

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 20
3226119

BETWEEN OLENA LAVRECHUK
Applicant

AND EVEREST PAINTERS AND
DECORATORS LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Hayley Johnson for Applicant by AVL
No appearance for Respondent

Investigation Meeting: 14 November 2023 at Wanaka

Submissions received: 20 November 2023 from Applicant

Determination: 15 January 2024

DETERMINATION OF THE AUTHORITY

[1] Ms Lavrenchuk was employed by the respondent (Everest) from 11 January 2021. She claims she was unjustifiably dismissed by the respondent on 18 February 2023. She claims compensation, lost wages, a penalty, and costs. Ms Lavrenchuk claimed further penalties at the investigation meeting.

The Authority's investigation

[2] I investigated this employment relationship problem by holding a meeting that lasted approximately half a day. I heard from Ms Lavrenchuk, her partner Mr Mills and two other

witnesses by AVL, both described as her friends. The respondent did not appear. I am satisfied that the respondent was served all documentation and notices. An Authority file note shows me that Mr Bees, the director of Everest, when prompted to provide evidence explained on the phone to the Authority officer that he would file further information. No information was received from Mr Bees or from anyone for Everest. The Authority received no communication from Everest to show there was a reason for its non-attendance at the investigation meeting.

[3] I considered the above circumstances and continued with the investigation meeting as I am able to do¹. I now make this determination.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions in this determination. I have set out my findings of fact and law and based on this I have expressed conclusions on issues and made orders as necessary to dispose of the matter. I will now consider the issues and record my findings.

Issues

[5] The issues for me to now determine are:

- a. Was Ms Lavrenchuk dismissed during her notice period?
- b. If so, was the dismissal justified?
- c. Has Ms Lavrenchuk proven a grievance for constructive dismissal?
- d. What remedies are to be awarded for any grievance:
 - i. compensation
 - ii. lost earnings?
- e. Is Everest to pay Ms Lavrenchuk any amount of arrears for wages, or holiday entitlements during her employment?
- f. Is a penalty to be awarded against Everest for not providing her with a wages and time record under s 130(2) of the Act?
- g. Are any other penalties to be awarded?
- h. Is there to be a reduction in any remedies due to employee contribution?

¹ Employment Relations Act 2000, Schedule 2, Clause 12.

- i. What if any costs are to be awarded?

Was Ms Lavrenchuk dismissed during her notice period?

[6] Ms Lavrenchuk worked for Everest as a ‘brush hand’ painter on what she describes was a ‘sponsorship visa.’ She affirmed to me that her role was an occupation that was regarded as an essential skill to allow her to work and stay in New Zealand on this type of visa working only for Everest.

[7] English is Ms Lavrenchuk’s second language.

[8] On 15 February 2023, Ms Lavrenchuk was painting a house in Wanaka for Everest with a co-worker. She texted Mr Bees towards the end of the working day saying she was unhappy working with her co-worker because she alleged the co-worker was impaired from smoking ‘weed’. Ms Lavrenchuk included in her text that, ‘I want workmates who are positive in life, it is so hard work with people who are upset at the time. It affects me. I better go work with [another worker].’

[9] I accept Ms Lavrenchuk’s evidence that Mr Bees then rang her and said something like ‘nobody is perfect’ in relation to the other painter to which Ms Lavrenchuk understood Mr Bees was taking that worker’s side. The conversation was not recorded, but Ms Lavrenchuk says it became heated and she gave verbal notice. She has put forward that this was because Mr Bees ‘would not support her to improve her work environment.’²

[10] Ms Lavrenchuk says that she offered two weeks’ notice in the heated conversation, but Mr Bees told her she could ‘leave right now.’ Ms Lavrenchuk in her oral evidence described the manner of Mr Bees in this conversation as aggressive and that he raised his voice. She recalled him saying repeatedly, ‘listen to me, listen to me’.

[11] Mr Bees then sent a text to Ms Lavrenchuk. Given the timing it must have been soon after the above conversation. This text was as follows:

This is sadly not good situations. To many differences between you too. Bound to get a little upset arnt i. U both have a lot to say about one another. Gets frustrating. If you

² Statement of Problem dated 28 April 2023 at paragraph 9.

want to talk about u can call if not don't worry u can leave also. I appreciate the work an efforts by all.

[12] That Mr Bees said 'bound to get upset arnt I' gives support to this text coming after the heated phone call when Ms Lavrenchuk says Mr Bees told her to 'leave right now' which she did. She did not work the next day, Thursday. Mr Bees did not contact her on Thursday. Ms Lavrenchuk did not contact him until the evening of that day:

Hi Jimmy [Mr Bees]

Just wanted to touch base. As I mentioned in our last conversation I stand by my decision to leave Everest painters for a number of reasons. As I said I am happy to give you two weeks notice or even 3 if it helps you out. But I understand and respect what you said to me about how you would prefer if I leave straight away.

Regards Olena

[13] Mr Bees responded by email to Ms Lavrenchuk the following morning (Friday 17 February 2023) at 4.41am beginning with 'No worries' and then immediately continued with:

Ur needed in qt [Queenstown] please. Make your way there once you have received this message. Both units will require plastic on the kitchens and there after sanding off the filters from the light checking. Doors are needing to be sanded also. As there not on stackers they can be sanded off easily enough. Frames and bathrooms can be sprayed too. If you need any plastic etc stop at container first. You will be working on your own so there will be no problems. Outside needs completing two [sic]. Thanks.

[14] The above email includes 'you will be working on your own so there will be no problems.' I find this a likely consistent response to Ms Lavrenchuk previously telling Mr Bees about her issues with her co-worker.

[15] I accept as highly plausible Ms Lavrenchuk's evidence that she did not see Mr Bees' 4.41am email until after she woke up and was alerted to a text from him at 7.38am to say 'Are you going to work? We have contract commitments with one another?' Ms Lavrenchuk texted back: 'Happy to go to Qt on Monday. It's too short notice for travel to a different town. We can meet [and] I can give you all your tools what I got.'

[16] Mr Bees then responded with:

Nope your required at work if not today tomorrow as 3 days not working tomorrow 3 days missing is breach of contract. I accept your resignation your contracts now terminated. Good luck with future employment. No more contact is needed. Contract is void. Thank you for your time. Please put in the hours you worked from Monday to Wednesday. Thanks again.

[17] Following this were further email exchanges where Ms Lavrenchuk says that she had not been off work 3 days and that there had been contact during this time. She repeats that, 'I can't be in any place in 20 min as you asked me' and that she needed more time to get petrol (she gave evidence that she would have had to take her own vehicle rather than the usual transport in Mr Bees' company vehicle), organise food and prepare to work away in Queenstown. Ms Lavrenchuk further says she will return Everest's tools and will provide her hours for her last days but says that 'I just need more notice'.

[18] Mr Bees responds with:

You resigned. I accepted your resignation. Take it up with a no win no fee lawyer and see how you stand. I won't pay out anything unless I have too. Thanks again.

[19] Ms Lavrenchuk texted reply includes ... 'we just do what is fair to both sides'. Mr Bees responded, 'I'm not going to discuss this any further'.

[20] While Mr Bees for Everest has not participated in these proceedings, Mr Bees' email on 19 February 2023 to Ms Lavrenchuk indicates something of his view about what happened at the end of Ms Lavrenchuk's employment. In that email he says to Ms Lavrenchuk,

You was given the chance to go to work on Friday morning you chose not to go. I also gave you the chance to call me before Thursday if you wanted to sort it out you chose not to. I sent you an email at 4.41am to go to work on Friday morning after your text on Thursday evening this is ample time to get ready etc or go to work on Saturday I have obligations to my clients.

...

My insurance will cover lawyer's fees so im happy to let them deal with it. Stop telling me I'm angry, that's also an opinion.

[21] Mr Bees in the above email then finishes by saying he cannot trust Ms Lavrenchuk to work for him after her partner [Mr Mills] 'threatened' him. He then appears to say that if she has not given notice then he was 'not given the chance to make things ok' and that Ms Lavrenchuk 'didn't take the correct measures to resign.'

[22] More email communications followed.

[23] I heard affirmed evidence from Mr Mills who is Ms Lavrenchuk's partner. He confirmed that without Ms Lavrenchuk knowing it at the time, he contacted Mr Bees by phone thinking he could sort things out for her. He says he had previous limited contact with Mr Bees in the same industry. He says he was concerned about Ms Lavrenchuk's ability to communicate given English is not her first language. He says he thought he may be able to help. Mr Mills gave evidence that Ms Lavrenchuk's end of employment situation occurred when he had been out of town with limited phone coverage. He became concerned about the distressed state she was in when he saw her messages upon his return. He further explained that the phone call he had with Mr Bees became heated and things were said on both sides. He said he was very surprised that Mr Bees then later claimed to Ms Lavrenchuk that a police complaint had been laid about him 'threatening' Mr Bees. I have no information before me that police were involved in this matter. I found Mr Mills to be a straightforward witness and I accept his uncontested version of events.

[24] Standing back from the above I find that Ms Lavrenchuk resigned from her employment. She did this just over a day after the 'heated discussion' when Ms Lavrenchuk raised issues about her co-worker. Mr Bees did not exactly use words saying that he accepted her resignation in his texted response but rather says at 4.41 am on the Friday morning 'no worries' and proceeds to refer to Ms Lavrenchuk needing to work that day. I find this supports that the notice period was back on track and that Ms Lavrenchuk had not at that stage been dismissed. This is further supported by her response that she objected to the late notice but was available to do the Queenstown work on the Monday.

[25] I do however find that Ms Lavrenchuk was dismissed during her then notice period in a process commencing with Mr Bees' email to Ms Lavrenchuk at 4.41am on Friday morning. I accept Ms Lavrenchuk's highly plausible evidence that she did not see this email until she was alerted to it by Mr Bees' text at 7.38am to say 'Are you going to work? We have contract commitments with one another?' When Ms Lavrenchuk challenged the unreasonableness of requesting her to be at Queenstown at such short notice I find Mr Bees dismissed her summarily on what appears to be purported 'abandonment' of employment.

[26] Ms Lavrenchuk did not work Saturdays, so it was not part of her employment conditions to have to work on those days. Mr Bees appeared to erroneously rely on this as the 'third day' of abandonment because Ms Lavrenchuk would not go to Queenstown to work on the Saturday. Mr Bees also ought to have known why she was not at work on the Thursday and if he thought she had abandoned her employment on that day he did not challenge her for not then being at work that day.

[27] Ms Lavrenchuk's individual employment agreement (IEA) contains a clause about abandonment of employment, but it requires non communication and the employer making reasonable efforts to clarify the reason for the absence. The reason given by Ms Lavrenchuk for her absence when offered work on Friday was that notice to be in a different town over an hours' drive from her usual place of work and a request coming in the early hours of the morning was not reasonable. I agree. By the time she was alerted to the request the working day had virtually begun. This is far from what a fair and reasonable employer could have done especially after its director, Mr Bees likely lost his temper with the same employee and earlier told her to 'leave right now' when she raised issues about a co-worker. The context here supports that Mr Bees appeared not to have acted reasonably when he then sent what could only be described as an aggressive response saying that Ms Lavrenchuk's employment had ended. 'No further contact required' made it clear he dismissed Ms Lavrenchuk immediately in that communication.

If Ms Lavrenchuk was dismissed, was it justified?

[28] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could

have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair.

[29] Under s 103A(3) of the Act the following factors are considered to measure an objectively reasonable employer's fair process leading to a decision to dismiss:

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated;
- (b) whether the allegations were raised with the employee;
- (c) whether the employee was given a reasonable opportunity to respond to the allegations;
- (d) whether the employer genuinely considered feedback.

[30] In addition to the above other factors may be considered³ but procedural unfairness alone will not support an unjustified dismissal if they are only minor and did not result in an employee being treated unfairly.⁴

[31] I do not find Everest was justified in dismissing Ms Lavrenchuk. Based on the communications before me I find that Mr Bees' poorly communicated an immediate aggressively worded decision to terminate based on an erroneous 'abandonment' claim. I find this was far from what a fair and reasonable employer could have done in the circumstances at the time.

[32] Accordingly, I find Ms Lavrenchuk was unjustifiably dismissed and will consider remedies below.

Has Ms Lavrenchuk shown she was constructively dismissed?

[33] Ms Lavrenchuk's evidence was about saying that her employer had a history throughout her employment of not treating her well and that she felt she could not speak up

³ Section 103A (4) of the Act.

⁴ Section 103A (5) of the Act.

because she was on a sponsored visa. As I took it, she claimed in the alternative that she had been constructively dismissed. This is where an employee gives the appearance of resigning, but the resignation was in fact the result of some adverse action by the employer's initiative. A court may treat the resignation as a constructive dismissal because it is considered a termination of the employment at the initiative of the employer.

[34] The Court of Appeal⁵ has listed three non-exhaustive situations where constructive dismissal might occur:

- a. Where the employee is given a choice of resignation or dismissal;
- b. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- c. Where a breach of duty by the employer leads a worker to resign.

[35] I am not satisfied that Ms Lavrenchuk has proven by providing sufficient evidence that she was constructively dismissed. Much of her evidence supporting this was too general both from herself and her witnesses. I have already found she was directly unjustifiably dismissed and have not progressed this alternative claim any further.

What remedies are to be awarded for the unjustified dismissal:

Compensation

[36] Ms Lavrenchuk's evidence is that she was embarrassed about the situation that occurred with her dismissal. She was worried that Mr Bees would talk about her negatively and that this would affect her chance of further employment. However, Ms Lavrenchuk soon secured another position on more favourable terms than she had with Everest. Her concerns relating to her visa and apprenticeship while likely real also appeared to get resolved soon after she left Everest.

[37] Ms Bobok, Ms Lavrenchuk's close friend, spoke with her in the same first language in regular talks. She gave straight forward plausible evidence that she observed Ms Lavrenchuk's 'stress and disappointment' about getting another job and her reputation in the town. Ms Bobok

⁵ Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

gave oral evidence that Ms Lavrenchuk was visibly upset in front of her around the time of the dismissal.

[38] Mr Westhorpe, a friend of Ms Lavrenchuk gave evidence describing himself as having some experience in human resources type matters. I accept he had regular coffee discussions with Ms Lavrenchuk during her time she was employed by Everest. He described her being unhappy in her job due to pay issues and that he talked with her in 'general terms' about this. He described her being tearful around the time the employment ended and in particular when she discovered Mr Bees had cancelled her BCITO apprenticeship when he dismissed her. Mr Westhorpe says he was able to guide her about communicating with that organisation about this which she did. Mr Westhorpe observed that Ms Lavrenchuk had become less confident in herself after she worked for Everest and was a lot less trusting of employers generally.

[39] Mr Mills gave evidence that Ms Lavrenchuk needed counselling support after the employment ended. He estimated that she was distressed for about two months after she left Everest. He says she expressed fears to him that Mr Bees would approach her or come to the house.

[40] Standing back from the above I consider that the effects of the unjustified dismissal were relatively short term albeit very real and likely distressing to Ms Lavrenchuk. However, she secured more favourable terms with work for another business very quickly and her visa issues resolved. She enjoys her new position. While Ms Lavrenchuk may have found this investigation process stressful that is the same for anyone who is trying to resolve their employment relationship problem. I accept however that she ought not to have had to bring her claim to the Authority and likely suffered humiliation when Everest did not participate in resolving the matter.

[41] Standing back from the above I award Ms Lavrenchuk \$10,000.00 as compensation.

Lost earnings

[42] I accept Ms Lavrenchuk's evidence that her final wages were not paid to her. I accept she worked a total of 22 hours in her last week and this amounts to \$660.00 that Everest is now to pay her.

[43] Ms Lavrenchuk managed admirably to obtain further work on a higher rate per hour commencing just on two weeks after she finished her employment with Everest. Accordingly, I do not find there is to be any award for lost wages for paid leave lost after dismissal. She is however entitled to be paid for the two weeks' contractual notice she was not paid upon Mr Bees' instant dismissal.

[44] It has been submitted for Ms Lavrenchuk that she worked 'on average' 40 hours per week. This is inconsistent with the grievance letter to Everest that was raised on Ms Lavrenchuk's behalf, and the Statement of Problem. Both say the hours of work were 30 hours per week between Monday to Friday 8am to 6pm. Ms Lavrenchuk's IEA states 'minimum guaranteed 30 hours each week on Monday – Friday'. Ms Lavrenchuk's oral evidence confirmed that she worked each week depending on the hours she did, and she confirmed it was about 30 hours per week. Based on all of this I find that Ms Lavrenchuk likely worked 30 hours per week for the purpose of considering that she is to be awarded payment of two weeks' notice. I accept her evidence that by the time she finished her employment she was paid \$30.00 gross per hour.

[45] Accordingly, based on the above I find that Everest is to pay Ms Lavrenchuk two weeks' notice which is \$1,800.00 gross.

Is Everest to pay Ms Lavrenchuk any amount of arrears for wages, or holiday entitlements during her employment?

Queen Elizabeth II Memorial Day Act 2022

[46] I accept Ms Lavrenchuk's evidence that Mr Bees refused to pay her an entitlement for the public holiday on 26 September 2022 being a 'one-off' additional public holiday in New Zealand for the death of Queen Elizabeth II.⁶ I have already found above that Ms Lavrenchuk likely worked 30 hours per week, which I find in the absence of employer records not supplied, equates to 6-hour days. I find she should be paid a total of \$180.00 gross for this public holiday not worked.⁷

⁶ Queen Elizabeth II Memorial Day 2022, ss 6 and 7.

⁷ Holidays Act 2003, s49.

Annual leave entitlement

[47] Under the Holidays Act 2003 an employee is entitled to four weeks of paid annual leave at the end of every 12 months of continuous employment.⁸

[48] If the employee leaves their employment after their four week per year annual leave entitlement has arisen, they are entitled to be paid for whatever portion of this leave remains untaken at the end of their employment calculated at the end of the employment.⁹

[49] Ms Lavrenchuk says that she only took four weeks of annual leave entitlement during the period of her employment. I accept this uncontested evidence in the absence of employer records. She confirmed in her oral evidence to me that these were the weeks taken in the Christmas and New Year period of 2022/2023 excluding public holidays during that time. This means that she was entitled to be paid out the remainder of her untaken entitlement at the end of her employment, being four weeks outstanding. This is to be calculated based on her pay at the end of her employment which was \$30.00 per hour.¹⁰ Again based on a 30-hour week as the likely hours she worked I find she should be paid \$3,600.00 gross for unpaid annual holiday pay entitlement.

[50] The final part year between 11 January 2023 (Ms Lavrenchuk's anniversary date) and Ms Lavrenchuk's last day of notice (3 March 2023) is to be calculated as 8% of total gross earnings.¹¹ This is because further entitlement to holiday leave had not yet arisen with another year of work. The total gross for this calculation is to include the above notice period payment, the above calculated unpaid public holiday, and the untaken paid annual leave entitlement.¹²

[51] A lack of employer records means that to calculate Ms Lavrenchuk's final part year entitlement to annual leave I rely on what is before me which includes Ms Lavernchuk's IRD records. There were 15 working days between 11 January and 31 January 2023. The IRD records are not detailed enough to assist me. I therefore calculate this period as likely gross earnings of 15 days x \$180.00 gross per day, a total of \$2,700.00 gross. To this I add the IRD

⁸ Holidays Act 2003, s 16.

⁹ Holidays Act 2003, s 24.

¹⁰ Holidays Act 2003, s 24.

¹¹ Holidays Act 2003, s 24

¹² Holidays Act 2003, s 26

declared gross earnings for 1 February to 28 February 2023 which are \$2,520.00 gross. To these two figures I add the above calculated arrears of \$660.00; \$1,800.00; \$180.00 and \$3,600.00 to give an overall total gross earnings \$11,460.00. The 8% component of this for the purpose of the part year holiday pay entitlement is \$916.80 gross.

Is a penalty to be awarded for nonproduction of a wages and time record under s130(2) of the Act?

[52] The maximum penalty against a company for breaching s 130(2) is \$20,000 and that is the starting point. This is a breach of a fundamental employer obligation. I have considered the matters under s 133A of the Act and find that it is appropriate to award a penalty against Everest. My reasons follow.

[53] While I have not heard from Mr Bees or anyone from Everest, I note the aggressive tone and manner in which Mr Bees communicated Mr Lavrenchuk's dismissal to her and his apparent choice not to participate in these proceedings or provide the time and wage records requested. This is consistent with Mr Lavrenchuk's evidence that Mr Bees continued not to provide her with a record of her pay and how it was calculated.

[54] Ms Lavrenchuk's witnesses plausibly support they heard and observed her distress about her ongoing concerns that she was not provided with information to help her understand what she was paid. I found the evidence of Mr Westhorpe particularly plausible in that he reported ongoing discussions with Ms Lavrenchuk about her concerns regarding her pay particularly about how much tax she was paying and some issues relating to sick leave entitlements. I accept as a new employee in New Zealand, Ms Lavrenchuk had a degree of vulnerability and the lack of clarity about her pay and entitlements had an adverse effect on her.

[55] I find that a penalty of \$1,000.00 is appropriate and this is to be paid in full to Ms Lavrenchuk¹³.

¹³ Employment Relations Act 2000, s 136(2).

Are any other penalties to be awarded?

[56] At the commencement of the investigation meeting it was put forward for

Ms Lavrenchuk that two further penalties should be considered. I noted that these were not penalties included in the Statement of Problem. A penalty sought needs to be lodged in the Authority. These were not and as such were never served on Everest to reply to. Accordingly, I have only considered the penalty properly lodged as above.

Is there to be a reduction in any remedies due to employee contribution?

[57] I do not find any reason to support a reduction of remedies¹⁴ due to contribution by Ms Lavrenchuk.

What if any costs are to be awarded?

[58] The Authority may order any party to pay the other party for their reasonable costs in bringing a claim.¹⁵ Ms Lavrenchuk has been largely successful in her claim, and she should not have been put to the cost of bringing this matter before the Authority to resolve it.

[59] The investigation meeting took the morning of the 14 November 2023. The current tariff¹⁶ of costs generally applied for a one-day Authority investigation meeting is \$4,500.00.

[60] Accordingly, Everest is ordered to pay half of the daily tariff being \$2,250.00 as a contribution to Ms Lavrenchuk's costs together with the Authority filing fee of \$71.55.

Summary of Orders

[61] Everest Painters and Decorators Limited is ordered to pay Olena Lavrenchuk:

- a. \$10,000.00 compensation under s 123(1)(c) of the Act.
- b. \$660.00 gross for final wages (22 hours).

¹⁴ Employment Relations Act 2000, s 124.

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

¹⁶ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>.

- c. \$1,800.00 gross for two weeks' notice.
- d. \$180.00 gross for Queen Elizabeth II Memorial Day on 26 September 2022.
- e. \$3,600.00 gross for annual holiday pay for leave untaken at the end of employment.
- f. \$916.80 as 8% of total gross earnings for the final part year to the end of employment.
- g. \$1,000.00 penalty for breach of s130(2) of the Act to be paid wholly to Olena Lavrenchuk.
- h. Costs of \$2,250.00.
- i. \$71.55 for the Authority filing fee.

Antoinette Baker
Member of the Employment Relations Authority