

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 446
3120872

BETWEEN MARY-LOUISE FAITHFULL
Applicant
AND CAISTEAL AN IME LIMITED
Respondent

Member of Authority: Claire English
Representatives: Applicant in person
Respondent in person by Zoom
Investigation Meeting: 23 September 2021
Submissions received: At the Investigation Meeting from Applicant
At the Investigation Meeting from Respondent
Determination: 11 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed to work at the respondent's ice cream store. She claims that she was unjustifiably dismissed during the Level 4 "lockdown" that occurred between 25 March and 27 April 2020, following a disagreement about what she should be paid during the lockdown period.

[2] She claims lost wages, compensation for hurt and humiliation, and costs.

[3] The respondent company, represented by its director, Mr Darren Angus, replies that the applicant was not dismissed, but rather she resigned. Mr Angus says that in any event, there was agreement between himself and the applicant to a reduced wages payment to the applicant

during lockdown. And that this reduced payment was made at the respondent's discretion, because the applicant was a casual employee paid on an hourly rate and had no entitlement to receive payment when not working.

[4] In addition, Mr Angus says that immediately prior to her resignation, the applicant made comments on a local community Facebook page which brought himself and the respondent company into disrepute, and that these actions were sufficient to reduce or remove any entitlement to compensation the applicant might otherwise have.

The Authority's investigation

[5] For the Authority's investigation, a written witness statement was lodged by the applicant, and an email statement was provided by the respondent. Both parties provided documents in support. The applicant, and the director of the respondent, attended the investigation meeting in person, and answered questions under oath or affirmation from me. The parties also gave oral closing submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

- (a) Was the applicant constructively dismissed, or did she resign?
- (b) If the respondent's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
 - Lost wages; and
 - Compensation under s123(1)(c)(i) of the Act;
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to the grievance?

(d) Should either party contribute to the costs of representation of the other party?

Background

[8] The applicant began her employment in December 2018. Her position was that of Ice Creamery Manager, and she was paid \$20/hour.

[9] Her employment agreement stated that it was a “Casual Individual Employment Agreement”. It contained several provisions that were inconsistent with such a status, including a 90 day trial period provision, a requirement for 2 weeks’ notice, and a requirement that holiday pay would be accrued.

[10] In practice, the applicant worked according to a weekly roster, which was provided each Sunday. She stated that she usually worked 4 or 5 hours a day, starting at about 10.00 am, with her finish time being determined by customer demand, or more accurately, the lack thereof. She said she expected to work 4 or 5 days a week.

[11] Mr Angus said that there was no such thing as a normal week because the applicant’s hours and days of work varied from week to week. Mr Angus pointed out that the applicant’s hours were few to none in the winter season, and less in the “shoulder” seasons. The applicant’s payslips reflect this seasonal change.

[12] Over the course of the applicant’s employment, which lasted some 16 months, the applicant earned a mathematical average of \$310 per week, which both parties accepted was a reasonable expectation in practice, give or take the seasonal variations present in the business.

[13] In March 2020, the parties were highly aware of the potential impact of Covid-19, as the respondent’s business (which included a motel component) served many cruise ship customers. On 15 March 2020, the applicant decided to self-isolate, as she was concerned by the visit of the cruise ship the Ruby Princess. She accordingly told Mr Angus that she would not be working and would be staying at home. This was accepted by Mr Angus as a short-term measure at that time.

[14] On 18 March 2020 Mr Angus, on behalf of the respondent company, applied for the wage subsidy scheme then available. He applied for the subsidy for 11 employees who were working more than 20 hours per week, and for 2 employees who were working less than 20 hours per week. He confirmed that he had applied for the wage subsidy for the applicant as an employee who worked more than 20 hours per week. When asked why he had done so, he indicated that, at that time, he had thought this was an appropriate estimation of the applicant's hours of work, and that he had expected her to return to work relatively shortly.

[15] The respondent told his employees including the applicant that he had made application for the wage subsidy on their behalf.

[16] On 23 March, the country moved into Level 3 for the first time. On 25 March, the country moved into Level 4 lockdown.

[17] The respondent was successful in its application for the wage subsidy. On 29 March 2020, Mr Angus emailed the applicant (and other staff) setting out how the business intended to approach payment of wages during the next four weeks.

[18] Mr Angus stated that during the month of April, employees would be paid 80% of the hours they had worked in the month of March. Mr Angus did not specify what figure the applicant could expect to receive. The applicant was concerned that it would be a lower amount than the subsidy payments which had been publically announced, as her hours in March were lower than usual, due to a combination of her decision to self-isolate beginning on 15 March, and her inability to work her normal hours immediately prior to this due to a broken ankle.

[19] The applicant did not agree with this approach. She emailed Mr Angus on the same day, beginning:

completely wrong sorry your accountant's are full of BS [sic]...

[20] She stated that:

"we are entitled to the subsidy", and ended "Oh give your workers there subsidies [sic]".

[21] Mr Angus replied the following day, in a long email which ended:

we are not the social services. Once the lockdown is over, hours will become available again, people will be paid based on what hours they have worked, as always. Until then, the process outlined below will apply. I am sorry that this is not what you want to hear but this is how things are.

[22] There were some further short email exchanges that same day, where the applicant told Mr Angus she was looking for money she believed she was entitled to, that she was a permanent part time employee, and that she was eligible to receive the wage subsidy.

[23] Mr Angus replied that:

there is no entitlement to but we are paying anyway...

[24] This exchange ended when the applicant wrote:

Just leave it sorry to have bothered you.

[25] Mr Angus said that this statement indicated to him that the applicant had agreed to be paid 80% of her hours worked in March, for the month of April.

[26] It is clear that the applicant did not agree to be paid only 80% of her hours worked during the month of March 2020, and repeatedly asked to be paid the wage subsidy amount that Mr Angus had advised had been received on her behalf. Both parties recalled that there was mention of a figure of around \$300 per week in a text message which was not before the Authority.

[27] On 5 April 2020, the applicant made a comment on a local community Facebook page. The post was removed by the page administrators, and neither party was able to provide copies to the Authority. In essence, it appears that the applicant complained that she worked for a business that had not paid its workers but had received the wage subsidy.

[28] Mr Angus replied, attempting to clarify his view that his employees had been paid.

[29] He then posted:

Nice way to resign, Lou

and the applicant replied:

Yeah, I resign.

[30] There was no further correspondence between the parties.

[31] Mr Angus made up a final payslip for the applicant and processed it in the next fortnightly pay run. The applicant received a payment of \$150.17 gross, and a payslip stating “This was a Final Pay”, on 15 April 2020.

[32] The applicant texted Mr Angus on 15 April, saying:

please explain I have not resigned.

[33] Mr Angus replied by email explaining that he considered she had resigned in her Facebook post on 5 April. The applicant again stated that she did not resign.

[34] On 25 April, some 10 days later, Mr Angus replied that:

we do not intend to enter into any further communications in this matter and consider the issue closed.

[35] The applicant then raised a personal grievance.

Findings:

[36] The applicant was a permanent part time employee. Although the respondent argued that she was a casual employee, she had an expectation of on-going work. The real nature of the applicant’s employment is demonstrated by Mr Angus applying for the wage subsidy on her behalf as an employee who worked more than 20 hours per week, on the expectation that her employment would continue for at least the following 12 weeks.

[37] The applicant did not resign. It was Mr Angus who suggested that she had done so, by using the word “resignation”, in the context of an unresolved dispute about the payment of the applicant’s wages. Mr Angus then decided to treat this short exchange as a resignation, but did not convey this to the applicant. The applicant was unaware that Mr Angus considered she had resigned, until she received her final payslip.

[38] Mr Angus' use of the word "resignation" and his reliance on the applicant repeating that word back to him via the mechanism of a Facebook post, as evidence of a resignation by the applicant, is insufficient to establish that the applicant resigned. This is especially the case as the applicant contacted Mr Angus to clarify that she had not resigned, as soon as she became aware that Mr Angus had made up (and paid out) her final pay.

[39] Mr Angus' actions amount to him "sending away" the applicant¹. The initiative for the so-called resignation came from the employer². This is an unjustified constructive dismissal.

[40] Having been unjustifiably dismissed, the applicant is entitled to reimbursement of any lost wages.

[41] No issues arise as to the payment of wages from the two weeks starting on Sunday 15 March, when the applicant decided to self-isolate, and Mr Angus agreed.

[42] This is because, although at hearing the applicant suggested she should have been paid for these two weeks, and Mr Angus suggested she should have worked them, at the time there was a straightforward agreement that the applicant would not attend work for these two weeks, and would not receive payment.

[43] After the expiry of this agreed two-week period, the applicant remained an employee of the respondent company, and the respondent could not reduce her wages without her agreement³.

[44] The contemporaneous emails show that there was no agreement between the applicant and Mr Angus to reduce her wages. The applicant explicitly and using strong language, rejected the proposal put forward by Mr Angus, and repeatedly advocated to be paid a higher amount,

¹ In *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZLR 154, (1989) ERNZ Sel Cas 247 (CA), it was held that a dismissal includes a "sending away".

² *NID Distribution Workers etc IUOW v Foodtown Supermarkets Ltd* [1988] NZILR 588 (LC), where a constructive dismissal is described as a situation where the initiative for the dismissal comes from the employer.

³ The Wages Protection Act 1983.

equivalent to the subsidy payment that Mr Angus had told her and other staff that the business had received.

[45] The applicant remained employed until she became aware that Mr Angus considered her employment to be at an end, which occurred when he sent her a final pay slip on 15 April 2020.

[46] Accordingly, the applicant is owed unpaid wages from Monday 30 March through to the ending of her employment on 15 April 2020, to be calculated at the applicant's average rate of pay, being \$310.00 gross per week, less the final pay of \$150.17 already paid to her.

[47] Following the ending of her employment, the applicant is entitled to reimbursement of a sum equal to the whole or any part of the wages lost as a result of her unjustifiable dismissal⁴.

[48] The applicant lost the wages she would otherwise have received as a result of the ending of her employment, and both she and Mr Angus explained that they had originally expected, when the applicant went into self-isolation, that she would be back at work relatively soon.

[49] The applicant indicated that she had found other work in August of 2020. However, looking at the applicant's past pattern of work, there was approximately an 8 week period in the winter season from mid-June to mid-August, when she had not historically worked. With this in mind, it is appropriate to conclude that the applicant could have expected, at the most, a further 8 weeks work from the date of her dismissal on 15 April. Accordingly, the applicant is owed compensation for 8 week's lost wages, at the rate of \$310.00 gross per week.

[50] The applicant may also be entitled to compensation for the humiliation, loss of dignity, and injury to the feelings that occurred as a result of her unjustifiable dismissal.

[51] Mr Angus' view was that the applicant made comments on a public Facebook page which he believed brought him into disrepute, and this should reduce or remove any rights to compensation she might have. Mr Angus used the word "libel", and other similar words, which are not relevant concepts in an employment context, even if they were made out.

⁴ Section 128 of the Employment Relations Act 2000.

[52] In general terms, and drawing from their memories, both parties indicated that they made comments about the other that were unflattering in the heat of the moment. It seems that both parties bear some responsibility for their actions, although I can make no other findings on these comments, as the transcripts of these comments were not fully or even mainly before the Authority.

[53] However, the applicant is still entitled to claim compensation for hurt and humiliation that arose from the loss of her job, and the abrupt manner in which it occurred, which was effectively when she learned of her dismissal by being sent a final payslip during a Level 4 lockdown. The applicant described how being without a job put her under financial pressure, and how she had lost the friendship and social contact she enjoyed at work. She said she had known Mr Angus for many years, and considered him a friend, and expressed distress at the loss of his friendship.

[54] Standing back and taking all the circumstances into account, I find that compensation in the sum of \$5,000 is appropriate.

Orders

[55] The respondent is to pay to the applicant:

- (a) Two-and-a-half week's unpaid wages, calculated at the rate of \$310.00 gross per week, less \$150.17 already paid, being \$624.83.
- (b) Eight weeks compensation for lost wages, calculated at the rate of \$310.00 gross per week, being \$2,480.00.
- (c) Compensation for hurt and humiliation, being \$5,000 without deduction.

Costs

[56] The applicant was represented prior to the hearing, but provided no evidence as to any costs incurred by this. The respondent was self-represented throughout. Accordingly, no orders as to costs are made.

[57] The applicant is entitled to the reimbursement of the filing fee, being \$71.56.

Claire English
Member of the Employment Relations Authority