

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 97/09
5111286

BETWEEN NICOLA EDITH BERGMAN
 Applicant

AND PASCOE ENTERPRISES
 (2000) LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Kent Arnott, Counsel for Applicant
 Esmai Pascoe, Advocate for Respondent

Investigation Meeting: 19 March 2009 at Blenheim

Determination: 6 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nicola Bergman was employed by Pascoe Enterprises (2000) Limited between October 2005 and late October 2007. The company traded as Gateway Gifts and owned and operated a gift shop in Picton. Esmai Pascoe is the director, owner and manager of Gateway Gifts. I shall refer to the company from hereon as Pascoe Enterprises.

[2] Ms Bergman was party to an individual employment agreement with Pascoe Enterprises. The individual employment agreement had a commencement date of 12 October 2005 and guaranteed Ms Bergman a minimum of 4 hours work per week. The hours of work were specified to be either as detailed in Schedule 1 of the employment agreement or as advised in the roster posted by the employer from time to time. Ms Bergman's hours were at all material times advised to her by roster.

[3] Ms Bergman's employment relationship was an event free one until after the period following her maternity leave from January 2007 until May 2007. Ms Bergman said that she was affected by an unjustified action of her employer in or about September 2007 when her hours of work and rate of pay was not in accordance with the agreement that she entered into with Mrs Pascoe to apply from September 2007. Ms Bergman says that she was then unjustifiably dismissed in October 2007.

[4] Ms Bergman seeks payment of wages at the agreed sum and for the agreed hours from September to October 2007 in the sum of \$540, payment of lost wages from November 2007 to the end of April 2008 in the sum of \$1,890, payment of two weeks lost wages for a notice period of \$180, compensation of \$15,000 and costs.

[5] Pascoe Enterprises, by its director Esmail Pascoe does not accept that Ms Bergman was dismissed and says there were no breach of an agreement by her that would support an unjustified action causing disadvantage.

The issues

[6] The issues for the Authority are as follows:

- Did Ms Bergman enter into an agreement with Mrs Pascoe guaranteeing her 6 hours work a week at \$15 per hour from September 2007?
- If the agreement was entered into was it complied with?
- If that agreement was not complied with then is that an unjustified action that caused Ms Bergman disadvantage and, if it is, what remedies is Ms Bergman entitled to?
- What happened in late October 2007 when Ms Bergman attended at the shop?
- Was Ms Bergman dismissed from her employment and, if she was, was that dismissal unjustified?
- If Ms Bergman was dismissed, then what remedies should she receive and are there issues of contribution?

Did Ms Bergman enter into an agreement with Mrs Pascoe guaranteeing her 6 hours work a week at \$15 per hour from September 2007?

[7] When Ms Bergman returned from maternity leave in May 2007 she agreed with Mrs Pascoe that there would be a gradual increase to her hours until she was working at the guaranteed 4 hours per week under her employment agreement. The evidence was very clear that the relationship between Ms Bergman and Mrs Pascoe was one of trust and friendship. When Ms Bergman went on maternity leave Mrs Pascoe and the staff organised a baby shower and gave her a microwave for a gift. Ms Bergman and her good friend Megan Coyle both gave evidence that Ms Bergman placed considerable reliance in Mrs Pascoe's statements to the effect that her job would be there for her after maternity leave.

[8] The rosters show that for much of May and June 2007 Ms Bergman only worked 2 hours per week. Neither party produced the July roster but by August I am satisfied that Ms Bergman had started to become concerned about the limited hours she was rostered on for each week. She wanted more hours to make her job financially viable.

[9] I do not need to determine the exact nature of the discussion that I find Ms Bergman and Mrs Pascoe had in August 2007. It is enough for my purposes that a note was made by Mrs Pascoe as a result of those discussions which is fairly self explanatory. That note supports Ms Bergman's evidence that from September onwards she was to be rostered to work Monday to Wednesday 11am to 1pm and that she would be paid \$90 for those 6 hours. The handwritten notes support Ms Bergman's evidence that her hourly rate was to increase from \$12 to \$15 with the handwritten calculation $11-1 \text{ 2 hrs} \times 6 = \90 . The note also reflects that there was discussion of what is referred to as *unofficial hours* Thursday to Friday 11am to 2pm.

[10] Ms Bergman said that she was told to get back to Mrs Pascoe about her availability after making inquiries about childcare. Mrs Pascoe said that Ms Bergman did not get back to her about her availability and therefore she continued to roster her for limited hours per week and not the hours that had been discussed.

[11] I consider it very unlikely that Ms Bergman did not get back to Mrs Pascoe. Ms Bergman's mother, Sandra, gave evidence she was telephoned by her daughter about the extra hours and that she confirmed she could help out if necessary with the childcare.

[12] In circumstances where Ms Bergman had been concerned about the hours she had been rostered I find it more likely than not that Ms Bergman did get back to Mrs Pascoe and confirm her availability for the hours as agreed. Her claim is based on the official rather than the unofficial hours.

[13] When the September roster showed that Ms Bergman was only rostered for 2 hours each week between 11.30am and 1.30pm I think it is likely that Ms Bergman again raised the matter with Mrs Pascoe. I find it likely that Mrs Pascoe advised that she wanted to delay the commencement of the new arrangement with respect to hours because business was slow over the winter period.

[14] Ms Bergman said that she trusted Mrs Pascoe and agreed to that although she was concerned that another person had been employed to work and that this had impacted on the hours she had been promised. I am not satisfied that the September roster supports there was a complete overlap in terms of the hours although it was quite understandable that Ms Bergman was concerned at the hiring of another employee in light of the agreement.

[15] In conclusion I find that that there was an agreement entered into between Ms Bergman and Mrs Pascoe on behalf of the company that Ms Bergman would be rostered for at least 6 hours per week from Monday to Wednesday at the rate of \$15 per hour. There was potential for further hours on top of that. I also find that Ms Bergman agreed to delay the implementation of the agreement until October 2007 trusting Mrs Pascoe that the reasons for doing so were legitimate.

If the agreement was entered into was it complied with?

[16] The October roster did not have Ms Bergman undertaking the increased hours and I find it likely that Ms Bergman again questioned Mrs Pascoe about this and also the fact that there was a new employee working some of the hours Ms Bergman had been promised. As it transpired, the agreement was never complied with before the employment relationship ended and Ms Bergman's hourly rate never increased to \$15 per hour.

If that agreement was not complied with then is that an unjustified action that caused Ms Bergman disadvantage and, if it is, what remedies is Ms Bergman entitled to?

[17] I find the failure to roster Ms Bergman for the month of October in accordance with the agreement to defer the implementation of the new hours and pay rate until that time was unjustified and it caused Ms Bergman disadvantage as a result.

[18] I find the claim for an unjustified action causing disadvantage is confined to the month of October 2007 because Ms Bergman did agree that the new hours would commence at that time.

[19] I have considered Ms Bergman's timesheet for October 2007 and have calculated on the basis of the time sheet what the loss was to Ms Bergman when she was not being rostered for the agreed hours.

[20] For the first week of October 2007 Ms Bergman worked $1\frac{3}{4}$ hours and was paid at the rate of \$12 per hour. There is a \$5.25 difference between what Ms Bergman would have received had she been paid at the agreed rate of \$15 per hour. Ms Bergman was entitled to be rostered for a further $4\frac{1}{4}$ hours at \$15 per week, which is \$63.75. For the first week of October, therefore, the amount that Ms Bergman would have been paid had the agreement properly been complied with is \$69.

[21] For the second week in October 2007 Ms Bergman was unavailable to work the rostered 2 hours. I am of the view that the fairest way to calculate any loss for that week is on the basis of 4 additional hours being \$60.

[22] For the third week Ms Bergman was rostered and worked 2 hours. There is a shortfall between what she was paid for those hours and the agreed \$15 per hour rate of \$6. Ms Bergman should have been rostered for a further 4 hours. The loss for the third week is \$66.

[23] In the fourth week, Ms Bergman worked $5\frac{3}{4}$ hours. There is a \$17.25 difference between what Ms Bergman would have been paid for that work on the basis of \$15 per hour. Ms Bergman was also entitled to a further \$3.75 for $\frac{1}{4}$ hour which would make the hours up to 6. There was a loss to Ms Bergman for that week in the sum of \$21.

[24] For the week commencing Monday 29 October 2007, Ms Bergman worked 2 hours on Tuesday 30 October 2007. There is a shortfall in her pay of \$6 and a further loss because she was not rostered for an additional 4 hours of \$60, making a total loss of \$66 for that week.

[25] In terms of the unjustified action causing disadvantage claim the appropriate remedy for Ms Bergman is for her to receive what she would have for the month of October 2007 had the agreement been complied with. I have calculated that to be the sum of \$282 gross.

[26] I order Pascoe Enterprises (2000) Limited to pay to Nicola Bergman the sum of \$282 gross being payment that she would have received in terms of her agreement with Mrs Pascoe if that agreement had been adhered to.

What happened in late October 2007 when Ms Bergman attended at the shop?

[27] Mrs Pascoe and Ms Bergman both agree that there was a meeting in late October 2007 at the gift shop. There is a dispute about what occurred at that time which it is necessary to resolve in terms of how the relationship ended.

[28] Mrs Pascoe said that she asked Ms Bergman to attend at the store for coffee in late October 2007 to talk about the November roster. There was a difference in the evidence about the timing of the meeting but considering it in the round that matter is not central to the issue I am required to determine. There is no dispute that the roster did not have Ms Bergman working at all for November. Mrs Pascoe said that she told Ms Bergman when she met with her at the store that she would like her to work the cruise ship days. She said that Ms Bergman started to go through the roster and query it. Mrs Pascoe said that she then became engaged with customers and could not respond and that Ms Bergman then left the store in tears. Mrs Pascoe said there was never any intention to dismiss Ms Bergman and that she was merely wanting Ms Bergman to indicate her availability.

[29] Ms Bergman's evidence is that she went into the store and Mrs Pascoe asked the other employee to go to lunch. She said that she was handed the November roster and simply told that she was not on it. She said that she then attempted to get answers from Mrs Pascoe as to what was happening and why the recently appointed employee had been included on the roster instead of her. She said that Mrs Pascoe responded

that the other employee Trish could open up the store and that Ms Bergman needed time with her children.

[30] Ms Bergman said that she attempted to discuss the matter further but that Mrs Pascoe continued to serve customers. Ms Bergman said that she then left the store in tears.

[31] I accept that misunderstandings can arise following discussions. Had there been a misunderstanding along the lines that Mrs Pascoe gave evidence about then I would have expected her to promptly put that misunderstanding straight. She knew that Ms Bergman had left the shop in tears, clearly upset. Mrs Pascoe said that she attempted to talk to Ms Bergman that day however I am satisfied that Ms Bergman knew nothing about that. There were some text exchanges between the two about references and the like and then on 30 November 2007 Ms Bergman wrote to Mrs Pascoe asking her to attend mediation and setting out her view of the exchange in the gift shop. Mrs Pascoe did not respond to that letter and Ms Bergman then involved a Labour Inspector in terms of the holiday pay that was outstanding. A cheque for holiday pay was provided in January 2008.

[32] The roster for November 2007 did not have clear gaps in it for Ms Bergman's hours to be accommodated along the lines suggested by Mrs Pascoe. Mrs Pascoe agreed that Ms Bergman raised the other employee's inclusion on the roster and said that she could do the opening of the shop if required.

[33] I prefer the evidence of Ms Bergman to that of Mrs Pascoe that Mrs Pascoe did not intend to roster Ms Bergman on for November 2007. I find that Mrs Pascoe's actions with the roster amounted in the circumstances at the time to a sending away or dismissal of Ms Bergman. There were no further steps taken by Mrs Pascoe to enable me to reach a different conclusion such as a misunderstanding after Ms Bergman left the store.

Was Ms Bergman dismissed from her employment and if she was, was the dismissal unjustified?

[34] I find that Ms Bergman was dismissed from her employment with Pascoe Enterprises in late October 2007. Mrs Pascoe did not attempt to justify the dismissal and I do not find there are any grounds on which there could be justification. A fair

and reasonable employer would not have dismissed Ms Bergman in those circumstances.

[35] I find that Ms Bergman has a personal grievance that she was unjustifiably dismissed from her employment with Pascoe Enterprises (2000) Limited in late October 2007 and she is entitled to remedies for that dismissal.

Remedies

[35] I do not find that Ms Bergman contributed to her personal grievance.

Lost Wages

[36] Ms Bergman seeks lost wages for a period of six months. She did obtain some limited work but said that she would in all probability have undertaken that work in any event if still employed by Pascoe Enterprises. I accept that Ms Bergman made attempts to obtain other work. She explained that much of the summer work positions in Picton were filled by the end of October. I am not satisfied however that she should be reimbursed for the loss of wages for the full six month period. I intend to order reimbursement for four months (seventeen weeks) lost wages from November 2007 to February 2008. I will make no deduction for the money earned in terms of the casual work because Ms Bergman would in all likelihood have earned that money even if still employed by Pascoe Enterprises. The appropriate calculation for lost wages is on the basis of six hours per week at the hourly rate of \$15.00 per hour. I make no separate award in terms of a notice period.

[37] I order Pascoe Enterprises Limited to pay to Nicole Bergman the sum of \$1530 gross being reimbursement of lost wages under s123 (1)(b) of the Employment Relations Act 2000.

Compensation

[38] The evidence supported that Ms Bergman was significantly distressed by her dismissal. She said that she was humiliated with being dismissed in front of customers in the shop and that she was an emotional wreck. I heard from Ms Bergman's mother that her daughter could not seem to get over what had occurred and the distress in facing people in a small community and explaining why she was no longer working at the shop. Ms Coyle also confirmed that Ms Berman was distraught about the

dismissal. It was clear that Ms Bergman had placed considerable trust in Mrs Pascoe and considered her a friend. She felt that trust had been betrayed. In all the circumstances I am of the view that a suitable award would be \$5000.

[39] I order Pascoe Enterprises Limited to pay to Nicola Bergman the sum of \$5000 compensation under s123 (1)(c)(i) of the Employment Relations Act 2000.

Costs

[40] I reserve the issue of costs. Mr Arnott has under 27 July 2009 to lodge and serve submissions as to costs and Mrs Pascoe has until 17 August 2009 to lodge and serve submissions in response.

Helen Doyle
Member of the Employment Relations Authority