

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 321
3017142

BETWEEN

KARINE DE CARTERET
Applicant

AND

E-COMM GROUP LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
No appearance for Respondent

Investigation Meeting: 12 October 2017

Date of Determination: 13 October 2017

DETERMINATION OF THE AUTHORITY

- A. E-Comm Group Limited is ordered to pay to Ms de Carteret the sum of \$3,634.61 gross under s 131 of the Act within 14 days of the date of this determination.**
- B. Ms de Carteret was unjustifiably dismissed.**
- C. E-Comm Group Limited is ordered to pay to Ms de Carteret within 14 days of the date of this determination:**
- a) \$4,038.45 under section 123(1)(b) of the Act; and**
 - b) \$8,000 compensation under section 123(1)(c)(i) of the Act.**
- D. E-Comm Group Limited is ordered to pay costs of \$321.56 within 14 days of the date of this determination.**

Proceedings

[1] Ms de Carteret lodged her statement of problem in the Authority on 10 August 2017. Two copies of the statement of problem were served on E-Comm Group Limited. One was served at E-Comm's physical address on 17 August 2017 and the other was served on E-Comm's address for service as notified on the Companies Register.

[2] The courier envelop served on the registered address for service was opened before being returned to the Authority. The Authority was advised that the registered address for service was not correct.

[3] No statement in reply was received and on 11 September 2017. I issued a Notice of Direction setting out a proposal that the matter be dealt with by way of investigation meeting today. Included with the Notice of Direction was a direction to E-Comm that any correspondence to the Authority must include an application for leave to respond to the matter.¹

[4] The Notice of Direction was served on both the physical address on 14 September and on the registered address for service on 28 September. The parties were advised that any objections to the proposal must be lodged within 7 days. No objections have been received.

[5] E-Comm has not engaged in the Authority's process and as provided in clause 12 of schedule 2 of the Employment Relations Act 2000 I have proceeded to act fully in the matter as if the respondent had engaged.

Employment Relationship Problem

[6] Ms de Carteret attended a meeting with her employer on 17 February 2017 and was dismissed two days later. She claims the dismissal was unjustified and that she is owed arrears of wages including unpaid holiday pay.

¹ See Employment Relations Regulations 2000, Regulation 8(3).

Issues

[7] In order to resolve this employment relationship problem I must determine the following issues:

- a) Are any wages or holiday pay owed to Ms de Carteret?
- b) Was Ms de Carteret unjustifiably dismissed?

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence received from Ms de Carteret but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Arrears of Wages

[9] Ms de Carteret claims she is owed money for wages she was not paid, for 20 hours worked over the three weeks 1-17 February 2017 inclusive. The terms and conditions of Ms de Carteret's employment had not been reduced to writing at the time her employment terminated.

[10] Initially the oral terms included that she would work for 40 hours each week Monday to Friday inclusive and receive a salary of \$70,000. Ms de Carteret told me she was expecting to be paid monthly. This equates to 12 monthly payments of \$5,833.33.

[11] During the first week of employment it was agreed Ms de Carteret would work 20 hours per week. Accordingly she has claimed for time worked over the first three weeks at 20 hours. In an email on 19 February Ms Kennard, the sole director and shareholder for E-Comm, advised Ms de Carteret that she would be paid all outstanding payments that week.

[12] Ms Kennard also advised Ms de Carteret that she would be on garden leave for fourteen days from 19 February and noted in brackets (40 hours). I have read that to mean that Ms de Carteret would receive two weeks paid notice at a total of 40 hours. This is a logical conclusion given that Ms de Carteret was working 20 hours each week.

[13] Despite these promises Ms de Carteret has not received any payments from E-Comm. Ms de Carteret has established that she is owed arrears of wages for the period 1 – 17 February 2017 amounting to \$2,019.23 and arrears of wages in lieu of notice amounting to \$1,346.15. Ms de Carteret is entitled to holiday pay on these sums calculated at the rate of 8% which amounts to \$269.23.

[14] E-Comm Group Limited is ordered to pay to Ms de Carteret the sum of \$3,634.61 gross under s 131 of the Act within 14 days of the date of this determination.

The Dismissal

[15] The email dated 19 February 2017 advises Ms de Carteret that the employment relationship was ending. The onus falls upon E-Comm to establish that its actions in dismissing Ms de Carteret were justified.

[16] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether E-Comm's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[17] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, E-Comm sufficiently investigated allegations, raised the concerns with Ms de Carteret, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[18] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms de Carteret being treated unfairly.² A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[19] Ms de Carteret was employed in the role of business development. She did not sign a written employment agreement. On 17 February 2017 Ms de Carteret was

² Employment Relations Act 2000 (the Act), s 103A(5).

invited to attend a catch up meeting which she thought was to be an informal meeting to discuss standard work related matters.

[20] The meeting on 17 February was amicable and was essentially a business review meeting so that Ms de Carteret could provide Ms Kennard with an update of her activities. There was no indication during this meeting that terminating Ms de Carteret's employment was a consideration.

[21] Two days later on 19 February Ms Kennard emailed Ms de Carteret terminating her employment. The email came out of the blue and was a shock to Ms de Carteret.

[22] In her email Ms Kennard referred to the termination being within a 90 day trial period. I have accepted Ms de Carteret's evidence that she never signed a written employment agreement. Therefore E-Comm is unable to rely on the provisions set out in ss 67A and 67B of the Act.

[23] The process leading to Ms de Carteret's dismissal was defective. There is no evidence E-Comm met any of the mandatory considerations set out in s 103A(3). E-Comm had not raised its concerns about Ms de Carteret's performance or behaviour prior to making the decision to dismiss her. There was no opportunity for Ms de Carteret to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. The dismissal was immediate and abrupt. These defects were not minor and resulted in Ms de Carteret being treated unfairly.³

[24] Ms de Carteret's dismissal was unjustified and she is entitled to a consideration of remedies.

Remedies

[25] Ms de Carteret claims reimbursement of wages lost as a result of the dismissal. Ms de Carteret found alternative employment on 27 March. Her new role pays significantly more than her previous role.

[26] Taking into account the two weeks payment in lieu of notice Ms de Carteret's employment with E-Comm ended on 3 March. The period between the ending of the

³ The Act at s 103A(5).

employment with E-Comm and commencing her new employment is 3 weeks which amounts to \$4,038.45 (based on 20 hours per week).

[27] E-Comm Group Limited is ordered to pay to Ms de Carteret the sum of \$4,038.45 under section 123(1)(b) within 14 days of the date of this determination.

[28] Ms de Carteret claims the sum of \$10,000 compensation under section 123(1)(c)(i). Based on the evidence before the authority I am satisfied the dismissal came as a shock to Ms de Carteret. In arriving at an award for compensation I have taken into account the manner of the dismissal. There was no meeting or phone call. Instead she received an email on Sunday afternoon.

[29] I consider an award of \$8,000 compensation for hurt and humiliation under section 123(1)(c)(i) of the Act appropriate in the circumstances.

[30] E-Comm Group Limited is ordered to pay to Ms de Carteret the sum of \$8,000 within 14 days of the date of this determination.

Contribution

[31] Having determined Ms de Carteret has a personal grievance I must consider the extent to which her actions contributed towards the situation that gave rise to the personal grievance. I must reduce the remedies if Ms de Carteret's actions contributed in some blameworthy way.⁴

[32] I am not satisfied Ms de Carteret contributed in any blameworthy way to the situation given rise to her personal grievance. The remedies will not be reduced.

Costs

[33] Ms de Carteret attended the investigation meeting without the assistance of a representative. I was aware that Ms de Carteret had been assisted up to the week of the investigation meeting. Ms de Carteret spent \$250.00 in costs associated with that representation plus \$71.56 for the filing fee for this application.

⁴ Employment Relations Act 2000 s 124.

[34] Ms de Carteret is entitled to reimbursement of her costs which I am satisfied are more than reasonable. E-Comm Group Limited is ordered to pay to Ms de Carteret costs of \$321.56 within 14 days of the date of this determination.

Certificate of determination

[35] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 that Ms de Carteret be provided with a certificate of determination, sealed with the seal of the Authority recording that within fourteen (14) days of the date of this determination, E-Comm Group Limited is to pay Ms de Carteret:

- \$3,634.61 gross under s 131 of the Employment Relations Act;
- \$4,038.45 under section 123(1)(b) of the Employment Relations Act;
- \$8,000 compensation under section 123(1)(c)(i) of the Employment Relations Act;
- \$321.56 in costs.

Vicki Campbell
Member of the Employment Relations Authority