

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 17
5574997

BETWEEN NIKITA ANN HENARE
 Applicant

AND JOHN KINZETT
 First Respondent

AND TRADITIONAL CANDY
 COMPANY LIMITED
 Second Respondent

Member of Authority: M B Loftus

Representatives: Brendan McDonnell, Counsel for Applicant
 John Kinzett, on behalf of the Respondents

Investigation Meeting: 21 January 2016

Submissions Received: At the investigation meeting with additional comment by
 5 February 2015

Determination: 9 February 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Nikita Henare, claims she was unjustifiably dismissed by the first respondent, John Kinzett t/a Traditional Candy Co, on or about 11 December 2014.

[2] Mr Kinzett denies this on the grounds:

- a. Ms Henare was employed by Traditional Candy Company Limited (a company of which he is the sole director and shareholder) and not him personally; and

- b. Irrespective of who employed her, Ms Henare was not dismissed but left of her own volition.

Citation of respondent and issues

[3] The application, as initially filed, identified the respondent as *John Kinzitt* (sic) of *Traditional Candy Limited* (also incorrectly named).

[4] Documents were subsequently sent to both Mr Kinzett's private address and the registered office of the Traditional Candy Company Limited (with both being correctly named) though there were difficulties with some deliveries.

[5] Here I note Mr Kinzett did not participate in the Authority's process until his appearance at the investigation. The question of the employers' identity was not, therefore, discussed until raised at the commencement of the investigation meeting.

[6] Mr Kinzett conceded he was in receipt of the documents and attending, whether as an individual or in his capacity as an officer of the company, in order to have the matter resolved.

[7] Following the discussion, which involved both parties, the intituling was amended to reflect Mr Kinzett's concession on the basis there were two issues to be resolved. They are:

- a. Was Ms Henare unjustifiably dismissed or did she leave of her own volition; and
- b. If Ms Henare was unjustifiably dismissed who was her employer and therefore responsible; Mr Kinzett or Traditional Candy Company Limited?

Background

[8] Ms Henare commenced the employment on or about 17 July 2014 having been assisted in doing so by Work and Income. Her employment attracted a subsidy payable by Work and Income.

[9] Ms Henare says notwithstanding one non-work related exception there were no problems until 10 December 2014. She says when she arrived at work that day Mr Kinzett called her into his office, asked her to have a seat and proceeded to yell at her. She says she found his behaviour frightening and chose to leave the workplace.

[10] Mr Kinzett denies he was yelling or overbearing and is of the view it was Ms Henare who lost control. He says he had concerns about her capabilities as a barista and had arranged for another part time employee who had experience training baristas to assist a couple of days earlier. He says he was disappointed with the way Ms Henare reacted and, in particular, the content of some notes she wrote following the training. He wished to discuss the notes with Mr Henare.

[11] Here it should be noted Mr Henare denies she received any training and states it was she who was giving *tips to new work replacement*.¹

[12] Following Ms Henare's departure Mr Kinzett telephoned her home. He left a voice message and she returned the call later that day. Ms Henare says she told Mr Kinzett she had left as she felt threatened and upset. She says he then suggested she return the next day to resolve the issues. Mr Kinzett says he told Ms Henare she needed to come in, talk about the problem and sort it out.

[13] Ms Henare says she arrived the following morning (11 December 2014) at her normal start time of 8.00am. She says she went straight into a meeting with Mr Kinzett. The meeting took approximately five minutes and Ms Henare covertly recorded it. The recording shows the following.

[14] Mr Kinzett opened with *I'll just let you know umm Malcolm [the Kitchen Manager] doesn't really want you back.*

[15] The conversation continues with:

John Kiznett [JK] *...the situation is that I believe you've been looking for other jobs umm*

Nikita Henare [NH] *yep*

[JK] *this is what I've been told*

[NH] *mmm*

[JK] *umm and Malcolm has told me yesterday that you've been putting your cv up*

[NH] *yep*

[JK] *so you've obviously not been happy here for a while*

¹ Description attached to a copy of the notes appended to the Statement of Problem

[NH] *yep*

[JK] *so you know I wish you'd been straight up with me because you know its just umm I think your best idea for umm for you to give us your resignation rather than us getting rid of you ah for your own sake*

[NH] *for my own sake why why do you word it that way*

[JK] *because simply because if I if I give you a umm a written umm warning with umm and sack you its not it doesn't look good for your trying to get future jobs and of course Social Welfare won't like it either*

[NH] *brief and inaudible*

[JK] *so my suggestion is that you umm write a resignation out and say you resign*

[NH] *ok*

[JK] *and that's the best for your (inaudible).*

[16] Ms Henare then advised she had not come to resign and considered she was entitled to look for other jobs. She observed there was nothing in her contract to say she could not have other work and she currently had other employment about which Mr Kinzett was aware. She then commented that what occurred the previous day was unfair before asking what would happen should she not resign.

[17] Mr Kinzett's response was *We'll have to get rid of you.*

[18] Ms Henare then says *well then I think its going to have to be that way because I'm not willing to put in my resignation I can't live otherwise ah financially I meant.* Mr Kinzett replies *well you should have thought about that before you before you played up you should have thought about that yesterday.*

[19] The conversation briefly turns to the previous days' events with Ms Henare saying she was caught unawares and had no warning of what was coming. Mr Kinzett then says *Well that's the way it is and I'm saying to you now is that Malcolm's not happy.*

[20] Ms Henare challenges that on the grounds Malcolm is a fellow employee and it is Mr Kinzett who is responsible for decision making. Mr Kinzett replies *No, don't argue with me I'm telling you what he's said he's in charge of the kitchen he doesn't want you back in his kitchen.*

[21] Ms Henare then asks *ok what have I done wrong to suggest that I'm not umm capable of being in the kitchen anymore?* Mr Kinzett replies *you he just doesn't want you back in there because he he doesn't feel you're doing the job.*

[22] Ms Henare tells Mr Kinzett he has to be more particular than that to which he says *I don't have to be anything I'm telling you what the story is and I do not like you talking over me ok.*

[23] The conversation then continues with:

[NH] *so you've got a personal grievance with me and that's why you want to get rid of me*

[JK] *there is that situation*

[NH] *yeah.*

[24] Mr Kinzett goes on to advise *we have a problem with your attitude.* He cites Ms Henare's alleged desire to talk over others and a failure to listen to what is being said to her before alleging *you think I'm just nothing.* Ms Henare denies that accusation to which Mr Kinzett replies *oh yeah I think you do.* He then says *I will not take you dissing anyone in this place* which was a reference to the notes Ms Henare had written and which had been the initial impetus for the events of 10 and 11 December (refer [10] and [11] above).

[25] The conversation continued with Ms Henare briefly trying to trying to defend herself but this was brought to an end with Mr Kinzett stating *I'm not taking it and I'm not going to have it.*

[26] That was followed by:

[NH] *ok, so what happens now*

[JK] *the situation is right now I'll give you your pay (briefly inaudible) is you can come back to get your holiday pay and I'll give you your umm your final pay as well everything will be done umm you to me you resigned as of yesterday.*

[NH] *no I haven't given you a resignation*

[JK] *Well you walked out and that's enough so I'm not interested in talking to you anymore.*

[27] Ms Henare advised she was not happy with the outcome and spoke of mediation. She then tells Mr Kinzett she considers herself to have been *fired* and claims he then handed her a final pay (outstanding wages only). She received the balance (holiday pay) about a week later.

[28] Mr Kinzett accepts the recording is accurate but disputes when the discussion took place. He says Ms Henare did not arrive until about 2.30 in the afternoon but this is not a difference I need to decide to determine this claim. Mr Kinzett also questions when he paid Ms Henare's outstanding wages. He thought it was the following day but accepts he cannot be absolute about that. Given the content of the recording I conclude it was paid at the end of meeting of 11 December.

[29] Ms Henare consulted community law later that day (11 December) and raised her grievance by letter dated 15 December 2015.

[30] The day after she raised her grievance community law wrote to Work and Income and sought a waiver of the normal stand down period before payment of a sole parent benefit could commence on the grounds Ms Henare had been unjustifiably dismissed. Community law also put Ms Henare in contact with a wellbeing service which provided some assistance in the new-year.

Determination

[31] The recording speaks for itself. A dismissal is a sending away. There cannot, in my view, be any doubt Mr Kinzett's words and actions (the proffering of the final pay) constitute a sending away.

[32] There is, however, the argument Ms Henare resigned (*walked out*) on 10 December. For three reasons I dismiss this proposition.

[33] First, and if she had resigned as claimed, there would have been no need for Mr Kinzett to try and procure Ms Henare's resignation on the 11th. The fact he did undermines the argument. Second, Mr Kinzett's admission that when he and Ms Henare spoke over the telephone on 10 December he told her to come in and resolve the problem indicates he still felt there was an extant relationship. Third, the parties agree the conversation on the 10th was heated though each blames the other for this. It is well established it is fraught to accept a resignation in such circumstances and it is

unlikely a resignation would have been enforceable if it had been tendered in the circumstances described.²

[34] The evidence leads to a conclusion this was a dismissal.

[35] Once an applicant has established the fact of dismissal, as I conclude Ms Henare has, the onus falls upon the employer to justify its actions.

[36] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... 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 could have done in all the circumstances at the time the dismissal ... occurred.

[37] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated its concerns/allegations. A sufficient investigation requires, as a bare minimum, that the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[38] It is clear from the recording the above requirements were not met. Mr Kinsett's airing of concerns was minimal to the point of being risible but, in any event, they occurred after Ms Henare had been told she was going; after Mr Kinzett had tried to attain her departure via the procurement of a resignation and after he had confirmed the outcome by preparing the final pay which he gave her at the end of the meeting. There cannot, therefore, have been a considered response of any reply offered by Ms Henare – not that she was permitted to offer a proper explanation in any event.

[39] Turning then the question of employer resources. While this is a relatively small employer with limited resources I must be cognizant of the Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley*.³ At paragraphs [94] and [95] the Court noted such all-encompassing failures were neither excusable nor minor (s.103A(5)).

[40] This dismissal must be found to be unjustified.

² *Kostic v Dodd* EMC Christchurch CC14/07, 11 July 2007 Judge Couch

³ [2013] NZEmpC 152

[41] The conclusion Ms Henare's dismissal was unjustified raises the question of remedies. She seeks wages lost as a result of the dismissal and compensation (in an unspecified amount) for hurt and humiliation.

[42] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis.

[43] Ms Henare took steps to mitigate her loss and acquired replacement employment about four months after dismissal. That said, she does not ask I exercise the discretion to award more than the three months loss payable under s128(2).

[44] Three months pay is \$7,410.00 gross and, given the provisions of s128(2), that is payable.

[45] Turning to compensation. Ms Henare seeks compensation in an unspecified amount.

[46] While I note the Courts have recently been commenting on the adequacy of compensatory payments such claims still require evidential support.⁴ Here the evidence was weak. It was limited to a statement Ms Henare felt *upset, embarrassed, stressed, worried and humiliated* and she was concerned about left without a regular income just prior to Christmas.⁵ She also referred to the fact she sought the services of a free wellbeing service though here I note she only used two of the three available consultations and with one exception (sleep deprivation) the issues discussed during counselling do not appear indicative of hurt and humiliation.⁶

[47] The evidence does not, in my view, support a significant award and I consider \$3,000 appropriate.

[48] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Henare contributed to her dismissal in a significant way. While Mr Kinzett undoubtedly had a negative view of her performance I conclude the answer is no, at least in the way envisaged by the Act. I reach this conclusion for two reasons. First there is no evidence upon which a

⁴ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [87] endorsed in *Campbell v The Commissioner of Salford School* [2015] NZEmpC 122 at [345]

⁵ Letter of grievance dated 15 December 2015

⁶ Letter from Te Awakairangi Health Network dated 28 April 2015

finding of contribution may safely be based and second Mr Kinzett consistently said the issue that precipitated the dismissal was the notes yet he failed to explain why he saw them as obnoxious to the extent they warranted dismissal and having seen then I am struggling in this regard. He also raised another potentially serious issue but that cannot be considered as, aside from the fact Ms Henare denies it ever occurred, he chose not to pursue it at the time.

[49] The conclusion Ms Henare was unjustifiably dismissed means I must address the question of who, as her employer, is responsible for the remedies that then accrue.

[50] Ms Henare says she was employed by Mr Kinzett personally. In asserting this she claims the Work and Income work-broker who accompanied her to the interview introduced Mr Kinzett as the employer; her employment agreement expressly identifies Mr Kinzett as the employer and a letter provided by Work and Income states *Work and Income helped you into employment with Traditional Candy Co* and that the resulting wage subsidy contract was with Traditional Candy Co.⁷

[51] Traditional Candy Co is the trading name under which the business was conducted and it was used consistently by Mr Kinzett whenever he referred to the business.

[52] Mr Kinzett is of the view Ms Henare was employed by his company, Traditional Candy Company Limited. He explains the employment agreement by saying it was prepared by Work and Income but accepts he should have checked and *done it right*. There is no additional documentary evidence as Ms Henare was paid in cash and there were no pay slips.

[53] These answers gave me cause to approach the Work and Income manager who signed the letter of 30 June 2015. The parties have had an opportunity to comment on her responses.

[54] Work and Income advises it does not prepare employment agreements and did not do so in this case. Instead it directs prospective employers to various tools which might be used to assist the employer prepare the required employment agreement such as the Ministry of Business, Innovation and Employment's employment agreement builder.

⁷ Letter Work and Income to Henare dated 30 June 2015

[55] Work and Income also advised it takes various steps to check it is dealing with a legitimate business when it introduces a prospective employee. A revisiting of those steps in this case appeared to indicate their records incorrectly identified the intended employer and the reference should have been to the company and not the trading entity.

[56] Having considered the evidence I conclude Mr Kinzett was the employer.

[57] On the face of it the employer was Mr Kinzett. In saying this I place reliance on the employment agreement. I accept Work and Income's assertion it did not prepare the agreement, especially as Mr Kinzett concedes his memory of events and details was, with the passage of time, hazy. The employment agreement expressly identifies Mr Kinzett as the employer and he signed it. He did so as John Kinzett and there is no suggestion he did so on behalf of the company. Indeed his signature is accompanied by an express statement it is he who *offer[s] this employment agreement*.

[58] I say on the face of it ([57] above) as there is also the issue of Work and Income's records and their identification of the employer. Is this sufficient to override the express provisions of the employment agreement. For three reasons I conclude the answer is no and Mr Kinzett was the employer.

[59] First Mr Kinzett did not contest Ms Henare's claim the work broker identified him as the prospective employer ([50] above). Second, the realisation the records may wrongly identify the employer is post fact while the original documentation is contemporaneous and can, I conclude, be considered a reflection of who Work and Income thought it was dealing with at the time especially given Mr Kinzett's habit, illustrated in the investigation, of referring to the business by its trading name. Finally the purpose of Work and Income's checks is to establish the existence of a legitimate business and it does not play a part in finalising the documentation. A legitimate business existed and then, I conclude, Mr Kinzett completed the employment agreement as he did.

Conclusion and Orders

[60] For the above reasons I conclude Ms Henare was employed by the first respondent, John Kinzett.

[61] I also conclude Ms Henare has a personal grievance as she was unjustifiably dismissed by Mr Kinzett.

[62] As a result Mr Kinzett is ordered to pay Ms Henare:

- i. \$7,410.00 (seven thousand, four hundred and ten dollars) gross being wages lost as a result of the dismissal; and
- ii. A further \$3,000.00 (three thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[63] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority