

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 234
5634601

BETWEEN ROSE MARIE KININMONTH
Applicant

A N D THE NEW ZEALAND
PROPERTY MARKET
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
M McGoldrick, Counsel for Respondent

Investigation Meeting: 1 August 2017 at Auckland

Submissions Received: 1 August 2017 from both parties

Date of Determination: 9 August 2017

DETERMINATION OF THE AUTHORITY

- A. Rose Kininmonth was not constructively dismissed. This personal grievance is dismissed.**
- B. Rose Marie Kininmonth was unjustifiably disadvantaged in her employment by New Zealand Property Market Limited's actions.**
- C. New Zealand Property Market Limited is to pay Rose Marie Kininmonth the sum of \$15,000 compensation pursuant to s123(c)(i) of the Employment Relations Act 2000.**
- D. Costs are reserved.**

Employment relationship problem

[1] Rose Marie Kininmonth alleges she was constructively dismissed, disadvantaged and there were breaches of duties owed to her as a consequence of the mismanagement of her taxes by her employer, New Zealand Property Market Limited (NZPML), actions.

[2] NZPML states it is not liable for these actions because its agent, Cloud Accounts Limited gave advice the taxes were being managed and it reasonably believed it could rely upon that advice. Ms Kininmonth has benefitted from receiving the funds. She is now lawfully required to pay taxes owing. Therefore she cannot have been disadvantaged or constructively dismissed.

Relevant facts

[3] Rose Kininmonth was employed as a real estate salesperson on 9 March 2015. She signed an employment agreement that provided for remuneration by base salary of \$40,000 and sales commission. The agreement provided for deduction of KiwiSaver and for the employer to pay contributions. She signed the agreement and KiwiSaver and IRD forms that same day. She returned these to Antonia Baker, NZPML director.

April 2015

[4] NZPML contracted with Cloud Accountants Limited (Cloud Accountants) to manage its payroll through IPayroll, an online payroll service. Ms Baker had access to IPayroll and received a list of payments she signed off for NZPML each pay period. This list included employees' taxes and deductions to be made through IRD.

[5] In April 2015 Ms Baker arranged for Ms Kininmonth to meet with an employee of Cloud Accountants, EL. It is accepted they were told that PAYE would be deducted from Ms Kininmonth's salary.

August 2015

[6] However this did not occur because in August 2015 Ms Kininmonth was contacted by IRD. She was told she was required to pay more withholding tax. Ms Kininmonth emailed EL and Ms Baker advising about conversation with IRD and her understanding that she was not required to pay withholding tax.

[7] Ms Baker replied:

I am wondering if they've just assumed that you're an independent contractor paid on commission only as you would be in any other real estate agency. Did they ask about your employment status or if you were a salaried employee?

[8] Ms Kininmonth stated she had told IRD she was a salaried employee. EL from Cloud Accountants then advised:

You are paying [withholding tax] on the commission payments and PAYE on your salary payments.

IPayroll file the PAYE and [withholding tax] payments on your behalf.

Feel free to give your contact at the IRD my mobile number if they want to discuss it with me.

Cheers, [EL]

[9] Ms Kininmonth then replied:

Cool okay, so all tax regardless of whether its PAYE on the base salary and WT on commission has come out before it hits my account? So everything currently in my account is mine, all mine!

Great! I will get them to give you a call to clarify.

Thanks!
Rosie

[10] EL then replied "*yes that is correct*". Unfortunately that advice was not. There is also no evidence Cloud Accountants contacted IRD at all.

[11] Following that advice Ms Kininmonth:

- (a) Purchased motor vehicle for herself for \$16,000 plus a \$1,500 warranty;
- (b) Purchased a motor vehicle for her mother totalling \$7,500;
- (c) Purchased a boat for \$17,000.

May 2016

[12] In May 2016 Ms Kininmonth was contacted again by IRD and advised that she had a bill for unpaid tax of \$10,903.79. Ms Kininmonth wrote to EL at Cloud

Accountants on 10 May expressing her concerns about the tax bill and her understanding she had been taxed correctly before she received her pay.

[13] EL then disavowed being a tax expert but assured her the payments of PAYE and withholding tax were correct and undertook to discuss this with JK of Cloud Accountants.

[14] Ms Baker then replied directly to both Ms Kininmonth and EL that same day stating she would get in touch with JK. JK emailed Ms Baker and Ms Kininmonth on 11 and 12 May offering advice on how she could repay the amounts owed including deduction of her expenses as a 'sole trader' from her income. He stated they did not act for Ms Kininmonth and had 'no visibility' of her personal situation except through NZPML.

[15] Ms Baker and Ms Kininmonth met with JK until 20 May 2016. Cloud Accountants accepted responsibility for the failure to deduct the PAYE from Ms Kininmonth's salary including in particular commission. JK suggested she start paying off the debt by deductions from her commission. Ms Kininmonth was unhappy and sought to pursue a claim against Cloud Accountants in the Disputes Tribunal.

[16] By 24 May 2016, issues about deductions other than PAYE had arisen. Cloud Accountants provided a payslip which had PAYE, KiwiSaver and student loan deducted from her commission to be paid. Ms Kininmonth raised concerns about the amounts deducted for her student loans. Ms Baker then sought a summary of all of her payments. JK provided a printout from iPayroll showing the deductions.

[17] Later that evening Ms Kininmonth reviewed the amounts deducted for student loans and KiwiSaver. She realised none had been deducted from her previous commissions. She emailed Ms Baker about her concerns alleging mismanagement and that it appeared she now owed \$12,807.

[18] Ms Baker met with JK again on 25 May 2016. He undertook to come back with a final summary of the tax deductions that should have been made for Ms Kininmonth. He enquired about a commission payment due. Both parties agreed the commission would be paid as calculated.

[19] Ms Kininmonth then sought stress leave “until this is sorted” meaning the alleged mismanagement of her taxes. She also sought mediation with NZPML. Ms Baker required she obtain a doctor’s certificate but offered to reimburse her doctor’s expenses. Ms Kininmonth provided a medical certificate on 28 May 2016.

[20] Ms Kininmonth followed up Ms Baker twice about her tax payments on 26 and 27 May and also advised Ms Baker that she had received an odd payment of \$2,680.50 that she believed she was not entitled to. She enquired whether her fortnightly payment of \$1,192.92 reflected the new 33% PAYE tax deduction. Cloud Accounting confirmed Ms Kininmonth there was a \$2,680.50 overpayment and that the bi-weekly amount of \$1,192.92 was correctly taxed.

[21] Ms Baker confirmed on 27 May she had tried to contact JK and confirmed NZPML’s willingness to attend mediation.

[22] Ms Baker followed up with Cloud Accountants again on 30 May 2016. JK sent a letter accepting Ms Kininmonth’s tax and student loan repayments had been deducted incorrectly. As a result, Ms Kininmonth now had a shortfall of approximately \$28,677.23. Cloud Accountants suggested it could negotiate with IRD on repayments after the due dates due to the situation. It apologised to Ms Baker and sought a time to meet. Ms Baker sent the letter to Ms Kininmonth seeking a meeting.

[23] Unsurprisingly Ms Kininmonth was upset. She was not interested in Cloud Accountants negotiating repayments with IRD. The parties then exchanged correspondence about resolving this matter by discussions between the parties directly or mediation. Ms Kininmonth also revoked authorisation for NZPML to make deductions from her pay and asked for all correspondence between them to be in writing.

[24] By 8 June 2016, no resolution had been achieved. Ms Kininmonth decided to email a resignation that evening at 11.46pm:

Hi Antonia

Thank you so much for giving me the opportunity to work for you at The Property Market, it has been an invaluable experience.

After much thought and consideration I have decided to hand in my resignation for a variety of reasons.

With the lucrative structure you have in place at The Property Market, it won't take long to find a replacement I'm sure.

I would still like to go down the MBIE and Disputes Tribunal road for the unfortunate current situation we are in re the tax and other shortfalls.

Given the current unresolved situation we are facing, I do not wish to return to work during the three weeks' notice period as it is just too stressful and upsetting with the very unexpected \$31,000 shortfall looming.

Again thank you for the opportunity and for the experience. I wish you all the best with the growing business and taking over the traditional real estate world.

[25] The following day, Ms Baker accepted Ms Kininmonth's resignation stating she "had hoped that our relationship would be ongoing". She asked for the return of company property and confirmed arrangements for her final pay including commission would be processed.

[26] Between 16 and 22 June 2016 the parties exchanged correspondence about the return of property and Ms Kininmonth's final pay. On 22 June 2016 Ms Baker emailed confirming \$6,351.21 commission had been paid less deductions for 2 days salary overpayment, \$2,680.50 overpayment and PAYE, student loans and KiwiSaver.

[27] Mediation occurred on 30 June 2016. It was unable to resolve matters.

[28] On 1 July 2016, Ms Kininmonth raised a personal grievance alleging unjustified disadvantages and breaches of employee contracts. She sought compensation and payment of her ACC levies, KiwiSaver, the tax shortfall and reimbursement for her lawyer's fees.

[29] In reply, NZPML sent a letter through its lawyer alleging it had overpaid Ms Kininmonth \$28,677.23 that should have been paid to the IRD. It expressed an intention to pay the KiwiSaver employer contribution which remained unpaid by NZPML again due to error. NZPML considered it had acted justifiably on being informed of the issues.

[30] On 11 July 2016, Ms Kininmonth filed a statement of problem with the Employment Relations Authority. The matter is now before me for determination.

[31] On 22 July 2016, NZPML's lawyers wrote to Cloud Accounting advising NZPML would pursue a claim in the Disputes Tribunal and asked that they notify

their insurers. At the time of hearing, NZPML had made no further progress on this claim against Cloud Accounting.

Issues

[32] At hearing, Ms Kininmonth advised she had sold assets to meet her tax bill and avoid interest and penalties accruing. As a result of Ms Kininmonth having paid her outstanding taxes, NZPML withdrew its counterclaim for the same amount.

[33] Therefore the issues for hearing are now:

- (a) Was Ms Kininmonth constructively and unjustifiably dismissed by NZPML's mismanagement of her taxes resulting in unpaid taxes from 9 March 2015 until termination?
- (b) Alternatively, was Ms Kininmonth unjustifiably disadvantaged by the same actions?
- (c) Alternatively, whether the respondent employer breached the employment agreement by the same actions?
- (d) What remedies should be awarded?
- (e) What damages should be awarded for hurt and humiliation?

Was Ms Kininmonth constructively and unjustifiably dismissed and/or disadvantaged?

[34] Ms Kininmonth alleges that she felt she had to resign due to the continuing breaches of NZPML towards her. NZPML disagrees it disadvantaged her and therefore caused her resignation.

Is NZPML liable to Ms Kininmonth for the actions of Cloud Accountants?

[35] From the evidence Cloud Accountants were contracted by NZPML to provide advice to it and to manage its payroll. On that basis Cloud Accountants was NZPML's agent for tax purposes. It did not and has never acted on behalf of Ms Kininmonth.

[36] Where an agent is acting on behalf of a known principal, the only person who can be sued for the actions of the agent is the principal”¹.

[37] There is no dispute Cloud Accountants failed to make the correct deductions for PAYE, student loan, ACC and KiwiSaver from Ms Kininmonth’s salary. It had also failed to make the correct employer KiwiSaver contributions on behalf of NZPML.

[38] The fact NZPML relied upon the advice of Cloud Accountants does not absolve it of its statutory and contractual obligations to Ms Kininmonth. If the actions of its agent cause Ms Kininmonth disadvantage or breach of its duty to her then NZPML must take responsibility for that.

[39] NZPML may also recover its losses suffered as a result of erroneous professional advice from Cloud Accountants. It is not for Ms Kininmonth to bear that burden.

Was there a constructive dismissal of Ms Kininmonth by the actions of the agent?

[40] Constructive dismissal includes, but is not limited to, cases where there is a breach of duty by the employer that causes an employee to resign.² The Authority must examine all the circumstances of the resignation. If there was a breach, the next question is *whether a substantial risk of resignation is reasonably foreseeable, having regard to the seriousness of the breach.*³

[41] The onus is upon Ms Kininmonth to prove the conduct of NZPML towards her was of such a repudiatory nature that she was entitled to elect to cancel the employment agreement and did so.⁴

[42] Ms Kininmonth accepted her resignation occurred when she had sought mediation. NZPML were willing to attend mediation. At no stage immediately prior did Ms Kininmonth signal resignation may occur in advance of mediation. The

¹ Burrows Finn and Todd *Law of Contract in New Zealand* (Third Edition LexisNexis Wellington 2007 at 511.

² *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

⁴ See above n 1.

evidence supported NZPML's belief at the time that her employment would continue into the foreseeable future.

[43] The breaches may have been serious and resignation may have been a possibility. However at the time resignation occurred, it was not reasonably foreseeable. Ms Kininmonth was not constructively dismissed. This personal grievance is dismissed.

Was there disadvantage to Ms Kininmonth by the actions of the agent?

[44] To prove a personal grievance of unjustified disadvantage Ms Kininmonth must show that one or more of the conditions of their employment was affected to her disadvantage by some unjustifiable action by the employer. The onus is on the employee to establish disadvantage before an employer must show justification for it.⁵

[45] Once disadvantage is proven the onus falls upon NZPML to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). The Authority must consider whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to taking the action complained of.⁶

[46] The Authority must not determine the dismissal/disadvantage unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a disadvantage being found to be unjustified.⁷

[47] It is accepted that at law the primary responsibility for deduction of employee taxes rests with the employer⁸. This lawful responsibility must imply that a reasonable employer has a basic knowledge of the taxes its employees are required to pay i.e. PAYE not withholding tax. There was evidence Ms Baker knew this. She accepted Cloud Accountants had told them in April 2015 PAYE would be deducted from Ms Kininmonth's salary. Her personal experience included being both an employee and an independent contractor. Ms Baker (and NZPML) were aware in

⁵ *Clark v Northland Polytechnic Council* [1999] 1 ERNZ 270 at 280.

⁶ Section 103A Employment Relations Act 2000.

⁷ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

⁸ Section RD4, Income Tax Act 2007

August 2015 of the differences in taxation paid by independent contractors and employees. The evidence supports my finding she knew employees should not have withholding tax deducted.

[48] NZPML should have identified this defect from the beginning of the employment. Ms Baker was responsible for signing off payments for employee taxes and deductions.

[49] Her correspondence in August 2015 also indicated her knowledge of taxation. Ms Baker believed IRD had erred in treating Ms Kininmonth as an independent contractor when it required withholding tax to be deducted. This should have led her (and NZPML) to conclude Cloud Accountants should not be deducting withholding tax from an employee's wages.

[50] NZPML should have made further enquiries of Cloud Accountants or IRD about the payment of withholding tax. It did not. The duty of good faith requires an employer to be active and constructive. In my view this duty was breached by NZPML's failure to take steps to enquire about the payment of withholding tax in August 2015. This also disadvantaged Ms Kininmonth.

[51] Both at law⁹ and in Ms Kininmonth's employment agreement¹⁰ KiwiSaver employee deductions and employer contributions were required to be made by the employer. The Authority has held the failure to make KiwiSaver contributions was a disadvantage that was not minor.¹¹ I agree there was a breach of her agreement by the failure to deduct and make the employer contributions which caused disadvantage. Ms Kininmonth has lost any interest payable on those funds.

[52] Employers are also required to pay ACC levies by the due date.¹² Ms Kininmonth may also have had a defence of change of position against payment of any ACC levies.¹³ There is no evidence NZPML took any steps to defray Ms Kininmonth's liabilities in those circumstances. It had access to expert taxation advice but did not seek to utilise this to Ms Kininmonth's advantage. From the evidence NZPML sought to resolve its liability to IRD only.

⁹ Sections 66 and 101B KiwiSaver Act 2006.

¹⁰ Document 1 Respondents Bundle of Documents (RBD).

¹¹ *Black v Yankee Bourbon Company Limited* [2017] NZERA Christchurch 10.

¹² Section 168 Accident Compensation Act 2001.

¹³ Section 251 Accident Compensation Act 2001.

[53] It is accepted Ms Kininmonth subsequently changed her position in reliance upon the agents advice the correct deduction had been made from her wages. She purchased assets totalling \$42,000. She then had to sell some of those assets to meet her tax bill and avoid interest and penalties. This was at a loss of \$5,500. Ms Kininmonth remains at risk of interest and penalties given she still has an outstanding tax bill to pay for the year ending 31 March 2017.

[54] The defects in the process were not minor. There was evidence of unfairness to Ms Kininmonth. Rose Marie Kininmonth was unjustifiably disadvantaged in her employment by New Zealand Property Market Limited's actions.

Remedies

[55] Ms Kininmonth has established a personal grievance of unjustified disadvantage. She seeks remedies of lost remuneration and compensation for hurt and humiliation.

[56] Given my finding the unjustified action did not cause her dismissal, Ms Kininmonth cannot claim any lost remuneration post dismissal. She received her salary while employed or on leave. No lost remuneration can be awarded.

[57] Compensation awarded in the Authority over the past 6 months for single unjustified disadvantage has ranged from \$2,400¹⁴ to \$7,000.¹⁵ In my view Ms Kininmonth's circumstances justified uplifting her compensation to \$15,000. This is because:

- She suffered actual losses of \$5,500 on the sale of assets purchased as a result of NZPML's agent's incorrect taxation advice;
- She suffered immediate stress as a result of the disadvantaging behaviour that required leave from work in May 2016. This was evidenced by her medical certificate and oral evidence about the medications she was required to take;
- Her stress was exacerbated by the delay of 20 days before NZPML quantified the final taxation amounts owed and by the lack of assistance provided to her with IRD;

¹⁴ *Hartstone v Enviro Scientific Group Ltd* [2017] NZERA Auckland 41.

¹⁵ *Singh v Corporate Energy Ltd (in Liquidation)* [2017] NZERA Auckland 39.

- Her evidence of ongoing trauma post dismissal as a consequence of the disadvantaging behaviour. This included the eventual loss of another job due to stress and evidence about the negative impact upon her personal relationship with her partner.

[58] Ms Kininmonth has not contributed to her situation in any way. Rather she has taken steps to sell assets to meet her tax obligations and incurred losses and personal cost in doing so.

[59] New Zealand Property Market Limited is to pay Rose Marie Kininmonth the sum of \$15,000 compensation pursuant to s123(c)(i) of the Employment Relations Act 2000.

[60] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority