

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 323
3015771

BETWEEN ABBY HILLIER
 Applicant

A N D MEDEU INTERNATIONAL
 LIMITED trading as BLD CAFÉ
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Emma Moss, Advocate for Applicant
 Abdrakhman Assilbekov, Director of Respondent

Investigation Meeting: 13 October 2017 at Auckland

Date of Determination: 16 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Ms Abby Hillier was unjustifiably dismissed by Medeu International Limited (Medeu).**
- B. In order to settle Ms Hillier’s personal grievance claim, Medeu is to make payment of the following sums to her within twenty one (21) days of the date of this determination:**
- (a) \$5,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to feelings in respects of her unjustifiable dismissal;**
- (b) \$ 5,320.35 gross in lost remuneration under s.128 of the Act.**

- (c) **\$886.72 gross being two weeks notice owing under the terms of Ms Hillier's employment agreement;**
- (d) **\$402.41 gross holiday pay owing.**

Employment relationship problem

[1] The applicant, Ms Abby Hillier was employed by Medeu International Limited ("Medeu") from 23 January 2017 until her dismissal on 19 April 2017.

[2] Ms Hillier says she received a text message from the director of Medeu, Mr Assilbekov on 19 April 2017 informing her that she was no longer required to work in the café. No reasons were given. Ms Hillier says her dismissal was unjustified and she was hurt and humiliated by it.

[3] Ms Hillier attempted to find work following her dismissal but so far has not been successful. Ms Hillier applied for approximately twenty different jobs following her dismissal.

[4] Mr Assilbekov accepts that Ms Hillier's employment with Medeu was terminated. Mr Assilbekov gave various reasons for the dismissal. He says his business was a start up business and he realised he had taken on too many staff. He decided to "let go" the front of house staff including Ms Hillier. He also says the café was struggling and he could not keep Ms Hillier on. Finally, he says Ms Hillier damaged the reputation of the business, customers were complaining about her and did not return. Accordingly, Mr Assilbekov says Ms Hillier's employment with Medeu was terminated for serious misconduct. Mr Assilbekov says Ms Hillier does not have any claims against Medeu, her employment was justifiably terminated.

Investigation meeting

[5] As permitted under s.174E of the Act, this determination has not set out all evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[6] The investigation in the Authority took approximately half a day. Ms Abby Hillier filed a witness statement. For Medeu, Mr Assilbekov provided a statement.

Mr Anton Pelekh, a customer of BLD Café provided a letter but did not attend the Authority's investigation meeting to give evidence.

[7] Each witness who attended the Authority's investigation meeting confirmed on oath or affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

Issues

[8] The issues for the Authority to determine are as follows:

- (a) Was Ms Hillier's dismissal by Medeu unjustifiable?
- (b) If Ms Hillier's dismissal was unjustifiable, what remedies is she entitled to?
- (c) Does Ms Hillier have unjustifiable disadvantage claims as a result of not being provided with a written employment agreement and Medeu not meeting its PAYE, student loan and KiwiSaver obligations?

First issue

Was Ms Hillier's dismissal by Medeu unjustifiable?

[9] Medeu owns and operates the BLD Café in Glendene. Mr Assilbekov is the sole director and shareholder of Medeu.

[10] In late 2016, Ms Hillier saw a front of house position advertised for BLD Café based in Glendene, Auckland. Ms Hillier was keen to find a job which fitted in with school hours as she is a solo parent. Ms Hillier applied for the job.

[11] After attending an interview with Mr Assilbekov at the café on 15 November 2016, Ms Hillier was offered the front of house/barista job. Ms Hillier began work at the café on 23 January 2017.

[12] Ms Hillier was provided with an individual employment agreement which she signed as did Mr Assilbekov. Ms Hillier was never provided with a signed copy of her employment agreement, despite several requests. She retained a blank copy of the employment agreement which both she and Mr Assilbekov agree is a copy of the one that she signed.

[13] The café was a new café and Mr Assilbekov was trying to build the business up. Ms Hillier worked from 8am to 3 pm from Monday to Fridays for almost the entire period of her employment. Ms Hillier was paid \$15.50 gross an hour when she started work. Ms Hillier was paid this rate for the period of her employment.

[14] Ms Hillier says that she enjoyed the work at the café. Her job was to open up the café to customers in the morning, put the sign out, set up the coffee machine and serve customers. Ms Hillier also did the rosters for the café for most of her employment.

[15] Ms Hillier says that she was often paid late and would follow Mr Assilbekov up and he would pay. Mr Assilbekov agreed that this happened, he was having cash flow problems and often could not pay wages for some days.

[16] On 31 March 2017, Mr Assilbekov took over the rosters. This meant that Ms Hillier would have to text him each week to check the roster.

[17] On 5 April 2017, without Ms Hillier's agreement, Mr Assilbekov reduced her hours so that he could "trial" other staff. The following week, Ms Hillier's hours were returned to normal.

[18] Mr Assilbekov says as the business was new, he was keen to make sure he had the right staff and so he did trial "front of house" staff from time to time.

Dismissal

[19] On 17 April 2017, Ms Hillier texted Mr Assilbekov about whether she had been paid and what her roster was for the week. Her text was sent at 10.51 am and said:

Hi Raha, just wondering what the go is for this week with work? Also I haven't been paid?

[20] Ms Hillier sent another text to Mr Assilbekov on 19 April 2017 at 11.39 am as follows:

Hi Raha, just wondering what is going on with work this week I am available and keen to work.

[21] At 6.01 pm on 19 April 2017, Mr Assilbekov replied by text as follows:

Hello Abby sorry for no reply was a little preoccupied. Hope you got your pay. For now there will be no work available. When I have work and you are in need of work I will let you know. My apologies but don't have enough work so I have to pay so many people.

[22] Ms Hillier says, and Mr Assilbekov agrees, that they had a brief discussion on the steps to the kitchen about her dismissal. Mr Assilbekov told Ms Hillier that she was not doing well, the business was not doing well and he needed to make changes to ensure the business did not “fail totally”.

[23] Mr Assilbekov accepts terminating Ms Hillier’s employment but says it was justified by her incompetence and poor service.

[24] When questioned about the dismissal at the Authority’s investigation meeting, Mr Assilbekov said that Ms Hillier was incompetent and he had received customer complaints about her service which left him with no alternative but to terminate her employment. Mr Assilbekov explained that he had met some customers when he was at the local Mall and he had asked them about the café. They told him about poor service, the poor quality of the coffee and how one staff member who he understood to be Ms Hillier was unpleasant. This is how Mr Assilbekov says he became aware of the issues with Ms Hillier. Mr Assilbekov stated to the Authority that Ms Hillier’s conduct amounted to serious misconduct.

[25] Mr Assilbekov accepted not raising the customer complaints with Ms Hillier during her employment or when she was dismissed. It was clear that Mr Assilbekov did not inform Ms Hillier of his views that her conduct amounted to serious misconduct. I do not accept on the evidence that Mr Assilbekov could have formed the view that Ms Hillier’s conduct amounted to serious misconduct.

The Law

[26] An employer who dismisses an employee, has the onus of establishing that the dismissal was justified. The test of justification is set out in s.103A(2) of the Act:

The test is 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 or action occurred.

[27] I do not accept that there were issues with Ms Hillier’s performance, this was not raised in any detail until after the dismissal. Even if there were complaints about Ms Hillier and her performance, it is clear that they were not raised properly with her or investigated by Medeu. There was no discussion with Ms Hillier about any issues or customer complaints. No attempts were made to investigate supposed allegations from

customers to the café that she was rude. Instead of taking these steps Mr Assilbekov sent a text to Ms Hillier informing her that she was not required to return. This amounted to a dismissal which was not the action of a fair and reasonable employer in all the circumstances at the time the dismissal occurred. I conclude that Ms Hillier was unjustifiably dismissed.

[28] Ms Hillier was dismissed without notice. Under clause 13.1 of her employment agreement, Ms Hillier was entitled to two weeks notice of termination.

Remedies

Unpaid notice

[29] Medeu failed to pay Ms Hillier two weeks notice owing under the terms of her employment agreement. This amounts to \$886.72 gross. I order Medeu to pay the sum of \$886.72 gross to Ms Hillier within twenty one (21) days of the date of this determination.

Holiday pay

[30] Medeu failed to pay Ms Hillier holiday pay owing upon termination of her employment. Ms Hillier is owed \$402.41 gross.

[31] I order Medeu to pay Ms Hillier holiday pay in the sum of \$402.81 gross within twenty one (21) days of the date of this determination.

Compensation

[32] I consider that compensation in the sum of \$5,000 for the humiliation, loss of dignity and injury to Ms Hillier pursuant to s.123(1)(c)(i) of the Act to be an appropriate sum.

[33] I order Medeu to pay the sum of \$5,000 compensation to Ms Hillier within twenty one (21) days of the date of this determination.

Reimbursement of lost income

[34] Ms Hillier has not been able to find another job. She has applied for approximately 20 jobs unsuccessfully. Calculated on an average of her previous 11 weeks of employment, Ms Hillier worked 28.15 hours a week. Ms Hillier was being paid \$15.50 gross per hour. From 1 April 2017, the minimum hourly rate was \$15.75 gross. Ms Hillier

seeks reimbursement of the equivalent of 3 months lost remuneration (based on the minimum hourly rate) under s128(2) of the Act. This amounts to \$5,320.35 gross.

[35] I order Medeu to pay Ms Hillier the sum of \$5,320.35 gross within twenty one (21) days of the date of this determination.

Unjustifiable disadvantage claims

[36] Ms Hillier raised claims of unjustified disadvantage as a result of the failure by Medeu to pay her the minimum wage, failure to deduct her PAYE and KiwiSaver contributions. By the time of the Authority's investigation, it was accepted that Medeu had complied with its obligations and there were no outstanding claims.

Costs

[37] Costs are reserved. Ms Hillier has 14 days from the date of this determination to file a memorandum as to costs. Medeu has 14 days from receipt of Ms Hillier's memorandum to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority