

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Shireen May Gillan (Applicant)  
**AND** RDF&F Catering Limited (Respondent)  
**REPRESENTATIVES** Tony Shaw and Maarten Dirkzwager, Counsel for Applicant  
Murray Cleverly, Advocate for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INVESTIGATION MEETING** 29 March 2006  
**DATE OF DETERMINATION** 18 May 2006

**DETERMINATION OF THE AUTHORITY**

***Employment relationship problem***

[1] Shireen Gillan worked part time at the Rainbow Dairy Wildberry Café in Waimate. Some time in 2005 the owner sold the business and the new owner took over from 1 August 2005. It was agreed that Mrs Gillan would work for the new owner which she did until October 2005. There is agreement that the new owner and Mrs Gillan's employer at the relevant time is a company called RDF&F Catering Limited. Daryl James and Rose James are the directors and shareholders of that company. By agreement, the name of the respondent is amended to RDF&F Catering Limited.

[2] Mrs Gillan says that she was dismissed by Mr and Mrs James during a discussion with them on 6 October 2005. They were the only people present during the relevant exchange and there is some conflict in their evidence about what happened during the discussion which will need to be resolved. As well as the evidence of the three participants, I have letters and notes written or sent by both sides soon afterwards. During the investigation meeting, it emerged that Mrs James had kept some unsent drafts. The respondent's representative objected but I required Mrs James to give me the previously undisclosed material and copies were provided to the applicant. As will be explained, the drafts helped in the resolution of some of the factual disputes in this problem.

[3] Part of the dispute is about Mrs Gillan's terms of employment. There is a signed written employment agreement but Mrs Gillan says that it differs from the document she signed. It will be necessary to consider the employment arrangements entered into by the parties. There was also some evidence about work performance issues. I will need to assess their relevance to what happened on 6 October and it may be necessary to resolve some or all the disputed details about those matters.

### ***Employment arrangements***

[4] Prior to the change in ownership of the business, Mrs Gillan worked Tuesday to Friday, 11am to 5pm, a total of 22 paid hours per week. She was paid \$12 per hour. At the time ownership changed, Mrs Gillan discussed her hours of work and other conditions with Mr and Mrs James. They agreed that her pay, hours and days of work would remain the same. It was also agreed that Mrs Gillan could have the school holidays off, if possible, so she could look after her two children. There is no dispute in the evidence on this point.

[5] There is a signed written employment agreement dated 2 August 2005. It states that employment is subject to the employee successfully completing a trial period. The number 2 is handwritten in the space provided and the printed word *weeks* is crossed out with *months* handwritten in its place. Mrs Gillan's evidence is that she recalls the trial period on the agreement she signed being written as *1 month*. If Mrs Gillan's recollection is correct, the employer must have removed the original page and substituted the current page. Mr and Mrs James denied doing that. There is not sufficient evidence to conclude that Mr or Mrs James did remove the original page so I will treat the document tendered in evidence as the same written employment agreement that was signed by Mrs Gillan. Mrs Gillan's recollection must be mistaken.

[6] The hours of work are specified as ... *generally ... between the hours of 9am/pm and 5am/pm on the following days Mon-Fri*. The clause goes on to say *The employer retains the right to allocate hours as are required for the efficient running of the business. Hours may differ from time to time according to seasonal and other circumstances*. Mrs Gillan says that she attached a handwritten note to the employment agreement to reflect her discussion with Mr and Mrs James about her days and hours of work, that being somewhat different from the clause in the employment agreement which is a form document for use with all employees. As noted above, it is common ground that Mrs Gillan was offered the same hours of employment including school holidays off if possible when the new owner took over the business. As a result, it is unnecessary to decide whether Mrs Gillan's recollection about the note is correct.

[7] The time and wage records show that Mrs Gillan worked regularly Tuesday to Friday, usually 5½ hours each day, between 2 August and 23 September 2005. Tuesday, 27 September is marked in Mr James' writing as *off*. Mrs Gillan's evidence, which I accept, is that she spoke to her employer shortly before the school holidays to remind them that she would be taking that time off and no difficulty was mentioned to her at that point. I infer that the school holidays started from Monday, 26 September 2005.

[8] During the school holidays, Mrs Gillan went into the dairy to collect her wages. The pay week ends on a Tuesday so Mrs Gillan was owed a day's pay for Friday, 23 September 2005. Mrs Gillan's evidence is that Mr and Mrs James saw her waiting but ignored her even when they became free. In hindsight, Mrs Gillan thinks that this indicated a change in attitude towards her on the part of Mr & Mrs James but it is not necessary to reach any conclusion on the point. Mrs Gillan called out to them and her wages were fetched. She left without anything of any relevance being said. The next contact was a phone call on 6 October 2005 from Mrs James asking Mrs Gillan to come in for a discussion, which Mrs Gillan did.

### ***What happened on 6 October?***

[9] Mrs Gillan arrived at the dairy and went out to the back of the shop with Mrs James and Mr James. Both women agree that Mrs James said at the outset that Mrs Gillan was not on the roster. The accounts differ from there. The gist of Mrs James' evidence is that she intended to have a discussion with Mrs Gillan about her future hours of work in order to fit her into the roster; that

Mrs Gillan did not offer to make herself available for any other days or hours other than those previously worked by her; that Mrs Gillan became belligerent and critical about them and the business; that there was discussion about some performance concerns; that Mrs Gillan made an allegation about another employer stealing from the business; and that Mrs Gillan left saying *I guess I'm sacked*. Both sides agree that neither Mrs James nor Mr James said anything in response to Mrs Gillan's last words.

[10] Mrs Gillan's account is that she asked what hours they wanted her to work but she was told that there was a new employee and others who were paid \$10 per hour. Mrs James told her that she was useless and gave a number of examples from a list. These are the work performance issues referred to above. Mrs Gillan asked for a copy of the reasons but that was refused by Mrs James. Mrs Gillan ... *tried to defend herself* ... but Mrs James and Mr James did not listen. It being obvious to Mrs Gillan that Mr and Mrs James wanted her gone, she said *I guess I'm sacked* and left.

[11] I accept Mrs Gillan's evidence that she went straight home afterwards and phoned her husband who told her to contact the Department of Labour helpline, which she did. As a result, Mrs Gillan then wrote out some notes of what had happened and also drafted a letter to Mr and Mrs James. Mrs Gillan delivered the letter to the business premises on 6 October 2005. Its receipt prompted Mrs James to draft a response. The draft neither admits nor denies the allegation about a dismissal.

[12] Mrs Gillan drafted and delivered a second letter a day or so later thinking that her first letter was not sufficient. That caused Mrs James to draft a second reply, also not sent. It reads:

*Shireen*

*I have now received your second letter. The purpose of our talk with you was to be a chance for you to discuss with us the hours and days you would make yourself available – as I explained to you. I had not put you on next wks roster but there was room for negotiation by both employer and employee – all the concerns we raised with you only seemed to make you feel – as you said – “we don't like you” – all our problem with your work are “nitpicking”. As we told you Shireen – we do like you – but liking someone and dealing with someone as an employer is different. Also, concerns regarding an employee's work should not be considered “nitpicking” but constructive criticism. We understand you had major problems with your previous employers – but as we explained to you – that is not our problem. You only worked for us for 32 days we trialled you longer than necessary as we were hoping you would start to get more interested in doing your job better. As it is we are now left short with staff. If you feel you need to take this further – that is up to you – but you cannot have it both ways. If you take this matter further, you can expect us to explain how we are being accused of unfair dismissal rather than you are pursuing other interests.*

~~*If you feel as strongly as you say you do about working here – by all means – let us know what hours and days you will make yourself available for us and then we can renegotiate your hourly rate, as this is what we anticipated originally with our talk. Please feel free to come in and discuss this matter with us, I will not be replying to any more letters you send.*~~

*Again regards*

*Daryl and Rosemarie James*

[13] Mrs Gillan instructed a representative who wrote to Mr and Mrs James seeking reasons for the dismissal. The respondent sent a reply. It reads (in part):

*After having a meeting with Miss Gillan on unsatisfactory work performance, after numerous occasions we were informed by her that she could not work under these terms, and the way she spoke to us and conducted herself we are happy not to have her employment. She is well aware of the reasons for dismissal. ...*

*... This is a serious matter that we will take issue with, as she did leave us without notice, and we may claim against her.*

[14] The respondent's statement in reply was lodged on 15 November 2005. That says that the company did not dismiss Mrs Gillan. It goes on to say that the company found the current contract with Mrs Gillan was not working and asked Mrs Gillan in for a meeting to discuss this and performance concerns; that Mrs Gillan became very critical and walked away saying *I guess I'm sacked*.

[15] When questioned at the investigation meeting, Mrs James initially denied having any list with her during the 6 October exchange with Mrs Gillan. She later admitted having some papers with her but steadfastly maintained that any notes on the papers were not to do with Mrs Gillan individually but were related generally to the running of the business. In contrast, Mrs Gillan's evidence was clear and consistent that Mrs James had a list of concerns on a piece of paper which she referred to in their discussion. I prefer Mrs Gillan's evidence on this point, which ties in with statements by Mrs James that Mrs Gillan was called in for a meeting to discuss performance concerns.

[16] A second point emerges from the statement in reply and the second draft letter prepared by Mrs James. Mr and Mrs James had decided that the contract they had with Mrs Gillan was not working. They considered that Mrs Gillan was paid too much in light of their view about her inadequate performance. They also considered that they had *trially* Mrs Gillan longer than was necessary.

[17] In the light of the admissions by Mrs James in the document mentioned above, I do not accept that she was simply trying to work out a new roster with Mrs Gillan's input on 6 October 2005. I find it more probable than not that Mrs James referred to other workers being paid less and that she raised various criticisms of Mrs Gillan's work. Mrs James started by making it clear that Mrs Gillan was not on the roster and she made no proposal to Mrs Gillan during the discussion about future work. Mrs Gillan rightly concluded that her employer was terminating the relationship. I find that Mrs James dismissed Mrs Gillan.

### ***Justification for dismissal***

[18] While the employment agreement included a two month trial period and the termination occurred just after the end of that period, in evidence Mrs James denied having relied on the end of the trial period to affect the dismissal. Accordingly, the trial period is not relevant for present purposes.

[19] Justification for the dismissal must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances of the dismissal.

[20] While the company claimed during the investigation meeting not to have dismissed Mrs Gillan, my finding is that it did dismiss her without notice or pay in lieu on 6 October 2005. I must assess whether those actions were what a fair and reasonable employer would have done in the circumstances at that time.

[21] I accept Mrs Gillan's note accurately refers to the matters raised by Mrs James on 6 October. Mrs Gillan was told that her wage was expensive compared with other staff and that she made too many mistakes with the till; that smokes were not properly put away; that not all dishes were put away; that she kept annoying Mrs James with petty issues; that she had it in for another staff member; that she had put too many pies in the pie warmer contrary to Mr James' instructions to another staff member; and that she had made chicken soup for the business from a chicken intended for Mr and Mrs James' private use. Most of these were essentially teething problems which had been discussed with Mrs Gillan as they arose. They do not constitute adequate grounds for a summary dismissal by a fair and reasonable employer, especially without any prior warning and opportunity to improve.

[22] Mrs Gillan was not asked to provide an explanation about these matters. As Mrs Gillan's notes indicate, she had cogent things she could have said if she had been properly asked to explain any of the concerns. Mrs James raised these matters to justify the employer's decision already made not to have Mrs Gillan resume her regular hours of work at the conclusion of the school holidays. My earlier finding that Mrs James had a list of these matters with her means that she intended to mention these things to Mrs Gillan. A fair and reasonable employer would have given Mrs Gillan proper notice of these concerns and an opportunity to respond before deciding to change Mrs Gillan's hours of work, assuming that the employer was entitled to make such a change. No fair employer would have wanted to use the situation as an opportunity to negotiate a reduction in Mrs Gillan's rate of pay.

[23] It follows from the above conclusions that the dismissal is unjustified and Mrs Gillan has a personal grievance.

### ***Remedies***

[24] Mrs James' draft letter indicates that the employer would have considered some form of continued employment at a lower rate of pay but no such offer was ever made to Mrs Gillan. The availability of some work at the Rainbow Dairy Wildberry Café is therefore irrelevant. Mrs Gillan sought reimbursement of lost wages for the 11 weeks immediately following the dismissal up to the next school holidays. I am satisfied that she took reasonable steps during that period to mitigate her loss by looking for other employment and she did obtain some work. Mrs Gillan is entitled to her lost wages for the period claimed. Her gross loss is \$264 per week for 11 weeks, a total of \$2,904. Mrs Gillan's evidence is that she received approximately \$390 in wages from other work during that time, leaving a loss of \$2,514 approximately. I order the respondent to pay compensation for lost wages to Mrs Gillan amounting to \$2,500.

[25] I accept that Mrs Gillan was upset and hurt by the dismissal. There is no reason to doubt her evidence that the loss of her job caused financial difficulties for her. The upset was compounded because it arose during her father's terminal illness. Mrs Gillan was concerned about what might be said about her by her employers in the small community of Waimate. However, there is no evidence that anything damaging or harmful to Mrs Gillan was said. I recognise that the employment was of short duration and the respondent is a small business presumably with limited ability to meet an award of compensation. Those are factors that support a modest award. At an early point following the dismissal, Mrs Gillan indicated that she should receive a minimum of \$2,000 compensation for distress. Counsel argued that Mrs Gillan should not now be bound by a figure she nominated without the benefit of advice. However, I consider it gives a good indication of what Mrs Gillan thought was necessary to restore her to her previous position and it takes account of the reality of the employment situation. I order the respondent to pay Mrs Gillan compensation for emotional distress in the sum of \$2,000.

[26] Because Mrs James disavowed any reliance on the expiry of the probationary period for the employer's decision not to have Mrs Gillan resume her previous hours, I find that her complaints about Mrs Gillan during that period cannot amount to blameworthy actions by her contributing to the circumstances of the grievance.

*Summary*

[27] Mrs Gillan has a personal grievance. To remedy the grievance the respondent is to pay her compensation of \$2,000.00 pursuant to section 123 (c)(i) of the Act and \$2,500.00 by way of lost remuneration.

[28] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority