

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 103/07
File Number: 5054808

BETWEEN Abby Leigh Eagle
Applicant

AND Esther Monteith
Respondent

Member of Authority: G J Wood

Representatives: Rebecca Guthrie and Tony Snell for Applicant
Esther Monteith on her own behalf

Investigation Meeting: 29 May 2007 at Napier

Further Information: Due by 18 July 2007

Determination: 25 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Abby Eagle, claims the respondent, Mrs Esther Monteith, trading as The Centre Café, unjustifiably dismissed her, paid her at a rate below the minimum wage, failed to provide a written employment agreement and failed to comply with requests for copies of her wage and time records and the reasons for her dismissal.

[2] Mrs Monteith claims that Ms Eagle's dismissal was justified, that she had agreed to be paid at the rate she had in fact been paid and that she had responded to requests made on Ms Eagle's behalf for information after her dismissal.

[3] The evidence given by Ms Eagle and Mrs Monteith differed in many respects. There can be no certainty as to events that took place about a year ago, but the Authority must decide, on the balance of probabilities, what occurred in every relevant instance where the parties' evidence is in conflict. On areas that could be corroborated by the two witnesses who were not parties, such as whether Mrs Monteith responded to requests for employee information, her evidence was

contradicted. I have no reason to doubt the evidence of the other witnesses and thus determine that Mrs Monteith was mistaken about them. If she could be mistaken on these issues, it is also likely she would be mistaken on others. In general, therefore, I have preferred Ms Eagle's evidence to that of Mrs Monteith wherever there is a difference.

[4] I accept, on Ms Eagle's evidence and that of another witness, that Ms Eagle was employed by Mrs Monteith at the end of January 2006 as a café assistant in Ms Monteith's café, The Centre Café in Hastings. She started on a two week trial at \$7.20 per hour, which was raised to \$8.50 after the trial. I do not accept Mrs Monteith's evidence that Ms Eagle was engaged on a two month trial. Ms Eagle worked on average between 33 and 37 hours per week.

[5] I do not accept Mrs Monteith offered a written employment agreement to Ms Eagle that she declined to sign, on the basis of my general preference of Ms Eagle's evidence over Mrs Monteith.

[6] While Ms Eagle and Mrs Monteith got on very well at the commencement of the employment, the relationship deteriorated over time. Mrs Monteith had reason to raise work issues with Ms Eagle a number of times. In particular she was concerned about Ms Eagle's attire on occasion and also about her not focusing on her work.

[7] Mrs Monteith raised these concerns with Ms Eagle directly. Although she did not give her a formal warning or follow any procedure involving Ms Eagle that would have led to any such warning being justified, I do accept that Mrs Monteith was justifiably concerned about these matters, raised them with Ms Eagle and made it reasonably clear to her that she did not expect such behaviour to continue.

[8] Matters reached a head when Ms Eagle cut her finger at work and had to have time off. On her return she was only fit for light duties. On one occasion when Ms Eagle refused to do the dishes because of her injury, Mrs Monteith became upset with her. Ms Eagle then swore about Mrs Monteith, which Mrs Monteith either overheard or had relayed to her by another staff member. For Mrs Monteith this was the final straw. On 8 September she wrote out what was described as a final written warning over job performance. Her areas of concern were Ms Eagle's swearing about her and Ms Eagle not completing her tasks, being uncooperative and overlooking her duties.

[9] Furthermore, Ms Eagle had recently discovered that she was being paid less than the minimum wage and had approached Mrs Monteith about that. Mrs Monteith did not accept that Ms Eagle was being underpaid and while Mrs Monteith denies there being any linkage, I find it significant that she received the warning letter a day or so later.

[10] While this document was stated to be a final warning, Mrs Monteith accepted that she had already decided at that point that she was going to dismiss Ms Eagle. In fact she did not expect Ms Eagle to return to work the next day, which was not surprising given the fact that the warning had been accompanied by a dressing down in front of other staff. Ms Eagle did return to work and in fact continued to work for the next two weeks, although Mrs Monteith remained unsatisfied with her performance.

[11] On 22 September, Mrs Monteith called the staff to a meeting and told them she had something unpleasant to do. Ms Eagle asked if she was being sacked, as she had earlier heard that that was going to happen from another worker. Mrs Monteith confirmed that Ms Eagle had to leave, which she did.

[12] Ms Eagle was not paid any holiday pay after she left.

[13] On 4 October Ms Eagle raised a personal grievance through her lawyer, together with a claim for breaches of the Minimum Wage Act 1983 and penalties for the non-provision of an employment agreement.

[14] Mrs Monteith was also requested, under s.121 of the Act, a statement in writing of the reasons for the dismissal, as well as copies of all wage and time records under s.130(2). I am satisfied from the evidence of Mr Snell, Ms Eagle's representative, that he received no response to his request.

[15] The Mediation Service was then approached at the end of the month, but Ms Eagle was informed that Mrs Monteith had declined to attend mediation in another matter and therefore the best thing to do was to file with the Employment Relations Authority. A claim was made accordingly in November.

[16] In Mrs Monteith's statement in reply, she stated that the matter was closed because of other debts that Ms Eagle owed to her because they had previously been landlord and tenant. Mrs Monteith also claimed that Ms Eagle owed her money for goods taken from the café, but I am satisfied with Ms Eagle's explanation that any moneys owing to the café were repaid. The alleged debts not relating to work were not quantified and do not fall within the jurisdiction of the Authority in any event.

Determination

[17] In assessing whether the dismissal was justified, I must determine on an objective basis whether Mrs Monteith's actions and how she acted were what a fair and reasonable employer would

have done in all the circumstances at the time the dismissal occurred. This was a dismissal for unsatisfactory work performance and therefore a warning or warnings and an opportunity to improve must be provided.

[18] It was clear from Mrs Monteith's own evidence that she did not issue a formal warning until she had reached the point where she had decided that Ms Eagle would have to go, whatever happened after the warning. In fact she did not expect Ms Eagle to return after having issued the warning.

[19] As Ms Eagle had no opportunity to improve her performance in order to avert dismissal, there can have been no good cause for dismissal and the procedure adopted by Mrs Monteith was also unjustified (*Trotter v. Telecom Corporation of NZ Ltd* [1992] 2 ERNZ 659 applied).

[20] The manner in which Ms Eagle was dismissed was also quite unsatisfactory. She was dismissed in front of other staff as a result of Mrs Monteith's predetermined views as to her performance. While Mrs Monteith might not have deliberately associated the dismissal with Ms Eagle's recent complaints about being paid below the minimum wage, it was quite reasonable for Ms Eagle to do so. She gave evidence of being embarrassed and upset by the treatment she suffered and hurt and humiliated by the process.

[21] I accept this evidence and consider that an appropriate amount of compensation, subject to contribution, would be \$5,000.

[22] Ms Eagle did not obtain another position until the end of December. I do not accept that had she been actively looking for work she would have been unable to find a job before then, remembering that she was under a duty to mitigate her loss by earning whatever income she could. In Hawkes Bay there is an abundance of seasonal work from the beginning of December onwards and it was indeed this sort of work that Ms Eagle obtained later that month. Furthermore, Ms Eagle has not satisfied me, despite having been given several opportunities after the investigation meeting to do so, that she has mitigated her loss by, for example, enrolling with Work and Income for job seeker assistance. I consider therefore that any lost remuneration should be limited to 4 weeks at 35 hours per week, namely \$1435.00 gross, again subject to contribution.

[23] I must consider the extent to which the actions of Ms Eagle contributed towards the situation that gave rise to the personal grievance. The situation that gave rise to the personal grievance included Ms Monteith's dissatisfaction with Ms Eagle's performance over an extended period of time. I do not accept that Ms Eagle swore at Ms Monteith, otherwise that would have been grounds for a substantial reduction of the remedies that would otherwise have been awarded to her. Rather I

find that Ms Eagle swore about Mrs Monteith in a way that was not designed for other people to overhear.

[24] Furthermore, while Ms Eagle's performance may have been substandard on the occasions alluded to in the warning letter, any worker is entitled to a formal opportunity to improve and this was effectively denied to Ms Eagle. Given that Ms Eagle had no control over this decision by Mrs Monteith; I find that no reduction for contributory fault is warranted in this case.

[25] Ms Eagle was underpaid throughout the course of her employment. Calculation of the amounts owing is difficult in the absence of full wage and time records and the failure of Ms Eagle to provide the promised calculations on wage losses. Primarily, this was Mrs Monteith's failing (see s.132) and Ms Eagle should not be penalised for this accordingly. In equity and good conscience, therefore, I determine that she is entitled to be paid, based on an average working week of 35 hours, an additional \$2.30 per hour for the first two weeks of her employment (\$161.00) and then an additional \$1.50 per hour between mid-February and 27 March 2006 (\$315.00). From that point on, she is entitled to be paid \$1.75 per hour more for the remaining 25 weeks of her employment (\$1531.25). Thus the total owing is \$2007.25 gross. Ms Eagle is also entitled to be paid holiday pay at the rate of 6% of her total earnings, which should have been \$11,296.25, constituting \$677.78 gross.

[26] Ms Monteith has left herself open to penalties for failing to provide Ms Eagle with a copy of an intended employment agreement; for failing to comply with Ms Eagle's request for copies of all her wages and time records; and for failing to comply with Ms Eagle's request for a statement in writing outlining the reasons for her dismissal.

[27] These are all serious breaches of the Employment Relations Act and warrant the imposition of penalties. As substantial compensation has already been ordered against her and such penalties are normally payable to the Crown I elect to limit the amount of the penalty to \$500 on a global basis, even although penalties totalling \$3000 may have been appropriate.

[28] I therefore order the respondent, Esther Monteith, to pay a \$500 penalty to the Crown, and to pay the applicant, Abby Eagle, the following sums:

- \$5000 in compensation under s.123(1)(c)(i);
- \$1435 gross in lost remuneration;
- \$2007.25 gross under the Minimum Wage Act;

- \$677.78 for unpaid holiday pay.

Costs

[29] Costs are reserved.

G J Wood
Member of the Employment Relations Authority