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## Komene v Nisroc Ltd CA 134/07 (Christchurch) [2007] NZERA 829 (8 November 2007)

Last Updated: 23 November 2021

### IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 134/07 5086871

BETWEEN	AMANDA KOMENE Applicant
AND	NISROC LIMITED Respondent

Member of Authority: James Crichton

Representatives: Amanda Komene in person

No appearance by Respondent Investigation Meeting: 31 October 2007 at Dunedin Determination: 8 November 2007

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] By statement of problem filed in the Authority on 9 May 2007, the applicant (Ms Komene) alleged that she had been unjustifiably dismissed from her employment. The respondent, Nisroc Limited (Metro Café) runs a café and bar in Dunedin.

[2] Metro Café resists that contention and claim that Ms Komene was justifiably dismissed from her employment as a chef.

[3] The parties were unable to engage in mediation because the respondent missed more than one mediation meeting.

[4] An investigation meeting was arranged for 31 October 2007 as a consequence of a directions conference I convened between Ms Komene and Mr Damian Black, the sole director of Metro Café.

#### The process of investigation

[5] At the commencement of the appointed time for the investigation meeting on

31 October 2007, Ms Komene was present with a support person, Mr Kelly Broderick, but Mr Black or any other representative of Metro Café was not present. In case Mr Black had been delayed, I deferred the start time for 10 minutes and then had my support officer attempt to contact Mr Black by telephone.

[6] Mr Black was not at his office and his staff gave my support officer Mr Black's cellphone number but he did not respond to that call. My support officer advised me of those particulars.

[7] I determined that it would be unjust to Ms Komene to not proceed to take her evidence and to deal, as best I could, with the issues that required investigation. Accordingly, at approximately 9.50am, the investigation meeting commenced.

[8] By 10.25am, I had completed my examination of Ms Komene and, in the absence of Mr Black, reached the conclusion that I could deal with the matter by way of an oral determination.

[9] I then adjourned for 10 minutes to prepare the oral decision and commenced to give that decision at 10.40am. During the process of giving that decision and before I had given the decision proper and identified the remedies that I proposed to award to Ms Komene, my support officer telephoned again to indicate that Mr Black had been in touch by telephone and had understood that the investigation meeting commenced at 11am, a view which is not supported by any of the documentation, and in particular by the notice of hearing. My support officer encouraged Mr Black to attend the investigation meeting directly, and gained the impression that he intended to take that advice. It appeared that Mr Black had a document which he thought the Authority should see.

[10] Based on that intelligence, I immediately terminated my oral decision presentation and gave Ms Komene and her support person the opportunity to remain in anticipation of Mr Black's arrival or depart having given her evidence. I indicated to Ms Komene that given Mr Black's imminent arrival, it would be improper of me to continue with my oral decision and that I would need to hear his evidence now and then prepare a determination in the usual way. She understood that and left the investigation meeting.

[11] In the result, Mr Black did not appear and accordingly this determination has been prepared on the basis of the evidence from Ms Komene and the limited documentary material supplied by Mr Black. On my return to the Authority's Christchurch office I found a document had been faxed to me from Mr Black. I have considered this document but it adds nothing salient to the matters in contention.

## **The employment relationship**

[12] Ms Komene told me that she had been employed by Metro Café from the beginning of 2007 and that she commenced work just after New Year. She said that she responded to a newspaper advertisement for a chef and that she was interviewed by the head chef at Metro Café who she knew as Richard. She was hired by Richard but was never given an employment agreement. She did not meet Mr Black until some time later in the employment.

[13] She was offered work amounting to around 40 hours a week but not all of that work was in cheffing. In order to build up her hours, she was given a day's work waitressing as well. Ms Komene produced two wage slips which she had been able to find from her employment and both recorded more than 40 hours work.

[14] She told me that there was a roster put up on the wall of the kitchen every week which identified what shifts she was working, but that typically she would work every week day starting at 4pm and continuing until the kitchen closed. On Saturdays, she would start typically at 10am and then work through until the kitchen closed.

[15] The payslips that Ms Komene had available and which she produced at the investigation meeting show that holiday pay was retained by the employer and Ms Komene told me that she understood that she could take holiday leave in the normal way and be paid for it.

[16] This evidence is important because Mr Black contended that Ms Komene was a casual employee. I am satisfied on the evidence I heard that Ms Komene was not a casual employee, that she was in fact an ordinary wage worker working a reasonably defined set of hours on a regular basis and the fact that she worked to a roster that was determined in advance and that she had her work augmented by a day's waitressing does not in any way militate against the conclusion that she was not a casual employee as Mr Black contends she was.

## **The dismissal**

[17] On Anzac Day 2007, Ms Komene said she texted Richard, the head chef, to indicate that she was ill and could not start her shift at 4pm that day. Ms Komene told me that she always dealt with the head chef in anything to do

with her employment and never with Mr Black who had nothing at all to do with the running of the kitchen. The only involvement she had with Mr Black was in relation to the waitressing hours which Mr Black had organised because he ran the bar and front of house part of the operation. Ms Komene says that she texted Richard in plenty of time on Anzac Day so that he could make alternative arrangements. Her recollection is that her text was sent in the morning of Anzac Day.

[18] It is important to note that chefs are precluded from working when they are ill because they are handling food which is prepared for public sale and Ms Komene was very clear about her professional obligations in this way when she gave her evidence before the Authority.

[19] Ms Komene says that she received a responding telephone call from Richard, the head chef, and then sometime later, indeed after the time that she would have started work if she had been working, she received a text from Mr Black inquiring as to where she was and indicating that as a consequence of the fact she had not bothered to turn up, she would be dismissed with immediate effect.

[20] By letter dated 30 April 2007, Mr Black wrote to Ms Komene confirming that *your casual employment contract with Metro Café has been cancelled due to gross misconduct*. He goes on to allege that Ms Komene had failed to attend the work shift on Anzac Day, 25 April 2007, and failed to notify her workplace or employer of her absence. On Ms Komene's sworn evidence, that is simply untrue. Ms Komene very clearly texted Richard, the head chef, and then got his telephone response acknowledging that he had received her message that she was unable to attend work that day.

[21] Next, in his letter, Mr Black goes on to allege that Ms Komene's absence on 25 April 2007 is *your third such incident of this type*. He then refers to two earlier examples which he claims are evidence of the same failing. I carefully put these issues to Ms Komene during the investigation meeting.

[22] The first issue which Mr Black refers to is that on Saturday, 14 April, Ms Komene failed to attend the work shift, claimed to be ill when contacted by the head chef, then turned up three hours late and said she was not ill at all and simply had transport problems getting to work.

[23] Ms Komene has no recollection whatever of any of those events, and thinks it implausible to say the least that the event happened at all. She denied that she was an untruthful woman and I believe her. She said if she was sick she would not work because she understood her professional obligations, and if she was not sick she would not claim that she was. She also denied ever having transport problems; she owns her own car which she said was perfectly reliable.

[24] The second issue raised by Mr Black relates to an alleged absence on 22 April when he says that Ms Komene failed to attend a two hour rostered shift for cleaning purposes.

[25] Ms Komene remembers this event. The 21 April was her 21st birthday and she asked for and got the whole weekend off. Then there was a staffing problem and she agreed to work the Saturday (that is, 21 April) from 8am to 8pm and she then went to her 21st birthday party straight from work. However, she made it absolutely clear that she was not going to work the following day because she had already been given that time off and she came in on the Saturday to accommodate the employer. I accept that evidence as truthful.

[26] It follows that Mr Black's letter of 30 April is, to say the least, wrong headed. On the basis of the evidence I heard, not one of the allegations he makes in that letter have any thread of credibility attached to it.

[27] It follows that I am absolutely satisfied on the evidence I heard that Ms Komene was unjustifiably dismissed. I am satisfied she was not a casual employee as Metro Café allege and her dismissal did not follow a proper process.

[28] I am also satisfied that Ms Komene did in fact notify the workplace that she was unable to work on Anzac Day because she was ill and as a person involved in food preparation for public consumption, she is absolutely right to not attempt to work in those circumstances and the employer is wrong in endeavouring to penalise her for her stance.

[29] Further, I am unimpressed with Mr Black's attempts to create a chain of earlier alleged indiscretions; for reasons I have enunciated above, I do not believe him.

[30] Finally, I note that Ms Komene has not been paid her final pay; nor has she been paid her holiday pay which is due and owing to her. Of itself, the fact that she would have holiday pay due and owing from the employer makes it all the more implausible that the employer could seriously contend that she was a casual worker.

## Contribution

[31] Given my finding that Ms Komene has a personal grievance by reason of an unjustified dismissal, I need to consider whether she has in any way contributed to the situation she finds herself in.

[32] On the facts that I heard, I am absolutely satisfied that Ms Komene has had no part whatever in her dismissal and accordingly there are no contribution elements that need to be considered.

## Hurt, humiliation and injury to feelings

[33] Ms Komene gave evidence that she had been seriously upset by the dismissal. While the employment was not a lengthy one, that of itself does not reduce the hurt to a young employee who is treated harshly and unreasonably by her employer.

[34] I am satisfied that Ms Komene has suffered hurt, humiliation and injury to her feelings within the meaning of that phrase in the statute.

## Determination

[35] Ms Komene has suffered a personal grievance by reason of an unjustified dismissal. She is entitled to remedies.

[36] I order that Nisroc Limited is to pay to Ms Komene the following amounts:

- (a) The sum of \$2,000 as compensation under [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#);
- (b) Reimbursement of the filing fee of \$70;
- (c) Payment of one week's pay (her last week at work for which she received no pay) of \$526 gross;
- (d) Payment of unpaid holiday pay retained by the employer of \$463.11 gross;
- (e) Contribution to lost wages between the dismissal and the finding of a new position of \$500 gross.

[37] In summary then, Nisroc Limited is to pay to Ms Komene the following amounts:

- (a) \$2,070 net; and (b) \$1,489.11 gross.

## Costs

[38] Costs are to lie where they fall.

James Crichton

Member of the Employment Relations Authority