

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 189
5387490

BETWEEN AROHA KERR
 Applicant

A N D SHARNA LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Peter Moore, Advocate for Applicant
 Robert Thompson, Advocate for Respondent

Investigation meeting: 3 April 2013 at Christchurch

Submissions Received: 11 April 2013 and 24 April 2013 from Applicant
 17 April 2013 from Respondent

Date of Determination: 12 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Aroha Kerr, claims she was unjustifiably dismissed, albeit constructively, by the respondent, Sharna Limited, on or about 10 April 2012.

[2] She also raises claims in respect to:

- (a) Sharna's failure to provide a written employment agreement;
- (b) Sharna's alleged failure to be communicative and responsive; and
- (c) Sharna's failure to allow rest and meal breaks as required by s.69ZD of the Employment Relations Act 2000.

[3] Sharna denies any of the allegations have merit.

Background

[4] Sharna operates a dog grooming and day care business in Hornby, Christchurch.

[5] Ms Kerr previously worked for the SPCA as an animal welfare inspector. She and Sharna's owner, Ms Keryn Ashworth, knew each other as a result.

[6] Christchurch's February 2011 earthquake saw Ms Kerr's home become uninhabitable. She and her family moved to Temuka. Her partner, Roger Double, obtained work but they considered his income inadequate and decided Ms Kerr should also get paid work.

[7] On 26 March 2012 Ms Kerr saw an advertisement placed by Sharna. It reads:

We have a very busy Dog Grooming and Day Care centre and due to maternity leave we have a vacancy for this position in our Grooming division.

[8] Further detail follows, and included therein is *work type: full time*.

[9] Ms Kerr sent her CV and the following day she and Ms Ashworth arranged an interview in Christchurch on Friday March 30. Ms Kerr says she and Mr Double discussed the distance and the fact it was such she could not travel daily. They agreed she would only take the job if it were full time.

[10] Ms Kerr says the interview was at lunchtime and she was asked to start immediately. She goes on to say:

The hours were agreed to be 45+ hours per week. They would run from 8 am to 5 pm Monday through Friday. Keryn made clear that I would be required to be available to work past 5 pm whenever needed.

[11] Ms Kerr says she told Ms Ashworth the distance from Temuka meant she would be seeking a flat in Christchurch and it was therefore important the hours were as discussed. She says the employment would otherwise be *a non-starter*.

[12] Ms Kerr says she commenced work at approximately 1pm and remained for some six hours though there was no mention of a written contract or a specific rate of

pay. She does, however, say she was performing the basic tasks of a *bather* and paid accordingly. She was not going to do full grooms which would attract higher pay.

[13] Ms Kerr adds just before she commenced Ms Ashworth said something about the day being an unpaid trial and she (Ms Kerr) responded that would not be acceptable. She says Ms Ashworth's only reply was *get started*.

[14] That weekend Ms Kerr arranged accommodation at her mother's home for weekly stays in Christchurch. She also arranged for her sister to care for one of her children who would accompany her to Christchurch. Mr Double rearranged his working hours so he could care for their other children.

[15] Ms Ashworth has a very different view about the hours of work they agreed. She says she explained Ms Kerr could not commence before 1pm on Tuesdays, Wednesdays and Thursdays due to another employees hours and the resulting lack of a workstation. A full day was available Monday and Friday but there was another employee who had priority in respect to any additional hours that might become available. That employee was soon to go on maternity leave so more hours might become available but that was dependant on bookings. Ms Ashworth goes on to say:

During this discussion, while having coffee out in Day Care, I did mention to the Applicant that next week we were overwhelmed with bookings with the build-up to Easter and if she was interested I could probably give her some extra hours for this week only, to lighten the pressure off the rest of the staff. However, after Easter the hours I offered and the days would be as discussed. The Applicant was keen for this and agreed to come in on Monday at 8am.

[16] Ms Ashworth says the two also discussed an hourly rate of \$14. It would be reviewed at a later date.

[17] With respect to Ms Kerr working that day, Ms Ashworth attributes it to the fact a problem arose during the interview. Ms Ashworth says Ms Kerr offered to assist and she accepted. She denies any mention of a work trial.

[18] Monday 2 April was Ms Kerr's first full day. She says she worked 11 hours without breaks. She claims she worked 9.5 hours on Tuesday, again without breaks. She says by the end of that day she was completely shattered and raised her concerns with Ms Ashworth. She says she also advised that while she did not mind assisting with the odd bit of dog grooming, she objected to doing full grooms as she claims she

was. Ms Kerr says Ms Ashworth's response was she had never been asked to do full grooms though Ms Kerr disagrees with that assertion.

[19] On the Wednesday Ms Kerr worked between 8am and 5.30pm but says *for the first time I took the liberty of having a 15 minute lunch break*. She says at the end of the day Ms Ashworth told her she would not be needed till noon Thursday and to come in then.

[20] The next morning Ms Kerr says *I texted Keryn to ask if I could come in early to discuss this change in hours. She agreed*. That is not, however, what the text says. It reads:

Morning, its Aroha, would u b free 2 spare time 4 a chat this morning if I come in a bit earlier than 12?

[21] Ms Kerr says she came in at 11am and approached Ms Ashworth who just walked away. She says there was no recognition until 11.50am at which point she reminded Ms Ashworth she had come early to meet. She goes on:

I asked her about my change in hours, and also about the situation with breaks...

Keryn's response about the hours really surprised me. She said that the job was 'on call as required,' and that, 'it was never a full time job'.

I was shocked. That was not at all what we had discussed. I wouldn't have moved to Christchurch and split my family up just for casual work.

[22] With respect to the breaks Ms Kerr states Ms Ashworth said *If you don't get a break that's your problem*.

[23] Ms Kerr says she saw little point in arguing so simply asked for a copy of her employment agreement. She says Ms Ashworth said she did not have time to work on such things before conceding she would try. Ms Kerr says Ms Ashworth then said she would get in touch over the weekend and left.

[24] Ms Ashworth disputes Ms Kerr's claim regarding the hours worked. She says Ms Kerr worked 10 hours on the Monday, 8.5 hours on Tuesday, 10.5 on Wednesday and 3 on Thursday. She says the Tuesday's departure was early as Ms Kerr had become frustrated. She says Ms Kerr returned once the business had closed and

complained the hourly rate was unfair given the work she was performing as the result of another employees' request she fully groom a spaniel. This turned into a difficult task which caused the frustration.

[25] Ms Ashworth says she acknowledged Ms Kerr was not employed to undertake grooming and should not do so. Ms Ashworth says she re-explained the duties and advised she was preparing an employment agreement to which a job description would be appended.

[26] Ms Ashworth says she explained normality would be returning to the workplace at the completion of work on Wednesday. Ms Kerr would not, therefore, be required till 12 noon Thursday.

[27] Ms Ashworth also disputes Ms Kerr's version of Thursday events. She says Ms Kerr did not arrive till 11.45am and then questioned her hours of work and why she was no longer commencing at 8am. Ms Ashworth says she again told Ms Kerr she was guaranteed a minimum of 30 hours a week which were to be worked between 8am to 5pm Monday and Friday and 1 to 5pm Tuesday, Wednesday and Thursday. She says she again explained the previous couple of days were exceptions resulting from inordinate workloads.

[28] Ms Ashworth goes on to say Ms Kerr became upset and advised she would not be back if she did not have full time hours. Ms Ashworth says she responded with advice she had never offered a full time role and the hours were as discussed. Ms Ashworth says she explained Ms Kerr would not get less than the promised 30 hours. She says she closed by asking Ms Kerr take the Easter weekend to think about whether or not she wanted to work at Sharna.

[29] There was no further communication till Ms Kerr sent a text at 11.29 am on Easter Sunday. It read:

Hiya its aroha. Hope your easter weekend has been relaxing for u! As a follow on from our meeting on thursday i am wondering if u hav sorted my working hours as yet? As i explained 2 u frm the very beginning i hav 3 older children at school & a baby 2 organise childcare 4 & i also live in temuka so need notice to organise travel etc. At my Interview on fri it was an 8am - 5pm mon to fri job so i begun wrk doing those hrs plus more, then u said on wed i was not 2 start until 12 on thurs. then on thurs u said no the job was an as required oncall job...i would clarification please as i requested on thursday of the exact hours my job entales. U said u would contact me over the weekend & as it is sunday i need to know as soon as possible

*so i can make the necessary arrangemnts 4 my family & travel.
Thanks.*

[30] The response was:

I can, as i have already said offer 30hours maximum per week. All the girls contracts are on an, as required basis, and yours would be the same.

[31] The exchange continued through the day with no resolution. If anything the situation worsened with the reference to 30 being a maximum replacing the earlier minimum. Ms Kerr sent further texts over the next two days but there was no response until 11.38am on 10 April at which point Ms Ashworth sent:

Send through your bank details, and your contract is here for you to sign.

[32] Ms Kerr responded by thanking Ms Ashworth and advising she wanted to read the agreement before signing. Exchanges continued through the afternoon and about 7pm Ms Kerr asked *Can u not tell me wot hrs u hav stated in contract?*

[33] The response was *Guaranteed 30 as its always been.*

[34] Ms Kerr replied that was not what was originally agreed and again asserted her hours were to be 8am to 5pm Monday to Friday inclusive.

[35] Ms Ashworth responded there had never been the possibility of 40 hours due to the engagement of another employee. The exchange continued but its tone became acrimonious with additional disputes over the hours Ms Kerr had already worked.

[36] On 10 April Ms Kerr also sent Ms Ashworth an email. Contained therein is advice that if the job were not full time Ms Kerr would have no choice but to resign. It goes on to say:

Please let me know ASAP whether the contract was what we originally discussed full time ... or what you said to me on Thursday last week 'on call as required', or as per one of your txts on Sunday when you said 'maximum of 30 hours'. ...

[37] There was no response. Ms Kerr concluded that as she had not received Ms Ashworth's confirmation her employment was full time, the hours had been unilaterally altered and, as a result, she could not remain in Sharna's employ.

[38] Advice thereof was never formally given and the two did not communicate directly until they met at a mediation to address this claim.

Determination

[39] Ms Kerr's prime contention is she was constructively dismissed.

[40] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[41] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[42] There must also be a causal link between the employer's conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[43] That a unilateral and substantial variation to an employee's terms and conditions of employment is a breach that can render a subsequent resignation a constructive dismissal is well established. That a reduction in hours, and with it pay, can constitute such a breach is also well established (see, for example, *Gorrie Fuel (SI) v Gittoes*, EmpC Christchurch CC21/07, 8 November 2007).

[44] It is Ms Kerr's contention there has been such a reduction as Sharna would not honour the original agreement she be employed full time. Ms Ashworth has a different view and contends full time employment was never offered, let alone agreed.

[45] To decide the claim of constructive dismissal I must determine the nature of the original agreement.

[46] I prefer Ms Kerr's evidence and conclude full time employment was originally envisaged and offered. If nothing else, the advertisement offers concrete evidence that is what was intended and Ms Ashworth confirmed that when she said, while answering questions, she originally sought a full time employee.

[47] Add to that Ms Kerr's evidence she would not have disrupted her family for anything less than full time hours went undisturbed and the fact she acted with alacrity in respect to her private arrangements. The evidence was such I accept she would not have done so had she not understood the engagement was full time. Finally I note her evidence about the offer remained consistent when tested and challenged through questioning.

[48] The same could not be said of Ms Ashworth's evidence. Aside from the concession she originally sought a full time recruit, there are further inconsistencies about the terms of the original offer. They are perhaps best illustrated by the *minimum maximum* conflict in the texts. Further inconsistency and conflict arises when the employment agreement's content (admittedly unseen and unsigned by Ms Kerr) is considered. On one hand it entrenches the 30 hour minimum but does not provide when the hours were to be worked; on the other it states the arrangement was casual. The concepts are incompatible.

[49] The conclusion the original arrangement was full time means Ms Kerr was constructively dismissed. It is clear the hours Ms Ashworth intended Ms Kerr work were significantly less than full time which is, in this country, normally considered to be forty. The reduction, I conclude, constituted a breach of sufficient magnitude to nullify the original agreement and cause Ms Kerr to conclude it had been irreparably breached.

[50] Finally I note there can be no argument Ms Kerr's response was a surprise given the texts and their advice Ms Kerr considered the employment unworkable without full time hours.

[51] For the above reasons I conclude Ms Kerr was constructively dismissed. A constructive dismissal must be unjustified. The circumstances mean the employer could not have complied with the requirements of section 103A of the Act.

[52] Turning to the ancillary claims.

[53] I take the claim Sharna failed to provide a written employment agreement no further. The evidence is one was prepared but the parties failed to determine how it was to be delivered to Ms Kerr – sent or collected.

[54] The reason I delve no further is the remedy sought. It is a penalty payable to Ms Kerr. A penalty is a fine generally applied when there is a wilful and blatant breach. I cannot conclude a failure to agree the method of delivery constitutes such a breach, especially given the deteriorating nature of the text communications and the fact both could be considered culpable for that.

[55] Similarly I take the claim concerning a failure to communicate no further. The evidence is the parties were communicating, albeit ineffectively. The fact Ms Kerr did not like what she was being told does not mean Sharna was failing to communicate and there is no evidence the inconsistencies in Sharna's messages resulted from wilful behaviour of a type that might warrant the remedy sought – a penalty.

[56] Finally there is the claim Sharna failed to allow rest and meal breaks. Ms Kerr's claim she did not take breaks went undisturbed. That therefore means there was most likely a breach as s.69ZD which states an employer *must provide* breaks. The word *must* implies compulsion. To *provide* is to supply or furnish something and here the duty to provide falls upon the employer. If the breaks were not taken Sharna failed to provide but, again, the remedy sought is the imposition of a penalty.

[57] Once again there is no evidence of a deliberate breach with Ms Kerr conceding the issue of breaks was neither raised nor discussed until the Tuesday evening and, from then, she took breaks. In these circumstances I would not consider a penalty, so again I take the claim no further.

[58] Finally I note the disagreement over what hours Ms Kerr actually worked but again I take this no further as there is no wage arrears claim.

[59] The conclusion Ms Kerr was unjustifiably dismissed raises the question of remedies. She seeks wages lost as a result of the dismissal and \$10,000 as compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[60] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Case law requires a successful applicant mitigate their loss and seek a new job.

[61] Ms Kerr claims four months lost remuneration and backs this with evidence of unsuccessful attempts to obtain another job. These culminated in a decision to establish her own business though there was a debate between the parties about when Ms Kerr began working on that enterprise and stopped looking for employment.

[62] While her business opened some four months after the dismissal paragraph 96 of her brief, along with answers to questions, support a conclusion she stopped seeking employment after eight weeks and then put her efforts into establishing her new enterprise. There is also evidence of some income during that establishment phase so, in the circumstances, I conclude the award of lost wages is limited to the eight weeks.

[63] When answering questions Ms Kerr conceded the hourly rate mentioned by Ms Ashworth (\$14) was appropriate and may even have been mentioned. Eight weeks wages, assuming full time employment of 40 hours at an hourly rate of \$14, is \$4,480. That is payable.

[64] Ms Kerr supported her claim for compensation with evidence of the hurt she felt. While reasonably extensive the evidence also raised other factors which impacted on Ms Kerr's emotional wellbeing at the time but could not be attributed to Sharna such as the effect of the earthquakes. Having considered the evidence I conclude an award of \$5,000 appropriate.

[65] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Kerr contributed to her dismissal in a significant way. There is no evidence to support such a finding and I conclude the answer is no.

Conclusion and Orders

[66] For the above reasons I find Ms Kerr has a personal grievance in that she was unjustifiably dismissed.

[67] As a result the respondent, Sharna Limited, is ordered to pay the applicant, Ms Aroha Kerr, the following:

(a) \$4,480.00 (four thousand, four hundred and eighty dollars) gross as recompense for wages lost as a result of the dismissal; and

(b) A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[68] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority