

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2019] NZERA 261
3029813

BETWEEN SARAH BEANEY
Applicant
AND RAW SUSHI LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Applicant on own behalf
Hyun Ji Kim and Jin Ho Nam on behalf of Respondent
Investigation Meeting: 14 November 2018 at Palmerston North
Submissions Received: At the investigation meeting
Determination: 2 May 2019

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Sarah Beaney, claims she was unjustifiably dismissed by the respondent, Raw Sushi Limited. She also says she disadvantaged by reason of the employer's unreasonable behaviour with respect to constant unwarranted admonition and the taking of leave.

[2] Raw Sushi admits it dismissed Ms Beaney but contends its decision was justified. It denies the allegations concerning improper conduct.

[3] Originally there was a claim concerning unpaid wages but this was resolved prior to the investigation.

Background

[4] Ms Beaney was employed as a part time kitchen hand by Raw Sushi in May 2013. The company operates a food outlet and is owned and directed by Hyun Ji Kim and Jin Ho Nam.

[5] It appears the relationship was cordial for the bulk of its tenure but from Ms Beaney's perspective the situation deteriorated around Christmas 2017.

[6] She says she was getting tired. She felt she needed a holiday and in late October or early November requested two periods of leave. One was at Christmas and one in February. Each was for approximately a week and her requests were approved.

[7] About two days before the Christmas break Ms Beaney claims she was told her leave would be reduced as the business was busy and could not accommodate an absence of the length originally sought. She says she accepted the situation on condition her February request remained intact and that she could also have a break around Easter. She says the response was *no problem* and Ms Beaney's claims regarding these events is not disputed.

[8] Ms Beaney claims that problems again arose just prior to her taking leave in February when Mr Nam approached and advised *My wife (Ms Kim) says too busy – no holiday*.

[9] Ms Beaney objected and advised she had made arrangements and was going. She says she was then asked if the employer could cash up the leave and again refused. Ms Beaney says she was then told the employer would require her at a meeting upon her return and not to plan on taking leave at Easter.

[10] Again there is little dispute. Mr Nam accepts he asked Ms Beaney postpone her leave as the shop was busy and that she refused. It is the way she advised that refusal that he takes issue with – he portrays it as *not pleasant*.

[11] Ms Beaney says from this point Ms Kim refused to make eye contact or communicate and on her first shift back from leave the previous regular communication with others was also absent. Ms Beaney says she started to feel very uncomfortable and said to Mr Nam, in Ms Kim's presence, things would be easier if

she and Ms Kim could talk. Ms Beaney says the response was they would talk when the Nam's daughter returned the following Sunday.

[12] Ms Beaney left distressed and went to see her mother, Jan Teikamata, who reacted by visiting Raw Sushi's premises. Ms Teikamata says she explained Ms Beaney was feeling upset and asked why no-one was speaking to her. She says Mr Nam replied that it was a cultural issue and Ms Beaney had been rude to Ms Kim.

[13] The following evening Ms Beaney received a text from Mr Nam suggesting she take leave. She didn't but returned to work where she says the ostracising continued.

[14] The next day Ms Beaney says she was approached by Mr Nam, shown a message on his phone and asked to agree to a new employment agreement. The agreement purported to be a new arrangement commencing the following day but it was an attached final page to which Ms Beaney took issue. It criticised her for having involved her mother and asked Ms Teikamata not come to the shop. It also alleged Ms Beaney left the premises without permission when upset (12 above) and needed to apologise. That said Ms Beaney was not given a copy despite asking for one. Indeed she says the response was *Do you still want your job and to work here*.

[15] The conversation continued but ended with Ms Beaney advising she wanted support and was leaving. She returned an hour later with her mother. The two were shown an electronic version of the new agreement on Mr Nam's phone and told the changes related to start and finish times. Ms Beaney says she agreed and asked her outstanding leave be paid out. The conversation then turned with Mr Nam advising Ms Kim was upset and because in her culture elders were not to be disagreed with and had been offended by Ms Beaney's refusal to give up her leave. Ms Teikamata asked what would address the issue and says she was told nothing - it was a cultural thing that would require a lot of time to sooth.

[16] A couple of days later a written copy of the new agreement was provided and again the final page upset Ms Beaney due to her belief the accusation were untrue. She expressed her dissatisfaction in writing on 26 February. She also advised she was seeking advice about the agreement and depending on what she was told return it by 6 March.

[17] In the interim, 22 February, Ms Beaney was handed a note alleging she had been having personal conversations with customers and suggesting she may have divulged information related to the company. The note ended with advice this was unacceptable.

[18] While Mr Nam has a different view about some of the detail these differences need not be resolved to determine the issues I am asked to determine. He says he considered Ms Beaney's response to the leave issue and decided he had to make things clear though was unable to say what he meant by that. He says he also wanted to make changes and cease paying part of Ms Beaney's pay in cash which was, he says, the trigger for her angst and the first departure. He takes issue with both her attitude and that of Ms Teikamata when the two returned portraying their behaviour as disruptive and rude. He says this caused significant inconvenience especially as it meant another employee had to cease working so as to interpret *in the non-business associated conflicts*.

[19] In his written statement Mr Nam says:

As a result, a new contract was delivered with a letter attached asking for an apology that should be made to her colleague and endeavour to make the environment friendly and more pleasant.

[20] He takes issue with the fact that did not elicit the desired response and claims Ms Beaney was *conducting incomprehensible activities* such as asking if customers would be referees should the need arise.

[21] Following the events of mid-February, at least from Ms Beaney's perspective, there followed six weeks during which the environment remained frosty but there were only two further events of significance. The first was the delivery of a further note of admonition on 23 March which alleged Ms Beaney had not passed information to customers and gave instructions about doing so in future.

[22] The second occurred on 29 March. Ms Beaney says she was at the back of the shop when Mr Nam approached, handed her a letter and simply said *I'm very sorry for this*. The letter advised Ms Beaney she had been dismissed. It says the decision was the result of *a thorough consideration over the past few months*. It says *The loss of trust in the relationship between you and us and within the team has significantly influenced the teamwork and work environment* and alleges this contributed to the

recent departure of two other staff. The letter closes by thanking Mr Beaney for her contribution over the last five years and stating the employer *sincerely appreciate your work and dedication.*

[23] Mr Nam, when giving oral evidence, essentially agreed with Ms Beaney's portrayal of this final event stating *I wrote it and gave it to her.*

Discussion

[24] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[25] Ms Beaney's prime claim is she was unjustifiably dismissed.

[26] As already said, Raw Sushi accepts it dismissed Ms Beaney and in doing so accepts the requirement it justify the dismissal.

[27] Essentially Ms Beaney's position is she was dismissed as a result of her having tried to ensure she enjoyed a period of leave as she is entitled to under both her employment agreement and statute. Raw Sushi denies the taking of leave was a factor and cites poor conduct and a refusal to address that when it was raised.

[28] Raw Sushi says:

...the employee did not attempt to change or improve in any way despite the multiple notices and warnings she had constantly been given. Rather she attributed the responsibilities and causes to other (respondents) and did not endeavour put herself into perspectives as to what have contributed to the disagreements that have been addressed.¹

[29] In support Raw Sushi relies upon the written missives produced during February and March. That raises a significant problem as their content can only be considered minimal. They lack specificity about both concerns and rectification. They definitely make no mention they could be considered formal warnings and in any event there was no evidence corroborating the allegations despite claims witnesses could be produced.

¹ Statement in reply

[30] What the evidence leads me to conclude is the dismissal was attributable to Ms Beaney's determination to take leave and a belief that by doing so she insulted her employer by not adhering to the contrary wish of an elder. That position was enunciated in both the documentation and the respondent's oral evidence. To that was added a view Ms Teikamata's behaviour was unacceptable and Ms Beaney was responsible for the loss of other staff.

[31] That conclusion gives Raw Sushi a significant problem. First Ms Beaney is entitled to take leave especially once it has been approved as the parties agree it was here. To subsequently choose not to relinquish that leave cannot be construed as insulting the employer and despite Raw Sushi's claims there is no evidence supporting a claim she acted rudely or inappropriately in any other way. Here I note that while it was said witnesses friendly to the company saw such events none were called and no explanation could be given for their absence. Similarly there was no evidence to support the claim Ms Beaney's behaviour played a part in the departure of two others as alleged. Nor was there any evidence to support claims Ms Teikamata's acted inappropriately not that it matters as her behaviour should not be visited upon her daughter in the way it appears to have been here.

[32] Turning to procedure. Section 103A requires the Authority consider whether, having regard to the resources available to it, the employer sufficiently investigated its concerns. A sufficient investigation requires, as a bare minimum, the employer put the issues, allow an opportunity to respond and consider the response with an open mind.

[33] Raw Sushi has offered no evidence it complied with these requirements. Indeed it accepts it never sat down and had any discussion about allegations raised in the various memos or the letter of dismissal. Here I repeat the observation the written admonitions lack clarity and I conclude Ms Beaney would be ill-equipped to register their import in the absence of such discussion.

[34] Finally I comment on resources and while small I conclude a lack there-of does not assist Raw Sushi.² First it offered no evidence it was hobbled by such a lack and second I note the Court's conclusion in *The Salad Bowl Ltd v Howe-Thornley*³

² Section s 103A(5) of the Employment Relations Act 2000

³ [2013] NZEmpC 152 at [94] and [95]

that such all-encompassing failures as occurred here are neither excusable nor minor (s 103A(5) of the Act).

[35] For the above reasons I find the dismissal unjustified.

[36] I take the purported disadvantages no further for three reasons. First they were not pleaded as such. Second the way the evidence was presented leads me to conclude they were integral to the dismissal and with that Ms Beaney has been successful. Third there was minimal evidence of harm or remedies attributable to them as distinct events with that evidence being holistic and concentrating on the effect of the dismissal.

[37] The conclusion Ms Beaney has a grievance in that she was unjustifiably dismissed raises the question of remedies. She seeks lost wages and compensation pursuant to s 103(1)(c)(i) of the Act.

[38] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. To be entitled to this remedy there must, however, be evidence the applicant made attempts to mitigate the loss. Here there is no such evidence – indeed the contrary. Ms Beaney admits that by her own choice she *didn't really try*. She attributes that in part to her health though it must be noted that was a pre-existing situation which cannot be visited upon the employer. On the basis of this evidence I find myself unable to award lost wages.

[39] The amount claimed as compensation has never been specified. That said, and aside from the fact a dismissal carried out in such an arbitrary manner must have a harmful effect, Ms Beaney offered reasonable evidence of the hurt she felt and her sense of betrayal. She spoke of the embarrassment engendered by trying to explain the dismissal especially when there were contradictions emanating from the comments about appreciable work and dedication in the dismissal letter. She spoke of her feeling of worthlessness enhanced by an inability to understand the reasoning behind the employers unexplained admonitions which she characterised as bullying. When I consider the evidence and compare it to others I consider an award of \$12,500 to be appropriate.

[40] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Ms Beaney contributed to her dismissal in a way that warrants a reduction in remedies. The earlier comments on the dismissals justification lead me to conclude the answer must be no.

[41] Finally there is the issue of costs to which Ms Beaney is entitled given she has been wholly successful. As she is self-represented these are, however, limited to reimbursement of the Authority's filing fee. That too is payable.

Conclusion and orders

[42] For the above reasons I conclude Ms Beaney has a personal grievance in that she was unjustifiably dismissed.

[43] As a result I order the respondent, Raw Sushi Limited, pay Ms Beaney:

- (a) \$12,500.00 (twelve thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i); and
- (b) a further \$71.56 (seventy one dollars and fifty six cents) being reimbursements of the Authority's filing fee.

Michael Loftus
Member of the Employment Relations Authority