

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 318
5623846

BETWEEN SUSAN CLARK
 Applicant

AND MORAVA GROUP LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Nick Webster, director of the Respondent

Investigation Meeting: 19 September 2016

Oral determination: 19 September 2016

Written record issued: 19 September 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Morava Group Limited (MGL) employed Susan Clark as manager of its high end glass and homeware store in Newmarket on 7 March 2016. On 26 April 2016 MGL director Linda Webster told Ms Clark her employment was being terminated due to poor sales figures.

[2] At issue was whether Ms Clark was dismissed on the spot or whether proper arrangements were made for her to work out a 30 day notice period. Ms Clark said she was told she was being “let go”. She said that when she asked if she would get the 30 days’ notice referred to in her employment agreement and was told no, she asked “do you want me to go now”. She said Ms Webster replied “yes” and asked if she had any personal belongings to take with her. Ms Clark said she handed Ms Webster the store keys and wished her the best. MGL disputed that account and said Ms Webster had told Ms Clark before she left the store that her last day of work would be 25 May.

[3] Ms Clark did not challenge MGL's decision to end her employment for financial reasons but sought an order requiring MGL to pay her for the 30 day notice period. MGL denied liability to do so. Instead it said Ms Clark had failed to attend work as instructed during the notice period, effectively abandoning the remainder of her employment.

The Authority's investigation

[4] For the purposes of the Authority's investigation written witness statements were lodged by Ms Clark, Ms Webster, her husband and fellow director Nick Webster and Praveen TP, an MGL employee.

[5] At the notified time for the investigation meeting no representatives of MGL were present. An Authority Officer made a telephone call to Mr Webster who said he had mistaken the time of the meeting as being 2pm and not 10am. He asked for the meeting to be delayed until 2pm. When he was told that the meeting would proceed in 15 minutes, he said that was unacceptable and he would contact his lawyer. He sent an email to the Authority to that effect at 10.26am.

[6] Mr Webster attended a case management conference by telephone on 25 July 2016 at which the date of the investigation meeting was set. The next day he was served electronically with the investigation meeting notice. The notice includes a note stating that if the respondent does not attend the investigation meeting, the Authority may issue a determination in favour of the applicant without hearing evidence from the respondent.

[7] The Authority has the power to proceed if a party, without good cause shown, fails to attend or be represented at an investigation meeting.¹ Mr Webster's supposed error in reading an investigation meeting time was not good cause for the failure of MGL to attend. The investigation meeting proceeded. I asked questions of Ms Clark, under oath, about her application and the details in support of it, including her account of what happened on 26 April, whether she was paid holiday pay at the end of her employment, and what days she would have worked if she had been given 30 days' notice.

¹ Employment Relations Act 2000, Schedule 2 clause 12.

[8] This determination is a written record of an oral determination issued at the investigation meeting. As permitted by s 174A and s 174E of the Employment Relations Act 2000 (the Act) this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received. I have taken account of what was said in the written witness statements lodged by MGL although they were not confirmed under oath or affirmation or able to be tested by questioning at the investigation meeting.

The issues

[9] The issues for determination were:

- (i) Was Ms Clark's employment relationship MGL terminated, with immediate effect, on 26 April 2016 or were arrangements made for Ms Clark to work out her notice until 25 May 2016?
- (ii) If the relationship was terminated by MGL on 26 April, was Ms Clark entitled to be paid what she would otherwise have earned in the 30 day notice period?
- (iii) Was any other money still due to Ms Clark for holiday pay?
- (iv) Was MGL entitled to make any deduction from any money owed to Ms Clark for a broken glass, and, if so, what should that be, but, if not, what orders if any are required in respect of payments due to Ms Clark?
- (v) Should either party contribute to the costs of representation of the other party?

[10] Conclusions on those issues are reached on the civil standard of proof, that is the balance of probabilities or what is more likely than not to have been so.

The end of the employment – immediate or on notice?

[11] Ms Clark said Ms Webster told her on the morning of 26 April that "they will have to let me go" as the business could no longer afford to have her work for it. Ms Clark said she was entitled to 30 days' written notice under her employment agreement. Ms Webster then rang Mr Webster to check whether that was so. Ms Clark said Ms Webster then told her MGL did not have to give her notice. She then asked if she "need[ed] to go now" and Ms Webster had replied, yes. Ms Clark said she had checked behind the counter for any personal possessions and handed over the

store key before leaving. She said she had asked for a payslip and a written notice of dismissal to be sent to her, asked that Mr Webster contact her later that day, and left the store. Ms Clark was adamant there was no reference to working out a notice period or any reference by Ms Webster to working through to 25 May.

[12] Ms Webster's written account was that she met with Ms Clark that morning to tell her that "due to sales figures being very poor, we can't go on any further". She said she told Ms Clark her last day of work would be 25 May, four weeks from 26 April. Ms Webster said that she then rang Mr Webster because Ms Clark "became very aggressive" and Mr Webster had said he would be in contact with Ms Clark "in the next few days". Ms Webster said it was Ms Clark who then decided to leave. Ms Webster's written account was that she had asked Ms Clark for her store keys because Ms Clark had been "aggressive in her behaviour" and Ms Webster would "open up the store from now on". Ms Webster said she also told Ms Clark Mr Webster would not contact her for a few days because he was unwell and had been in and out of hospital several times.

[13] Available documents support Ms Clark's account of events as more likely than not to be correct. Two text messages she sent to her sister-in-law about an hour after her conversation with Ms Webster included the following relevant comments: "As I suspected, they have let me go, can't afford to keep me" and "owners said closing down and don't have to give notice".

[14] Ms Clark sent Mr Webster an email the next morning with the subject heading: "Employment dismissal". She wrote that she was disappointed her employment agreement was not adhered to. She asked for a letter "stating my immediate dismissal and the reasons for this immediate action", a copy of all her payslips, and her holiday pay. She also asked to be paid for her notice period.

[15] Mr Webster's reply, sent on the morning of 28 April, told Ms Clark the first reason for her "release on 26 April morning" was that MGL "can not carry on with the current sales figures" that were covering only about ten per cent of its outgoings. It ended with the following paragraph (as written):

We understand as per your employment contract we must be given 30 days written notice, however there seems to be some mis-communication on maybe Linda and yourself how the conversation went. Linda advised you that 26 April verbally and written today, that last day at work is 25 May. What this means is

that were start work tomorrow with your last day being 25 May. Payslips attached. I expect your reply today.

[16] The following extracts from two paragraphs in MGL's employment agreement with Ms Clark were relevant to its actions (bold emphasis added):

11.1 In the event the Employee's employment is terminated on the basis of redundancy, **the Employee shall be entitled to notice of termination of employment as specified in the termination clause ...**

and

12.1 The Employer may terminate this agreement for cause, by providing **30 days notice in writing** to the Employee. Likewise the Employee is required to give 30 days notice of resignation. The Employer may, at its discretion, pay remuneration in lieu or some or all of this notice period.

[17] Contrary to Mr Webster's 28 April email, in circumstances where MGL was terminating Ms Clark's employment on the grounds of redundancy (having decided it could not afford to pay her), MGL was required to give her 30 days' notice in writing, rather than being given notice by her.

[18] Ms Webster's written account that she asked Ms Clark to hand over the store keys as she would "open up the store from now on" (although Ms Clark does not agree that the request was made) is an indicator, on the evidence of an MGL director, that Ms Clark was being 'sent away' that day. Ms Webster's written statement that she only made such a request because Ms Clark was "aggressive" was not compelling. The 'aggression' comprised Ms Clark asking about her contractual right to 30 days' notice of the termination of her employment. The company had drafted and proposed the employment agreement and could be expected to comply with the terms to which it and Ms Clark had agreed. Mr Webster's email sent two days later purported to provide the contractually-required notice but was too late.

[19] MGL, as evident from Mr Webster's subsequent communication to Ms Clark and his written evidence for the Authority investigation, had an exaggerated and mistaken view of its rights in the situation. Having provided written notice of the termination of the employment two days after it was put into effect, Mr Webster told Ms Clark by email on 28 April that she was expected to return to work from 29 April and continue until 25 May. On the basis that Ms Clark had not returned to work in response to that direction, Mr Webster took the incorrect view that MGL could

therefore treat the employment as having automatically terminated after three days. A term in the employment agreement allowed for such circumstances but was not applicable to what had happened here.

Payment for the 30 day notice period

[20] Ms Clark was entitled to be paid for the 30 day notice period that she was denied by her immediate dismissal on 26 April 2016.

[21] The 30 day notice period, running from 27 April to 25 May comprised 21 days that would otherwise likely have been work days for Ms Clark. Taking the daily rate of \$173.10 on which her wages were calculated, she was therefore entitled to \$3635.10 as payment for notice over that period.

Did MGL owe any other money to Ms Clark?

[22] Ms Clark was not paid holiday pay on her earnings at the end of her employment.

[23] For the seven weeks of her employment Ms Clark was paid \$6230.57. She was entitled to holiday pay calculated as eight per cent of that amount. The holiday pay due was \$498.44.

Can any deduction from money owed be made for a broken glass?

[24] Ms Clark admitted she had broken, by accident, a glass in the store. It was one of the luxury products on sale at the store. Ms Clark said it was a tumbler in a set of six which had a retail price of more than \$3000. An invoice provided by MGL for that stock showed its cost for the individual glass was around 120 Euros, that is around \$185.

[25] Mr Webster's written statement said Ms Clark was aware of a company policy that she must pay for any goods she broke. He said it was a "gentlemen's rule".

[26] The employment agreement did not include a clause agreeing to such reductions. The purported policy was not in writing. Ms Clark denied she knew of or had agreed to any written or spoken rule of "you break it, you pay for it".

[27] In those circumstances, the following provisions of the Wages Protection Act 1983, including recent amendments in effect from 1 April 2016 (before the end of Ms Clark's employment), prevent the deduction proposed by MGL:

4 No deductions from wages except in accordance with Act

Subject to [sections 5\(1\)](#) and [6\(2\)](#), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

5 Deductions with worker's consent

(1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—

- (a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or
- (b) on the written request of the worker.

(1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.

(2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's wages, by giving the employer written notice to that effect; and in that case, that employer shall—

- (a) within 2 weeks of receiving that notice, if practicable; and
 - (b) as soon as is practicable, in every other case,—
- cease making or vary, as the case requires, the deductions concerned.

Costs

[28] Ms Clark was entitled to be reimbursed for the fee of \$71.56 she paid to lodge her successful application in the Authority. She had not incurred any costs of legal representation in pursuing her claim so no costs award was necessary.

Summary and orders

[29] For the reasons given in this determination I have found that:

- (i) MGL terminated its employment of Susan Clark without notice on 26 April 2016.
- (ii) Ms Clark was entitled under the terms of her employment agreement to 30 days' notice.
- (iii) As a result of MGL's failure to provide her with notice in the manner required by her employment agreement before the termination of her employment, Ms Clark was entitled to be paid for days that she would have been expected to work during that time if she had been given proper notice.

- (iv) Ms Clark was not paid holiday pay due to her on termination of her employment.
- (v) MGL was not entitled to deduct any money from amounts due to her as arrears and holiday pay.

[30] Consequently, MGL must by order of the Authority pay to Ms Clark within 28 days of the date of this determination the following sums:

- (i) \$3635.10 as arrears of money due to her for a notice period under her employment agreement: s 131(1) of the Act; and
- (ii) \$498.44 as holiday pay due to her on the termination of her employment;
- (iii) \$71.56 in reimbursement of the Authority fee.

Robin Arthur
Member of the Employment Relations Authority