

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 694
3213599

BETWEEN MICHELLE ESCOTT
Applicant

AND MANAWATU WALL
INSULATION LIMITED
First Respondent

AND ANTONIO CANDERLE
Second Respondent

Member of Authority: Rowan Anderson

Representatives: Ursula Nicholls, counsel for the Applicant
No appearance for the First Respondent or Second Respondent

Investigation Meeting: 6 October 2023 at Palmerston North

Submissions received: 18 October 2023 from the Applicant

Determination: 22 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michelle Escott was employed as the Kitchen Manager at Antonio's Café in Palmerston North, commencing her employment on 27 August 2022. Antonio Canderle, the Second Respondent, is the sole director and shareholder of Manawatu Wall Insulation Limited (MWIL), the First Respondent.

[2] Ms Escott claims that she was unjustifiably dismissed without notice on 27 November 2022 when she was informed that Antonio's Café would be closing. She also claims that she was unjustifiably disadvantaged in her employment in that she was not paid wages when they were due. Ms Escott seeks compensation for lost wages and for

humiliation, loss of dignity, and injury to feelings. She also seeks payment of unpaid wages and holiday pay.

Issues

[1] The issues identified for investigation and determination, are:

- (a) Was Ms Escott employed by Mr Canderle? If not, was MWIL her employer?
- (b) Was Ms Escott unjustifiably dismissed?
- (c) Is Ms Escott entitled to payment for an arrears of wages and/or payment for annual holidays?
- (d) Was Ms Escott unjustifiably disadvantaged in her employment having regard to Mr Canderle's or MWIL's failure to make payment of wages and/or other entitlements?
- (e) If Mr Canderle's or MWIL's actions were not justified what remedies should be awarded, considering:
 - (i) Compensation for humiliation, loss of dignity, and injury to feelings; and/or
 - (ii) lost wages;
- (f) Should either party contribute to the costs of representation (if any) of the other party?

The Authority's Investigation

[2] Neither Mr Canderle or MWIL lodged a statement in reply responding to Ms Escott's claims. Mr Canderle and MWIL did not meaningfully engage in the Authority's process, nor did either attend or appear at the investigation meeting.

[3] I am satisfied that Mr Canderle and MWIL were served with the statement of problem, notice of investigation meeting, and other relevant documents relating to the Authority's investigation. This is confirmed by courier delivery reports, including confirmation that Mr Canderle signed for receipt of the statement of problem on 1 March 2023.

[4] On 8 May 2023, the Authority received an email response stating that Mr Canderle was in hospital and could not attend a scheduled case management conference. That response was sent from the email address identified in the statement of problem as belonging to Mr Canderle, although the email was sent by a 'Nicky'.

[5] On 9 May 2023, I instructed the Authority Officer to respond advising that the case management conference would be adjourned for a period of one week and that any further request for adjournment would need to be accompanied by additional information as to the alleged incapacity and inability to attend (for example, a letter from a medical practitioner confirming the purported inability to attend). Such information was not provided despite the Authority following up on 15 May 2023, nor was any further adjournment request received.

[6] A case management conference was held on 18 July 2023. There was no appearance by Mr Canderle or MWIL. Written directions were issued and an investigation meeting scheduled for 6 October 2023 in Palmerston North. The written directions issued provided a timeframe within which any objections should be made as to the proposed timetable. They also noted that substantive information would need to be provided if any variation to the directions was to be sought.

[7] On 20 July 2023, the Authority received a further email response from Mr Canderle's email address simply saying, "I'm in hospital". On 25 September 2023 the Authority sent an email reminder to Mr Canderle reminding him that the investigation meeting would proceed regardless of whether he chose to attend. A further email was received from Mr Canderle on 25 September 2023 referring, in general terms and absent any supporting documentation, to a medical condition and saying that he was in hospital three times a week. Mr Canderle was informed the same day that the investigation meeting would be proceeding. Mr Canderle responded as follows (without correction):

I won't be incurring more the. Company is closed I have no assets so if you want to proceed against an disabled beneficiary go for. It

[8] Despite having multiple opportunities to do so, no supporting information was provided as to Mr Canderle's purported inability to attend.

[9] An investigation meeting was held on 6 October 2023. Ms Escott was the only witness, having earlier provided a written statement in accordance with the directions issued. She answered questions under affirmation at the investigation meeting.

[10] Mr Canderle and MWIL were served with a copy of the written submissions lodged on behalf of Ms Escott, and also a Minute of the Authority dated 9 October 2023. That Minute included timetable directions for the lodgement of submissions from Mr Canderle and MWIL. None were received by the Authority.

[11] 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 of evidence and submissions received.

Was Ms Escott employed by Mr Canderle?

[12] Ms Escott claims that Mr Canderle, and in the alternative MWIL, was her employer. She says that her first dealings were with Mr Canderle, including an initial meeting, and then an interview held early in the week of 22 August 2022 at which terms and conditions were discussed. Another person, Nicky Delbeth, was present at that interview and was introduced as “the accountant” to Ms Escott.

[13] Ms Escott was provided an individual employment agreement (IEA) providing for a commencement date of 27 August 2022. The IEA provided that she would report to the “Business Owner” and that her employer was “Antonio’s Cafe”. Antonio’s Café is not registered with the Companies Office.

[14] Ms Escott’s evidence is that she engaged with Mr Canderle in relation to the operation of the café, including as to the absence of a food control plan being registered with the council and inadequate food stocks.

[15] MWIL had no explicit role in Ms Escott’s employment. Payslips provided to the Authority listed her wages as being paid by Antonio’s Cafe. However, Ms Escott’s own bank records, which were provided to the Authority, show the payments as having been made from MWIL. Mr Canderle is the sole director and shareholder of MWIL.

[16] I find that MWIL was used as a payment mechanism by Mr Canderle in order to pay wages in the context of the café struggling financially. Ms Escott was interviewed, engaged, and ultimately dismissed under Mr Canderle’s control and I find that he was Ms Escott’s employer. Mr Canderle has not contested that.

[17] I conclude that Ms Escott was employed by Mr Canderle in his personal capacity and not by MWIL.

Was Ms Escott unjustifiably dismissed from her employment?

[18] Ms Escott claims that she was unjustifiably dismissed on 27 November 2022 when she received the following email that was sent to all staff:

To all staff
It is with great regret and sadness that as you are probably aware now, we have very sadly had to close our doors permanently.
Tony and myself greatly appreciate all the effort and hard work you have all put into the cafe, you are all amazing and wonderful people, I have high regard for you all.
This is an extremely difficult and sad time for everyone involved.

I'm working on a plan for wages owed to be paid off, once I have worked it out I'll be in touch.
And we are both more than willing to be a work reference if you need one.

Again, the deepest apologies to everyone, we are very sorry and saddened this situation has happened.

Kind Regards
Nicky

[19] I am satisfied, based on her evidence and the email of 27 November 2022, that Ms Escott was dismissed from her employment. I conclude that the dismissal was at the initiative of Mr Canderle.

[20] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Mr Canderle's actions, and how Mr Canderle acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.¹

[21] Justification requires the consideration of both substantive and procedural fairness. The onus is on Mr Canderle to justify his actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

[22] On 25 November 2022, Ms Escott sent messages to both Ms Delbeth and Mr Canderle regarding the stock issues. Ms Escott's evidence is that there were significant issues and that she had in fact purchased produce out of her own money at times in order to be able to open and serve food. The following text message exchange occurred between Ms Escott and Mr Canderle after Ms Escott messaged advising of the urgent need for stock (without correction):

¹ Employment Relations Act 2000, s 103A.

Mr Canderle we all broke

Ms Escott Hen we cannot run

Mr Canderle No looks that way

[23] Ms Escott and the other staff at the café left at around 3.30pm that same day. She then received the all staff email on 27 November 2022 stating that the café was closing. Ms Escott said that at the same time as the café was closing, that Mr Canderle was opening a new business in Ashhurst.

[24] Mr Canderle has not responded to Ms Escott's claims and no justification for the dismissal has been put forward. I am not satisfied that Mr Canderle has discharged the onus of proving there was a justification for the dismissal or his actions.

[25] I find that the dismissal was both substantively and procedurally unjustified. Whilst the café closed, I am not satisfied that it has been shown that it was a situation of genuine redundancy.

[26] Section 4(1A)(c) of the Act required Mr Canderle to provide access to Ms Escott to information relevant to any decision that was likely to have an impact on the continuation of her employment and to provide her an opportunity to comment on the information prior to any decision being made. I find that Mr Canderle did not do so, nor did he engage in any form of consultation. Ms Escott was given no notice of the dismissal.

[27] I find that Ms Escott was unjustifiably dismissed from her employment.

Was Ms Escott unjustifiably disadvantaged in her employment?

[28] Ms Escott claims that she was unjustifiably disadvantaged in her employment by Mr Canderle's failure to pay her full wages when due.

[29] Ms Escott's evidence is that whispers about pay issues started to circulate prior November 2022. She said that her pay was late on two occasions but that she didn't have any concerns at that time. In November 2022 she received late and inconsistent payments and there were significant stock issues.

[30] Ms Escott's evidence is that she did not receive payment for all her wages that were due on 3 November 2022, 10 November 2022, 17 November 2022, and 22

November 2022. Ms Escott provided payment receipts showing that only partial payments were received.

[31] Ms Escott also gave evidence as to stock shortages that arose during her employment that impacted the business. I consider it clear that the business was under severe financial strain and that it did not pay Ms Escott's full wages when they became due. Ms Escott was entitled to payment for the hours worked. Clause 7.2 of her IEA required that Ms Escott be paid her wages weekly.

[32] Ms Escott suffered financial loss as a result of Mr Canderle's failure to make payment of her full wages when due.

[33] Mr Canderle has not discharged the onus of showing that his actions were justified. I find that the failure by Mr Canderle to make payment to Ms Escott in accordance with her IEA was both substantively and procedurally unjustified.

[34] I find that Ms Escott was unjustifiably disadvantaged in her employment.

Is Ms Escott entitled to remedies?

Is Ms Escott entitled to compensation for lost wages?

[35] Ms Escott seeks compensation for lost wages equivalent to 10 weeks at her full rate of pay, and three weeks at a reduced rate reflecting some income received from alternative employment.

[36] Ms Escott's evidence is that she obtained alternative employment at a reduced rate of pay on 5 February 2023. She said that she worked 15 hours per week in the new role and that the employment did not last long.

[37] I accept Ms Escott's evidence and consider it appropriate to make an order for lost wages on the basis sought. I conclude that Ms Escott is entitled to payment of an equivalent of 10 weeks wages at the rate of \$25.00 per hour and 40 hours per week. Additionally, she is entitled to a total of 25 hours for each of the three weeks, at the rate of \$25.00 per hour, for which it was submitted she worked less hours in alternative employment.

[38] I order Mr Canderle pay Ms Escott, within 28 days of the date of this determination, compensation of \$11,875 for lost wages.

Is Ms Escott entitled to compensation for humiliation, loss of dignity and injury to feelings?

[39] Ms Escott seeks a total award of \$10,000, as compensation for humiliation, loss of dignity and injury to feelings.

[40] Ms Escott's evidence is that she was not provided notice of the dismissal. Ms Escott found herself suddenly unemployed in later November 2022, with the Christmas period being bleak for her family as a result. She also said that the employment relationship, which included significant issues as to payment of wages, was very stressful for her.

[41] I am satisfied that Ms Escott was negatively impacted by Mr Canderle's actions, both in relation to the issues with payment of wages and as to the dismissal. I consider the sum sought as compensation to be modest in the circumstances.

[42] I order Mr Canderle make payment to Ms Escott, within 28 days, of \$10,000 as compensation for humiliation, loss of dignity and injury to feelings relating to her unjustified dismissal and disadvantage claims.

Contribution

[43] Section 124 of the Act requires that the Authority consider the extent to which Ms Escott's actions contributed towards the situation that gave rise to her personal grievances, and if those actions so require, that the Authority reduce the remedies that would otherwise have been awarded accordingly.²

[44] I do not consider there is any basis on which Ms Escott's actions could be said to have contributed to the situation that gave rise to her personal grievances. I decline to make any reduction on account of contribution.

Is Ms Escott entitled to any arrears of wages and/or payment for annual holidays?

Unpaid wages

[45] Ms Escott claims that, starting in November 2022, Mr Canderle failed to pay her wages when due, and that she is owed \$1,672.25. Ms Escott listed the payments

² Employment Relations Act 2000, s 124.

received and gave evidence as to her hours of work. Whilst her IEA said that she was engaged to work 40 hours per week, she said that she worked 37.83 hours per week.

[46] Ms Escott's hourly rate of pay was \$25.00. She was paid a total of \$2,110.75 gross but based on her weekly hours she was due to be paid \$3,783.00 gross. I accept Ms Escott's evidence and the calculations provided, and she is entitled to payment of \$1,672.25.

[47] I order Mr Canderle pay Ms Escott, within 28 days of the date of this determination, \$1,672.25 in unpaid wages.

Annual holidays

[48] Ms Escott claims that she was not paid for untaken annual holidays and that she is entitled to payment at the rate of 8 percent of her gross wages for the period she was employed. Ms Escott's evidence is that she did not take annual holidays during her employment, and that she was not paid for annual holidays at the conclusion of her employment.

[49] Ms Escott submitted that she is entitled to payment of \$991.15 based on the 40 hours per week she was to work in accordance with the IEA, and having worked a total of three months in her employment. I find that Ms Escott is entitled to payment based on her gross earnings. I conclude from Ms Escott's evidence that she worked 37.83 hours per week.

[50] I accept Ms Escott's evidence and I am satisfied that Ms Escott was entitled to be paid, at the rate of 8 percent of her gross earnings, for annual holidays when her employment came to an end as required by s 23 of the Holidays Act 2003.

[51] I order Mr Canderle pay Ms Escott, within 28 days of the date of this determination, \$907.92 for unpaid annual holiday pay.

Costs

[52] Ms Escott seeks an award of costs of \$3,750.00 plus reimbursement of the filing fee.

[53] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.³

[54] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

[55] The daily tariff is usually taken as a starting point,⁴ although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

[56] Ms Escott was represented by counsel from the Manawatū Community Law Centre. She seeks a contribution of \$3,750 towards costs, calculated based on time worked on her file. Counsel referred to the decision of the Employment Court in *Innovative Landscapes (2015) v Celia Popkin*⁵ in support of its submission that an order for costs should be made notwithstanding Ms Escott has not actually incurred legal fees.

[57] Whilst the decision in *Popkin* concerned the application of the Employment Courts discretion, I find the reasoning no less applicable to the discretion to be exercised by the Authority. That position is also consistent with the approach taken by the Authority⁶ in relation to the same employment relationship problem that was subject to de novo challenge in *Popkin*. I find that making a costs order is consistent with the Authority's broad discretion informed by the underlying purposes and objectives of the statutory scheme.⁷

[58] I consider that an award of costs in the amount of \$1,500 is appropriate in the circumstances. To that, I add reimbursement of the filing fee. I order that Mr Canderle make payment of \$1,571.56 to Ms Escott as a contribution towards costs. It is a condition of my order that the full amount of \$1,500 be paid by Ms Escott to the Manawatū Community Law Centre within 14 days of payment being received by her.

³ Employment Relations Act 2000, Schedule 2, clause 15.

⁴ Employment Relations Authority Practice Direction, August 2023, <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

⁵ [2020] NZEmpC 96.

⁶ *Popkin v Innovative Landscapes (2015) Limited* [2020] NZERA 374.

⁷ [2020] NZEmpC 96 at [21].

Summary of orders

[59] Anthony Canderle is ordered, within 28 days of the date of this determination, to make payment to Michelle Escott of:

- (a) \$11,875 for lost wages;
- (b) \$10,000 as compensation for humiliation, loss of dignity, and injury to feelings relating to her unjustified dismissal claim;
- (c) \$1,672.25 in unpaid wages;
- (d) \$907.92 for unpaid annual holiday pay; and
- (e) \$1,571.56 as a contribution towards Ms Escott's costs (it is a condition of my order that the full amount of \$1,500 be paid by Ms Escott to the Manawatū Community Law Centre within 14 days of payment being received by her).

[60] Such that there may be any issues as to taxation, that a matter for the parties and the relevant agency to resolve if necessary.

Rowan Anderson
Member of the Employment Relations Authority