

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 147
5552064

BETWEEN CHRISTINA JEMMETT
Applicant
A N D ROBIN SAUNDERS
Respondent

Member of Authority: James Crichton
Representatives: Steve Richardson, Advocate for the Applicant
Respondent in person
Investigation Meeting: 21 and 23 September 2015 at Christchurch
Date of Determination: 8 October 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Jemmett) alleges that she was unjustifiably dismissed from her employment on 27 December 2014. No statement in reply was filed in the Authority to respond to Ms Jemmett's allegation and it was not until I was able to interview Mr Saunders on 23 September 2015 that his position in the matter could be established.

[2] Ms Jemmett commenced employment with Mr Saunders in the latter's takeaway bar in Waikari. Ms Jemmett was a permanent part time employee, was paid \$15 an hour and generally worked Wednesday to Friday starting at 5pm and finishing as required sometime between 8pm and 9pm. In addition, Ms Jemmett also worked Saturdays and Sundays as required, typically between 2pm and 9pm.

[3] By common consent, there were no issues in the employment until December 2014. Mr Saunders was very clear that Ms Jemmett was "*one of his best workers*".

[4] On 12 December 2014, there was an altercation between Ms Jemmett and Mr Saunders about Ms Jemmett having her iPad out and open in the workplace. It

seems agreed between the parties that Mr Saunders remonstrated with Ms Jemmett for bringing the iPad to the workplace and his objection, so far as I could discern it, was not so much that Ms Jemmett was more interested in the iPad than she was in working but rather that he thought Ms Jemmett might use the iPad for some improper purpose like photographing his recipes. Mr Saunders told me that he "*felt threatened by the iPad*" although my questioning of him did not establish to my satisfaction why he should feel threatened, particularly as Ms Jemmett's evidence was very clear that the iPad was not switched on at the time.

[5] Because of that difference of opinion, Ms Jemmett told me that she "*felt very uncomfortable about being in [Mr Saunders'] presence*" after that exchange and so she rang in the next day saying that she was not proposing to come to work on Saturday, 13 December 2014. She says that Mr Saunders said to her that if she was not going to come to work on Saturday, she should not bother coming in on the Sunday either.

[6] Ms Jemmett took that statement from Mr Saunders to mean that she had been dismissed and so she did not attend at work on the Sunday either but she says she got a text message from Mr Saunders at about 5.15pm that day asking why she was not at work to which she replied that Mr Saunders had told her not to come in.

[7] When I discussed this matter with Mr Saunders, he was very clear that his reason for suggesting that Ms Jemmett not come on the Sunday if she was determined not to come in on the Saturday was that it was easier for him to get one of his casual staff to do two days at the weekend rather than one, but he agrees that he did not make this clear to Ms Jemmett. He seemed genuinely puzzled that she should think he had dismissed her, but he agreed that he probably did send her a text message on the Sunday at around 5.15pm asking where she was because by then he would have forgotten what he had said to her earlier. Mr Saunders told me that he had not kept good health and had had several strokes as a consequence of which his short term memory was compromised.

[8] In any event, because Ms Jemmett thought she had been dismissed, she did not attend at the workplace on Wednesday, 17 December either (which after the previous weekend would have been her next day of work) and the day following that (Thursday, 18 December) Ms Jemmett sent Mr Saunders another text message inviting him to confirm if she had been dismissed. Mr Saunders responded

immediately to say that she had not been dismissed and with the employment relationship now apparently back on foot, Ms Jemmett asked for a written employment agreement which Mr Saunders agreed to. Notwithstanding that agreement, no employment agreement was ever provided.

[9] Mr Saunders did tell me when I interviewed him that employment agreements for staff were coming but it is common ground that Ms Jemmett was never provided with one.

[10] When Ms Jemmett reported for work again on Thursday, 18 December having established that she had not been dismissed and was still required, she was presented with a payslip on the back of which was a list of matters Mr Saunders alleged Ms Jemmett had done incorrectly, with some explanation beside each one.

[11] For instance, the first of those items reading across the page contains the following legend:

Away without leave written warning Saturday 13 December.

[12] In all, the payslip purported to record a total of five written warnings.

[13] Ms Jemmett continued to work her normal span of hours and she says that on Christmas Eve, a Wednesday that year, she discussed with Mr Saunders whether she would be available to work on the following Friday, Boxing Day. Ms Jemmett's evidence is that she indicated to Mr Saunders in that conversation that she might not be able to work on Boxing Day because her family might be coming out to have Christmas with her (they not being able to come out on Christmas Day itself).

[14] Mr Saunders' evidence is different; he says that Ms Jemmett and he had been discussing the requirements for Boxing Day for some weeks, that there had been several discussions between them and that he thought the only issue was whether she needed to have the morning of Boxing Day off, he understanding that she was always going to be available from around 1pm onwards.

[15] In the result, Ms Jemmett was not available on Boxing Day at all and she sent a text message to Mr Saunders at around 7am as soon as she knew that she could not work. There was no reply to that text message according to Ms Jemmett and so she rang Mr Saunders several times, starting around 9am and again got no response.

[16] Mr Saunders told me that she should have rung him on the landline in the shop rather than send him text and phone messages to his cellphone but he does not deny that he may well have received Ms Jemmett's messages.

[17] When Ms Jemmett returned to work the following day, Saturday, 27 December 2014, a normal working day for her, she says that Mr Saunders fired her on the spot. Although not apparent at the time (according to Ms Jemmett), she subsequently discovered that Mr Saunders had dismissed her because she had committed to working on Boxing Day and failed to attend work.

[18] Again, Mr Saunders does not entirely accept that account of matters. He says that Ms Jemmett attended work around her start time of 2pm on Saturday, 27 December 2014 and that rather than get ready for work, she effectively stood over him while he was serving a customer and demanded to know (he says by asking him three times) if she had been fired.

[19] Mr Saunders remembers some brief discussion where he emphasised the importance of staff relying on each other but also says that because he was busy dealing with a customer, he said something to the effect that he could not deal with the matter now but she kept insisting that he tell her if she had been fired.

[20] On Mr Saunders' evidence, he felt badgered by Ms Jemmett and the sense I got from him was that he agreed with her that she had been dismissed, in order to get rid of her so that he could carry on looking after his customer. He says that his attitude and approach may have been different if Ms Jemmett had got ready for work and started working.

[21] Mr Saunders thought Ms Jemmett's behaviour was rude and he said that he expected her to wait until he was less busy and then they could talk the matter through.

[22] In addition, two further supplementary claims are made by Ms Jemmett. The first is an allegation that Mr Saunders made racist comments directed at Ms Jemmett (she is of Maori descent) and the second is that Mr Saunders had not accounted to the Inland Revenue Department for the PAYE that was deducted from her wages.

[23] Dealing with the racist allegation first, Mr Saunders seemed genuinely distressed by that suggestion and denies making any such observations. The evidence

for the contention is frankly equivocal and I decline to take that matter any further. I spoke to a Ms Ginders who is a former employee of Mr Saunders and whose name was given to me by Ms Jemmett. Ms Ginders was unable to help me with any of the specific matters that I asked her about although it was apparent that she had a rather jaundiced view of Mr Saunders as an employer and because of that fact, I must treat her evidence rather cautiously.

[24] As far as the IRD issues are concerned, Mr Saunders' evidence was that he had had difficulties with the Inland Revenue Department because of the failure of an earlier business, but that he had been trying to get up to date and thought that he had paid most of the tax that was owed.

[25] Mr Saunders readily gave me the name of his accountant who I subsequently interviewed and she was very straightforward that according to her records, all of Ms Jemmett's tax entitlements had been lodged with the Inland Revenue Department but that because Ms Jemmett had never provided her IRD number, the Revenue were unable to assign the PAYE tax to a particular taxpayer. Moreover, it was apparent in my conversation with the accountant that Ms Jemmett's surname was incorrectly spelt which would not have helped either.

[26] Accordingly, I arranged through Ms Jemmett's able advocate for her IRD number to be provided to my Authority officer and he has subsequently provided Ms Jemmett's IRD number to the accountant such that I fancy if Ms Jemmett were to contact the Inland Revenue Department now and inquire as to its records of her employment with Mr Saunders, she would obtain a different response to the one that she obtained prior to these proceedings being on foot.

[27] A final matter that I allude to is the inadequacy of the employer's records generally. I have already noted that Ms Jemmett asked for a written employment agreement. She is of course entitled to that as of right and it is not a negotiable add-on but rather a requirement of New Zealand law. Moreover, every employer must maintain adequate records of the wage, time and holiday leave pertaining to each employee. There are records of sorts provided by Mr Saunders to Ms Jemmett through Ms Jemmett's advocate, but they are by no means complete and therefore are not compliant with the minimum code legislation.

Issues

[28] The Authority needs to deal with the following questions:

- (a) Was Ms Jemmett unjustifiably dismissed;
- (b) Did she contribute in any way to that dismissal;
- (c) Has PAYE been attended to;
- (d) Is the employer compliant with the minimum employment code?

Was Ms Jemmett unjustifiably dismissed?

[29] I have no hesitation in concluding that Ms Jemmett was unjustifiably dismissed. One of the best formulations of the test for a dismissal is whether the evidence discloses that the employee was “*sent away*” by the employer and here, while there must be some doubt about whether the events of mid-December constitute a sending away, there can be no doubt at all that the events of 27 December 2014 were a sending away of Ms Jemmett by Mr Saunders.

[30] Here we have an employer who, no matter how provoked, by his own admission after being asked three times if Ms Jemmett was fired confirmed that she was indeed dismissed from her employment.

[31] I do not think that there can be any other reasonable construction of the facts. Looked at dispassionately, any reasonable observer would have no hesitation in concluding that what Mr Saunders did was to effect a dismissal of Ms Jemmett even although I incline to the view that that probably was not his intention. Even with my charitable inclination, it is difficult to see how anybody receiving a message that they had in fact been dismissed could get any other message than the simple one that their employment was now at an end.

[32] It matters not at all that there was some disputation about whether Ms Jemmett would or could work on Boxing Day; even if there were factual agreements between the two principal protagonists (and there is not), the fact remains that Ms Jemmett was given no opportunity whatever to engage with the employer, to provide explanation or to deal with the matter in any measured way. In effect, Mr Saunders dismissed

Ms Jemmett in order that he could concentrate on serving his client, or at least that is the thrust of his evidence.

[33] Accordingly, I conclude that a good and fair employer could not reach a conclusion that dismissal was one of the options available in the particular circumstances of this case: s.103A of the Employment Relations Act 2000 (the Act) applied.

[34] It follows that Ms Jemmett has a personal grievance for unjustified dismissal.

Has Ms Jemmett contributed to the circumstances giving rise to her personal grievance?

[35] I am satisfied that Ms Jemmett has contributed to the circumstances giving rise to her personal grievance. It seems to me on the evidence I heard that she effectively badgered the employer, turning up in the workplace apparently not dressed and ready for work but rather determined to, as it were, have it out with Mr Saunders about just exactly what her status was. I reach the conclusion I do because I prefer Mr Saunders' recollection of these events to that of Ms Jemmett.

[36] However, I have to accept that given the difficulties Ms Jemmett had had in engaging with Mr Saunders, difficulties which I think can be attributed to his significant ill health, it is understandable that she would want to get her position clear.

[37] This is particularly so given the sequence of events which I have already related. First there was the incident involving the iPad which resulted in Ms Jemmett not attending at the workplace on 13 December 2014 and Mr Saunders' response to that being that if she was not going to attend on 13 December, then she may as well not attend on 14 December either. As I have already noted, I accept Mr Saunders' explanation of this that he could more easily get a relieving staff member in to do a Saturday and a Sunday than just one of those days but it is apparent on the evidence that he did not make that clear to Ms Jemmett.

[38] Accordingly, she thought that she had been dismissed then and on that basis, having not worked the weekend of 13 and 14 December, did not turn up for work on Wednesday, 17 December 2014 either.

[39] When she sought to establish whether she was in fact fired or not on Thursday, 18 December 2014, and she asked Mr Saunders what the position was, he told her that of course she was not dismissed so she accordingly returned to work.

[40] But in returning to work she was then confronted with the succession of so-called warnings on the back of a payslip. But none of those warnings can have any force or effect; Ms Jemmett did not know about them, they were never discussed with her, and she was never asked for any explanation before the warnings were administered.

[41] While it seems that Ms Jemmett simply proceeded to work notwithstanding the discomfoting nature of this bundle of warnings that she had never heard about before, it must have at the very least unsettled her.

[42] So in coming to the workplace on 27 December 2014 and seeking to establish from Mr Saunders whether or not she was dismissed, (Mr Saunders' evidence), while her behaviour is understandable in a human sense, in a legal sense it is difficult to avoid the conclusion that by her assertive behaviour in seeking to get an answer from Mr Saunders while he was busy, Ms Jemmett did contribute to Mr Saunders' eventual response that she was dismissed from her employment.

[43] Reaching that conclusion, I rely on the evidence of Mr Saunders who was very clear about Ms Jemmett's behaviour on the day in question and given the history of the employment relationship, especially the recent history, I think it more likely than not that Ms Jemmett did in fact behave in the way that Mr Saunders maintained that she did.

[44] Were there no context I should probably consider that the contribution was 50% but of course there was a context. Mr Saunders' communication with Ms Jemmett had been flawed from 12 December onwards and accordingly I reduce the level of contribution from 50% to 25% which I think fairly reflects Ms Jemmett's contribution, reduced somewhat because of the communication challenges caused by Mr Saunders.

What about PAYE?

[45] I think that the PAYE position of Ms Jemmett ought to be resolved as a consequence of my discussion with the accountant and the subsequent request for the provision of Ms Jemmett's IRD number.

[46] If that is not the position and if there is still a deficit in that regard, then leave is reserved for Ms Jemmett to revert to me for further orders.

What about minimum code issues?

[47] Here I refer to the failure to provide an employment agreement and the failure to provide accurate wage, time and holiday records in respect of Ms Jemmett's employment with Mr Saunders.

[48] Ms Jemmett asked for a written employment agreement and Mr Saunders does not dispute that. But one was not provided. Templates for employment agreements are readily available including on the Ministry of Business, Innovation and Employment's website.

[49] Moreover, the evidence of just what Ms Jemmett earned and when is at best equivocal because the records are either incomplete or inadequate. I understand there are challenges in running small businesses and profit margins are narrow but the law requires a basic minimum level of compliance in order that the parties themselves or, dispassionate third parties such as the Employment Relations Authority or a Labour Inspector, can discern the actual position for themselves. As things stand, what Ms Jemmett earned and even when she earned it is not necessarily clear.

[50] That said, I have not been persuaded this is a case where I ought to impose a penalty. I consider that the compensation that Ms Jemmett is entitled to and the lost wages (calculated as best her advocate can) to which she is entitled, because of her lost job, will be challenging enough for this small employer and accordingly I decline to award any penalty.

Determination

[51] Ms Jemmett seeks compensation under s.123(1)(c)(i) of the Act, lost wages at the rate of \$312 gross per week and an award of costs. She has been dismissed from her employment (a dismissal acknowledged in his evidence by Mr Saunders) and I

have found that dismissal unjustified at law. She therefore has a personal grievance for unjustified dismissal and is entitled to remedies. I note that she has not found alternative employment since the unjustified dismissal and accordingly the law is that she is entitled to have Mr Saunders make some contribution to the wages she would have earned, but for the dismissal.

[52] I have given earnest consideration to this question because while I consider that Ms Jemmett has suffered a clear wrong, I am equally troubled by the ability of the employer to pay anything other than the most modest award. This is because the employer operates a very small business in a very small town and was very frank about his compromised health.

[53] In the end, it cannot be right and just for Ms Jemmett to be denied a proper award just because her employer has limited means and the proper course is to make awards based on the requirements of the case and leave enforcement issues to another day.

[54] I determine that Mr Saunders is to pay to Ms Jemmett the sum of \$1,000 as compensation under s.123(1)(c)(i) of the Act, that figure taking account of the contributory figure that I have already identified.

[55] I assess lost wages at \$3,000, again reflecting the 25% contribution.

[56] A contribution to costs is allowed of \$750.

[57] Because I discern that Mr Saunders will have difficulty satisfying this determination without time to pay, I allow him the opportunity to pay over time.

James Crichton
Member of the Employment Relations Authority