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Hungry Hound Limited v Hayes [2015] NZEmpC 134 (4 August 2015)

Last Updated: 7 August 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 134](#)

EMPC 311/2014

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN HUNGRY HOUND LIMITED Plaintiff

AND SHANI HAYES First Defendant

AND DANICA HAYES Second Defendant

Hearing: 12 June 2015 (heard at Dunedin)

Appearances: B Oliver, representative for the plaintiff

Defendants in person

Judgment: 4 August 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Two sisters, Ms Danica Hayes (Danica), then aged 15, and Ms Shani Hayes (Shani), then aged 16, together with their grandmother, Mrs Lois Hayes (Mrs Hayes), were employed by Hungry Hound Limited (HHL) to work at a café which commenced operations in Tapanui, Southland in early 2013. The Directors of HHL were Mr Brian Oliver and his wife Mrs Diana Oliver. The parties were all well known to each other. All of them except for Mr Oliver had worked together for some considerable time at a local dairy; Mr Oliver operated a local computer

business.

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[2] For the purposes of the proposed business, roster arrangements were agreed. Danica and Shani would work after school and on weekends as junior staff members. Mrs Hayes was offered work as a senior staff member for a minimum of 30 hours per week. They each handed in a notice to quit from at the dairy and commenced work at the café in late May 2013.

[3] Only three weeks later, on 16 June 2013, Mr Oliver considered that there was insufficient demand so that Danica and Shani could no longer be employed by HHL, at least during the week. Mr Oliver informed Mrs Hayes and Danica of his conclusion. Because her grandchildren would not be employed as originally anticipated, Mrs Hayes resigned.

[4] The next day, Mr Oliver was requested to, and did, meet with Danica and Shani. He said that in the circumstances which had now arisen following Mrs Hayes' resignation, he and his wife would have to operate the café themselves, and no work would be available to them after school or during weekends.

[5] The two girls and their grandmother raised a personal grievance, which ultimately resulted in an investigation meeting.

The Employment Relations Authority (the Authority) determined¹ first that Danica and Shani were employed on a permanent part-time basis, and not on a casual basis as had been asserted by HHL. Secondly, because HHL had provided no evidence as to why it concluded that the business was incapable of retaining Danica and Shani as employees, the Authority determined that there was no substantive justification for their redundancy. Further, there had been no advance consultation notwithstanding the requirements of

[s 4\(1A\)\(c\)](#) of the [Employment Relations Act 2000](#) (the Act). The Authority determined that Danica and Shani were unjustifiably dismissed. HHL was ordered to pay Danica \$2,957.50 gross for lost wages, and \$1,500 for humiliation, loss of dignity and injury to feelings; and to pay Shani \$910 for lost wages, and \$1,500 for compensation for humiliation, loss of dignity and injury to feelings. Mrs Hayes' claim of constructive dismissal was dismissed.

[6] HHL brought a challenge de novo to the determination of Danica and Shani's personal grievances.

¹ *Hayes v Hungry Hound Ltd* [2014] NZERA Christchurch 168.

[7] At the hearing of the challenge, the parties were unrepresented. Mr and Mrs Oliver gave evidence for HHL, followed by Danica and Shani as the defendants. Relevant documents were also placed before the Court. Despite not being represented, the case for each party was clearly explained.

[8] From the pleadings and the evidence, it is evident that the key issues are:

a) whether Danica and Shani were employed on a casual basis as HHL

asserts, or as permanent part-timers as they assert;

b) whether they were unjustifiably dismissed; and c) whether they are entitled to remedies.

[9] It emerged in the course of evidence that HHL is insolvent, although it has not been placed in liquidation. The main creditors are Mr and Mrs Oliver. However, in the absence of detailed evidence as to whether, and if so, when HHL traded whilst insolvent, or as to classification of its debts, I express no opinion as to the prospect of enforcement of remedies, if awarded.

[10] Mr Oliver told the Court that the reason the challenge had been raised was because it was believed the Authority had reached incorrect conclusions, and he and his wife wish the record to be corrected. For their part, Danica and Shani are aware of the financial difficulties of the company. However, they say an injustice has occurred; and they consider it is important that they resist the challenge because they believe the Authority's determination in their favour is correct.

First issue: casual employment

[11] Before the café opened, Mr Oliver set about planning for the new operation. Funding would be needed. He and his wife borrowed on mortgage, and advanced the necessary capital to HHL. On the topic of staffing, the plan stated that Mr Oliver and his wife would be in charge of the day-to-day operation of the shop; and that staff of the business would:

... come from workers already employed in the food outlets in the town. There is no problem recruiting quality staff as there is little employment available in the town for females.

[12] Mr Oliver also developed a "work roster", which provided for the assistance of "juniors", from 4.30 pm to 8.30 pm, Monday to Friday, and for 11.30 am to

1.30 pm and 4.30 pm to 8.30 pm on Saturdays and Sundays. "College girls" would

be employed as junior staff.

[13] For her part, when still employed at the dairy, Mrs Oliver discussed the planned operation with Mrs Hayes and her grandchildren, asking them if they were interested in being involved. Initially, however, Danica, Shani and Mrs Hayes thought they would remain employed at the dairy. Subsequently, they reconsidered their options. A meeting occurred at Mrs Hayes' home where the possibility of their retaining work at the dairy was discussed. According to them, Mrs Oliver stated that they would be paid \$14 per hour, and that the hours of employment would be from after school to 8.00 pm each weekday and on weekends, but that she would have to check these details with Mr Oliver.

[14] For her part, Mrs Oliver said that she advised the hourly rate would be "about

\$14" and also emphasised that Danica and Shani would need to be flexible as to hours. She then discussed the matter with Mr Oliver who said that they would need to resign from their current jobs at the dairy in order to undertake this work. Mr Oliver did not want to be seen to be luring staff from the dairy as he wished to maintain good relations with its owner who was a near neighbour.

[15] I find that soon after, Mrs Oliver told Shani by telephone that she had discussed the position with Mr Oliver, and that they could be employed as had previously been indicated, but it was for them to decide what the apportionment of after-school and weekend hours would be as between her and her sister. No further mention was made as to the hourly rate which would be paid.

[16] Danica and Shani, along with their mother, Ms Selena Hayes, and Mrs Hayes met with Mrs Oliver. There was some discussion at the hearing as to whether Selena Hayes in fact attended such a meeting, but on the basis of Danica and Shani's evidence I am satisfied that she did. As their mother, she naturally wanted to ensure that appropriate arrangements were in place before they resigned their long-held positions at the dairy.

[17] At the meeting, Mrs Oliver was advised that Danica would work from

3.30 pm until 8.00 pm on Mondays, Tuesdays and alternate Fridays, and on Sundays from 11.30 am to 3.30 pm; and that until another employee returned from Canada, she would also work on Saturdays. Shani would work from 3.30 pm until 8.00 pm on Wednesdays, Thursdays and on those alternate Fridays not worked by Danica, and on Sunday afternoons from 3.30 pm to 8.00 pm. They understood the rate of pay would be \$14 per hour. How holiday entitlements would be paid was not discussed.

[18] To this point there had been no mention of the possibility that they would be employed as casual employees. They understood that they would need to resign from their permanent part-time positions at the dairy so that they would be available to work on an ongoing basis at the café. There was discussion as to the date when the café would open and when their services would be required. They needed to know this date for the purposes of giving appropriate notice to the dairy owner. I find that it was at this meeting that their employment arrangements were agreed. They resigned accordingly, although there was a short delay in the commencement of the café operation.

[19] Danica and Shani were employed, initially, according to the hours which had been agreed with Mrs Oliver. Although Mr Oliver had prepared a roster indicating that the commencement of their after-school duties would be at 4.30 pm, they began work at 3.30 pm each day. As to their wages, Mr Oliver arranged for payment by direct credit to their bank accounts at the rate of \$13.75 per hour, plus holiday pay which was paid at \$1.10 per hour on a "pay as you go" basis. Although some payslips were produced at the hearing, I find that these were not provided to Danica and Shani at the time. Consequently they did not initially realise they were being paid on this basis.

[20] After Danica and Shani had been employed for about five days, they were each provided with a copy of a draft individual employment agreement (IEA) which

Mr Oliver had prepared, using material from what he described as "the Department of Labour website" for guidance.² At that stage they realised they were not being paid \$14 per hour as they had expected since the draft IEAs referred to an hourly rate of \$13.75 and holiday pay of \$1.10. Danica and Shani also noticed that the draft employment agreement stated that the nature of the employment relationship was described as casual.

[21] Surprised by these provisions, a meeting was conducted to discuss the proposed IEAs. They made it clear that they were very unhappy with the draft terms, and that they would not sign the agreements in that form. Mr Oliver was adamant that the payment arrangements would not be changed. Mr Oliver said, however, that he would consider further the issue of whether the relationship should be described as casual.

[22] Thereafter, Danica and Shani continued to work the hours which had previously been discussed, although on some days they were asked to leave early because there were insufficient customers attending the café; on those occasions they were not paid for hours which they did not work. However, there was never any suggestion that they would not continue to work each day according to the roster arrangements which had been agreed.

[23] Matters continued on this basis until Sunday, 16 June 2013. As indicated earlier, by that time Mr Oliver had decided there was insufficient demand to justify continuing to employ Danica and Shani. In the course of their attendance at the café that day, Mr Oliver told Danica and Mrs Hayes that this was the position; Danica was understandably very upset and left. There was some dispute as to whether Mr Oliver said that they would no longer be required on weekdays only. In any event, Mrs Hayes resigned in response to this development.

[24] At a meeting requested by Shani which was held the next day, Mr Oliver stated that because of Mrs Hayes' resignation, he and his wife would now operate the café and there would be no work available for Danica and Shani at all. At that

meeting, after explaining his reasoning, he suggested that if they could find alternative work elsewhere then they should take it.

Discussion – first issue

[25] In *Jinkinson v Oceania Gold (NZ) Limited*, Judge Couch carried out a comprehensive analysis of the case law relating to casual employment. He concluded:³

[40] Against this background, it is also important to understand what is meant by the terms “casual” and “ongoing” or “permanent”. Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[26] Later, after reviewing overseas decisions, Judge Couch observed:

[52] The common theme of these cases is that, where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[27] I agree that these are the applicable principles. In assessing the nature of the relationship in the present case, I find:

a) HHL, through Mr Oliver, required Danica and Shani to give notice to their current employer before they commenced work for the company. Both of them had worked for the dairy for lengthy periods as permanent part-time staff, and it was obvious that they wanted continued

permanent employment. They were led to believe they would have permanent roles at the café.

b) Mrs Oliver negotiated the employment arrangements, after consulting with Mr Oliver. At no time was the possibility of a casual arrangement referred to before Danica and Shani gave notice to the dairy owner and commenced work. Mrs Oliver referred to the possibility that there may need to be some flexibility in hours, but that did not amount to an indication that Danica and Shani would work from time to time only, or on an intermittent basis, or on an as-required basis, or that there could be no legitimate expectation of work.

c) The draft IEAs, presented to Danica and Shani after they had commenced employment, contained provisions which had not been discussed with them previously. As already mentioned, the first related to the fact that the employment relationship would be of a casual nature; the second was the amount of the hourly rate; and the third was that holiday pay entitlements would be paid on a “pay as you go”

basis.⁴ I have found that Mr Oliver said he would consider the issue of

the nature of the relationship further. However, he did not revert on this topic to Danica and Shani prior to 16 June 2013, so there was no consensus between the parties that there would be a casual agreement.

d) I also observe that although the draft IEA was described as a “casual individual employment agreement (intermittent)”, the language adopted by Mr Oliver in the relevant clause did not state that there was no guarantee of any hours of work and did not clearly refer to an arrangement which could in fact be described as casual. Although the clause stated that work would be “as required”, it also stipulated that the employees would take “reasonable steps to be available for work during 3.30 pm to 8.00 pm weekdays and 9.00 am to 8.00 pm weekends

or as agreed to”. It further stated that the duration of the casual

⁴ Presumably so as to comply with [s 28](#) of the [Holidays Act 2003](#), however, because Danica and Shani had not agreed to this in an employment agreement, there was not compliance with that section.

agreement was until such time as terminated by either party pursuant to the termination clause in the agreement; there was no provision in the agreement for either party to terminate the agreement, except where there was serious misconduct, extended absence through illness or abandonment of employment. The last two possibilities suggested permanency of employment.

e) The reality of the employment arrangements was that Mr Oliver, when planning the establishment of the café, intended that there would be a roster; Danica and Shani were each offered regular employment on the basis they would work according to a regular work arrangement as shown on the roster. They had a legitimate expectation in all the circumstances that one or other of them would be employed each day after school and on Sundays; and that some work was also available in the meantime on Saturdays.

f) I find that they would not have resigned from their previous position, which also offered regular hours, unless there was an understanding for ongoing and not intermittent work.

[28] In summary, I find that the parties agreed to continuity of employment on a regular basis so that it is not appropriate to describe the employment arrangements in the present case as casual.

Second issue: unjustified dismissal?

[29] Section 103A of the Act requires the Court to consider whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[30] In a redundancy situation, this requires a consideration of both substantive and procedural factors.

[31] The Court of Appeal discussed these requirements in *Grace Team Accounting*

Limited v Brake.⁵ In its judgment the Court stated:⁶

If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of [s 4](#) of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subject of findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or now, could) have done in the circumstances.

[32] [Section 4\(1A\)](#), to which the Court of Appeal referred, relevantly states:

(1A) The duty of good faith ...

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the

employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[33] I must consider whether HHL can show that the redundancy decision was genuine, and whether there was compliance with its notice and consultation obligations.

[34] Contrary to the position in the Authority, financial information was provided to the Court as to HHL's position. The budgeted surplus of over \$2,000 per week

was never achieved; in fact for each week of its operations up to the date when

⁵ *Grace Team Accounting Ltd v Brake* [\[2014\] NZCA 541](#), [2014] 2 ERNZ 129.

⁶ At [85].

Mr Oliver decided to lay off staff, there were losses of between \$500 and \$8,900. It was explained that these unanticipated results were due to the fact that Mr and Mrs Oliver had significantly over-estimated the number of customers which the café would attract. I conclude from this material that as at mid-June 2013, a fair and reasonable employer could have concluded that the business was not financially viable, so that there was an issue as to the continued employment of Danica and Shani which required giving notice to them and proper consultation. That would include discussion as to possible options before any decisions were made by HHL.

[35] Such consultation did not happen. Mr Oliver made a decision and then communicated it to Danica and Mrs Hayes only. Although he may have intended the reduction of hours would apply only to weekdays, his decision was presented in such a way that Danica believed that a substantial component of the work which she had agreed to undertake would no longer be available to her. She also believed – correctly – that she was being presented with a *fait accompli*. Not only was there non-compliance with the obligations of [s 4\(1A\)\(c\)](#), but the way in which Mr Oliver presented his decision led to confusion and distress. It also caused a chain-reaction by Mrs Hayes deciding to resign.

[36] Mr Oliver then made a further decision after Mrs Hayes' resignation, indicating when he met with Danica and Shani on

the following day that no work at all would be available. Again, there was non-compliance with the obligations of [s 4\(1A\)\(c\)](#); and again Danica and Shani were presented with a *fait accompli*.

[37] The result is that there were significant breaches of the statutory obligation of good faith; the steps taken were not those which a fair and reasonable employer could have taken in the circumstances.

[38] The effect of the decision was to end the employment relationship which had been agreed between the parties. Danica and Shani were sent away, thereby bringing their employment to an end. Their dismissal was unjustified and their personal grievances are established.

Third issue: remedies

[39] Turning to the issue of appropriate remedies for the personal grievances, I deal first with the issue of lost remuneration. Section 128(2) of the Act provides that if an employee has lost remuneration as a result of a personal grievance there must be an order that the employer pay to the employee the lesser of a sum equivalent to that lost remuneration or to three months' ordinary time remuneration.

[40] Danica was not able to obtain after-school work in Tapanui within the period of three months following her dismissal. I am satisfied that she took reasonable steps to mitigate her loss, and it is unsurprising that it did not prove possible to obtain work in a small rural community. There was some evidence that Danica was later offered some work at HHL, but I find the offer was unspecific. No firm offer was made so that no arrangement could be entered into. Nor is there evidence that the relevant discussion occurred within the three-month period which followed her dismissal.

[41] The parties' evidence was that, on average (allowing for the alternating Friday arrangements between Danica and Shani), Danica would work 20.25 hours per week,⁷ and Shani would work 15.75 hours per week.⁸ It is appropriate to rely on this evidence to assess lost remuneration. The rate paid was \$13.75 per hour. Holiday pay was paid at \$1.10 per hour. Since Danica obtained no work within the three-month period, she is entitled to three months lost remuneration in the sum of \$3,608.55. As Shani obtained employment after four weeks, I award her lost remuneration in the sum of \$935.55.

[42] As to compensation for hurt, humiliation and injury to feelings, I agree with the assessment made by the Authority, and award \$1,500 each to Danica and Shani.

Conclusion

7. See [17] of this judgment. I have allowed five hours for Saturday, having regard to the time record contained in Appendix 10 which recorded Danica working for five hours on Saturday 1

June 2013.

- 8 See [17] of this judgment.

[43] In summary, I am satisfied that Danica and Shani were employed on a permanent part-time basis. I find that the steps taken to effect their dismissal were not actions which a fair and reasonable employer could have taken, so their personal grievances are established. As to remedies HHL should pay to:

- a. Danica: the sum of \$3,909.26 gross as lost remuneration, and \$1,500 for hurt, humiliation, loss of dignity and injury to feelings.
- b. Shani: the sum of \$935.55 gross as lost remuneration, and \$1,500 for hurt, humiliation, loss of dignity and injury to feelings.

[44] Because my decision differs from the Authority's determination as to remedies, this judgment replaces that determination.

Costs

[45] Danica and Shani are entitled to reimbursement of professional costs and disbursements in relation to the challenge, if they have incurred such expenditure. Whilst they were not represented at the hearing of the challenge, they may have incurred costs following the issuing of the Authority's determination and/or after the filing and service of HHL's challenge. If so, they may apply for an order for costs within 21 days of the date of this decision. That application should be supported by any relevant evidence as to costs. HHL may respond to any such application 21 days thereafter. HHL's response may be supported by evidence if need be.

Judgment signed at 10.10 am on 4 August 2015

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