

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 116
5355024

BETWEEN

DEBBIE HINDE
Applicant

A N D

BON CHIEN t/a MR BON
BAKERY AND ESPRESSO
Respondent

Member of Authority: James Crichton
Representatives: Applicant in person
Respondent in person
Investigation meeting: 30 March 2012 at Auckland
Date of Determination: 3 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Hinde) alleges that she was unjustifiably dismissed from her employment. The respondent (Mr Chien) resists the allegation.

[2] Ms Hinde was employed by Mr Chien in July 2010 and worked on a regular part-time basis in Mr Chien's café from July 2010 down to the end of May 2011. The printout supplied to the Authority discloses that for almost all of the weeks of the employment, Ms Hinde worked 35 hours per week and was paid \$14 per hour. There are a handful of weeks when a lesser number of hours was worked and there were some issues between the parties around the entitlement to sick pay and the payment of it, but those have now been resolved.

[3] The only issue remains Ms Hinde's contention that she was unjustifiably dismissed. It is common ground that Ms Hinde took leave as a consequence of an accident which took place on 19 May 2011. Ms Hinde's back was damaged in the accident, which happened at home, and she received a number of medical certificates from her general practitioner entitling her to remain away from the employment until she was again fit for duty. Those medical certificates ran out effectively on 17 June and on that same date, Ms Hinde texted Mr Chien to indicate to him that she could return to work the following Monday, 20 June 2011.

[4] Ms Hinde says that she got a text back from Mr Chien to the effect that she was not to bother as he had sold the business.

[5] At the investigation meeting, Mr Chien did not deny having told Ms Hinde this, and indeed confirmed that her evidence on the point was accurate. He explained that he had thought that he had sold the business but it appeared the sale later collapsed, for whatever reason.

[6] In any event, Ms Hinde's claim is essentially that she ought not to have been dismissed by text message when she told her employer that she was available to return to duty.

[7] The Authority agrees with that contention. It is difficult to envisage how a dismissal by text message could comply with New Zealand law and the facts the Authority heard in relation to this particular dismissal make plain that this dismissal was indeed an unjustified one. Whether or not Mr Chien had sold his business, he still had obligations to Ms Hinde. Certainly, at the point at which the text exchange took place, there was no confirmed sale and as a consequence he was still her employer. There is no legal basis for a dismissal in these circumstances. Ms Hinde's position ought to have been protected and she ought to have been able to simply return to duty once she was fit and able to do so.

[8] Furthermore, Mr Chien does himself no credit by alleging in the statement in reply that Ms Hinde had a gambling problem and was in consequence unreliable. His own records provided to the Authority show that over the period of what was a short employment relationship, she was in fact very reliable and she typically worked each week the same span of 35 hours in the business.

[9] Clearly, Mr Chien ought to have welcomed her back to the business once her accident leave had concluded and if, as he maintained then, the business was in the process of being sold, then he still had obligations to Ms Hinde during the period at least while he maintained charge of the business.

Determination

[10] The Authority is satisfied that Ms Hinde has been unjustifiably dismissed from her employment. There is no evidence whatever that Ms Hinde has contributed in any way to the unjustified dismissal. She suffered a legitimate injury as a consequence of an accident and was placed off work by her general practitioner who supported that decision with the appropriate medical certificates provided to the employer.

[11] Ms Hinde's hurt, humiliation and injury to feelings is clear to the Authority. Not only was she dismissed by text message (itself an entirely unreasonable and unjust way of treating an employee), but also she was subjected to further pressure and stress because Mr Chien rang her doctor twice to discuss her health status. That coupled with the allegation that she was a gambler and therefore unreliable, amply justify an award of compensation.

[12] In addition, Ms Hinde claims a contribution to lost wages, which of course is her legal entitlement. First, she is entitled to be paid wages for the period of notice that she would otherwise have been given, had she been fairly dismissed, and second she is entitled to a contribution to the wages that she lost as a consequence of the loss of her position.

[13] Accordingly, Ms Hinde is to be paid the following sums to remedy her personal grievance:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,250.
- (b) One week's wages payable in lieu of notice in the sum of \$490 gross.
- (c) A contribution to lost wages in the sum of \$4,500 gross.

[14] The Authority has calculated the wages lost by Ms Hinde taking into account first that she had no work for two months and then having found alternative work, in the third month after the dismissal, she was working significantly fewer hours although at a slightly higher hourly rate.

Costs

[15] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority