

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 421  
3059912

BETWEEN      ANDREA STEWART  
Applicant

AND              SCHOOLS OUT (GORE) LIMITED  
First Respondent

AND              LAURIE FERGUSON  
Proposed Second Respondent

Member of Authority:      Andrew Dallas

Representatives:              Applicant in person  
No appearance for the First Respondent  
No appearance for the Proposed Second Respondent

Investigation Meeting      15 July 2020

Date of the Determination      14 October 2020

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1]      Andrea Stewart was employed by Schools Out Gore Limited (Schools Out) as a childcare worker from February 2017 until February 2018. During Ms Stewart's employment Schools Out carried on business as an after school care programme provider on the premises of East Gore School, Southland. Ms Stewart said she was constructively dismissed by Schools Out, subjected to several unjustified actions to her disadvantage and owed wages and holiday pay. In addition, Ms Stewart said Laurie Ferguson as sole director and shareholder of Schools Out was a person involved in breaches of minimum standards

[2] To the extent that they were, given the limited involvement of Schools Out and Ms Ferguson in the Authority's processes, Ms Stewart's claims against Schools Out and Ms Ferguson were denied.

### **The Authority's investigation**

[3] As part of its regular practice, the Authority convened a case management conference to make directions about the resolution of Ms Stewart's employment relationship problem with Schools Out. There was no appearance by Schools Out. The matter was adjourned.

[4] Subsequently, Schools Out were re-served through Ms Ferguson. I am satisfied that service was effected; if not previously. Upon service, Schools Out failed to lodge a statement in reply to the Applicant's statement of problem with the Authority within 14 days as directed.

[5] Ms Stewart then advised the Authority that she wished to amend her statement of problem to seek to recover alleged unpaid wages and holiday pay personally from Ms Ferguson under s 142Y of the Employment Relations Act 2000 (the Act). Schools Out and Ms Ferguson were advised that they would be given an opportunity to comment on this application at the investigation meeting set down for 10am, 15 April 2020 in Invercargill. The meeting was adjourned due to the Covid-19 pandemic. A notice of investigation meeting for 15 July 2020 was subsequently served on the parties and Ms Ferguson, as the proposed second responding party. There was no engagement from Schools Out or Ms Ferguson in respect of this.

[6] Ms Stewart attended the investigation meeting with a support person. There was no attendance by Schools Out or Ms Ferguson nor did a representative attend on their behalf. The matter proceeded as a formal proof hearing of Ms Stewart's claims.

[7] Having regard to s 174E of the Act, I have not referred to all the evidence received from Ms Stewart.

## **Issues**

[8] The issues that arose for determination during the Authority's investigation were:

- (i) Was Ms Stewart unjustifiably constructively dismissed by Schools Out;
- (ii) Was Ms Stewart subject to one or more unjustified actions by Schools Out to her disadvantage;
- (iii) If so, what remedies should be awarded to Ms Stewart considering:
  - i. Lost wages;
  - ii. Compensation for hurt, humiliation and injury to feelings;
- (iv) Is Ms Stewart owed wages and holiday pay by the Respondent and, if so in what amount?;
- (v) Should Ms Ferguson be joined to the proceedings under s 142Y and s 142 of the Act as a person involved in breaches of minimum employment standards?; and
- (vi) Should either party contribute to the costs of the other?

### **What caused Ms Stewart's employment relationship problem with Schools Out?**

[9] Ms Stewart's employment with Schools Out was governed by an individual employment agreement, which she had signed but was not provided with a copy. Ms Stewart's hours of work were: 2:45 pm to 6:00 pm Monday to Friday and 8:00 am to 6:00pm during the school holiday programme.

[10] On 23 January 2018 an incident took place which left Ms Stewart "shocked and speechless". During a conversation with another staff member, Ms Ferguson started yelling at Ms Stewart: "you've fucken won". Ms Ferguson then ranted that she was sick of the staff disrespecting her. Ms Stewart said she replied along the lines of: "you're the one that's been walking around in a bad mood for days. I could see something was up so I left you to it ...". Ms Ferguson then turned to Ms Stewart and said: "do us all a favour and fucken quit. I would've fired you months ago if I knew you wouldn't go me". Ms Stewart said she had no idea why Ms Ferguson spoke to her in such a manner.

[11] On 21 February 2018 at or about 5:37 pm, Ms Ferguson contacted Ms Stewart to say that she was being suspended from her employment. Ms Ferguson said she had received an allegation from the principal and deputy principal of the school that Ms Stewart had “tackled” a child. Ms Stewart said this was the first she knew of the allegation.

[12] Ms Stewart refuted the veracity of the allegation to Ms Ferguson. According to Ms Stewart the incident giving rise to the allegation occurred in respect of one of the children in early to mid-January 2018. The child concerned was the son of Schools Out’s supervisor.

[13] Ms Stewart said the supervisor saw that her son was being physically aggressive with the other children. The supervisor yelled out to Ms Stewart to stop him. Ms Stewart said she headed towards the child to calm him down. She said she tried to get hold of the child’s arm, but his arm slipped out of her grasp, which caused both the child and her to fall over. Ms Stewart said to soften the fall, she placed her arm on the ground. The incident took place on the school field which is a grassed area. Ms Stewart said the child was not hurt or injured and the situation was observed by the child's mother.

[14] Ms Stewart said after was she suspended, which was with immediate effect, she spoke with the child's mother who told her that the "allegation is crap". Ms Stewart said the child’s mother had also spoken with principal who denied the allegation.

[15] On 22 February 2018, Ms Stewart spoke with Ms Ferguson via telephone. Ms Ferguson informed Ms Stewart that she was not “fired” and that her job was “safe”. Ms Ferguson added that Ms Stewart was suspended because Schools Out had to make it look like she was putting the children first. Ms Ferguson also told Ms Stewart that when Schools Out moved to a new location there was a possibility of alternative duties. However, Ms Stewart said heard nothing more about this.

[16] Ms Stewart said that Ms Ferguson advised her that she would continue to receive wages while being suspended. However, this did not happen and Ms Stewart was left with no money to pay her bills. To make ends meet, Ms Stewart borrowed money from friends. Ms Stewart said she contacted the Ministry of Social

Development and asked them to reassess her benefit at the full rate as she had no other income.

[17] On 6 March 2018, the Schools Out supervisor (and mother of the child concerned) informed Ms Stewart that Ms Ferguson had texted her to ask Ms Stewart for her resignation. According to the supervisor, Ms Ferguson wanted Ms Stewart's resignation in writing by 6:00 pm on 7 March 2018 or she would contact the Ministry of Social Development and Oranga Tamariki regarding the allegation.

[18] Ms Stewart said she was shocked and confused by what she had been told. Ms Stewart said she was also terrified as Ms Ferguson was aware that she was trying to gain day-to-day care of her daughter.

[19] Ms Stewart said she did not know what to do, so she contacted the Southland Community Law Centre for assistance. After further discussion with a caseworker at the law centre, Ms Stewart made the decision to resign from her employment. Ms Stewart explained the reasons for her resignation in a letter to Schools Out.

[20] On 26 March 2018, the law centre wrote to Ms Ferguson and raised personal grievances for constructive dismissal and several disadvantage grievances including in relation to Ms Stewart's suspension. Payment of all outstanding wages and holiday pay was also sought. The law centre also requested a complete copy of Ms Stewart's personnel file, including wage and time records, and all information pertaining to the allegation.

[21] Ms Stewart said that no information was forthcoming regarding the allegation and she was never provided with a copy of her wages and times records or a signed copy of her employment agreement.

[22] After the personal grievance letter was sent, Schools Out instructed an employment advocacy firm to represent it. Despite attempts by the law centre to resolve the matters between the parties, nothing came of it and the advocacy firm eventually stopped responding. Out of other settlement options, the law centre lodged a statement of problem in the Authority on Ms Stewart's behalf.

### **The Authority's view of Ms Stewart's employment relationship problems**

[23] The primary issue before the Authority is whether Ms Stewart was constructively dismissed by Schools Out. The disadvantage grievances advanced by Ms Stewart form part of Schools Out's conduct and are, effectively, subsumed by the primary issue.<sup>1</sup>

[24] Having carefully considered Ms Stewart's evidence, and taken into account such contrary evidence available to the Authority, which was extremely limited, I find Ms Stewart was constructively dismissed by Schools Out as a result of a serious breach of duty which had the effect of repudiating her contract of employment. The breach of duty by Schools Out consisted of several components, namely:

- (i) failure to pay wages and holiday pay;
- (ii) unlawful deprivation and retention of wages; including minimum wages;
- (iii) unjustified suspension;
- (iv) failure to properly particularise an allegation of misconduct; and
- (v) subsequent failure to investigate an allegation of misconduct.

### **Remedies**

[25] As Ms Stewart has been found to have a personal grievance, Ms Stewart is entitled to an assessment of remedies.

#### *Lost wages*

[26] Ms Stewart sought three months lost wages as one of the remedies for her personal grievance. Based on the evidence, Ms Stewart made reasonable attempts to mitigate the loss of employment.

[27] Subject to any contribution, Schools Out must pay Ms Stewart three months' pay on the basis of the following calculation: 13 weeks x (\$16.50 x 15 hours) \$247.50

---

<sup>1</sup> Section 160(3) of the Act.

= \$3217.50 gross. In addition, Schools Out must pay Ms Stewart \$257.40 being the applicable holiday pay on this amount.

*Compensation for hurt, humiliation and injury to feelings*

[28] Ms Stewart sought compensation for hurt, humiliation and injury to feelings arising out of the termination of employment by Schools Out. Ms Stewart did not specify a compensatory figure in the statement of problem.

[29] I accept Ms Stewart was significantly personally impacted by the loss of employment. Ms Stewart spoke of humiliation and loss of standing among her family and friends. Ms Stewart also said she was required to move out of a rental property shared with her daughter due to not being able to pay the rent, and move in with a friend. Ms Stewart spoke of a loss of dignity associated with lost independence and a sense of personal space. Ms Stewart's evidence was both forthright and moving.

[30] Taking these matters and other surrounding circumstances of Ms Stewart's dismissal into account it is appropriate for Schools Out to pay Ms Stewart \$15,000 under s 123(1)(c)(i) of the Act. This award is made mindful of an upward trend in awards being made by the Authority.

*Contributory conduct by Ms Stewart?*

[31] Having found that Ms Stewart was entitled to a remedy for a personal grievance for unjustified dismissal, I was required by s 124 of the Act to consider whether Ms Stewart contributed to the situation giving rise to the grievance.

[32] There was no evidence before the Authority of any conduct by Ms Stewart that contributed to the termination of the employment by Schools Out. Consequently, no deduction to Ms Stewart's remedies for contribution is made.

**Ms Stewart's claim for unpaid wages and holiday pay**

[33] Ms Stewart's claim for unpaid wages and holiday pay was supported by oral and written evidence. However, Ms Stewart's ability to provide the most accurate position as the alleged underpayments was hampered by Schools Out failure to produce wage and time records to assist in the calculation process.

[34] In the absence of such records and any other information from Schools Out disproving the claim and in reliance on s 132(2) of the Act. I accept Ms Stewart's claims for unpaid wages and unpaid holiday pay. Schools Out must pay Ms Stewart unpaid wages in the amount of \$1,440 gross and unpaid holiday pay in the amount of \$960 gross.

### **Other claim**

[35] The final substantive issue to be investigated by the Authority is whether Ms Ferguson should be joined to Ms Stewart's proceedings under s 142Y of the Act as a person involved in minimum standards breaches. This matter is adjourned pending disposal by the Court of Appeal of a Labour Inspector's appeal against a judgment of the Employment Court about the requisite level of knowledge required for a respondent be found to be a person involved<sup>2</sup>. The Employment Court found "intent" was required.<sup>3</sup> The Authority had earlier found in the same matter that "wilful blindness" was sufficient.<sup>4</sup>

[36] An Authority Officer will contact the parties once the legal position has been clarified.

### **Summary of orders**

[37] Schools Out must pay Ms Stewart the following amounts within 28 days of the date of this determination:

- (i) as a remedy for Ms Stewart's personal grievance, reimbursement of three months ordinary time wages of \$3217.50 gross and \$257.40 gross, being the applicable holiday pay on that amount;
- (ii) as a further remedy for Ms Stewart's grievance, \$15,000 as compensation for hurt, humiliation and injury to feelings;
- (iii) underpayment of wages in the amount of \$1,440 gross; and
- (iv) underpayment of holiday pay in the amount of \$960 gross.

---

<sup>2</sup> *A Labour Inspector v Southern Taxis Limited* [2020] NZCA 337 (CA)

<sup>3</sup> *A Labour Inspector v Southern Taxis Limited* [2020] NZEmpC 63 at [187]

<sup>4</sup> *A Labour Inspector v Southern Taxis Limited* [2019] NZERA at [47]

## **Certificate of Determination**

[38] The Authority officer is directed to prepare a Certificate of Determination setting out the orders made in paragraph [38] above.

## **Costs**

[39] Costs are reserved pending resolution of all matters before the Authority. However, as Ms Stewart was assisted in the preparation of the matter now before the Authority by the Southland Community Law, it may wish to apply for costs when the matter comes to be decided.<sup>5</sup> This determination and any subsequent determination will be provided to the law centre so that it might consider its position in this regard.

Andrew Dallas  
Chief of the Employment Relations Authority

---

<sup>5</sup> See, *Popkin v Innovative Landscapes (2015) Limited* [2020] NZERA 374