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## Clapham v Groundup Cafe Limited (Wellington) [2018] NZERA 2042; [2018] NZERA Wellington 42 (16 May 2018)

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## Clapham v Groundup Cafe Limited (Wellington) [2018] NZERA 2042 (16 May 2018); [2018] NZERA Wellington 42

Last Updated: 4 July 2018

**IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON**

[2018] NZERA Wellington 42  
3022661

BETWEEN VICTORIA CLAPHAM Applicant

AND GROUNDUP CAFÉ LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: Bede Laracy, Advocate for Applicant

Darryl Ellis, Advocate for Respondent

Investigation Meeting: 1 May 2018

Information Received: On the day and 2 May 2018

Determination: 16 May 2018

**DETERMINATION OF THE AUTHORITY**

## **Employment relationship problem**

[1] Victoria Clapham claims she was unjustifiably dismissed from her employment on 11 October 2017. She also claims to have been unjustifiably disadvantaged when her employer suspended her from her employment from

24 September 2017 until her dismissal. She seeks payment for the period of her suspension. She also seeks remedies for the loss of income she sustained following her dismissal and compensation for the hurt and humiliation she suffered. Ms Clapham seeks to recover the costs she has incurred in bringing this application to the Authority.

[2] Groundup Café Limited (Groundup) did not provide a statement in reply. Its sole director, Darryl Ellis, attended a telephone conference convened by the Authority. Groundup attended mediation directed by the Authority but did not adhere

to the timetable set for the provision of documentation and witness statements leading up to the Authority's investigation meeting.

[3] Mr Ellis attended the investigation meeting, however, and gave evidence of Groundup's position. He acknowledged he had suspended Ms Clapham from her employment but denied he had dismissed her. His view was that she had offered to resign and he had accepted her offer.

## **Background to the employment relationship problem**

[4] Groundup Café operates in the small community of Pauatahanui, north of Wellington. Ms Clapham commenced her employment with the café in July 2016. The parties disagreed whether she had been employed as the Assistant Manager, as Ms Clapham asserted, or whether she became the Assistant Manager some months into her employment as Mr Ellis asserted. No findings are necessary on that issue as it is not relevant to the determination of the claims Ms Clapham has brought to the Authority.

[5] It is Ms Clapham's evidence that in June 2017 she applied for annual leave for the period 23 August to 15 September of that year. She said there was no formal procedure for applying for leave and employees would put a note on the roster board indicating when they wished to take leave. Ms Clapham says both the café manager and Mr Ellis indicated verbally to her there was no problem with her taking the leave between the dates she had requested.

[6] Mr Ellis denies this and says she put a note on the roster saying she was going to Hawaii only two weeks before the leave was due to commence. He says he asked her about her plans and told her she had insufficient leave. He says Ms Clapham told him that she was going to take the leave in any event and would resign if he did not allow her to take it.

[7] Ms Clapham took the three weeks leave and was paid for it. Mr Ellis' evidence is that she was overpaid as she had no leave available. The documentation he provided the Authority does not support his contention. On her return, she contacted the café to ascertain her next rostered shift. She was told it was

20 September, which she duly worked. In discussion with the manager, it was agreed her next rostered shift would be Sunday, 24 September. On Saturday 23 September

she received a text from Danny Sola, a manager at Groundup, telling her not to come in for the Sunday shift.

[8] When she asked for the following week's roster she received no response. Ms Clapham texted Mr Ellis the same day to see if he was free for a discussion about her hours for the coming week. Mr Ellis's text response was that he was suspending Ms

Clapham until further notice. When she asked why, and noted she would need to be paid for 30 hours while she was suspended, Mr Ellis's response was that he would let her know when he had a meeting time to discuss the matters of concern.

[9] On 4 October, having not been contacted by Mr Ellis in the intervening period, Ms Clapham texted him again, advising him her wages had not gone through and she was still waiting for the reason she had been suspended. Mr Ellis's response on 5 October by text was "*I don't require you working for me again, as per your suggestion and offer*".

[10] Ms Clapham texted back "*This sounds like I'm being fired? What is the reason?*" Mr Ellis responded "*You're not fired you are suspended*". When Ms Clapham again asked what the suspension was for, Mr Ellis's response was "*No, you offered me your resignation if I wanted it, I accept your offer*". Ms Clapham's reply text made it clear she had not offered a resignation. She reiterated that she was still waiting to be told the reason for her suspension, and was also waiting for her wages to be paid. She reminded Mr Ellis that he was to arrange a meeting time.

[11] The next contact between the parties occurred on 11 October when Ms Clapham texted Mr Ellis, checking whether her wages would be going through that night, and also querying what was happening with the suspension. Mr Ellis's response was "*I'm accepting your resignation thanks*" to which Ms Clapham responded "*So is my employment ended?*" and Mr Ellis replied "*Yes*".

[12] Ms Clapham, through her advocate, raised a personal grievance for unjustifiable dismissal and unjustifiable disadvantage the same day, 11 October 2017.

## **Issues**

[13] Issues for the Authority to determine are:

- (a) Whether Ms Clapham's suspension was lawful;
- (b) If the suspension was not lawful, whether she was unjustifiably disadvantaged by it;
- (c) Whether she was unjustifiably dismissed.

## **Was the suspension lawful?**

[14] It is generally accepted there must be an express provision in the employment agreement sanctioning suspension for the suspension to be lawful. Ms Clapham did not have a copy of her employment agreement and Mr Ellis did not supply one to her advocate when he requested it. It is unknown, therefore, whether there was any contractual sanction for suspension.

[15] Suspension has been described as a drastic step which "*if more than momentary must have a devastating effect on the officer concerned*".<sup>1</sup> The Court of Appeal in that case described suspension, whether paid or unpaid, as an action which merited the application of the principles of natural justice.

[16] The Employment Court has held there is no absolute rule that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to influence the employer's decision.<sup>2</sup> A sensible and flexible approach needed to be taken on a case by case basis to determine what the requirements of fairness were in the particular circumstances.

[17] In this instance Mr Ellis informed Ms Clapham by text she was suspended. The text gave her no information about the reason for the suspension, or how long it was intended to remain in place or whether she would be paid during that time. Mr Ellis acknowledged in oral evidence he had suspended Ms Clapham without following any process. He said he "*wanted her out of the workplace*" and he "*just wanted to get rid of her*". He claimed to be unsure whether Ms Clapham had been paid during her suspension.

[18] Even if there was a provision in Ms Clapham's employment agreement

providing for suspension, I find she was entitled to be given an opportunity to be

<sup>1</sup> *Birss v Secretary for Justice* [1984] NZCA 24; [1984] 1 NZLR , 513 at 521

<sup>2</sup> *Tawhiwhirangi v A-G in respect of CE Dept of Justice* [1993] 2ERNZ 546; *Graham v Airways*

*Corporation of New Zealand* [2005] NZEmpC 70; [2005] ERNZ 587

heard about her employer's intention to suspend her before he made any final decision on the matter. No such opportunity was given. Ms Clapham discovered she had been suspended only after she had contacted her employer to ask for a discussion about the roster, after failing to get a response from the café manager.

[19] Under questioning, Mr Ellis gave no convincing explanation for suspending Ms Clapham. He claimed to have been a very good employer to her, and said he had overpaid her for leave to which she was not entitled. He referred to liberties she had taken during her employment, such as arriving late for her shifts.

[20] I am satisfied from the evidence that Ms Clapham was given no forewarning of her suspension or of any dissatisfaction with her performance or services by her employer. The suspension was accomplished by text message in a manner devoid of any procedural considerations and lacking any semblance of fairness.

[21] Whether or not an action is justifiable is to be determined on an objective basis by applying the test in [s.103A](#) of the [Employment Relations Act 2000](#) (the Act). 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 action occurred.

[22] Ms Clapham's suspension was, in all the circumstances, not an action a fair and reasonable employer could have taken. I therefore find her suspension to be unjustifiable.

### **Was Ms Clapham disadvantaged by her unjustifiable suspension?**

[23] Ms Clapham asserts she was not paid for the period of her suspension between

24 September and 11 October 2017. Mr Ellis could not recall whether or not she had been paid. Wage records produced to the Authority by Mr Ellis make clear that she was not paid for that period. Accordingly I find she was disadvantaged financially during the period of her suspension, as well as being disadvantaged by being taken off the café's roster without consultation and being suspended without consultation.

### **Was Ms Clapham unjustifiably dismissed?**

[24] Mr Ellis maintained, both in his text correspondence with Ms Clapham in

September and October 2017 and in the Authority's hearing of her claims, that

Ms Clapham had offered to resign and he had accepted her resignation. Ms Clapham denied having made such an offer.

[25] There was some evidence, denied by Ms Clapham, that she had a conversation with Mr Ellis before taking annual leave in August 2017 in which she told him she would resign if he did not allow her the leave. I am sceptical whether that conversation occurred at the time Ms Clapham discussed her leave with Mr Ellis but it is not necessary for me to make a definitive finding on that matter. It is undisputed that Groundup paid Ms Clapham for the period of her leave. It is also undisputed that she returned to work for one shift and had agreed on her next shift before Mr Ellis suspended her on 24 September. Clearly the employment relationship remained afoot during and after Ms Clapham's holiday.

[26] If any "offer" to resign had been made by Ms Clapham, it was a conditional one, being dependent on the outcome of her leave application. In paying Ms Clapham for the duration of her leave, and in providing her with work on her return from it, Groundup demonstrated it had approved her leave and had rejected her offer. There was no resignation offer available for Mr Ellis to accept on 11 October 2017, even if such an offer had been made at the time Ms Clapham had applied for her leave.

[27] Mr Ellis acknowledged he did not tell Ms Clapham she could not take leave to go on her holiday in August. His actions gave her no cause to believe that her employment would be terminated on her return from holiday. I reject Mr Ellis's evidence that he accepted Ms Clapham's resignation and I find he dismissed her.

[28] There was no process leading up to Ms Clapham's dismissal, other than the unjustifiable suspension, and the purported acceptance of a resignation which, if it had ever been offered, was contingent on an event (refusal of leave) that had not occurred.

[29] In such circumstances I have no hesitation in finding Ms Clapham was unjustifiably dismissed.

### **Remedies and contribution**

[30] I have found Ms Clapham to have been suspended unlawfully by her employer on 24 September 2017. She remained suspended until 11 October when Mr Ellis purported to accept her resignation and confirmed her employment had ended.

Ms Clapham had not agreed to be suspended and had no say in the matter. I accept her claim for compensation for loss of wages for that period.

[31] I have also accepted Ms Clapham's claim to have been unjustifiably dismissed. She seeks compensation for wages lost following her dismissal. She gave compelling evidence of the effect on her of her dismissal. She sought medical assistance and found it difficult to seek or obtain alternative employment in the weeks immediately following the loss of her job. Nonetheless she was successful in finding some work four weeks later. I accept an award of 4 weeks wages is appropriate.

[32] Ms Clapham was paid an hourly rate of \$23. Her hours were not consistent from week to week. She seeks payment on the basis of 30 hours per week. Mr Ellis says her hours averaged 27 per week. After examining the wage and time records Groundup provided I accept Mr Ellis' evidence on that matter. I note, however, that Ms Clapham had requested but not received wage and time records until the day of the Authority's investigation and I accept her claim was based on the best estimate she could make in the absence of those documents.

[33] I have considered, as I am obliged to do, whether Ms Clapham contributed to the situation that lead to her personal grievance. I find she did not and, accordingly, there will be no deduction for contribution from the awards made.

### **Determination and orders**

[34] Ms Clapham was unjustifiably disadvantaged by her employer's action of suspending her without justification and by subsequently being unjustifiably dismissed by her employer. She is awarded compensation for wages lost as a result of her period of her unlawful suspension; compensation for loss of wages following her dismissal; and compensation for the humiliation, loss of dignity and injury to feelings she sustained.

[35] Groundup Café Limited is ordered to pay the following amounts to Ms

Clapham:

a. Compensation for wages lost as a result of suspension from 24

September to 11 October 2017 inclusive in the sum of \$1,738.80 gross;

b. Compensation for lost wages for four weeks following dismissal pursuant to [s. 123\(1\)\(b\)](#) of the Act in the sum of \$2,484.00 gross;

c. Compensation for humiliation, injury to feelings and loss of dignity

pursuant to [s. 123\(1\)\(c\)\(i\)](#) of the Act in the sum of \$12,000.

### **Costs**

[36] Ms Clapham seeks the reimbursement of representation fees she incurred in her bringing this matter successfully to the Authority. She also seeks reimbursement of the Authority's filing fee. This was discussed with the parties at the investigation meeting.

[37] The hearing of Ms Clapham's application took half a day. She was represented by an experienced employment advocate. I find it appropriate to make an award of costs using the Authority's notional daily tariff, which is \$4,500 for the first full day of hearing.

[38] On that basis an award of \$2,250, based on one half of the daily tariff, is appropriate and I order Groundup Café Limited to pay that amount to Ms Clapham and to reimburse her the filing fee of \$71.56.

Trish MacKinnon

Member of the Employment Relations Authority

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