

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA188/10
5291848

BETWEEN SAMANTHA KEENE
 Applicant

AND CAROD LIMITED TRADING
 AS CARSPA AND CAFE
 Respondent

Member of Authority: P R Stapp

Representatives: Robert Thompson Advocate for Applicant
 No Appearance for the Respondent

Investigation Meeting: 23 September 2010 at Christchurch

Determination: 27 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Keene was employed as a café worker for Carod Limited trading as CarSpa and Café in Christchurch. She commenced work on 16 August 2009. She was paid \$13 per hour and was required to work a minimum of 30 hours per week. The employment agreement makes provision for 7 clear days notice. Under the employment agreement the applicant was required to be paid weekly and her pay paid into a bank account, but she says she was paid irregularly in cash. Ms Keene was dismissed with seven days notice by Mr Clem Wooding, the Company's director, when he sent her a text message on 30 October 2009. She worked two of the days before being told by Mr Wooding in another text message that she was not required to work out the remaining three days. She claims that she was not paid for any of that time and did not receive any final pay and holiday pay.

[2] Ms Keene requested the employer to attend mediation to try and resolve the matter. The parties did attend mediation. Also, Ms Keene's representative requested

wage time and holiday records from the employer. Since the records were not provided the Authority directed the respondent to provide time and wage records by 25 June 2010. The time and wage records have not been produced.

[3] Ms Keene believed that she had been made redundant and filed a statement of problem in the Employment Relations Authority. However, a letter dated 27 April 2010 attached to the respondent's statement in reply to the Authority outlined other reasons for the dismissal.

[4] Ms Keene has claimed that her dismissal was unjustified and she is seeking lost wages, compensation and costs. Also, she is seeking a penalty against Carod Limited for failing to abide by the employment agreement for reasonable notice.

Power to proceed if any party fails to attend

[5] There was no appearance for the respondent at the start of the Authority's investigation meeting. The start of the investigation meeting was delayed to find out if the respondent would attend or be represented. The support officer made telephone contact with Mr Wooding. His information was that the company no longer existed and he would not be appearing. The companies register was checked, and it was found that Carod Limited is still registered.

[6] There has been no good cause advanced for the failure of the respondent to be represented. I proceeded under clause 12 of Schedule 2 of the Employment Relations Act to act fully in the matter as if the respondent had attended or been represented.

Issues

[7] What were the reasons relied upon by the respondent for Ms Keene's dismissal at the time? Was a fair procedure followed by the respondent?

The facts

[8] Ms Keene believed that she had been dismissed on the grounds of redundancy. This was a genuine belief reasonably reached at the time because of the text messages from her employer which stated:

Notice is given to you and a written letter will be sent regarding your employment as per the contract your employment will be terminated in 7 days.
(30 October 2009).

[9] Ms Keene asked for a reason and a text response from the employer stated:

It is called a cost thing nothing personal. You are able to work the next week out. (30 October 2009).

[10] The letter referred to above, dated 30 October 2009, by the employer stated:

Further to my text notice is given to you under clause 11.1 of your employment Agreement of seven days notice ending your employment.

[11] There were no reasons provided in the letter for the dismissal.

[12] Ms Keene's last day at work was 3 November 2009 when Ms Keene received another text message from Mr Wooding that stated:

Samantha you will not be required to work out the last three days, ie Wednesday to Friday. Pay will be through as per usual with final one on Friday night.

Determination

[13] Carod Limited did not consult Ms Keene as to the reasons for her dismissal. She genuinely believed that her dismissal was about cost savings and nothing personal according to the text messages and the 30 October 2009 letter allowing her time to work out notice.

[14] After the event the respondent has provided reasons for the dismissal that differ from the text messages and letter dated 30 October. Ms Keene says that none of the matters referred to by Mr Wooding in a letter dated 27 April 2010 to the Authority were raised with her during her employment and prior to her dismissal.

[15] It must follow that Ms Keene's dismissal from her employment was unjustified. My reasons are:

- a. No justification has been provided on any cost savings.
- b. There was no consultation on making cost savings and any impact on Ms Keene's job.
- c. Ms Keene was dismissed by text without an opportunity to have any input and to respond and make any comment before a decision was made.
- d. Carod Limited has provided reasons after the event, in the letter dated 27 April 2010, and without raising the matters with Ms Keene and giving her an opportunity to respond and make any comment before she was dismissed.

[16] Carod Limited has failed to assist the applicant by not providing her with the wage time and holiday records to check that she has been correctly paid and to enable her to calculate her holiday pay entitlement. I have to accept that Ms Keene was not paid for her notice period.

[17] I am satisfied that Ms Keene has lost wages due to her dismissal. She has attempted to mitigate her loss and to try and find other alternative work, albeit without any success. I hold that she has not contributed to the situation giving rise to her personal grievance because of the employer's failure to justify its action and the absence of any proper procedure. Given that Ms Keene had to make an assumption from the information available at the time about the reason for her dismissal she can not be blamed and or it said that she contributed to the situation. Furthermore the

reasons advanced by the respondent in its letter dated 27 April 2010 have not been supported by any evidence from the respondent. Ms Keene denied the claims made by Mr Wooding in that letter. Since he did not attend to rebut Ms Keene's evidence I accept Ms Keene's evidence.

[18] It is my conclusion that Carod Limited is required to pay Ms Keene her notice. The employment agreement provides that the employer "...*may, at its discretion, pay remuneration in lieu of some or all of this notice period*". In this case the employer rescinded its own notice that the applicant was willing to work out. The employer therefore in rescinding the notice without any proper consultation with the applicant is obliged to pay. In addition the employer is required to pay 3 months lost wages because of her unjustified dismissal. This amounts to \$5,616 (7 day's notice (\$546) and 13 weeks lost wages (\$5,070).

[19] Also, Ms Keene is entitled to compensation for humiliation loss of dignity and injury to feelings under section 123 (1) (c) (i) of the Employment Relations Act. She gave evidence of the impact of her dismissal on her. For instance she told me that she suffered financially, for example having to give up her tenancy and needing to borrow money. The impact on her involved a loss of dignity and embarrassment when she had to rely on borrowing money, and crying over the matter. I assess her compensation in the sum of \$3,500.

[20] Ms Keene has incurred costs and although she is legally aided she will have to repay the legal aid grant of \$1,562 paid for representation for the Authority's investigation meeting. This matter was set down for one day. It lasted approximately an hour including the delayed start. Although it appeared likely before the start that there would be no appearance for the respondent the applicant and her representative had to be prepared in case Mr Wooding did arrive, along with the list of witnesses he had identified would be backing the respondent. In the event the applicant's costs relate to a one day hearing. She has been represented and her representative attended the Authority's investigation meeting. The evidence was adduced from the statement of problem to save costs, without the need to have a written statement of evidence. Also the statement in reply and correspondence needed to be scrutinised and the applicant showed me the text messages which she had kept. I assess that \$1,562 is to be paid by the respondent to cover her costs.

[21] The respondent has deliberately and wilfully failed to provide wage time and holiday records. In addition the failure to pay the notice is a breach of the employment agreement. In the absence of any proper evidential explanation the employer's failure to pay the notice is a wilful and deliberate breach of the obligations to pay the applicant. I note that the business is no longer trading. There has been no explanation provided as to the financial affairs of the respondent in its defence. I can only conclude that Mr Wooding and the company have treated these proceedings too lightly and not taken the matter seriously enough.

[22] I have decided not to impose a penalty because the applicant's personal grievance resolves the employment relationship problem filed in the Authority.

Orders of the Authority

[23] I order Carod Limited to pay Samantha Keene:

- a. Lost wages of \$5,616
- b. Compensation of \$3,500
- c. Costs of \$1,562.

P R Stapp
Member of the Employment Relations Authority