

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 100
5391519

BETWEEN	VASIVASI FAITALA First Applicant
A N D	DALRENE GOFF Second Applicant
A N D	TERRANOVA HOMES & CARE LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Tim Oldfield, Counsel for the Applicants Elizabeth Coats, Counsel for the Respondent
Investigation Meeting:	On the papers
Determination:	6 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants request that their matter be removed to the Employment Court to be heard and determined without the Authority investigating it. The respondent acknowledges that grounds exist for removal of the whole of the matter to the Court.

[2] This determination addresses the application for removal.

Relevant information

[3] The applicants are employed by the respondent as caregivers at a rest home in Wellington. There is no dispute that the applicants are paid the statutory minimum wage rate. Each of the applicants is a member of a KiwiSaver scheme.

[4] The Authority was provided with a copy dated 19 April 2011 of the first applicant's individual employment agreement including the remuneration schedule. The remuneration schedule sets out information relevant to remuneration including the employee's ordinary hourly wage rate. Also contained within the remuneration schedule is the following clause:

The employee's remuneration is inclusive of any KiwiSaver compulsory employer contributions.

[5] The applicants say the clause purports to allow the respondent to treat the applicants' remuneration as inclusive of the respondent's compulsory employer contribution. They say this action is in breach of s.6 Minimum Wage Act 1983.

[6] Section 6 of the Minimum Wage Act 1983 states:

Payment of minimum wages

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7-9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[7] In contrast, the respondent says that it applies a "total remuneration" approach to its KiwiSaver compulsory employer contributions. The respondent says that this approach is permitted pursuant to s.101B(4) of the KiwiSaver Act 2006, whereby parties to an employment relationship can agree that the employer's compulsory contribution to KiwiSaver will not be paid in addition to the employee's gross salary or wages, provided that subsections (4)(a) and (b) are complied with. The respondent says it has complied with those subsections.

[8] The respondent says there is nothing in the KiwiSaver Act 2006 which provides that a total remuneration approach is unlawful where the employee's gross wage is the statutory minimum wage. It also says there is no provision in the Minimum Wage act 1983 which prohibits the arrangement provided for at s.101B(4) of the KiwiSaver Act.

[9] The applicants say that s.101B KiwiSaver Act 2006 does not permit the respondent to pay the applicants at a rate lower than the minimum wage.

[10] The relevant provisions of the KiwiSaver Act 2006 are as follows:

S.101B (1) The purpose of this section is to ensure that, for contractual arrangements of parties to an employment relationship (as defined by section 4(2) of the Employment Relations Act 2000) compulsory contributions are paid in addition to an employee's gross salary or wages described in section 101D(3).

...

(4) However, on and after 13 December 2007, parties to an employment relationship are free to agree contractual terms and conditions that disregard the purpose of this section described in subsection (1), and, to the extent of such agreement, sections (1)-(3) do not apply, unless, in respect of the employer and the employee –

(a) section 60(1)(a), (b) or (c) first applies on or after the day of assent for the Taxation (Urgent Measures and Annual Rates) Act 2008; and

(b) The contractual terms and conditions do not account for the amount of compulsory contributions the employer is required to pay.

(4A) In the circumstances described in subsection (4)(a) and (b), despite subsection (4),-

(a) compulsory contributions must be paid in addition to an employee's gross salary or wages described in section 101D(3) in accordance with the purpose of this section described in subsection (1); and

(b) subsections (2) and 3 apply

[11] In the alternative as to whether the respondent is in breach of s.6 of the Minimum Wage Act, the applicants say that the respondent cannot rely on s.101B(4) in support of its total remuneration approach. They say the clause contained within the remuneration schedule does not comply with the requirement to account for the amount of compulsory contributions the employer is required to pay (refer s.101B(4)(b)). In these circumstances the applicants say that s.101B(4) does not apply.

Determination of application for order for removal

[12] Section 178(2) of the Act provides that on application of any party to a matter, the Authority may order removal of the whole or any part of the matter to the Court. There are four separate grounds on which removal to the Court may be made. It is not sufficient that the parties simply agree that the matter should be removed to the Court.

[13] The application for an order for removal in this instance is pursuant to s.178(2)(a) that an important question of law is likely to arise other than incidentally.

[14] The question of law is as follows: is the respondent in breach of s.6 Minimum Wage Act by including its compulsory employer's contribution within an employee's total remuneration pursuant to s.101B(4) of the KiwiSaver Act in circumstances where the employee is paid the statutory minimum wage?

[15] Subsection 101B(4) was inserted into the KiwiSaver Act 2006 on 15 December 2008. This subsection has not been subject to litigation and the correct interpretation and application of ss(4) has not been determined as against s.6 of the Minimum Wage Act 1983.

[16] From the facts available to the Authority, I find that a question of law has arisen and I regard the question of law as being of both general and public importance on the basis that is relevant to all employment relationships where:

- i. an employee belongs to a KiwiSaver scheme; and
- ii. is paid the statutory minimum wage; and
- iii. the employee's remuneration includes the employer's compulsory employer contribution.

[17] With reference to the components of s.178(2)(a), I find a question of law is likely to arise in this matter; the question is important; and it arises other than incidentally.

[18] I consider the elements required to remove a matter to the Court pursuant to s.178(2)(a) have been satisfied. I order the matter be removed to the Employment Court to hear and determine.

[19] For clarity, as it will be of interest to the Court in relation to the obligations under s.159 and s.188(2) of the Act, this matter has not been to mediation.

Michele Ryan
Member of the Employment Relations Authority