her evidence, that she had not previously seen the letter attached to Mr Thomas' letter.

[23] On 25 July 2006, Ms Siataga left the house for the first time since her dismissal to attend a doctor. There was a medical certificate produced at the investigation meeting confirming an appointment on 25 July 2006 and that Ms Siataga had been treated for stress-related conditions. Ms Siataga is currently on a sickness benefit and has not felt able to return to work although prior to her dismissal had been in employment for 20 years.

Determination

[24] The justification for Ms Siataga's dismissal appears to be that she resigned and that such resignation was accepted but was to occur at a later time. There is also some suggestion that there may not have been the hours available for the Area manager role and that Ms Siataga was offered and refused other lower paid hours. In terms of the resignation I find that Ms Siataga's resignation was not accepted by her employer and there was a mutual agreement that Ms Siataga would continue working until a later time. Although there was discussion about the employment continuing until the end of the Post Shop contracts, Ms Siataga continued working beyond that date. The resignation could not therefore justifiably be relied on. There was some discussion about Ms Siataga reducing her Area Manager hours but such a change was never properly implemented in terms of a proper process and I am not satisfied that there is evidence to support that the Area Manager's role was genuinely redundant as at 6 July 2006.

[25] A fair and reasonable employer would have discussed any reduction of hours with Ms Siataga and gone through a proper process. A fair and reasonable employer would not rely on an earlier resignation which had not been accepted. To place reliance on the resignation was a breach of the obligation of good faith which is required in an employment relationship. The dismissal of Ms Siataga on 6 July 2006 were not what a fair and reasonable employer would have done in all the

circumstances and there was no justification for Ms Siataga's dismissal. I find in conclusion that Ms Siataga was unjustifiably dismissed from her employment with McKellar Property Services Wellington Limited on 6 July 2006. Ms Siataga has a personal grievance and she is entitled to remedies.

Remedies

Unpaid wages

[26] Ms Siataga has not been well enough to work following her dismissal on 6 July 2006. The record from the Labour Inspector shows that for her first year of employment, Ms Siataga earned a total gross figure of \$30,333.78. For her second year of employment Ms Siataga earned when averaged out approximately \$2,850.00 per month. Despite being requested by the Authority and the applicant to provide wage and time records, the respondent did not do so. Some excellent work was undertaken by the Labour Inspectors working from Ms Siataga's bank records to calculate the holiday pay which was owing to her. The Labour Inspectors' workings have been very helpful to me in terms of both the lost wages calculation and the holiday pay owed to Ms Siataga.

[27] In assessing lost wages, I have taken into account that the respondent company had lost a number of its cleaning contracts. On that basis Ms Siataga's employment may not have continued for a further full year. Taking that into account I make an award for six months' lost wages in the sum of \$17,100.00. I do not find that Ms Siataga contributed to her dismissal.

[28] I order McKellar Property Services Wellington Limited (in liquidation) to pay to Annette Jean Siataga the sum of \$17,100.00 gross under s 123 (b) of the Employment Relations Act 2000

Compensation

[29] I accept that Ms Siataga's dismissal had a particularly devastating effect on her. Ms Siataga was a very hardworking and loyal employee for the respondent organisation. She managed cleaning contracts and the cleaners who performed those contracts. There was a shortage of cleaners and Ms Siataga was required to perform cleaning duties on top of her management duties. She could work up to 60 hours per week. That hard work and dedication was simply disregarded on 6 July 2006 because

it simply suited the respondent to do so and Ms Siataga was dismissed in a particularly callous manner with no thought given to how she would manage. Ms Siataga was the major income earner of the household and suffered significant financial difficulties as a result of her dismissal. If it were not for the help from Ms Siataga's family, items from her house would have been repossessed. Ms Siataga has had to make payments because of her financial situation to her creditors by way of a summary instalment order.

[30] Ms Siataga also described being unable to leave the house because of her depressed state following her dismissal for some months. Ms Siataga's sister confirmed that Ms Siataga has suffered depression, loss of confidence and self esteem. It is only quite recently that Ms Siataga has started feeling more like her normal self.

[31] In all the circumstances of this case, there should be a high award in terms of compensation. I am of the view that an appropriate award is the sum of \$15,000.

[32] I order McKellar Property Services Wellington Limited (in liquidation) to pay to Annette Jean Siataga the sum of \$15,000.00 without deduction under s 123 (c) (i) of the Employment Relations Act 2000

Holiday pay

[33] It was accepted that the Labour Inspectors' workings reflected as accurately as possible the holiday pay that was owed to Ms Siataga. For the purposes of those workings I accept that Ms Siataga did not take annual leave in June 2006. Ms Siataga is owed holiday pay in the sum of \$1,993.53 gross and interest on that sum from the date of termination of 6 July 2006 to the date of payment at the rate of 10% in accordance with the 2nd schedule of the Employment Relations Act 2000.

[34] I order McKellar Property Services Wellington Limited (in liquidation) to pay to Annette Jean Siataga the sum of \$1,993.53 gross being holiday pay and interest on the sum from the date of termination on 6 July 2006 to the date of payment at the rate of 10%.

Unpaid wages

[35] Ms Siataga is owed 20 hours' pay for the week ending 30 June 2006. That is because on her pay slip under annual leave taken, which was incorrect, there is a further 40 hours payment made. To bring it up to the correct wage amount it should have been 60 hours. There are unpaid wages for 20 hours at the hourly rate of \$13.46 in the sum of \$269.20 gross.

[36] I order McKellar Property Services Wellington Limited (in liquidation) to pay to Annette Jean Siataga the sum of \$269.20 gross being unpaid wages and interest on the sum from the date of termination on 6 July 2006 to the date of payment at the rate of 10%.

Costs

[37] Ms Siataga is legally aided. Ms Siataga is entitled to costs for a relatively short meeting in the sum of \$1,500 together with her filing fee of \$70.

Summary of findings and orders made

- I have determined this matter with the agreement of the liquidator.
- I have found that Ms Siataga was unjustifiably dismissed from her employment with the respondent.
- I have ordered McKellar Property Services Wellington Limited (in Liquidation) to pay to Annette Siataga the sum of \$17,100 gross being lost wages under s 123 (b) of the Employment Relations Act 2000.
- I have ordered McKellar Property Services Wellington Limited (in Liquidation) to pay to Annette Siataga the sum of \$15,000 without deduction being compensation under s 123 (c) (i) of the Employment Relations Act 2000.
- I have ordered McKellar Property Services Wellington Limited (in Liquidation) to pay to Annette Siataga the sum of \$1993.53 being holiday pay together with interest on that amount from 6 July 2006 to the date of payment at the rate of 10%.
- I have ordered McKellar Property Services Wellington Limited (in Liquidation) to pay to Annette Siataga the sum of \$269.20 being unpaid wages

together with interest on that amount from 6 July 2006 to the date of payment at the rate of 10%.

- I have ordered McKellar Property Services Wellington Limited (in Liquidation) to pay to Annette Siataga the sum of \$1500 being costs together with her filing fee of \$70.00.

Helen Doyle
Member of the Employment Relations Authority