IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 170
EMPC 50/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AKKARANEE MAHAMAI Plaintiff
AND	EVA BELLEY (LABOUR INSPECTOR) Defendant

Hearing:	24 September 2015 (heard at Christchurch)
Appearances:	Mr J Dehghani, agent for the plaintiff Mr G La Hood, counsel for the defendant
Judgment:	30 September 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] A challenge has been brought by Ms Akkaranee Mahamai in respect of compliance, penalty and cost orders which were sought by a Labour Inspector, Ms Eva Belley, and made by the Employment Relations Authority (the Authority) in a determination of 28 January 2015.[1]

[2] Since Ms Mahamai did not file a statement of reply, and was not present at the investigation meeting, it is necessary to review the procedural background of this matter in some detail.

[3] In doing so I shall refer to the findings of the Authority where relevant. I observe at the outset that having now heard evidence from Ms Mahamai and

[1] *Belley (Labour Inspector) v Mahamai* [2015] NZERA Christchurch 8.

Ms Belley, it is clear that the key conclusions reached by the Authority were indeed accurate.

Background

[4] The Authority described the background to this matter in this way:[2]

> [7] Ms Mahamai operated a shop in The Palms, Christchurch. Between 26 January 2014 and 8 February 2014 she employed Ms Sahrunphatcharakul.
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> [8] On February Ms Sahrunphatcharakul approached the Labour Inspectorate about various concerns including her rate of pay which appeared to be less than that required under the Minimum Wages Act 1983. The rate was said to be a training one but the circumstances of Ms Sahrunphatcharakul's employment would preclude that.
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> [9] On 10 February Ms Belley wrote to Ms Mahamai about these concerns though by that time the employment had ceased. That led to a further issue. While an initial, albeit deficient, wage payment had been made for Ms Sahrunphatcharakul's work up till 1 February the balance was never paid and nor was holiday pay.
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> [10] Ms Belley's subsequent investigation led to the issuing of an Improvement Notice on 29 April 2014. It sought compliance with various provisions of the Employment Relations Act 2000, the Minimum Wages Act 1983 and the Holidays Act 2003. In particular Ms Belley took issue with the failure to pay appropriate wages.
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> [11] Further correspondence followed with Ms Mahamai advising she was no longer operating her franchise business in Christchurch and was incapable of complying with the Improvement Notice. As a result, and given further information about Ms Mahamai's financial state, Ms Belley issued the amended Improvement Notice which allowed payment via weekly instalments of $50 commencing 26 May 2014.
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> [12] There has been no compliance which led to this application.
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> [13] As already said Ms Belley seeks an order Ms Mahamai pay outstanding wages, holiday pay, interest thereon and receive a penalty for her failure to comply with the Improvement Notice. She calculates Ms Sahrunphatcharakul is owed, and seeks payment of:
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> a. $921.25 unpaid wages
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> b. $128.70 for holiday pay due upon cessation; and
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> c. $103.13 for an alternate public holiday.

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2 *Belley (Labour Inspector) v Mahamai*, above n 1.

> [14] There can be no doubt the monies sought are payable. Ms Mahamai has not objected to the Improvement Notice (s.223E of the Employment Relations Act 2000) and her correspondence acknowledges a debt.

[5] The Authority went on to conclude that a compliance order was appropriate, that interest should be paid on the amount which was due to Ms Sahrunphatcharakul, along with penalty and costs orders.

[6] The concluding paragraph of the Authority's determination is as follows:[3]

> [24] The respondent, Akkaranee Mahamai, is to make the following payments no later than 4.00pm Thursday 12 February 2015:
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> a. $1,153.08 (one thousand, one hundred and fifty three and eight cents) gross for unpaid wages and holiday pay. Payment is to be made to Eva Belley, Labour Inspector, for disbursement to Ms Sahrunphatcharakul; and
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> b. A further $56.07 (fifty six dollars and seven cents) being interest owing as of the date of this determination. This will increase by $0.15 (fifteen cents) with each calendar day that passes between 29 January 2015 and the date of payment; and
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> c. a further $750.00 (seven hundred and fifty dollars), being a penalty payable to the Crown pursuant to section 135 of the Employment Relations Act 2000. Payment is to be made to the Ministry of Business, Innovation and Employment (MBIE); and
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> d. a further $71.56 (seventy one dollars and fifty six cents) as a contribution towards MBIE's costs. Payment is to be made to the Ministry of Business, Innovation and Employment (MBIE).

The challenge

[7] Ms Mahamai's statement of claim asserted that she had not been the employer for Ms Sahrunphatcharakul, because she had agreed only to train her. She went on to allege she had nonetheless tried to clear the debt, so that she could "move on". It was pleaded that she offered ten to twenty dollars per week and that proof of her financial circumstances had been provided to the Labour Inspector. Notwithstanding her financial position, the Labour Inspector had ultimately sought a compliance order from the Authority, which meant she was liable for a significant lump sum.

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3 *Belley (Labour Inspector) v Mahamai*, above n 1.

[8] For her part, Ms Belley responded by asserting that the Authority's orders had been properly made, and that unpaid wages and holiday pay were due to Ms Sahrunphatcharakul.

[9] Because of Ms Mahamai's lack of participation in the process of the Authority, I requested a Good Faith Report so that I could resolve the question of whether the hearing should proceed on a de novo basis. Such a report was provided, with the Authority expressing its opinion that Ms Mahamai had failed to respond to both Ms Belley's claim and failed in the Authority's process with good faith. The Authority said:

> [23] In my view the above chronology speaks for itself. Despite it being apparent Ms Mahamai was receiving the Authority's notices and was aware of its various requirements she inevitably failed to respond or participate.
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> [24] She was absent from both telephone conferences and the investigation itself which aggravated her earlier failure to provide a statement in reply despite an awareness of the requirement. This last failure is, in my view, significant and obstructs the Authority. This is an investigative process and even were the respondent to be absent from the investigation meeting (as occurred here) it would have provided information that could have been used to test and examine Ms Belley's claims.
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> [25] The failure take on more significance when the statement of claim filed in the Employment Court is considered. Contained therein is a defence that was not raised with the Authority and which, on the evidence before me and contrary to the content of the statement of claim, was not aired with Ms Belley. It is that Ms Mahamai was not the employer.
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> [26] If this defence has validity it means Ms Mahamai has failed to be responsive or communicative and as a result:
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> a. Put the applicant to unnecessary expense and effort by failing to allow her an opportunity to investigate a pertinent and important issue before initiating her claim; and
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> b. Impeded the Authority's investigation by not appraising it of relevant matters and allowing an opportunity to investigate properly.
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> [27] Indeed it may be Ms Mahamai also misled both Ms Belley and the Authority. Here I refer to her initial response to Ms Belley dated 26 February which contains [advice] that "… we [Ms Mahamai and Ms Sahrunphatcharakul (the person upon whose behalf Ms Belley was making the claim)] both agreed by words that she will work as trainee at shop to get familiar with the system and the shop products before going into detailed employment agreement." That implies an employment relationship as does the e-mail sent to the Authority which implied liability.

[10] Following receipt of the Good Faith Report, I convened a telephone conference so as to hear from the parties before issuing directions as to the nature and extent of the hearing, as required under s 182(3) of the Employment Relations Act (the Act). Ms Mahamai confirmed that she wished to participate in a hearing even although she would have to travel from Auckland to Christchurch to do so. I determined that if Ms Mahamai complied strictly with a pre-hearing timetable which I established, the challenge would proceed on a de novo basis. I indicated that if she did not comply with the Court's directions, the challenge would be resolved on the papers, in reliance of the evidence which had been received by the Authority. The timetable was complied with Ms Mahamai and the hearing took place as had been directed. At the hearing, I heard evidence as to how Ms Mahamai had dealt with the improvement notice; and why she had not participated in the Authority's processes.

The background

[11] The evidence establishes that after Ms Sahrunphatcharakul contacted Ms Belley at the outset, the latter attempted to resolve the issue of Ms Sahrunphatcharakul's unpaid wages and holiday pay by email with Ms Mahamai. Since informal resolution did not prove possible, an improvement notice was served on Ms Mahamai on 23 April 2014, which required payment of the full amount in a lump sum of $1,737.46.[4] Ms Mahamai offered to pay the amount due at $10 - $20 per week; Ms Belley conferred with Ms Sahrunphatcharakul, and confirmed that she would accept reduction of the debt at $50 per week. Subsequently, a second improvement notice requiring such payments at $50 per week was sent to Ms Mahamai which required payment in full by 31 December 2014.

[12] Fifty dollars per week was more than Ms Mahamai could afford. Unfortunately there were no further discussions between the parties to see if a more realistic figure could be agreed. By September 2014, no payments had been made. Accordingly, Ms Belley filed her application for relevant orders. Ms Mahamai took no steps, citing various misunderstandings as to what was required of her, compounded by a short absence overseas. She acknowledged receipt of a notice

[4] This sum differs from the amount ordered by the Authority, $1,024.38, because Ms Belley recalculated the sum which was due.

informing her of the date of the investigation meeting but did not attend, although it is unclear why she did not do so.

[13] I am concerned that Ms Mahamai did not make some effort to establish when the meeting would be held, or even whether she could participate by telephone since by this time she was resident in Auckland and the investigation meeting was to be held in Christchurch.

[14] The second period which requires consideration is the period from the filing of the challenge through to the hearing. At that stage Ms Mahamai initially took the position that she was not the employer, asserting that no monies were payable. By the time of the hearing, however, she conceded that the monies were due and that the issue was how they should be paid. No voluntary payments were made in that period, nor did she make any provision for payment.

[15] Again, it is very unsatisfactory that liability was denied outright when the challenge was filed, when it appears the real problem was an issue as to payment.

[16] That said, as I shall discuss more fully below, it emerged in the course of the hearing that Ms Mahamai is present in New Zealand on a visitor's Visa, which means she is not permitted to work in New Zealand. Ms Mahamai has a child attending school in New Zealand; the father of the child is resident overseas, and is not paying child support. Therefore, Ms Mahamai's sole income is monetary support provided by family members who reside in Thailand. These realities have to be taken into account. However, I must also take into account the fact that Ms Sahrunphatcharakul was employed and was not adequately paid, so that there is a debt due. It is these circumstances which the Court must balance.

[17] Although Ms Mahamai has been tardy in resolving the issue of the unpaid wages and holiday pay, I consider that the Court, having a responsibility to exercise its powers in equity and good conscience, should take account of her circumstances when determining the appropriate outcome. Accordingly, the matter proceeded on a de novo basis notwithstanding the good faith issues.

Is Ms Mahamai's challenge frivolous or vexatious?

[18] Mr La Hood, counsel for Ms Belley, submitted that Ms Mahamai's claim should be dismissed on the basis that it was frivolous and vexatious. The essence of his submission was that although the challenge was originally pleaded on the basis that she was not Ms Sahrunphatcharakul's employer, this was not the actual focus of the challenge when it was heard. Rather, Ms Mahamai conceded she was the employer. The sole issue related to the question as to how payment should be effected.

[19] In *Gapuzan v Pratt & Witney Air New Zealand Services t/a Christchurch Engine Centre*, I reviewed the principles which apply to frivolous claims.[5] The issue is whether there is a significant lack of legal merit so that it is impossible for the claim to be taken seriously. In the same judgment I also considered the relevant principles when considering whether a claim is vexatious.[6] This requires an assessment of such factors as the fundamental importance of the right of access to courts which is to be balanced against the desirability of freeing defendants from the burden of groundless litigation; whether the proceeding has a reasonable basis and whether it has been conducted in a reasonable way; whether an attempt is being made to re-litigate issues already determined, containing scandalous and unjustified allegations; and whether the litigant is found to have had an improper purpose in commencing proceedings.

[20] As I indicated to the parties at the hearing, there are of course criticisms that can be made as to the way in which Ms Mahamai brought her challenge to the Court, but I must take into account the fact that she was not represented, and that English is not her first language. I consider there are bona fide issues requiring consideration by the Court – particularly as to how the debt should be paid, and whether a penalty is appropriate.

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5 *Gapuzan v Pratt & Witney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 206 at [52]-[57].

6 At [66]-[67].

[21] Accordingly, I do not consider that the circumstances are such that the Court should exercise its jurisdiction to conclude that the proceeding should be dismissed on the grounds that it is frivolous or vexatious.

Was Ms Mahamai an employer?

[22] The evidence clearly establishes that Ms Sahrunphatcharakul was an employee. Ms Belley took a statement from Ms Sahrunphatcharakul. I accept the accuracy of her evidence, since it is consistent with other evidence which is before the Court. Ms Sahrunphatcharakul explained that she saw an advertisement for a position as shopkeeper, on a Thai Community page on Facebook. Prior to commencing work, Ms Sahrunphatcharakul spoke with Ms Mahamai who offered her a job over the phone, discussing location, start date, time and wages. Ms Sahrunphatcharakul was offered payment at $10 per hour cash or $13.75 per hour including tax. The amount she was to be paid was not agreed. In Ms Sahrunphatcharakul's statement she then described the duties she undertook, and the hours she worked as from 26 January 2014.

[23] On 1 February 2014, Ms Sahrunphatcharakul advised Ms Mahamai of the hours she had worked. Ms Mahamai responded via text, asking what payment option she preferred ($10 cash in hand, or "the minimum wage"). On the same day Ms Mahamai spoke to Ms Sahrunphatcharakul and said she would be paid a "training wage of $11 per hour based on her accountant's advice" as she was new to the shop.

[24] On 5 February 2014, $467.77 was deposited to Ms Sahrunphatcharakul's bank account, for 52.5 hours of work covering the period 26 January 2014 to 1 February 2014, at $11 per hour. This was verified by an entry on her bank statement. Ms Sahrunphatcharakul tried to raise an issue as to the correct hourly rate, with no success. She then raised the issue of payment with the Labour Inspector. On 8 February 2014, Ms Sahrunphatcharakul ceased working for Ms Mahamai, as she was not being paid the correct rate and had not been provided with an employment agreement.

[25] For her part, Ms Mahamai acknowledged that she was the employer on several occasions. On 26 February 2014, she sent an email to Ms Belley stating that Ms Sahrunphatcharakul had been recommended by a friend via Internet, without any relevant experience. Ms Mahamai explained that she had just taken over operation of the shop and urgently required interim cover to operate it. She said "therefore we both agreed by words that she will work as a trainee at shop to get familiar with the system and the shop products before going into a detailed employment agreement". Ms Mahamai went on to acknowledge that a payment had then been made to Ms Sahrunphatcharakul accordingly.

[26] Section 4B of the Minimum Wages Act 1983 (MWA) provides for a prescribed minimum rate of wages for trainees; those rates were at the time prescribed under the Minimum Wage Order 2014, defining a trainee as a worker aged 20 or more to whom the MWA applied, and who was required to undertake at least 60 credits annually of an industry training programme for the purpose of becoming qualified for an occupation to which the contract of service related; and who was not involved in supervising or training other workers.[7] Since there was no agreement for such training, the provisions of s 4B could not apply. Rather, the provisions of s 4 of the MWA applied. That section provided for the prescription of minimum adult rates of wages which are payable to workers. At the time this rate was $13.75 per hour.[8]

[27] On 15 May 2014, Ms Mahamai sent an email to Ms Belley acknowledging that she had paid "wages" to Ms Sahrunphatcharakul. On 13 October 2014, Ms Mahamai communicated by email with the Support Officer of the Authority, offering, amongst other things, to pay "the outstanding balance via weekly instalments of $10". Finally, at the hearing, Ms Mahamai accepted that she had employed Ms Sahrunphatcharakul.

[28] Having regard to the totality of the evidence, I am satisfied that Ms Mahamai was indeed the employer and that Ms Sahrunphatcharakul was entitled to be paid at the prescribed adult minimum wage rate.

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7 Minimum Wage Order (No 2) 2013, cl 3(1).
8 Minimum Wage Order (No 2) 2013, cl 4.

How much is owed to Ms Sahrunphatcharakul?

[29] Ms Belley placed a calculation before the Court, which gave credit for the gross amount paid for Ms Sahrunphatcharakul's wages. In summary, the evidence establishes that Ms Sahrunphatcharakul is owed:

Wages:	$925.00
Alternative holiday pay:	$103.13
Final holiday pay:	$128.15
Total:	**$1,024.38**

[30] Ms Mahamai accepted this amount was correct.

[31] Two improvement notices were served by Ms Belley on Ms Mahamai, under s 223D of the MWA. As already mentioned the first required a lump sum payment for the outstanding wages and holiday pay. The second followed the attempt by Ms Mahamai to negotiate payment on a weekly basis. Ms Belley responded by serving the amended notice, which required payment at a rate "of at least $50 per week completing the payments by 31 December 2014". The notice also stated that if there was a failure to complete any weekly payment after 26 May 2014, formal action might be instituted in the Authority for the balance due including interest and a penalty.

[32] Section 223E of the MWA provides that an employer may, within 28 days after an improvement notice has been issued, lodge with the Authority an objection to the notice. No such objection was lodged by Ms Mahamai. She did not make any payments at all.

[33] Section 223D(6) of the MWA provides that an improvement notice may be enforced by the making in the Authority of a compliance order under s 137 of the MWA. Ms Belley then sought such an order, and a penalty.

[34] It is plain that there has been non-compliance with the improvement notice. I am also satisfied that the monies referred to in the improvement notice are due and owing.

[35] Clause 14 of the sch 3 of the MWA provides the power to award interest at the rate prescribed under s 87(3) of the Judicature Act 1908. The relevant instrument is the Judicature (Prescribed Rate of Interest) Order 2011, which fixes the relevant rate at five per cent.

[36] The Authority correctly determined the amount due as at the date of the determination (28 January 2015) was $56.07; and 15 cents per day until the date of repayment is payable thereafter.[9]

Payment by instalments?

[37] The primary issue raised by Ms Mahamai is whether she should pay the outstanding debt by instalments. Mr La Hood advised the Court that there had been unsuccessful discussions on the topic of repayment and that, in effect, Ms Belley would abide the decision of the Court as to this possibility.

[38] Section 138(4A) of the Act provides:

> If the compliance order relates in whole or in part to the payment to any employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[39] Since the issue arises in respect of a challenge brought against a determination of the Authority, the Court may exercise this power on a derivative basis.

[40] In the course of her evidence, Ms Mahamai produced a budget which had been prepared with the assistance of the North Shore Budget Service. It showed weekly outgoings significantly in excess of weekly income.

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9 *Belley (Labour Inspector) v Mahamai*, above n 1, [20] and [24].

[41] As described earlier, Ms Mahamai is not in employment; indeed, because she is the subject of a visitor's Visa, she is not permitted to work in New Zealand. She is in receipt of income from her parents. Ms Mahamai is supporting her daughter, whose father is also overseas and does not pay child support despite being employed, a matter about which Ms Mahamai might wish to seek assistance from a Citizen's Advice Bureau or other suitable advisor.

[42] On the basis of her strained financial circumstances, Ms Mahamai stated that she was willing to reduce the debt at $30 per week. In my judgment s 138(4A) applies since the debt is in relation to payment to an employee, albeit via the Labour Inspector. Ms Mahamai's financial circumstances require the making of an order that the debt be paid by instalments. The alternative is to order a payment by way of a lump sum, which if enforced could result in a petition for bankruptcy being brought before the High Court. I do not consider such a possibility, at this stage, to be appropriate.

[43] As already stated in my minute to the parties of 25 September 2015, Ms Mahamai is to pay $30 per week to a bank account as specified by Ms Belley. The first of those payments was to be made on 1 October 2015.

[44] In view of the history of the matter, I wish to review progress in six months' time. I have accordingly directed that the Registrar is to establish a telephone conference on or about 25 March 2016. Fourteen days prior to that telephone conference, counsel for Ms Belley is to file and serve a memorandum summarising the payments which have been made to that point.

Other matters

[45] Mr La Hood also submitted to the Court that a penalty should be ordered in the range of $500 to $1,000 having regard to the seriousness of the breach, the impact on Ms Sahrunphatcharakul through non payment, taking into account her vulnerability, the need for deterrence, and the absence of remorse.

[46] Section 138(5) of the Act provides:

> Where the Authority makes a compliance order of the kind described in s 137(2), it may then adjourn the matter without imposing any penalty or making a final determination, to enable the compliance order to be complied with while the matter is adjourned.

[47] I have already indicated that the proceeding should be adjourned to enable the compliance order which was made under s 137(2) of the Act to be complied with. I also consider it appropriate to defer the question of whether a penalty should be ordered. Whilst there are criticisms that can be made as to the way Ms Mahamai has dealt with the debt, she should be given an opportunity to remedy her default. I will hear from the parties further when I review the matter in six months' time on the issue of whether a penalty should be paid, and if so, for how much.

Conclusion

[48] I make a compliance order in respect of the following amounts:

a) $1,153.08 gross for unpaid wages and holiday pay. Payment is to be made to a bank account specified by Ms Eva Belley, Labour Inspector, for disbursement to Ms Sahrunphatcharakul.

b) Ms Mahamai is to pay the further sum of $56.07 being interest owed as at the date of the Authority's determination, increased by 15 cents with each calendar day that passes from 29 January 2015 and the date of payment.

[49] Final payment of the foregoing amounts is to be made within 12 months of the date of this judgment, subject however to the review of the above order at the telephone conference, as indicated above. On that occasion I will consider:

a) whether payment of the balance then owing should be maintained at the rate which I have fixed in this judgment, or whether payment should be made on some other basis;

b) whether a penalty should be ordered and if so, for how much; and

c) whether an order for costs in favour of Ms Belley should be made.

[50] These orders and directions replace those made by the Authority.

B A Corkill
Judge

Judgment signed at 2.30 pm on 30 September 2015