

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 250
3249099

BETWEEN

JEREMIAS MALAQUIAS
First Applicant

TATIANE MALAQUIAS
Second Applicant

AND

AWESOME CLEANERS/DRY
CLEANERS LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Ruth Pettengell, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 17 April 2024 in Queenstown and by AVL

Further Information Received: 19 April 2024 from the Applicant

Date of Determination: 2 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jeremias Malaquias and Tatiana Malaquias both worked for Awesome Cleaners/Dry Cleaners Limited as commercial cleaners.

[2] Mr Malaquias and Mrs Malaquias have two complaints about their employment with Awesome Cleaners:

(a) They were not paid correctly including payment for their contractual hours of work, holiday pay and payment for public holidays that they worked.

(b) Their dismissal in June 2023 for redundancy was unjustified.

[3] Mr Malaquias and Mrs Malaquias lodged a statement of problem in the Authority seeking payment of wage arrears and remedies for unjustified dismissal.

Progress of this matter

[4] The statement of problem was served on Awesome Cleaners but it did not respond to it by lodging and serving a statement in reply. Awesome Cleaners was then notified of the case management conference that the Authority scheduled to progress this matter, however, it did not participate in the case management conference.

[5] In the case management conference, I set this matter down for an investigation meeting and Awesome Cleaners was subsequently served with a notice of investigation meeting which set out the date and time for the investigation meeting. Awesome Cleaners did not attend the investigation meeting.

[6] I am satisfied that Awesome Cleaners was aware of the date and time of the investigation meeting and it should have attended but it chose not to. And, it did not contact the Authority to explain why it could not or would not attend.

[7] I note that the notice of investigation meeting advised Awesome Cleaners that if it chose not to participate in the investigation meeting then the claims would be determined in its absence. So, Awesome Cleaners was aware that I would proceed if it did not participate in the investigation meeting.

[8] Considering all of the above, there was no apparent reason why the investigation meeting could not continue without Awesome Cleaners when it did not attend. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

The Authority's investigation

[9] I investigated Mr and Mrs Malaquias's claims by receiving written evidence and documents from them and holding an investigation meeting on 17 April 2024. In my investigation meeting, under affirmation, the witnesses confirmed their statements and gave oral evidence in answer to questions from myself.

[10] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Wage arrears claims

What happened?

[11] Mr Malaquias commenced work with Awesome Cleaners on 23 January 2023 and Mrs Malaquias commenced work on 18 March 2023.

[12] Mr and Mrs Malaquias were employed on similar terms, which included that they would work a minimum of 30 hours per week with the actual hours of work set by roster each week. Mr Malaquias advised that their shift pattern would vary each week but generally they were allocated shifts in six hour blocks.

[13] Despite being entitled to a minimum of 30 hours per week in some weeks both Mr and Mrs Malaquias were not rostered on for 30 or more hours. And in these weeks they were not paid for 30 hours, i.e., they were not paid for the minimum entitlement.

[14] Mr and Mrs Malaquias both said they were not paid correctly for public holidays that they worked nor were they paid for the holidays at the end of their employment.

[15] In support of these claims Mr and Mrs Malaquias provided copies of their pay slips and time sheets.

Analysis

[16] I have reviewed Mr and Mrs Malaquias written and oral evidence and their time sheets and pay slips.

[17] From my assessment I calculate that Mr Malaquias is owed the following amounts:

- (a) 180.5 hours for work done but not paid and for additional hours of work for weeks in which he worked less than 30 hours but was not paid for 30 hours per week, including two weeks notice. The total owed is \$5,001.68.
- (b) 12 hours work for incorrectly paid public holidays worked. The total owed is \$333.12.
- (c) Holiday pay calculated at 8% of total earnings. The total owed is \$1,760.37.
- (d) Overall Mr Malaquias is owed \$7,095.17.

[18] From my assessment I calculate that Mrs Malaquias is owed the following amounts:

- (a) 174.7 hours for work done but not paid and for additional hours of work for weeks in which she worked less than 30 hours but was not paid for 30 hours per week, including two weeks notice. The total owed is \$4,849.67.
- (b) 6 hours work for incorrectly paid public holidays worked. The total owed is \$166.56.
- (c) Holiday pay calculated at 8% of total earnings. The total owed is \$961.38.

(d) Overall Mrs Malaquias is owed \$5,977.61.

Unjustifiable dismissal

What happened?

[19] On 2 June 2023 Mr and Mrs Malaquias received an email from Awesome Cleaners that advised them there was to be a meeting on the following day to discuss the financial situation for Awesome Cleaners due to the closure of Double Tree Hilton during renovations. In particular the email advised that Awesome Cleaners wished to discuss the options available to the company including any input they might have.

[20] The meeting did not take place on 3 June 2023 and Mr and Mrs Malaquias heard nothing further about a meeting or the financial position of Awesome Cleaners until 9 June 2023. On the morning of 9 June, Mr and Mrs Malaquias received an email advising them that the 3 June meeting was rescheduled for 1:00 pm that day.

[21] Mr and Mrs Malaquias attended the meeting at 1:00 pm on 9 June 2023. Siteri Khan, a director of Awesome Cleaners, attended the meeting for Awesome Cleaners. In the meeting Mr and Mrs Malaquias were advised that Awesome Cleaners no longer had work with Double Tree Hilton as it was closed for renovations and as a result Awesome Cleaners was experiencing some financial difficulties. Ms Khan did not tell Mr and Mrs Malaquias that their employment was at risk, she simply told them she was going to consider the options available to Awesome Cleaners.

[22] On 11 June 2023 Mr and Mrs Malaquias each received a letter from Awesome Cleaners. The letters stated:

It is with great regret that I have to inform you that your role as Commercial Cleaner with the Company has become redundant this decision has been made as a result of

- Double Tree Hilton has paused the Contract which has gone under renovations and our services is no longer required

- The financial hardship the Company is facing

This letter serves as a Notice of redundancy taking into account your notice period of two weeks as per your contract of employment this will take effect 11th June 2023 ending 24th June 2023.

[23] So, Mr and Mrs Malaquias' employment was terminated by Awesome Cleaners for redundancy. They both received two weeks' notice but they were not paid for this.

Analysis

[24] Mr and Mrs Malaquias were dismissed by Awesome Cleaners. In a claim for unjustified dismissal, once it is established that the employee has been dismissed the employer must prove that the dismissal was justified.

[25] Assessing justification in a redundancy dismissal involves applying s 103A of the Act, the test for justification. In *Grace Team Accounting v Brake*, the Court of Appeal considered s 103A in a redundancy situation and said at [85]:¹

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[26] So, the question of whether a dismissal, in a redundancy situation, meets the justification requirements of s 103A of the Act turns on whether an employer can show that its decision to restructure and then dismiss an employee for redundancy was genuine and in coming to those decisions the employer met the notice and consultation requirements of the Act.

[27] It is clear that there was no financial information provided to Mr and Mrs Malaquias that supported any possible redundancies. And because Awesome Cleaners did not participate in the investigation of this matter there is no evidence to show the financial basis

¹ See *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541.

for the redundancies. Therefore, I cannot conclude that the decision to make Mr and Mrs Malaquias redundant was genuine.

[28] Further, in addition to having a basis for making Mr and Mrs Malaquias redundant, Awesome Cleaners also needed to meet the notice and consultation requirements. In *Stormont v Peddle Thorp Aitken Limited* Judge Inglis summarised the consultation requirements as follows:²

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[29] Based on s 4 and s 103A of the Act and the guidance in *Stormont* I need to consider:

- (a) Did Awesome Cleaners set out its financial difficulties and any consequence for Mr and Mrs Malaquias' roles with sufficiently precise information for Mr and Mrs Malaquias to be able to respond?
- (b) Did Awesome Cleaners provide the necessary information in a timely manner?
- (c) Did Mr and Mrs Malaquias have an appropriate opportunity to respond to the information before any decisions were made by Awesome Cleaners?
- (d) Did Awesome Cleaners consider Mr and Mrs Malaquias' responses before making any decisions?
- (e) Overall, did Awesome Cleaners have an open mind such that consultation was not a charade?

² *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

[30] Awesome Cleaners' obligations in regard to consultation did not stop with consultation over the financial situation and the implications for their roles. Once consultation was completed and Awesome Cleaners decided to move forward and look at making Mr and Mrs Malaquias redundant it needed to consult with Mr and Mrs Malaquias over alternatives to dismissal.³

[31] I have set the consultation requirements out in detail because it is in stark contrast to what Awesome Cleaners did – it held one meeting, provided limited information about its position and did not seek any feedback before it decided to dismiss Mr and Mrs Malaquias. And it failed to consider alternatives to dismissal.

[32] On this basis it is clear that the dismissals of Mr and Mrs Malaquias were unjustified.

Remedies

[33] As Mr and Mrs Malaquias have both been successful with their unjustified dismissal claims I must turn to consider what remedies they may be entitled to; I may award any of the remedies provided for under s 123 of the Act.

Compensation

[34] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers. An award is made pursuant to s 123(1)(c)(i) of the Act.

[35] Mr and Mrs Malaquias each ask for \$15,000 in compensation. In order to establish if I should award this amount, I need to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of their dismissals; recent decisions of the Employment Court provide guidance on this exercise of quantification.⁴

[36] Mr Malaquias' evidence was that a result of his dismissal, he:

³ *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102.

⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

- (a) Became anxious and depressed.
- (b) Had significant financial problems which caused stress and further depression.
- (c) Lost his self-worth.

[37] Mrs Malaquias' evidence was that as a result of her dismissal, she:

- (a) Became sad and depressed.
- (b) Felt worthless.
- (c) Also suffered from anxiety and stress, particularly over her financial situation.

[38] Based on this evidence I accept Mr and Mrs Malaquias' claim for compensation at \$15,000 each.

Reimbursement

[39] As Mr and Mrs Malaquias each have a personal grievance if they have lost remuneration as a result of their grievance then pursuant to sections 123 and 128 of the Act, they may be entitled to that lost remuneration.

[40] Mr Malaquias was able to obtain new employment on 25 July 2023 and his lost remuneration is \$3,664.30. Mrs Malaquias obtained new employment on 11 July 2023 and her lost remuneration is \$2,331.80. They are both entitled to payment for their lost remuneration.

Contribution

[41] As I have awarded remedies to Mr and Mrs Malaquias, I must now consider whether either of them contributed to the situation that gave rise to their grievance.⁵ This assessment

⁵ Section 124 of the Act.

requires me to determine if they behaved in a manner that was culpable or blameworthy, and this behaviour contributed to their grievance.⁶

[42] I am satisfied that neither Mr Malaquias nor Mrs Malaquias behaved in a manner that contributed to their grievances and no reduction in their remedies is required.

Summary

[43] Awesome Cleaners/Dry Cleaners Limited failed to pay Mr Malaquias correctly for the work he undertook for it. Awesome Cleaners/Dry Cleaners Limited must pay Mr Malaquias \$7,095.17 in wage arrears and holiday pay.

[44] Awesome Cleaners/Dry Cleaners Limited failed to pay Mrs Malaquias correctly for the work she undertook for it. Awesome Cleaners/Dry Cleaners Limited must pay Mrs Malaquias \$5,977.61 in wage arrears and holiday pay.

[45] Awesome Cleaners/Dry Cleaners Limited unjustifiably dismissed Mr Malaquias. In settlement of this grievance Awesome Cleaners/Dry Cleaners Limited must pay Mr Malaquias:

(a) \$15,000.00 (without any deductions) for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

(b) \$3,664.30 for lost remuneration pursuant to ss 123 and 128 of the Employment Relations Act 2000.

[46] Awesome Cleaners/Dry Cleaners Limited unjustifiably dismissed Mrs Malaquias. In settlement of this grievance Awesome Cleaners/Dry Cleaners Limited must pay Mrs Malaquias:

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

(a) \$15,000.00 (without any deductions) for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

(b) \$2,331.80 for lost remuneration pursuant to ss 123 and 128 of the Employment Relations Act 2000.

Costs

[47] Costs are reserved.

[48] If Mr and Mrs Malaquias seek costs they may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Awesome Cleaners will then have 14 days to lodge any reply memorandum.

[49] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁷

Peter van Keulen
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.