

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 398
3034731

BETWEEN MICHELLE DAVIDSON
Applicant

AND ROBERT HEMMINGSON
Respondent

Member of Authority: Tania Tetitaha

Representatives: Kelly Coley, for the Applicant
Respondent in person

Investigation Meeting: 6 June and 2 July 2019 at Te Papaioea/Palmerston North

Submissions Received: 2 July 2019 from the Applicant
2 July 2019 from the Respondent

Record of Oral
Determination: 5 July 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michelle Davidson alleges she was unjustifiably dismissed and/or disadvantaged during her employment by Robert Hemmingson. Mr Hemmingson alleges Ms Davidson was a casual employee whom he dismissed due to performance concerns as well as other matters.

Relevant Facts

[2] Ms Davidson started work as a cleaner/bar person at the Foxton Hotel on or about 12 June 2017. There was no written employment agreement. This did not occur due to Mr Hemmingson being unwell. He authorised another employee to conclude the agreement verbally. He tells me he outlined to Ms Davidson, as well as this other employee, that she was employed upon the same terms and conditions of employment as he gives to all

employees. These terms and conditions included the payment of \$17 per hour inclusive of holiday pay and a trial period for 90 days after which she would be given a 'permanent contract'. Ms Davidson disagrees this occurred.

[3] The parties do agree that Ms Davidson was to be offered a minimum of three hours cleaning work every Monday, Thursday and Saturday. It appears from the evidence that there was also an agreement for additional hours of work as a bar person as and when required.

Concerns

[4] Although Ms Davidson started her cleaning duties well, it appears they deteriorated. By November 2017 that Mr Hemmingson was raising specific concerns about Ms Davidson's cleaning. This included stained toilets, the kitchen and laundry not being cleaned to a sufficient standard, upstairs hotel rooms not being cleaned at all, as well as wasting bar products. The other staff volunteered to assist Ms Davidson so that she could remain employed. Mr Hemmingson says he "left them to it" as he was too unwell.

[5] On Melbourne Cup day in 2017 patrons became somewhat unruly. Ms Davidson was working behind the bar. She states these people were drunk but not "drunk drunk". It appears at some stage during the evening these people became involved in a fracas with an unknown woman from out of town. This particular argument became violent, including thrown punches.

[6] Ms Davidson gave evidence that she got inbetween the patrons and was hit in the face. Mr Hemmingson gave evidence of Ms Davidson throwing violent punches towards one of the patrons. It is accepted Ms Davidson then pushed these patrons out the door.

[7] Ms Davidson then says that she went and consulted the police. I understand this was not a formal complaint but in fact was advice sought from a friendly police person she knew. Mr Hemmingson became concerned about the involvement of the police because his bar, he states, has never had any police involvement before. No formal complaint was laid with the police following this scuffle.

Raising concerns

[8] From November until January 2018 Mr Hemmingson was undergoing treatment for heart problems and was out of the workplace. By 13 January 2018 he had returned to the workplace. He states he met with Ms Davidson and raised further concerns about her performance and provided her with a record of their meeting which set out several matters of concern.

[9] Ms Davidson denied this meeting occurred or that she received that record. Despite this Ms Davidson accepted under oath, that she was aware of the matters set out in the record of the meeting document dated 13 January 2018.

[10] Mr Hemmingson became somewhat despondent about Ms Davidson's responses to his concerns. He believed that her cleaning did not improve; in fact it became worse. At the same time he also appeared to be receiving information from other people about Ms Davidson that sent up red flags for him.

[11] As a result, Mr Hemmingson sent a letter of termination that was received by Ms Davidson on or about 7 February 2018. The letter stated:

To Michelle Davidson

Termination of your employment with Foxton Hotel

Due to your incapacity to fulfil your duties at the required standard, I am unable to offer you ongoing employment with a contract and your services are no longer required at the Foxton Hotel.

After the three month trial period I discussed with you your poor standard of work and pointed out areas where improvement was necessary. Your trial period was extended in an effort to raise your standard of work so that I could give you a contract but in January I was so concerned about your shortcomings I gave you a written report about the matter. However, too much time has now gone by and it is apparent that you are incapable of attaining the standard required to continue working here.

In lieu of one week's notice of termination, I am paying you one week's notice and your employment will cease immediately.

I also enclose payment for the hours you worked 5th and 6th February including payment at time and a half for NZ day.

Because we have concerns over what you should be paid for working statutory holidays, I have also made an extra payment of your hourly rate to cover the time you worked on these days.

R. Hemmingson
Proprietor
Foxton Hotel

[12] Ms Davidson does not agree that this termination was warranted or justified. She raised a personal grievance. The parties have been unable to resolve that and the matter is now before me for determination.

Issues

[13] By agreement there are the following issues for determination at hearing:

- (a) Was Ms Davidson a casual or permanent employee?
- (b) If she was a permanent and part-time employee, was she unjustifiably dismissed?
- (c) If termination was unjustified then what remedies are owed?
- (d) What holiday pay (if any) is owed?

Was Ms Davidson a casual or permanent employee?

[14] I am satisfied on the evidence that at the outset this was an offer for a permanent part-time position for three hours, three days per week with additional hours as required and a 90-day trial period.

[15] However, the trial period is unenforceable. This is because the trial period needed to be in writing. It was not in writing and therefore it is not enforceable because it does not comply with s 67A of the Employment Relations Act 2000.

Was Ms Davidson unjustifiably dismissed?

[16] There is no dispute Ms Davidson was dismissed. Section 103A sets out the tests for an employer to justify a dismissal. To justify dismissal an employer must show that its actions were what a fair and reasonable employer could have done in all the circumstances. This requires an employer to investigate and raise their concerns, give an employee an opportunity to be heard and then take their concerns genuinely into account before taking action to dismiss.¹

¹ Refer s 103A Employment Relations Act 2000.

[17] There is little doubt Ms Davidson was aware of the concerns about her standards of cleaning, free drinks being given to friends and the bar room scuffle. However, Mr Hemmingson did not properly raise these concerns with Ms Davidson including advising her of the possibility of dismissal before he takes action to dismiss her on 7 February 2018. This means he cannot justify this dismissal in terms of the statutory tests.

[18] Therefore, Michelle Davidson was unjustifiably dismissed by Robert Hemmingson.

Remedies

[19] Because Ms Davidson has a personal grievance, she is entitled to seek lost wages and compensation. Ms Davidson must mitigate her lost wages. I am not satisfied she has sufficiently mitigated her losses. She told me she applied for two jobs and asked friends. She looked in the local paper but does not appear to have attempted anything more. Instead she appears to have concentrated upon assisting her husband's lawnmowing business.

[20] I do not accept her submission that Mr Hemmingson prevented her from obtaining jobs locally. There is no direct evidence of this. There was only speculation. In the circumstances I decline to make any award of lost wages.

[21] The evidence about compensation was minimal. She did not require any medical assistance or counselling though I accept she was undeniably upset. Her evidence placed her in the lower band of compensation i.e. below \$10,000. An award of \$5,000 is appropriate subject to any reduction for contributory behaviour.

Contributory behaviour

[22] There was contributory behaviour in the deterioration of the cleaning standards. Ms Davidson's explanation for the staining of the toilets was not credible. Her explanation that the staining occurred by leaving cleaning product on the bowls attributable to not washing off due to the lack of running water can only be attributed to her lack of care. Further, while the public areas of the bar may not have been at issue in terms of cleanliness it was clear other areas were. Ms Davidson was well aware of Mr Hemmingson's concerns and I accept she did not remedy these before dismissal.

[23] The bar scuffle was also concerning behaviour. If the patron had decided to press charges Ms Davidson's behaviour may well have brought her employer into disrepute and

likely placed, it under police scrutiny. From her evidence she knew her behaviour was concerning behaviour enough for her to consult a police friend “in case someone said I started it” suggesting she did more than just push patrons outside. Further the bar room scuffle involved Ms Davidson serving patrons who were drunk but, in her words, “not drunk drunk”. This may have exposed her employer to criminal action. Ms Davidson’s behaviour was both causative and blameworthy behaviour requiring a substantial reduction in remedies.

[24] I do not take into account the allegations about her giving away free drinks. The evidence was inconclusive. Ms Davidson referred to a bar tab which Mr Hemmingson denied he had given. No written evidence of this was provided. Further the last “free” drink Mr Hemmingson saw given was in August 2017. This behaviour appears to have stopped sometime prior to dismissal. He instead raises another concern that staff members had told him about her taking two drinks home instead of the one allowed to staff at the end of a shift. Given this concern was never raised with Ms Davidson I do not believe it can be contributory behaviour either.

[25] In these circumstances A reduction for contributory behaviour is warranted of 50 percent.

[26] Accordingly, I order Robert Hemmingson to pay Michelle Davidson the sum of \$2,500 compensation for hurt and humiliation. Payment is to be made within 28 days of the determination.

What holiday pay is owed?

[27] Holiday pay is due because of the effect of s 28 of the Holidays Act 2003. Mr Hemmingson did not have the legal right to pay holiday pay with an employee’s hourly rate unless it complied with s 28 of the Holidays Act 2003. This requires both intermittent employment and an agreement to pay holiday pay with wages written in an employment agreement. The employment was not intermittent and there is no employment agreement here. There was no ability to pay holiday pay in the manner that it has occurred here.

[28] Therefore, that holiday pay must be paid again. Accordingly, it will need to be calculated out at \$17 per hour. I am aware several payments have already been made to Ms Davidson which need to be deducted. In the circumstances I will reserve this part of the decision and issue a written decision next week.

Costs

[29] Costs are reserved. If the parties are unable to agree costs between them, they are to file submissions within 7 days of the date of this determination.

Tania Tetitaha
Member of the Employment Relations Authority