

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 606
3181059

BETWEEN

MARIA BYUN
Applicant

AND

F&B VULCAN LIMITED
(FORMERLY KNOWN AS
BURGERED VULCAN
LIMITED)
First Respondent

GRIND CAFE GREY LYNN
LIMITED
Second Respondent

MURRAY ATHOL OSMOND
Third Respondent

Member of Authority:

Marija Urlich

Representatives:

Simon Greening and Erin Drew, for the Applicant
No appearance for the Respondents

Investigation Meeting:

10 October 2023

Determination:

17 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Byun was employed by F&B Vulcan Limited (F&BVL) in the position of café-lead from 30 August 2021 until her employment ended on 15 May 2022 when she resigned with immediate effect because of repeated failure to pay wages. She says her unpaid wages remain outstanding as does holiday pay due when her employment ended for which she seeks orders for payment of arrears. Ms Byun also says she was unjustifiably constructively dismissed and seeks remedies for associated losses. In

addition, Ms Byun seeks findings that F&BVL has breached duties owed to her and an award of penalties, a portion of which to be paid to her.

[2] F&BVL has not lodged a statement in reply, filed documents in accordance with timetabling directions or otherwise engaged with the Authority. Ms Byun withdrew her claim against the director of F&BVL, Grahame Craig. The registrar of companies has initiated action to remove F&BVL from the register. Ms Byun has lodged an objection to its removal.

[3] Ms Byun also brings a claim against Grind Café Grey Lynn Limited (GCGLL) which offered her employment on or about 28 April 2022. GCGLL is associated with F&BVL - both companies are ultimately held by Delta Private Equity Limited. The claim against GCGLL cannot proceed because that entity was removed from the companies register on 22 June 2023. Notwithstanding, this determination will deal with whether Ms Byun was employed by that entity.

[4] The claim against Mr Osmond, the director of GCGLL also cannot proceed. The Authority is not satisfied Mr Osmond was served with these proceedings and, at this stage, it is not clear what the nature of any claim against him is in his capacity as director of a company which is currently removed from the register.

The Authority's investigation

[5] On 2 August 2022 Ms Byun lodged her statement of problem in the Authority. The statement of problem was served on the address for service of F&BVL on 10 August at 8.59am. It did not file a statement in reply or otherwise engage with the Authority. Service on the remaining respondents was unable to be effected by usual delivery method.

[6] On 6 October Ms Byun was directed to undertake service including arranging personal service on the named director respondents. On 10 February 2023 Ms Byun advised the Authority she was unable to arrange personal service. On 20 February Ms Byun was requested to confirm the respondent parties against whom she sought to bring a claim. On 12 April she withdrew her claim against Mr. Craig.¹

¹ Ms Byun advises the claim against Mr. Craig was withdrawn due to his health and that as a consequence service is unable to be effected on him personally.

[7] On 5 May the notice of investigation meeting was served on the address for service of F&BVL.

[8] On 7 September 2023 at 10.37am the statement of problem, the notice of investigation meeting and notice of directions dated 23 August 2023 were served on F&BVL's address for service. At 8.08am on 7 September 2023 these documents were also served on the address for service of Delta Private Equity Limited.

[9] F&BVL did not attend the investigation meeting. I am satisfied it was aware of the investigation meeting and has had a fair opportunity to attend or provide information to the Authority which is relevant to the investigation and determination of this employment relationship problem.

[10] It is appropriate to move to determine this matter. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received.

Issues

[11] The issues identified for investigation and determination are:

- (i) whether arrears of wages pursuant to section 131 of the Act are due and owing?
- (ii) whether interest on the same pursuant to schedule 2 section 11 of the Act?
- (iii) whether arrears of public holiday pay, alternative holiday pay, and annual leave pursuant to the Holidays Act 2003?
- (iv) whether interest on the same pursuant to section 84 of the Holidays Act 2003 or schedule 2 section 11 of the Employment Relations Act 2000?
- (v) whether Ms Byun was unjustifiably dismissed?
- (vi) if so, whether she is entitled to remedies including:

- (a) reimbursement of lost wages of \$1,749.00 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000;
- (b) compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000;
- (vii) whether penalties should be awarded against F&BVL pursuant to section 75 of the Holidays Act 2003?
- (viii) whether penalties should be awarded against all F&BVL pursuant to section 134 of the Employment Relations Act 2000?
- (ix) if any party is entitled to costs?

The parties' employment agreement

[12] Ms Byun and F&BVL entered a written employment agreement (the employment agreement) on 16 August 2021. Gareth Needham signed the employment agreement as a representative of the employer. Clause 7 of the employment agreement is titled 'Remuneration Details' and includes Ms Byun was to be paid fortnightly into her nominated bank account.²

Discussion

Was Ms Byun unjustifiably constructively dismissed?

[13] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of 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.³

² Individual Employment Agreement Julius Caesar 24 December 2021 clause 7.1.

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

[14] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.⁴

(i) *Did F&BVL breach the terms of the employment agreement causing Ms Byun to resign?*

[15] Failure to pay wages in full when due and owing is a serious breach of the duty owed to Ms Byun as an employee.⁵ F&BVL breached this duty because it did not pay Ms Byun when it agreed it would under the terms of the parties' employment agreement. The breach is ongoing.

[16] F&BVL first failed to Ms Byun wages in the period 5 – 11 December 2021. On 13 December F&BVL's 'People & Culture Team' messaged Ms Byun and other effected staff that the delay was due to a "major failure of out payroll system", offered an apology, advised any bank dishonour costs would be met by the business and the pay would be made in the 24 hours with a new pay slip issued. This did not occur, and the wages remain unpaid.

[17] The Companies Office register shows on 18 February 2022 Burgered Vulcan Limited changed its name to F&B Vulcan Limited. Mr. Osmond is recorded as the presenter of the name change. It does not appear Ms Byun's employer advised her it had changed its name.

[18] For the period 27 February 2022 to 2 April 2022 and 10 April to 4 May 2022 F&BVL again failed to pay Ms Byun wages when they were due and owing.

[19] On 28 April Ms Byun was called into a meeting with Mr. Needham who advised her F&BVL had ceased trading from 1 April, her role with that entity was redundant and the arrears owing her would be paid when the COVID-19 government wage subsidy had been received. Mr. Needham then offered her employment with GCGLL in the same position and advised her leave balance would be transferred to that entity. On 30 April

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

⁵ Wages Protection Act 1983, s 4.

Ms Byun messaged Mr. Needham "...I'm tired of asking you or getting stressed out. I have so much overdue payment to pay this week...I feel so unfair about this, Gareth."

[20] On 2 May Ms Byun was presented with a written individual employment agreement which appears to be signed by Mr. Needham on behalf of the proposed employer GCGLL. Ms Byun did not sign this employment agreement or, I am satisfied otherwise indicate acceptance of employment with that entity.

[21] Ms Byun did not return to work after 4 May. She wrote that day to F&BVL asking for her pay including "...I cannot work until I get paid..."

[22] Ms Byun did not receive a response to her letter.

[23] On 15 May 2022 Ms Byun wrote to her employer and three other addressees - Mr. Needham, Matt Young, who had made representations to her about her employment on behalf of her employer and the café manager. In the letter she advised she was resigning from her employment with immediate effect due to the ongoing failure to pay wage arrears which were due, that this failure had caused her a severe financial crisis over many months, that she could not afford to pay rent and other bills which were due to be paid and had caused her much mental stress. Ms Byun says in the letter she had no choice but to resign and characterises her resignation as a constructive dismissal.

[24] Ms Byun did not receive a response to her letter.

[25] Ms Byun's employment ended by way of resignation on 15 May because of F&BVL's breaches of duty in failing to pay her wages. She had previously communicated her concerns to F&BVL about the impact of its ongoing failure to pay her overdue wages. Despite this F&BL did not remedy its breach.

[26] For completeness, Ms Byun's employment did not transfer to GCGLL because she did not consent to being employed by that entity. Aside from Mr. Needham's representation to Ms Byun, there is no information before the Authority that GCGLL took over the business Ms Byun worked in or assumed any of its responsibilities towards Ms Byun. Further there is no information to support Mr. Needham's claim to Ms Byun that F&BVL had ceased trading from 1 April. Information on the Companies

Officer register suggests the company continued to trade during this period – its name was changed on 18 February, on 11 May 2022 Mr. Osmond filed an updated registered office address and address for service and he filed an annual return on 21 December 2022.

(ii) *If so, was Ms Byun’s resignation reasonably foreseeable given the nature of the breaches?*

[27] Yes. The failure to pay in the circumstances of this matter was a breach of duty of sufficient seriousness to make it reasonably foreseeable Ms Byun would resign. Ms Byun made it clear to F&BVL that her personal circumstances were such that she could not work without pay and that she did not agree to further delay in payment of the wages which were due and owing. The steps she took to end the employment relationship on or around 15 May were readily foreseeable.

[28] Ms Byun was unjustifiably constructively dismissed.

Remedies in relation to the personal grievance

[29] Ms Byun has established a personal grievance for unjustified constructive dismissal. She is entitled to a consideration of the remedies sought.

Reimbursement

[30] Ms Byun seeks reimbursement of \$1,794.00 (gross) earnings lost as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act. The period of claim runs from 15 to 22 May 2022 when she started a new job.

[31] After reviewing the evidence of loss and Ms Byun’s attempts to secure employment, the Authority is satisfied she is entitled to an award of one week’s wages being \$624.00 (gross) calculated at the agreed rate of pay and hours and days of work.⁶

Compensation for humiliation, loss of dignity and injury to feelings

[32] The evidence establishes Ms Byun’s dismissal and the circumstances leading up to it were very stressful and caused her financial strain.

⁶ For the week commencing 16 May 2022 usual hours of 30 per week at \$26.00 per hour = \$780.00 (gross) less earnings received of \$156.00 gross.

[33] The Authority is satisfied Ms Byun has experienced harm under each of the headings in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$16,000 under section 123(1)(c)(i) is appropriate.

Contribution

[34] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[35] Ms Byun did not contribute in a blameworthy way to the circumstances which led to her employment ending. It is not unreasonable for an employee to request payment for wages due and owing. There are no deductions from the monetary remedies for reasons of contribution.

Are arrears of wages due and owing?

[36] Ms Byun is entitled to be paid by F&BVL for hours worked at the agreed rate of pay, which was \$26 per hour.⁷ She has provided evidence of the actual hours she worked for which she has not been paid which is accepted.

[37] F&B Vulcan Limited is ordered to pay Ms Byun wage arrears totaling \$6,744.40 (gross) because the evidence establishes between the pay periods 4 December 2021 and 7 May 2022, she worked 284.4 hours for F&BVL for which she should have been paid at the rate of \$26.00 per hour and these arrears remain unpaid.⁸ In addition, I am satisfied but for F&BVL's breaches of duty Ms Byun would have worked her usual days and hours in the pay period 8 May to 15 May when she resigned.⁹ She is entitled to be paid arrears of \$1,170.00 (gross) for that period. These arrears payments are to be made within 21 days of the date of this determination.

⁷ Refer written individual employment agreement.

⁸ Less \$650.00 cash payment received from a representative of F&BVL.

⁹ 30 hours at \$26 per hour.

Are holiday pay arrears due and owing?

[38] As an employee Ms Byun was entitled to be paid time and a half for public holidays worked and alternative holiday pay and to be paid termination holiday pay when her employment ended.¹⁰ She is also entitled to be paid holiday pay on the wage arrears calculated at eight per cent of total gross earnings. She has received none of these payments.

[39] F&B Vulcan Limited is ordered to pay Ms Byun \$2,830.87 in holiday pay entitlements within 21 days of the date of this determination.¹¹

Should interest be ordered on the arrears?

[40] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[41] It is appropriate where a person has been deprived of the use of money to make an award for interest. Ms Byun is entitled to an award of interest on the wage arrears awarded including the holiday pay component.

[42] F&B Vulcan Limited is ordered to pay interest, using the civil debt interest calculator, within 21 days of this determination, as follows:¹²

- (i) Interest on the sum of \$10,745.27, being the total of arrears awarded, calculated from 15 May 2022 until the date payment is made in full.

[43] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Is F&B Vulcan Limited liable for a penalty?

[44] As found above F&BVL's failure to holiday pay when due and owing is a breach of statutory duty and the failure to pay wages is a breach of the parties' employment agreement. Ms Byun seeks penalties for these breaches. F&BVL's action in failing to pay Ms Byun's holiday pay entitlement when her employment ended is a breach of statutory

¹⁰ *Holidays Act 2003, sections 27, 50 and 56.*

¹¹ *Holiday pay of 8% of gross earnings = \$2,538.37 + 1-day public holiday pay with loading + alternative holiday pay = \$292.50.*

¹² *www.justice.govt.nz/fines/civil-debt-interest-calculator.*

obligations. Failure to pay wages when they were due and owing under the terms of the parties' employment agreement is a breach of that agreement and amounts to a statutory breach under s134 of the Act.

[45] The maximum penalty against a company is \$20,000.¹³ There is one found statutory breach and a breach of the employment agreement. They are sufficiently interrelated to be globalised. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.¹⁴

[46] F&BVL represented to Ms Byun that the arrears due, at least as at 28 April, would be met by the COVID-19 wage subsidy. This has not occurred and F&BVL has taken no steps to mitigate these breaches.

[47] F&BVL's actions must be seen as intentional and its culpability high. As the employer it was responsible for payments of wages and holiday pay and the failure to do so is a serious breach. On the information before the Authority the failures were intentional actions in breach of obligations owed by F&BVL to Ms Byun to pay wage arrears and holiday pay when due and owing.

[48] There is compelling evidence of direct loss suffered by Ms Byun as a result of F&BVL's breaches and she has spent time and resources seeking to enforce obligations owed to her. As a worker dependent on a visa which restricted her ability to work to F&BVL she was particularly vulnerable. There is no specific evidence before the Authority of any financial difficulty F&BVL may have in paying any penalty though it is accepted F&BVL is now no longer trading.

[49] Standing back and including comparison with other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$8,000. F&BVL is ordered to pay half the penalty to Ms Byun to compensate her for the inconvenience and resources expended in pursuing the payment of entitlements. The penalty is to be paid within 21 days of the date of this determination.

¹³ Employment Relations Act 2000, s 135

¹⁴ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

Summary of orders

[50] The Authority orders as follows:

Within 21 days of the date of determination F&B Vulcan Limited is ordered to pay Maria Byun the following sums:

- (i) \$16,000 under s 123(1)(c)(i);
- (ii) \$624.00 (gross) under s 123(1)(b);
- (iii) \$10,745.27 (gross) in wage and holiday pay arrears.
- (iv) F&B Vulcan Limited is to calculate and pay interest on total arrears;
and
- (v) \$8,000 penalty half of which is to be paid to Maria Byun and half to the Crown.

Costs and reimbursement of filing fee

[51] Ms Byun is entitled to a contribution to the costs of representation incurred in bringing her personal grievance to the Authority for determination and seeking to recover wage arrears and holiday pay from F&BVL. She seeks a contribution of \$2,000.00 towards those costs which the Authority accepts have been incurred.

[52] Applying the Authority's usual notional daily rate F&B Vulcan Limited is ordered to pay Ms Byun \$1500.00 as a contribution towards those costs and the filing fee of \$71.56. In making this award the Authority's usual daily tariff for costs has been taken into account and that the investigation meeting ran for less than half of the time usually allocated for one day.¹⁵

Marija Urlich
Member of the Employment Relations Authority

¹⁵ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>.

