

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 35**  
5349151

BETWEEN                      MARCIA ABRAO  
   Applicant  
  
AND                                FLORDELYN ARTUS  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Applicant in person  
   Respondent in person  
  
Investigation Meeting:        29 November 2011 at Tauranga  
  
Determination:                 24 January 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Abrao) alleges that she was unjustifiably dismissed by the respondent (Ms Artus) and that claim is resisted by Ms Artus.

[2]     Ms Abrao was employed as a café assistant at the Ambrosia Café operated by Ms Artus from 6 July 2010. By common consent, there was no employment agreement provided to Ms Abrao.

[3]     Ms Abrao became pregnant and discovered this in September. She promptly advised Ms Artus of that fact.

[4]     It seems the employment relationship continued without incident until December of that year when Ms Abrao alleges that, in a series of conversations, Ms Artus made clear that Ms Abrao would need to cease the employment because she was now pregnant and could not undertake the heavy work which was part of the employment. That heavy work consisted of lifting and placing furniture for the outdoor area of the café. Ms Artus denies absolutely that she sought to dismiss

Ms Abrao for being pregnant but admits that, on a number of occasions, she expressed anxiety about Ms Abrao undertaking heavy lifting because she was pregnant. Ms Artus denies that there was any suggestion that the employment relationship would come to an end because of the pregnancy.

[5] In fact, Ms Artus' evidence is that the café was not doing well and she needed to restructure. Ms Artus told the Authority that she needed to reduce the costs in the business and it was in that connection (a restructure) that she spoke to Ms Abrao about the future of her employment.

[6] According to Ms Abrao's evidence, the last day that she worked in the café was Sunday, 9 January 2011.

### **Issues**

[7] It will be useful if the Authority considers the following matters:

- (a) What were the terms of the employment;
- (b) How was the engagement documented;
- (c) What brought the employment to an end;
- (d) What was the position with maternity leave?

### **What were the terms of the employment?**

[8] Because there was no employment agreement and because the parties are in dispute about the nature of the engagement, the Authority must discern what was agreed from the evidence available. Although there is no employment agreement, Ms Artus has helpfully supplied copies of the relevant timesheets together with other documentation to assist the Authority to understand the position. In particular, a document is supplied by Ms Artus which, after the heading "*Ambrosia Café/Rest*" and the address and phone number, there appears the sub-heading in bold "*Employment details (both parties to sign on interview)*". This undated interview sheet then goes on to list down the left hand side a number of further sub-headings as follows:

- Name;

- Café assistant;
- Days/hours;
- Wage;
- Payment;
- Employment;
- Notes.

[9] The details in handwriting (Ms Artus') then record that this particular interview sheet refers to Ms Abrao. It is her name which is written against the heading "Name". Under the heading "Café assistant", the work required is set out. Amongst other things is the following information:

*Set up furniture in and out – carry tables and chairs and umbrellas – am and pm closing – must be fit to carry furniture.*

[10] Under the heading "days/hours" is the following information:

*As required (flexible hours) Tuesdays to Sundays (Monday closed) hours between 10am and 3pm.*

[11] Under the heading "Wage" is the information "minimum wage", and under the heading "Employment" is the information "casual/temporary" and this note "P/S note – filling in for staff who is on holiday".

[12] Under the heading "Notes", is the following:

*Advised that hours are minimal.*

[13] This document is signed by Ms Artus who confirmed her signature, and appeared to be signed by Ms Abrao. At the investigation meeting, Ms Abrao hotly contested that the signature in question was hers, despite the Authority's view that it appeared to be the same signature as the one appended to the statement of problem. Ms Abrao vociferously maintained that the signature was a forgery and that she had never seen the document that she allegedly signed.

[14] The Authority did not find Ms Abrao a convincing or helpful witness in this respect or indeed in any other respect of her evidence. The Authority is not persuaded

by Ms Abrao's protestations in relation to the document in question. The Authority's considered view is that this document was signed by both parties and that it does in fact represent the discussions between the parties prior to the commencement of the employment. The document, although undated, refers to training for Ms Abrao being scheduled for 9 July 2010 and the Authority is satisfied on the evidence it heard that training did in fact take place on that date. It follows that the interview between the parties, which this document records the detail of, took place sometime shortly before 9 July 2010.

[15] The interview sheet is important because, although the Authority is satisfied it does not represent an employment agreement in the sense the law requires, it does deal appropriately with some of the questions around the nature of the offer made by Ms Artus to Ms Abrao in terms of the employment. In particular, it is apparent that the hours to be worked are described as "*flexible*" and "*as required*" and the nature of the employment is categorised as "*casual/temporary*". Further, the reason for the employment being offered at all is that, as described in the record of the interview, Ms Abrao is replacing on a short term basis a staff member who is on holiday.

[16] The Authority is satisfied this document is genuine (despite Ms Abrao's protests), and considers that it supports Ms Artus' evidence that what was offered was casual work on flexible hours and for a temporary period only. In particular, it supports Ms Artus' evidence that the employment offered was not, as Ms Abrao contended, a full time position.

[17] Notwithstanding those conclusions and the information that can be derived from this interview sheet, the Authority is satisfied it does not constitute an employment agreement and that that deficit needs to be addressed later.

### **How was the engagement documented?**

[18] The principal document evidencing the employment is, of course, the interview sheet that has just been commented upon, but it is appropriate to note that that document is supported by a number of other documents, in particular a wages summary document, a statement of total wages paid during the employment, and a complete set of weekly timesheets covering the total period of the employment from the week commencing 8 July 2010 down to the week ending 12 January 2011.

[19] Those weekly timesheets confirm Ms Artus' evidence that the nature of this employment was very much an "as and when required" situation and very clearly not a full time position as Ms Abrao claimed. Ms Abrao's evidence on the point was that she was offered full time employment when she commenced. That evidence is inconsistent with the interview sheet supplied by the employer at the time of engagement, inconsistent with Ms Artus' own evidence as to the business's requirements, and inconsistent with the weekly timesheets just referred to. Those timesheets disclose a range of weekly hours, a range of shifts, and little pattern except irregularity. The highest number of hours ever worked in one week was 30 but that was very clearly an aberration, generating as it did net pay for the week of \$308.28. The other weeks on average generated around \$175 in net pay with a handful of weeks generating net pay around the \$250 and \$260 mark, but the vast majority being under \$200 a week in net earnings. The Authority is satisfied then that Ms Abrao was not offered full time permanent employment but was offered temporary work replacing a worker on holiday, with no fixed hours.

#### **What brought the employment to an end?**

[20] Ms Abrao claims that she was dismissed because she was pregnant and could no longer fulfil the obligations of the role, in particular the lifting of tables, chairs and umbrellas for the outside part of the café. Ms Artus absolutely denies that suggestion and, while acknowledging that she had indicated to Ms Abrao her concerns about the latter "*overdoing it*" with heavy lifting now that she was pregnant, she is adamant that the reason that the employment came to an end was because there was insufficient work. In order to deal with the heavy lifting aspect of the role (which it will be remembered was referred to in the interview sheet), Ms Artus hired another person and split the hours so as to cover that eventuality. In fact, after this happened, Ms Abrao's hours continued to fluctuate in the same way that they had prior to the extra person being hired.

[21] Ms Artus told the Authority that she met with Ms Abrao on 18 December 2010 to indicate to her that it was unlikely that her hours would continue to be offered because the business was not trading profitably and the employer needed to take some costs out of the business. Ms Artus says that until that conversation, she had never had a cross word with Ms Abrao but that from the moment that she had indicated that she was unlikely to be able to continue to offer Ms Abrao hours, the latter became

aggressive and unpleasant. It is appropriate for the Authority to note (as Ms Artus did in her evidence), that Ms Abrao speaks English as a second language and there may be a sense in which her command of English has limited her ability to understand what was happening in the workplace.

[22] Be that as it may, the Authority is satisfied it is not Ms Artus' fault if Ms Abrao was unable to comprehend the reason that she was not being offered continuing hours.

[23] Certainly, it is Ms Artus' contention that from the moment she indicated the likelihood that there would be little or no future work, Ms Abrao began raising other issues, in particular a claim for parental leave and a threat to go to the Labour Department to deal with Ms Artus' alleged irregularities as an employer.

[24] The Authority is satisfied that Ms Artus' view about the reason for the employment coming to an end is to be preferred over Ms Abrao's contentions. This was a part time, casual employment with no fixed hours. Ms Abrao was called to work as and when required. She did not work any particular span of hours although she was regularly called in to work on particular days of the week.

[25] By the end of December 2010, it was apparent to the business owner, based on accounting advice provided to the business (and seen by the Authority), that the loss for the business in that trading year was double the loss for the previous year and that costs needed to be addressed. That was the reason that Ms Artus spoke with Ms Abrao and indicated to her that it was unlikely that she would be able to continue offering hours of employment on into the future.

[26] In fact, the last day Ms Abrao worked was 9 January 2011. No further hours were offered because no further hours were available. Eventually, Ms Abrao's work permit expired by the passage of time and thus she was unable to work in New Zealand without that work permit being renewed.

### **What was the position with parental leave?**

[27] Ms Abrao claims to have been dismissed because she was pregnant, a claim which the Authority has already rejected. Ms Abrao also contends that she was treated unfairly and unjustly in relation to her application for parental leave. The Authority rejects this contention as well.

[28] The factual position is clear that there was no application made to the employer until after the employer indicated it would be unable to continue offering work. At that point, Ms Abrao has sought to remain in the employment long enough to then go on parental leave later on.

[29] Ms Artus' evidence, which the Authority much prefers in all things, is that when Ms Abrao raised the question of parental leave, Ms Artus honestly said that she did not know how the system worked but would find out. Ms Artus told the Authority that she contacted the Department of Labour and was given helpful advice about the way that the parental leave law worked. Armed with that information, she went back to Ms Abrao and proposed that, rather than her ceasing employment immediately, which would ensure that Ms Abrao could not take parental leave because she was not entitled to it unless she had been in the employment for at least six months, Ms Abrao should remain employed until the six months was up, would then go on parental leave and accordingly not miss out on her entitlement.

[30] It appears that Ms Abrao did not understand that process and, in breach of the legal position, kept demanding that Ms Artus complete a parental leave form there and then rather than allow Ms Artus the opportunity to consider her position and respond, within the 21 days the law allows. Ms Abrao then went to a Labour Inspector who helpfully took the initiative of trying to broker a sensible arrangement between the parties. The essence of the advice from the Labour Inspector was that the only way that the parental leave application could precede sensibly was on the basis that it was taken earlier than Ms Abrao had actually wanted. Ms Abrao seems to have not grasped that in asking her to take parental leave early, Ms Artus was acting within her legal rights.

### **Determination**

[31] The Authority is not satisfied Ms Abrao has any ground for complaint. She has not satisfied the Authority that she has a personal grievance. Ms Abrao was not unjustifiably dismissed in the sense of a "sending away" at the behest of the employer. She was told in December that work was running out. Given the short term, casual nature of the employment, that was proper. The Authority is satisfied Ms Artus endeavoured to keep the position open so that Ms Abrao could take her parental leave. As a matter of fact, the employment ended by force of law; Ms Abrao's valid work permit expired. The actions taken by Ms Artus were the actions that a fair and

reasonable employer would have taken in the circumstances: s.103A Employment Relations Act 2000, applied.

[32] The only matter on which the Authority needs to take any action to remedy the various claims brought before it by Ms Abrao is the absence of an employment agreement. It is plain from this particular employment relationship problem that the confusion around the nature of the employment was derived at least in part because of the absence of proper documentation as required by the law. The statute requires each employee to have a written employment agreement. Had one existed in the present case, as the Authority has just noted, there would have been less ability for parties to misunderstand the position.

[33] In all the circumstances of the present case, the Authority considers it appropriate to levy a penalty against Ms Artus for the failure to provide Ms Abrao with a written employment agreement in accordance with the law. That penalty is to be in the sum of \$500 and is to be paid by Ms Artus to Ms Abrao. For this purpose, Ms Abrao is to supply to Ms Artus her current bank account details.

#### **Costs**

[34] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority