

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 257
3030955**

BETWEEN SERENA ANDERSON
 Applicant

AND NORTHERN HYDROPONIC
 SUPPLIES 2006 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Tony Barrow, Advocate for Applicant
 Barry Nalder, Advocate for Respondent

Investigation Meeting: 14 August 2018 at Whangarei

Submissions received: 14 August 2018 and further information 15 August 2018 from
 Applicant
 14 August 2018 from Respondent

Determination: 16 August 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Serena Anderson, claims that she was unjustifiably dismissed by the Respondent, Northern Hydroponic Supplies 2006 Limited (Northern Hydroponic).

[2] Northern Hydroponic denies that it unjustifiably dismissed Ms Anderson, and claims that she was justifiably dismissed for serious misconduct.

Note

[3] During the course of the Investigation Meeting, the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties’ representatives. The parties have also submitted closing submissions on the facts and law.

[4] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on each of the issues necessary to dispose of the matter and specified orders made as a result.

Issues

[5] The issue for determination is whether or not Ms Anderson was unjustifiably dismissed by Northern Hydroponic.

Background Facts

[6] Northern Hydroponic trading as Grow and Brew operates three stores located at Waipapa, Silverdale and Manukau City.

[7] Ms Anderson commenced employment at the Waipapa store (the Store) as a Retail Assistant on 3 May 2017. She was provided with an individual employment agreement (the Employment Agreement) which set out the terms and conditions of her employment in Schedule 1 as being:

- Date of commencement: 3 May 2017
- Supervisor: Cameron Kerr or other delegated representative of Northern Hydroponic
- Date and hours of work: Tuesday to Friday 8.30 a.m. to 5.30 p.m.
Saturday 9.00 a.m. to 5 p.m.
- Remuneration: \$18.00 per hour
- Overtime: \$18.00 per hour
- Notice period: 4 weeks

[8] The Employment Agreement stated:

cl 5.1: During the employment, the Employee shall:

...

- (a) Comply with all reasonable and lawful instructions of the Supervisor; ...

cl 25.3 **Serious Misconduct**

- (a) ...
- (b) Theft, dishonesty, or fraud by the Employee during the Employment;
- (c) ...
- (g) Failure to follow any reasonable instruction from the Supervisor of the Employer;
- (h) Negligence or incompetence in performing the Employee's duties;
- (i) Bringing, or being likely to bring, the Employer into disrepute;
- (j) Acting in a manner that damages or is likely to damage the reputation of the Employer; ...
- (q) Falsifying the Employer's records, documents or timesheets. ...
- (s) Using, possessing or trafficking illegal drugs ...

[9] Ms Anderson confirmed that she had read and signed the Employment Agreement beneath the Acknowledgment section which stated that she had "*read and understands the terms and conditions of employment and accepts them fully*".

[10] During her employment at the Store Ms Anderson worked with another, Retail Assistant, and Mr Bennett Smith, Manager. The retail assistant worked on Thursday, Friday and Saturday, and later in his employment, Wednesday also. Mr Smith worked on Monday and Sunday. Ms Anderson reported to Mr Smith.

[11] Ms Anderson said that she liked to keep the outside of the premises and carpark clean and free from rubbish, putting the rubbish in the bin provided. This was not an allocated duty as set out in Schedule 2 of the Employment Agreement. Ms Anderson said she would perform this duty when she arrived at the work premises and before she entered the Store and unset the alarm. She had not anticipated that she would receive payment for this action.

[12] She had not informed Mr Smith that she was performing this action, nor had she been requested to do so.

[13] Mr Jean-Pierre Paquay, Owner and Managing Director of Northern Hydroponic, said he had appointed Mr Cameron Kerr as General Manager of Northern Hydroponic on or about

2016 as a result of him (Mr Paquay) being able to spend less time managing the business due to personal issues.

[14] Mr Kerr was employed by Northern Hydroponic until the early part of 2018 when his employment ended by way of redundancy due to Mr Paquay resuming a more active role in managing the business and resuming the role which by Mr Kerr had been appointed to fill.

[15] Neither Mr Kerr nor Mr Paquay were in the Store other than sporadically as Mr Kerr's responsibilities covered all three Northern Hydroponic Stores and he was based in Auckland. Mr Paquay said that as he lived nearby the Store, he would often call in to collect the cash takings and deposit them in the bank. His visits usually lasted approximately 15 minutes and he would on occasion talk informally to the employees.

[16] Although the employees had their contractual hours detailed in their employment agreements, it appeared to be fairly common practice for the employees to change shifts with each other at the Store. Mr Bennett would therefore telephone the employees if they were not present to check their hours before he completed these on electronic timesheets which were emailed to Mr Kerr's Administrative Assistant who completed the pay records.

[17] To avoid the need to telephone Ms Anderson and the other retail assistance to check their hours, Mr Bennett introduced a timesheet to simplify the process on or about late 2017.

[18] Ms Anderson said she had signed her timesheet at the commencement of each week to identify it as being hers, and completed the times worked each day at the end of that day.

[19] Ms Anderson said that at the time the timesheets were introduced by Mr Smith, she had not been informed that the timesheets would be used as a basis for payment, that they should be signed at the end of the week, or that failing to complete them in accordance with the contractual hours would be viewed as a disciplinary offence.

[20] Although she had completed the actual hours worked each day to include the time taken to tidy the Store outside area before entering the Store, she had not expected to be paid for this additional time.

[21] During the Investigation Meeting Ms Anderson explained that she had hoped the additional time on the timesheets would be taken as evidence of her commitment and assist in her application to replace Mr Smith as Manager of the Store, Mr Smith having resigned in December 2017.

[22] During December 2017 Mr Smith sent a timesheet for Ms Anderson to Mr Kerr, he had either been asked to do by Mr Kerr or did so of his own volition. The timesheet was in respect of the period 4 to 10 December 2017. It had been signed by Ms Anderson, and the finish time for Saturday 9 December 2017 had not been completed.

[23] The timesheet showed that Ms Anderson had worked 3 hours on Tuesday 5 December, 8 hours and 40 minutes on Wednesday 6 December 2017, 8 hours and 55 minutes on Thursday 7 December, and 8 hours and 55 minutes on Friday 8 December 2017.

[24] The total hours each day had been entered in green ink, and the start time on Saturday 9 December 2017 had also been entered in green ink. The employee name and signature were also in green ink. There had been no finish time entered for the Saturday.

[25] A comparison of the times written on Ms Anderson's timesheets with that recorded by the setting and unsetting of the Store alarm system indicated a discrepancy from which it appeared to Mr Kerr that Ms Anderson had been claiming an additional 43 minutes work time than had been worked during that week.

Events January 2018

[26] During a visit to the Store in January 2018 Mr Paquay said he had used the Store toilet and noticed an unpleasant smell which he concluded was the smell of methamphetamine having been smoked and sex having taken place there. Ms Anderson and the other retail assistant were in the Store but there were no customers present at that time.

[27] Mr Paquay said he had concluded the origin of the smells by personal knowledge rather than by having conducted any testing.

[28] Following his visit to the toilet Mr Paquay said customers had entered the Store, it was busy and he had no opportunity to raise the issue with the other retail assistant or Ms Anderson.

[29] After considering the issue for some days, Mr Paquay said he had visited the Store and spoken to the other retail assistant. Ms Anderson had been on leave at the time and was not present.

[30] Mr Paquay said he had spoken to the other retail assistant about his suspicions about the methamphetamine smoking and sex taking place in the toilets, and said that the other retail assistant had admitted that was the case, and apologised.

[31] Mr Paquay said he had been angry and had handed the other retail assistant a piece of paper and told him to write out his resignation. After the other retail assistant had done so, he had asked him to leave the Store.

[32] At the Investigation Meeting the other retail assistant strongly denied that Mr Paquay had raised the issue of methamphetamine smoking or having sex with Ms Anderson in the Store toilet with him.

[33] He said that when Mr Paquay had spoken to him in late January 2018, it was to complain about his work, stating that he had no trust or confidence in him, and asking him to resign.

[34] Because he was at a low period in his life, he had agreed to resign, and had signed the pre-written resignation letter Mr Paquay handed to him. He had left the Store that day.

[35] When Ms Anderson had returned from leave, Mr Paquay said he had spoken to her in respect of the allegations that she had been smoking methamphetamine and having sex with the other retail assistant in the Store toilet. He had asked her to resign.

[36] Mr Paquay said Ms Anderson had been very confrontational and had told him: "*You can't prove it*", and refused to resign.

[37] Ms Anderson strongly denied that Mr Paquay had mentioned the issue of methamphetamine smoking or having sex with the other retail assistant in the Store toilet to her.

[38] She said that Mr Paquay had told her that he had no trust in her, he had received complaints from customers and he believed she had 'bad customer rapport'. He had asked her to resign as a result of him having no trust or confidence in her, but she had refused to do so.

[39] Mr Paquay said he had taken the matter no further. He had informed Mr Kerr about what had occurred with Ms Anderson, and had become aware that Mr Kerr was commencing a disciplinary process involving Ms Anderson which was related to timekeeping discrepancies and unrelated to his suspicions about the events in the Store toilet. He had not been involved in that process.

[40] Mr Kerr had not taken any steps regarding the timesheet completion issue with Ms Anderson until he wrote to her on 7 February 2018 inviting her to a disciplinary meeting.

[41] In the letter dated 7 February 2018 Mr Kerr set out start times recorded on Ms Anderson's timesheet for the week ended 10 December 2017 and stated:

We are very concerned about the seriousness of this matter and we could decide that if the matter is proved, this may amount to misconduct or serious misconduct by you. This may lead to your dismissal.

[42] The letter advised Ms Anderson that there would be an opportunity during the meeting for her to provide an explanation which would be considered and, if required, any further investigation carried out. Ms Anderson was invited to bring a legal or union representative, or other support person, and was encouraged to do so.

[43] Ms Anderson responded to the notice of disciplinary meeting setting out her explanation of what had happened in respect of the time sheet.

[44] The disciplinary meeting took place on 8 February 2018. Present at the meeting were Ms Anderson and her Aunt, Ms Dorothy Dromgool as Ms Anderson's support person, Mr Kerr and Mr Dwayne Mealing who had been appointed as Store Manager as replacement for Mr Smith, and who took minutes of the meeting.

[45] The minutes of the meeting were accepted by Ms Anderson during the Investigation Meeting as recording what had occurred during the meeting.

[46] As recorded in the Minutes Mr Kerr explained that the meeting had been delayed due to the Christmas period and staff leave, and set out the allegation that the timesheet for week ending Saturday 9 December 2017 had been falsified.

[47] Ms Anderson had explained that she had not filled in the finish time for Saturday 9 December 2017 as she had forgotten to do so, and explained the additional times entered as differing from the contractual hours and/or the Store alarm system recorded time as relating to her picking up rubbish outside the Store.

[48] Mr Kerr had not accepted Ms Anderson's explanation about the rubbish tidying outside the Store prior to the Store alarm system being deactivated.

[49] Mr Kerr had stated that Ms Anderson signing her timesheet prior to filling it out concerned him. Ms Anderson explained that she had usually signed the timesheet on a Tuesday.

[50] Ms Dromgool also made several observations on Ms Anderson's behalf as recorded in the minutes of the meeting.

[51] Following the main part of the meeting it was adjourned and approximately 30 minutes later when the meeting resumed, Mr Kerr had told Ms Anderson that she had admitted signing a timesheet which she had let someone else complete, and that Northern Hydroponic viewed that as falsifying a timesheet. He concluded by confirming that Ms Anderson was dismissed.

[52] The decision was confirmed in a letter from Mr Kerr dated 13 February 2018 which stated:

During our disciplinary meeting last Friday (9/2) you admitted to signing a time sheet and letting someone else fill it out, which we view as falsifying a time sheet and is seen as serious misconduct.

Determination

Was Ms Anderson unjustifiably dismissed by Northern Hydroponic?

[53] Ms Anderson claims that she was unjustifiably dismissed by Northern Hydroponic. The test of justification in s 103A of the Employment Relations Act 2000 (the Act) states:

103A Test of justification

1. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
2. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[54] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. Northern Hydroponic must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

(i) Substantive Justification

[55] Pursuant to s25.3 (b) of the Employment Agreement, “*Theft, dishonesty or fraud by the Employee during the Employment*” and s 23.3(q) *Falsifying the Employees records, documents or timesheets*” constituted serious misconduct.

[56] Ms Anderson’s evidence was that she believed that she was paid in accordance with her contractual hours, and her sole reason for including time exceeding the contractual hours on the timesheets completed for the week commencing 4 December 2017 was to demonstrate her commitment to the Store with a view to influencing a decision to appoint her as the Store Manager.

[57] There is no evidence that Ms Anderson fraudulently advised Mr Smith of her finish time on Saturday 9 December 2017, and it was Mr Smith who completed the electronic timesheets for submission to the Northern Hydroponic pay clerk.

[58] There is no evidence that the employees at the Store were advised at the time Mr Bennett introduced the timesheets that they were to be used for payment purposes, or that a variance in time completion compared with either contractual hours or the alarm system hours constituted serious misconduct. Nor were the employees at the Store informed that signing the timesheet at the commencement of the week rather than at the end also constituted serious misconduct.

[59] I find that Northern Hydroponic had no substantive justification for dismissing Ms Anderson.

(ii) Procedural Justification

[60] In accordance with s 103A (3) of the Act, Northern Hydroponic was required to carry out a fair investigation and follow a fair procedure. The Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ...the employer gave the employee a reasonable opportunity to respond to the employer’s concerns ...
- (d) ... the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee ...

[61] Immediately prior to the meeting on 8 February 2018 Ms Anderson had sent Mr Kerr a letter setting out an explanation of her actions in regard to the timesheets, and gave further explanation at the disciplinary meeting.

[62] Mr Kerr did not believe Ms Anderson's explanation about the rubbish collection, but there is no evidence that he had carried out any investigation to verify or disprove the explanation either prior to, or after, the disciplinary meeting.

[63] Of more significance is the fact that Mr Paquay had informed Mr Kerr of his unproven suspicions concerning Ms Anderson and the fact that she had refused to resign.

[64] Employers embarking upon a disciplinary process should not hold a predetermined view of the matter, and in this case there is some indication that there was an element of predetermination in Mr Kerr's decision to dismiss Ms Anderson arising from the information provided to him by Mr Paquay and given the lack of substantive justification and investigation into her explanations.

[65] I find a lack of procedural justification and determine that Ms Anderson was unjustifiably dismissed by Northern Hydroponic.

Remedies

Notice Period

[66] Pursuant to clause 25.2 and Schedule 1 of the Employment Agreement, Ms Anderson was entitled, upon the termination of her employment with Northern Hydroponic to four week's notice.

[67] In the absence of contractual notice having been given by Northern Hydroponic, Ms Anderson was entitled to wages equivalent to the length of that notice. In other words due to the absence of the contractual notice having been given by Northern Hydroponic, the payment is equal to the amount of wages to which Ms Anderson would have been entitled but for the termination of her employment.

[68] As such I find that a payment of this nature is reimbursement of: "*the whole or any part of the wages*" to which Ms Anderson would have been entitled had she remained in employment. It is remuneration which is taxable and payable under Ms Anderson's Employment Agreement.

[69] Accordingly I determine that the payment falls under s 123(1)(b) of the Act which includes both wages and “*other money*” which has been lost “*as a result of the grievance*”.

[70] I find that Ms Anderson is entitled to 4 week’s wages payment of \$747.00 gross for the period 8 February 2018 to 8 March 2018 pursuant to s 123(1)(b) of the Act.

[71] I order Northern Hydroponic to pay Ms Anderson the sum of \$2,988.00 gross (calculated as 41.5 hrs x \$18.00 per hour x 4 weeks) less any monies earned in that period and benefit paid which was as a result of her lost employment pursuant to s 123(1)(b) of the Act.

Reimbursement of Lost Wages

[72] Northern Hydroponic is ordered to pay Ms Anderson lost wages for a period of 13 weeks from 8 March 2018 in the sum of \$9,711.00 gross (calculated as 41.5 hours x \$18.00 per hour x 13 weeks) less any monies earned in that period and benefit paid which was as a result of her lost employment pursuant to s 128(3) of the Act.

Unpaid Wages

[73] Ms Anderson was underpaid by 3 hours during the week commencing 4 December 2017.

[74] I order Northern Hydroponic to pay to Ms Anderson unpaid wages in the sum of \$54.00 pursuant to the Minimum Wage Act 1983.

[75] In addition to that amount, I order that Northern Hydroponic pay Ms Anderson the sum of \$4.32 as statutory holiday pay calculated in accordance with the Holidays Act 2003.

Interest

[76] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act.

[77] I consider that it is appropriate that Northern Hydroponic is ordered to pay interest on the outstanding sums owed to Ms Anderson.

[78] Northern Hydroponic is to pay Ms Anderson interest, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016, on the monies owed to her as set out above from 8 February 2018 until the date of payment.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[79] Ms Anderson is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Anderson suffered from depression as a result not only of the dismissal itself, but due to the implications of the unsubstantiated rumours concerning her and the other retail assistant which had been spread in the small community in which the events took place.

[80] Ms Anderson has a young daughter and the rumours, which have been difficult to counter without being able to ascertain and stem their source, have compounded her feelings of hurt and humiliation and injury to feelings.

[81] I order Northern Hydroponic to pay Ms Anderson the sum of \$10,000.00, pursuant to s 123(1) of the Act.

Contribution

[82] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[83] Ms Anderson was aware from cl 25.3 (q) of the Employment Agreement that falsifying the Employer's timesheets was considered to be serious misconduct.

[84] Although Ms Anderson's explanation to Mr Kerr about the additional hours on her timesheet was that because she did not consider she was paid based upon the timesheets, she had not, at any time prior to the disciplinary meeting letter dated 7 February 2018 taken any opportunity to explain the reason why she was entering additional time to the contractual hours on the timesheets to Mr Smith or Mr Kerr.

[85] Ms Anderson's evidence was that she had not informed Mr Smith or Mr Kerr that she was tidying the outside of the Store prior to opening each morning. Had she done so at any time prior to the 8 February 2018 meeting, her explanation about that may have obviated any need for the disciplinary meeting.

[86] I find that Ms Anderson was in part responsible for the position in which she found herself in February 2018.

[87] In these circumstances I consider that there has been some degree of contributory conduct by Ms Anderson and I accordingly reduce the amount ordered as compensation to be reduced by 15%.

Costs

[88] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant has lodged and filed supporting invoices in support of a costs claim and should serve a memorandum as to costs within 28 days of the date of this determination.

[89] The Respondent will have 14 days from the date of service to lodge a reply memorandum.

Eleanor Robinson
Member of the Employment Relations Authority