

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 60  
5587250

BETWEEN	NATALIE OLIVE CORNELIUS Applicant
AND	HPG PRIVATE LIMITED First Respondent
AND	KAMALJIT SINGH Second Respondent
AND	SATISH PANJETA Third Respondent

Member of Authority: M B Loftus

Representatives: Michael McAleer, Advocate for Applicant  
No appearance for Respondents

Investigation Meeting: 26 May 2016 at Napier

Determination: 26 May 2016

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**ORAL DETERMINATION OF THE AUTHORITY**

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[1] The applicant, Natalie Cornelius, claims she was unjustifiably dismissed (albeit constructively) by the First Respondent, HPG Private Limited (HPG). She also claims she was unjustifiably disadvantaged by a number of HPG's actions which were, in her view, contrary to its statutory obligations. Five specific failures were pleaded.

[2] Ms Cornelius also claims HPG has failed to be responsive and communicative as required by s 4(1A) of the Employment Relations Act (the Act). For this she seeks a penalty along with ones against the second and third respondents for aiding and abetting the alleged breach.

[3] There is no statement in reply but Mr Singh, the second respondent, participated in a telephone conference on 27 February 2016 to discuss the application and how it would proceed. Mr Singh is a director, and significant shareholder, of HPG. He advised he was representing both it and the third respondent. He advised the respondents denied the claims had validity but did not provide any details as to why.

### **Non-appearance of the Respondent**

[4] None of the respondents was present or represented at the investigation meeting. There was no advice of, or explanation for, the absence.

[5] The absence is not a surprise as I am of the view HPG has failed to address Ms Cornelius' claims in good faith – indeed the respondents appear to have gone out of their way to stall and impede the process but their absence does raise the question of whether or not I proceed.

[6] There is no doubt they are aware of the investigation. As already said Mr Singh participated in the telephone conference of 27 February 2016. The investigation was scheduled during that discussion and Mr Singh agreed to the date on behalf of the respondents.

[7] A notice of investigation meeting was subsequently sent to the address Mr Singh advised as that which should be used for the serving of documents. Receipt was acknowledged by signature and copies were also sent to an e-mail address Mr Singh supplied.

[8] The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.

[9] I am satisfied the respondents are, or at least should be, aware of the investigation meeting and the consequences of non-attendance yet chose not to attend. In the circumstances and given the absence of an explanation I consider it appropriate to continue.

### **Background**

[10] Ms Cornelius was employed by HPG as a crew member in a café it operated in Napier. She commenced in October 2014.

[11] The employment progressed smoothly enough though Ms Cornelius was becoming increasingly concerned about some of her employer's actions and particularly the way in which her pay was being managed. Of particular concern was HPG's practice of deducting 30 minutes wages from her pay each day. This was allegedly to cover breaks which she is adamant she was never allowed to take.

[12] On 22 September 2015 Ms Cornelius wrote to Mr Singh raising a number of her concerns. She did not receive a response.

[13] As there was no response Ms Cornelius says she then tried to raise her concerns verbally. She says that resulted in an increasingly unsatisfactory work environment. She says Mr Singh inevitably reacted in a rude and belligerent manner yet failed to address her concerns.

[14] Ms Cornelius says things got to the point where she even advised Mr Singh that she felt she would have no choice but to resign should he continue to ignore her attempts to discuss her concerns and react to them in the manner he did. She says Mr Singh's reply was *You'll have to do what you have to do*.

[15] Notwithstanding that, the situation and environment did not change leading Ms Cornelius to tender her resignation in mid-October. She worked two weeks' notice and left at the end of the month

[16] Subsequent attempts to address the claim have failed and HPG has not provided wage and time records which have been repeatedly requested.

### **Determination**

[17] As already said Ms Cornelius raised a number of disadvantages. That said, and after a discussion at the investigation meeting, she chose to withdraw a number of these and concentrate on the two she felt most important. Accordingly, she withdrew her other claims including those against the second and third respondents.

[18] The two remaining claims are the constructive dismissal and that pertaining to the 30 minutes deducted from each days' pay.

[19] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>1</sup> the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[20] In *Wellington etc Clerical Workers etc IUOW v Greenwich*<sup>2</sup> the Court stated that for a dismissal to be constructive:

*It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[21] There must also be a causal link between the employer's conduct and the tendering of the resignation<sup>3</sup> and the possibility of resignation in response to that conduct should be foreseeable.<sup>4</sup>

[22] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Ms Cornelius to establish, prima facie, there was such a breach.

[23] I have had a chance to question Ms Cornelius and challenge her claims. She was equal to the challenge. I find her evidence credible and her claims made out.

[24] She had numerous concerns about which she notified her employer in writing. Some of these, such as a request she be properly paid, go to the very heart of the employment relationship.

[25] HPG was under a statutory obligation to address them.<sup>5</sup> I conclude a repeated failure to do so constitutes a breach of sufficient severity Ms Cornelius could

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<sup>1</sup> (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

<sup>2</sup> (1983) ERNZ Sel Cas 95; [1983] ACJ 965

<sup>3</sup> *Z v A* [1993] 2 ERNZ 469

<sup>4</sup> *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

<sup>5</sup> Section 4(1A)(b) of the Employment Relations Act 2000

conclude the conduct repudiatory. This is especially so when I consider she put HPG on notice she thought this was the case and felt she was being put in a position where she had no option but to resign.

[26] In such circumstances and the absence of any response or defence I find Ms Cornelius was constructively dismissed.

[27] This conclusion leads to a consideration of remedies. Ms Cornelius seeks lost wages and compensation for hurt and humiliation.

[28] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[29] Ms Cornelius found replacement employment and commenced in mid-January 2016. Some 10 weeks had passed since her departure from HPG.

[30] The records before me show Ms Cornelius averaged 29.8 hours a week while at HPG, at least for the period they cover. 29.8 hours a week for 10 weeks at Ms Cornelius' hourly rate means a loss of \$3,278. Section 128(2) states this is payable.

[31] Turning to compensation. Ms Cornelius supported her claim with evidence of the hurt she incurred. While not particularly strong I accept she was hurt and note the evidence about having her confidence knocked and the pressures of an itinerant lifestyle while trying to source replacement.

[32] Having considered the evidence I conclude an award of \$4,000 appropriate.

[33] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Ms Cornelius contributed to her dismissal in a significant way. There is no evidence she did.

[34] Ms Cornelius says HPG deducted 30 minutes wages from her pay each day she worked. She says she understood this was to cover her breaks. She says she challenged this on the grounds she took no breaks but HPG's refusal to discuss her concerns means she can shed no further light on the deductions or the rationale.

[35] Having heard from her I accept her claims. I also note her evidence about requesting time and wage records, the fact they were not forthcoming and her

comments about how this affected her ability to quantify her claim. Indeed this was part of her rationale for withdrawing one of her other claims. She estimates the inappropriate deductions continued for about a year and total approximately \$2,080. She seeks that amount.

[36] Given the evidence and the provisions of s 132 of the Act I find myself in a position where I can accept her estimate. In the absence of any argument as to why not, I do so. Ms Cornelius should be paid the amount she claims in respect to improper deductions from her wages.

### **Costs**

[37] Ms Cornelius' costs total \$2,500.00. She seeks recompense.

[38] Normally costs follow the event and the Authority will use a daily tariff approach when addressing such a claim.<sup>6</sup> The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[39] This investigation took approximately half a day. That would see an award of \$1,750. That said I accept HPG's less than helpful approach has resulted in additional work and this should be recognised. Accepting the claim in full does not constitute a large increase. Given the evidence and in the absence of contrary argument I do not see why this should not happen.

### **Conclusion and orders**

[40] For the above reasons I conclude Ms Cornelius has a personal grievance in that she was unjustifiably dismissed. She has also established money was improperly deducted from her wages.

[41] As a result I order the respondent, HPG Private Limited, make the following payments to the applicant, Natalie Cornelius:

- i. \$3,278.00 (three thousand, two hundred and seventy eight dollars) gross as recompense for wages lost as a result of the dismissal; and

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<sup>6</sup> refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

- ii. A further \$4,000.00 (four thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$2,080.00 (two thousand and eighty dollars) being payment of wages improperly deducted; and
- iv. A further \$2,500 (two thousand, five hundred dollars) as a contribution toward the costs Ms Cornelius incurred in pursuing her claim.

[42] Payment is to be made no later than 4.00pm Thursday 16 June 2016.

M B Loftus  
Member of the Employment Relations Authority