New Zealand Employment Relations Authority Decisions

Tobin v GPK Group Limited (Auckland) [2016] NZERA 655; [2016] NZERA Auckland 393 (1 December 2016)

Last Updated: 15 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 351
5623766

BETWEEN PATRICIA JESSON Applicant

AND JUDEA TAVERN LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Mike Harrison for Applicant

Kerry Single for Respondent

Investigation Meeting: 14 October 2016

Submissions Received: 14 October 2016

Determination: 18 October 2016

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Ms Jesson's claim for arrears of wages is declined.

B. Ms Jesson was unjustifiably dismissed.

C. Judea Tavern Limited is ordered to pay to Ms Jesson the following amounts within 28 days of the date of this determination:
a) $5,985 under section 123(1)(b) of the Employment Relations

Act 2000; and

b) $5,000 under section 123(1)(c)(i) of the Employment Relations

Act 2000

D. Costs are reserved.

Employment relationship problem

[1] Ms Patricia Jesson claims she is owed arrears of wages for unpaid holiday pay and that she was unjustifiably dismissed from her employment with Judea Tavern Limited (Judea Tavern). Judea Tavern denies the claims.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Jesson and Judea Tavern but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Ms Jesson was employed as a Bar Manager for Judea Tavern starting work on 5 May 2015.

[4] On 28 August 2015 Ms Jesson received notification that her brother had passed away and left work at the end of her shift to travel to his funeral. During the funeral Ms Jesson fractured her ankle. She attended hospital and her leg was placed in a plaster cast to just below her knee.

[5] On 1 September 2015 Ms Jesson sent an email to her manager Mr Frank Wade advising him of the injury and that she had arranged for a colleague to work her shift for her.

[6] On 9 September 2015 Ms Jesson notified Mr Wade that she was not allowed to put any weight on her foot for at least five weeks. She advised that she was due to be reassessed on 12 October 2015. Ms Jesson continued to update Mr Wade on her condition on 17 September, 1 and 12 October 2015. Ms Jesson's continued absence was supported at all times by medical certificates.

[7] On or about 20 October 2015 Ms Jesson's ACC Case Manager contacted Mr Wade to discuss Ms Jesson's return to work. The Case Manager was advised by Mr Wade that Ms Jesson's employment had been terminated when she had her injury and there were no shifts for her to return to.

[8] On 21 October 2015 Ms Jesson found an unstamped envelop in her letterbox containing a letter from Mr Wade dated 20 October 2015. The letter advised Ms Jesson that her employment had been terminated for medical incapacity.

Issues

[9] The issues for determination are whether Ms Jesson is owed any outstanding holiday pay and whether she was unjustifiably dismissed.

Arrears of wages

[10] Ms Jesson claims she is owed outstanding holiday pay equivalent to 3.04 days. Judea Tavern says it has paid Ms Jesson's holiday pay in full and no further amounts are owed to her.

[11] At the investigation meeting I gave the parties an oral indication of my preliminary findings in respect of this claim. My preliminary finding was that Ms Jesson had been paid all amounts owed to her in respect of her holiday pay claim.

[12] Section 16 of the Holidays Act 2003 (the Holidays Act) provides for employees to receive four weeks holiday after the end of each completed 12 months of continuous employment. Where the employment of an employee comes to an end before completing 12 months, section 23 of the Holidays Act requires the employer to pay the employee 8% of the employee's gross earnings.

[13] There is no dispute that Ms Jesson did not complete 12 months employment with Judea Tavern. The records provided to the Authority and which were not disputed by Ms Jesson showed Ms Jesson's total gross earnings as $14,928.85. 8% of total gross earnings amounts to $1,194.31.

[14] The wages and time record shows Ms Jesson was paid $1,397.15 as holiday pay. This equates to an overpayment amounting to $202.84 which Judea Tavern has advised that it does not intend to recover.

[15] I confirm my oral indication of preliminary findings that Ms Jesson has received full payment of all holiday pay.

The dismissal

[16] There is no dispute that Ms Jesson was dismissed. I am satisfied the dismissal took effect on 28 October 2015. Judea Tavern is required to establish that its decision to dismiss Ms Jesson was justified.

[17] The statutory test of justification is contained in section 103A of the Act. I am required to determine the question of whether an action was justifiable on an objective basis, having regard to 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 action occurred.

[18] In applying the test in section 103A the Authority must consider the non- exhaustive list of factors outlined in section 103A(3):

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the

employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[19] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because of defects in the process as long as those defects were minor and did not result in the employee being treated unfairly.1

[20] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[21] As a full Court observed in *Angus v Ports of Auckland Ltd*[2]

1 Employment Relations Act 2000 (the Act), section 103A(5).

2 [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found

to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[22] Judea Tavern relies on clause 12.6 of the employment agreement which states:

12.6 Termination on medical grounds

12.6.1 The employer may terminate this Agreement by giving such notice to the employee as the employer deems appropriate in the circumstances if, as a result of the mental or physical illness or accident, the employee is rendered incapable of the proper and ongoing performance of his/her duties under the Agreement.

12.6.2 Before taking any action under Clause 12.6.1 the employer may require the employee to undergo and obtain, at the employer's expense, an assessment and subsequent opinion from a registered medical practitioner. On receipt of such an opinion the employee shall authorise that medical practitioner to release the results of that assessment to the employer and the employer shall take into account any reports and recommendations made available to the employer as a result of that medical opinion and any other relevant medical records or recommendations that the employer may receive or which may be tendered to the employer by or on behalf of the employee.

[23] This was a dismissal for medical incapacity. A number of principles may be derived from decided cases on medical incapacity. The test expressed in *Hoskin v Coastal Fish Ships Supplies Ltd3* is whether the point has come "*at which an employer can fairly cry halt*".

[24] In essence, this phrase captures the question of how long the employer is obligated to keep a job open. In the present case, Mr Wade told me he made the decision to dismiss after receiving an email message from Ms Jesson on 14 October

2015 which followed a telephone discussion between her and Mr Wade on 12 October

2015.

[25] Mr Wade told me he spoke to Ms Jesson on 12 October 2015 and advised her he could no longer keep her job open for her. Ms Jesson acknowledges they had a

discussion when she rang Mr Wade to advise him of the latest medical certificate

3 [1985] ACJ 124 at 127.

which cleared her to return to alternative duties on 26 October 2015. Ms Jesson denies Mr Wade spoke to her about whether he could keep her job open for her.

[26] I have preferred the evidence of Ms Jesson regarding this conversation. This is because although Mr Wade says he advised Ms Jesson during the call that he would write to her confirming his conversation he did not take any steps to write to Ms Jesson before the letter of 20 October 2015.

[27] Further, Ms Jesson sent an email message to Mr Wade on 14 October 2015 confirming her understanding of their 12 October discussion. There is no mention in Ms Jesson's email of any discussion about her job not being held open for her. If there was such a discussion Mr Wade did not take any steps to highlight that this aspect of the discussion between them was missing from Ms Jesson's email.

[28] On 20 October 2015 Mr Wade spoke to Ms Jesson's Case Manager who rang Mr Wade to request authority to have a workplace assessment undertaken of the workplace. The assessment would then be used to assist ACC in ascertaining Ms Jesson's capacity to return to work which would include a rehabilitation program for her return to work on 26 October 2015.

[29] According to the documented file note from ACC the Case Manager records that Mr Wade advised her Ms Jesson's employment had terminated when she had her injury. Mr Wade is recorded as advising the Case Manager that he would possibly look at work in one of their other taverns but that transport would be a problem for Ms Jesson as she did not have a car.

[30] In a letter dated 20 October 2015 Mr Wade advised Ms Jesson that her employment was terminated under clause 12.6.1 of the employment agreement and gave her eight days' notice. Mr Wade advised Ms Jesson that when she was able to return to work she could contact him and he would consider either part time or full time work at one of his other establishments but not in her management position at Judea Tavern.

[31] Clause 12.6.2 provides a discretion on Judea Tavern, before taking action under clause 12.6.1, to seek an assessment and opinion from a registered medical practitioner and to take into account any reports and recommendations made available. While this action is described as discretionary in the employment

agreement, it is good practice to have as much information available about an employee's capacity for work to ensure a sound decision is made about ongoing employment.

[32] Mr Wade says he asked Ms Jesson a number of times to come in and meet with him to discuss her situation. If that was the case, then it would have been prudent of Mr Wade to reflect those invitations in any email responses he made to Ms Jesson's email notifications about her injury. He did not do that and I have preferred Ms Jesson's evidence that Mr Wade did not attempt to meet with her to discuss her injury and/or her return to work.

[33] I am satisfied Judea Tavern has failed to undertake even the most rudimentary investigation into Ms Jesson's likely return to work and failed to raise with Ms Jesson any concerns held about the amount of time she had been absent on ACC in a way that she could respond prior to making a decision to dismiss.

[34] The breaches of process are fundamental and resulted in Ms Jesson being treated unfairly such that the dismissal is unjustified. Ms Jesson has established a personal grievance and is entitled to a consideration of remedies.

Remedies

[35] Ms Jesson claims lost wages of seven weeks and compensation as remedies for her personal grievance.

Lost wages

[36] Section 123(1)(b) empowers the Authority to award Ms Jesson a sum equal to the whole or any part of wages lost as a result of her personal grievance. Ms Jesson was cleared by ACC to return to full normal duties on 9 December 2015 and started working in a new job on 15 December 2015.

[37] Ms Jesson claims for the seven weeks wages lost between 26 October 2015 and 15 December 2015 on the basis that she was cleared to work alternate duties from

26 October 2015.

[38] Judea Tavern submitted that Ms Jesson has suffered no loss as she has been in receipt of earnings related compensation for the period between 26 October and 9

December 2015 and is not entitled to be compensated a second time.

[39] The Employment Court has previously held that liability to pay wages or compensation for wages rests with the employer.4 Any liability for repayment of a benefit, or as in this case, ACC earnings related compensation, is a matter to be determined

between Ms Jesson and ACC. I anticipate that Ms Jesson will be advising ACC of this determination and pursuing this matter directly with ACC.

[40] Ms Jesson says she was cleared to return to work on 26 October 2015 but this was subject to a workplace assessment being undertaken so that a rehabilitation plan could be developed. Mr Wade made the decision to terminate Ms Jesson's employment before he was asked about the workplace assessment. He advised the Case Manager of his decision during the 20 October 2015 telephone conversation. The notification to the Case Manager that Ms Jesson's employment had been terminated negated the need for a workplace assessment.

[41] If Ms Jesson had been able to return to work on 26 October 2015 her earnings related compensation would have ceased. Because Ms Jesson did not have a job ACC was unable to undertake a workplace assessment. This meant that Ms Jesson remained in receipt of earnings related compensation until her final clearance by ACC on 9 December 2015.

[42] Ms Jesson has lost seven weeks' wages as a result of her personal grievance.

Judea Tavern Limited is ordered to pay to Ms Jesson the sum of $5,985 under section

123(1)(b) of the Act within 28 days of the date of this determination.

Compensation

[43] Ms Jesson seeks an award of compensation under section 123(1)(c)(i) in the amount of $15,000.

[44] Ms Jesson has given compelling evidence of the affect the dismissal has had on her. Ms Jesson was told by her Case Manager of Mr Wade's notification to her

that Ms Jesson's employment had been terminated. It was not until the next day that

4 *Scissor Platforms (1997) v Brien* 2 ERNZ 672 at page 681.

she received a letter in her mail box, which had been hand delivered, confirming the dismissal.

[45] I am satisfied Ms Jesson has suffered emotional distress as a result of her personal grievance. Taking all of the circumstances into account, including the short tenure of her employment I consider an appropriate award to be $5,000.

[46] Judea Tavern Limited is ordered to pay to Ms Jesson the sum of $5,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[47] Section 124 of the Act obliges me to consider the extent to which Ms Jesson's actions contributed towards the situation that gave rise to her personal grievance. If I consider her actions so require, I must reduce her remedies accordingly.

[48] Having taken into account all of the circumstances leading to the termination of Ms Jesson's employment I am satisfied Ms Jesson's actions have not contributed in any blameworthy way to the situation that gave rise to her personal grievance.

Costs

[49] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Jesson shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Judea Tavern shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell

Member of the Employment Relations Authority