

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 70
5453068

BETWEEN SARAH HUNTER
Applicant
AND MOT HOT ROASTS LIMITED
Respondent

Member of Authority: Christine Hickey
Representatives: Luke Acland, Counsel for the Applicant
Shane Holtham, Advocate for the Respondent
Investigation Meeting: 27 May 2015 at Nelson
Submissions Received: At the investigation meeting
Determination: 29 May 2015

DETERMINATION OF THE AUTHORITY

- A. Sarah Hunter was unjustifiably dismissed.**
- B. Mot Hot Roasts Limited must pay Sarah Hunter:**
- (i) \$1,105.35 gross unpaid wages and notice period; and**
 - (ii) \$5,000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Costs are reserved**

Employment relationship problem

[1] Sarah Hunter was employed in August 2013 on a permanent full-time basis as a chef and waiter at the respondent's roast dinner restaurant and delivery business. She worked at least 40 hours per week and was initially paid \$15 per hour. Ms Hunter did not have a written employment agreement.

[2] Ms Hunter says that on 10 November 2013, her manager and a partner in the business, Anthony Hendon, presented her with an employment agreement which reduced the number of working hours per week to 37 but increased her pay to \$18 per hour. Ms Hunter signed this employment agreement. She has not been given a copy of the agreement. This may be because the respondent did not sign the agreement.

[3] On 27 November 2013, Ms Hunter went to work where the respondent's director, Shane Holtham, told her that she was no longer required to work and her employment was terminated immediately.

[4] Ms Hunter says that she was unjustifiably, summarily dismissed. She says that despite Mr Holtham telling her that the work had dried up so she was no longer required, the redundancy was not genuine because he later commented that he ended her employment because of poor work performance. Ms Hunter also says that no fair process was followed.

[5] Ms Hunter claims that she should have been paid two weeks' notice period but was only paid one week's notice. Ms Hunter says that the agreement that she signed on 10 November 2013 contained a requirement that she should be paid for a two week notice period. Ms Hunter also says that she was short-paid for the weeks after 10 November before she was dismissed and for the week's notice.

[6] Ms Hunter also claims that she should be paid compensation for humiliation, loss of dignity and injury to her feelings.

The respondent's view

[7] Mr Holtham says that there was no written employment agreement and that when Mr Hendon provided him with one to sign for Ms Hunter, approximately two weeks before the date on which she was dismissed, he refused to sign it. He says that was because he already had some problems with her work at that point.

[8] Mr Holtham says there would not have been a two week notice provision in any agreement and disputes that Ms Hunter signed one. He provided a copy of the standard employment agreement used by the respondent which instead shows one week's notice.

[9] Mr Holtham agrees that he dismissed Ms Hunter on 27 November 2013. He said that he did this in agreement with Mr Hendon and while he told her it was because the work was drying up, which was correct, he also dismissed her because he was dissatisfied with her work.

[10] Mr Holtham says Ms Hunter was only working about 24 hours a week in the weeks before she was dismissed and so should only have been paid for those hours and was paid for 24 hours only in the one week's notice pay she was entitled to.

[11] Mr Holtham agrees that he made a statement on his Facebook page, which he later removed, which was negative about Ms Hunter. However, he also says that he did not name her and the Facebook post was removed the same day that he put it up. He says they did not have Facebook friends in common and so not many people knowing Ms Hunter would have seen the post. He apologised profusely at the investigation meeting and said that he regretted posting the comments on Facebook.

The issues

[12] The issues that need to be determined are:

- whether Ms Hunter was unjustifiably dismissed,
- whether she is owed wages and a week's notice, and, if so, how much,
- whether she should be paid compensation, and, if so, how much.

Determination

[13] Section 103A of the Employment Relations Act (the Act) sets out the requirements in determining whether a disadvantage or dismissal are justified:

(1) For the purposes of section 102(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's action, 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.

[14] In applying that test I need to consider:

- whether, having regard to the resources available to the respondent, it sufficiently investigated its allegations against Ms Hunter before dismissing or taking action against her; and
- whether the respondent raised its concerns with Ms Hunter before dismissing her; and
- whether the respondent gave Ms Hunter a reasonable opportunity to respond to its concerns before dismissing her; and
- whether the respondent genuinely considered Ms Hunter's explanation in relation to the allegations against her before dismissing her; and
- any other factors I think appropriate.

[15] In addition, I must not determine a dismissal to be unjustifiable solely because of defects in the process followed by the respondent if the defects were minor and did not result in Ms Hunter being treated unfairly.

[16] There is no dispute that there was no process as required under the s.103A(3) of the Act when Ms Hunter was summarily dismissed on 27 November 2013. This was clearly an unjustified dismissal and not an action that a fair and reasonable employer could have undertaken in all the circumstances.

Remedies

[17] Ms Hunter no longer seeks reimbursement of wages that she lost as a result of her personal grievance, although her evidence is that she was not able to obtain work for two months after her dismissal.

[18] Mr Holtham's evidence was that in the weeks before Ms Hunter was dismissed, she was only working 24 hours a week. In fact, Ms Hunter's payslips leading up to her dismissal showed that she worked 26 hours in the period ending 12 November 2013, 27 hours in the period ending 19 November 2013 and 16.5 hours in the period ending 26 November 2013. Mr Holtham says that she has been paid all that she was entitled to be paid because she did not work 37 hours per week.

[19] In contrast, Mr Acland submits that because Ms Hunter had an agreement with the respondent to work a minimum of 37 hours per week, she should be paid for those hours even if she did not work them, as the agreement she would work 37 hours a week was not varied with her agreement.

[20] Mr Holtham disputed that Ms Hunter had ever been presented with a written agreement for 37 hours per week. However, had she not, then I would be bound to find that her agreement with the respondent was to work 40 hours per week. There is no dispute that when she was initially employed she was a full time employee and worked 40 or more hours a week.

[21] Ms Hunter does not deny that in the few weeks before her dismissal her hours of work were below 37 hours per week. However, because the respondent did not enter into a new agreement with Ms Hunter whereby she agreed to reduce her hours to 24 hours per week minimum, the respondent is bound to pay Ms Hunter for the 37 hours per week which was the minimum that it had agreed to pay her.

[22] Therefore, the following amounts are to be paid:

- (a) For the period ending 12 November 2013, Ms Hunter must be paid \$232.58 gross;
- (b) For the period ending 19 November, Ms Hunter must be paid \$215.91 gross;
- (c) For the period ending 26 November 2013, Ms Hunter must be paid \$390.94 gross.

[23] Ms Hunter was paid for the period ending 3 December 2013 for 24 hours. Both parties understand that to have been her notice period which Mr Holtham says was for a one-week period only.

[24] Ms Hunter specifically remembers the notice period in the employment agreement that she signed being two weeks. In any event, Ms Hunter should have been paid for 37 hours rather than the 24 hours she had been paid in the one week's notice pay she did get. Therefore, Ms Hunter is owed a further \$265.92 gross for that week of notice.

[25] While I accept Ms Hunter's evidence that she was presented with an employment agreement for 37 hours minimum at \$18 per hour, in the absence of a copy of that agreement I find that it is not sufficiently proved that Ms Hunter is owed a second week of paid notice.

Compensation

[26] Section 123(1)(c)(i) of the Act provides that the Authority may grant compensation to a successful personal grievance applicant for humiliation, loss of dignity and injury to feelings caused by the personal grievance.

[27] Ms Hunter says that she was very stressed and shocked at being dismissed. She also says that once she consulted a lawyer who wrote to the respondent, Mr Holtham made his post on Facebook. She first knew about it because her then partner's workmate texted her partner to say that Mr Holtham had been writing some stuff about her on Facebook. At that stage, she and Mr Holtham were Facebook friends. Before she read his post she also saw a private message on Facebook from a relative of her partner saying that she had read it and that Ms Hunter should go and read what had been written about her.

[28] In his post on Facebook, Mr Holtham, amongst other things, called Ms Hunter a *money hungry bitch*. He also said *some bitches are just greedy* and said that she was *going to bleed us dry*. The post also said that Mr Holtham would let the rest of Motueka's cafés and restaurants know about her and to watch out for her.

[29] Ms Hunter said that she was very upset when she read the message which was horrible to read. She felt that everyone in Motueka would know that it was her that the post was about, despite her not being named, because she was the only female employee who worked during the day. She felt that she was being attacked by Mr Holtham and that it was intimidating.

[30] Ms Hunter was entitled to seek legal advice about her dismissal and was entitled to make a request through her legal representative that she be paid in the way that she understood she was entitled to be. Mr Holtham admitted that he was angry when he posted what he did on Facebook. It was an unnecessary attack and I accept Ms Hunter's evidence that other people in Motueka would have been able to work out who was being talked about. However, I also accept Mr Holtham's evidence that he later regretted what he had done and took down the post on the same day and certainly did not tell other café and restaurant owners in Motueka about his dispute with Ms Hunter or that they should watch out for her.

[31] I consider in all the circumstances that an award of \$5,000 is warranted to compensate Ms Hunter for the unjustified dismissal and the aggravating effects of the Facebook post on her.

[32] I am also required to consider whether Ms Hunter's behaviour contributed in any blameworthy way to the situation leading to her personal grievance. If so, I am required to reduce the remedies that she should receive. However, despite Mr Holtham's evidence about dissatisfaction with Ms Hunter's work and attitude, the complete lack of a process of investigation and explanation means that there is no evidence at all that Ms Hunter was in any way to blame for the situation leading to her personal grievance. She did not contribute to that situation. There is no reduction in remedies.

Costs

[33] Costs are reserved. Ms Hunter is legally aided. Any question of costs is subject to the requirements of sections 45 and 46 of the Legal Services Act 2011.

[34] If a determination of the Authority is nevertheless required on costs, Mr Acland may lodge a memorandum within 28 days of the date of this determination and Mr Holtham would then have 14 days from the date of service to lodge a memorandum in reply. No submission on costs will be considered outside this timetable, unless prior leave has been sought. Unless appropriate to vary the Authority's usual practice because of legal aid requirements or other particular circumstances of the case, I am likely to determine costs on the basis of the usual daily tariff of \$3,500 for a full day. The investigation meeting lasted $\frac{3}{4}$ of an hour.

Christine Hickey
Member of the Employment Relations Authority