

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 83
5431552

BETWEEN LOUISE LOCK
 Applicant

A N D HL GROUP LIMITED
 TRADING AS THE
 FARMHOUSE CAFE
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, Advocate for Applicant
 John Ren, Shareholder of Respondent

Investigation Meeting: 06 March 2014 at Auckland

Date of Determination: 11 March 2014

DETERMINATION OF THE AUTHORITY

A. HL Group Limited (The Farmhouse Cafe) unjustifiably dismissed Ms Lock. It is ordered within 28 days to pay her:

- (1) \$6,825 lost remuneration;**
- (2) \$6,500 distress compensation.**

Employment relationship problem

[1] Ms Louise Lock was employed by The Farmhouse Cafe as a Floor Manager on 14 February 2012. However an employment agreement was not signed between the parties until 18 August 2012. That was a breach of The Farmhouse Cafe's obligations under s.63A of the Employment Relations Act 2000 (the Act).

[2] Clause 6.1 of Ms Lock's employment agreement records her hours of work would be set out in "*the schedule attached*". However, the schedule attached did not

refer to her weekly hours of work. This omission was a breach by The Farmhouse Cafe of s.65 of the Act.

[3] Ms Lock's hourly rate was recorded in her employment agreement as \$15 per hour. However The Farmhouse Cafe breached Ms Lock's employment agreement by unilaterally reducing her hourly rate to \$14.50 on 06 January 2013.

[4] The Farmhouse Cafe claims it was entitled to reduce Ms Lock's hourly rate because it moved her away from her usual kitchen duties to work upstairs because of her pregnancy. I do not accept that.

[5] Although there is no parental leave complaint and/or sex discrimination claim before the Authority I consider The Farmhouse Cafe's actions amounted to an unlawful unilateral reduction of pay arising solely from Ms Lock's pregnancy. These changes to were imposed on her and I accept Ms Lock's evidence that she had no choice in the matter. Her wages should not have been reduced because of her pregnancy.

[6] Ms Lock gave the Farmhouse Cafe notice of her intention to take statutory parental leave on 31 January 2013. Her notice states:

I am writing this letter to inform you that I would like to take parental leave. I attach a notice from my midwife stating that my baby is due.

I want to take leave from 26.04.2013 until 02.08.2013 as maternity leave. I plan to take a further few weeks as extended leave. I will notify you regarding my intention to return to work as soon as possible.

The leave I am applying for is no more than 52 weeks.

[7] Ms Lock says she sought and obtained confirmation from the Department of Labour helpline that the information she provided was what was required in order for her to access her parental leave entitlements.

[8] The Farmhouse Cafe admits it did not provide Ms Lock with any of the notices that an employer is required to give an employee under the Parental Leave and Employment Protection Act 1987 (PL&EPA). I find that these breaches resulted in the problems that occurred over Ms Lock's return to work.

[9] The Farmhouse Cafe also failed to notify Ms Lock that her request for extended parental leave (i.e. her leave request for more than her 14 weeks paid maternity leave) was defective. This failure by The Farmhouse Cafe deprived her of an opportunity to provide the information required in support of her application for extended parental leave.

[10] I further find that The Farmhouse Cafe appears to have been reluctant to have Ms Lock back at work because of concerns it had about her performance. I note such concerns were never fairly or properly raised with her.

[11] Ms Lock texted The Farmhouse Cafe on 03 August 2013 (the day after her 14 weeks statutory maternity leave expired) expressing her desire to return to work. When she did not get a response she sent a further text the next day and was told to attend a meeting on 07 August with John Ren and his son, Frank Ren who acted as an interpreter.

[12] At the meeting on 07 August Ms Lock was told that she needed to send a letter about her intention to return to work and that she was “*too late*” to return to her job.

[13] Ms Lock sought further advice from the Department of Labour helpline which resulted in her writing to The Farmhouse Café on 15 August stating:

I am writing to let you know of my intention to return to work at the Farmhouse Café, Warkworth on Monday 9th of September 2013.

I want to work 35-40 hours, Monday to Friday at an hourly rate of \$15 as my contract states.

[14] This was her contractual hourly rate and the days and total hours Ms Lock says she was working before The Farmhouse Cafe reduced her hours of work and rate of pay for pregnancy related reasons.

[15] This letter resulted in The Farmhouse Cafe setting up a meeting with Ms Lock to “*discuss her position in the Café*”. During this meeting Ms Lock was told by Mr Ren that he had intended to give her a warning before she went on leave because of her “*moods.*” When Ms Lock asked for details about these alleged moods she was told she “*couldn’t control [her] emotions because [she] was pregnant*”. When Ms Lock pressed for further information about this allegation no further information was given to her.

[16] On 22 August Ms Lock texted The Farmhouse Cafe asking what her hours of work would be and when she could start back at work. She did not get a response so sent a further text the following day (23 August) again asking about her days and hours of work and saying she needed to know so she could confirm daycare for her daughter.

[17] The Farmhouse Cafe replied to Ms Lock that she was not in the next week's roster so Ms Lock again asked for information about her work and noted that she could start back at work the following month.

[18] On 26 August The Farmhouse Cafe offered Ms Lock a one off four hour shift on 28 August. Ms Lock was unable to accept that due to other commitments and in light of the fact that she had already advised her employer that she was not ready to return to work until September.

[19] The Farmhouse Cafe texted Ms Lock on 07 September to do a one off five hour shift on 11 September. The morning of this shift Ms Lock texted The Farmhouse Cafe to advise that she could not come into work that day as she had been up all night sick the night before.

[20] The Farmhouse Cafe appears to believe this incident is an example of Ms Lock not being prepared to work. This is an unreasonable view. Ms Lock as an employee is entitled to take paid sick leave when she was too unwell to attend work. The fact she needed to take genuine sick leave on 11 September did not in any way undermine her right to return to her normal job at the conclusion of her parental leave.

[21] Daniel Ren (John Ren's son) had a telephone conversation with Ms Lock about her return to work on 12 September during which Daniel Ren told Ms Lock she could only have a few hours work to start off with. No timeframe was given for Ms Lock returning to her normal pre parental leave position. John Ren told the Authority that The Farmhouse Cafe wanted Ms Lock to work a few short shifts first before she returned to work because the systems had changed whilst she had been on leave.

[22] No information was provided about what systems had changed or why any such changes required Ms Lock to work short hours. I further find that the alleged changes (whatever they may have been) were never communicated to Ms Lock nor was she given any explanation as to why any such changes meant she would only be

allowed to work short hours. There was no evidence of Ms Lock being given any training or support regarding any alleged changes when she did in fact return to work one shift on 17 September.

[23] Ms Lock worked on 17 September, but because she did not have any regular days or hours of work she found arranging childcare for her daughter almost impossible at short notice. She relied on a friend to help but because of last minute changes to the days and hours she would be working that option closed because her friend was not prepared to continue to be available at short notice.

[24] I find that Ms Lock made The Farmhouse Cafe aware of the need for her days and hours of work to be set so she could arrange childcare and that the sporadic offers of work caused her difficulty with arranging childcare at short notice. However, The Farmhouse Cafe did nothing to address this reasonable and legitimate concern of Ms Lock's.

[25] Ms Lock told the Authority that if she knew what days and hours she was working and if she had been allowed to return to her usual (pre-parental leave contract hours) then she would have been able to arrange consistent childcare which would have allowed her to work. Ms Lock says that she would have put her daughter into full time day care which would have eliminated any childcare problems, but because she was working with such little advance notice and with erratic hours, the person she was relying on for childcare became annoyed and told her they could not do it. I accept Ms Lock's evidence about this.

[26] Ms Lock says that she considered her employment at an end on 17 September when she had still not been allowed to return to her pre-parental leave days and hours of work despite her attempts for that to occur. She says that she had not been offered any regular or ongoing hours of work up until 01 October 2013. That was two months after her expressed intention to return to work and one month after she had been actively attempting to return to work.

[27] The Farmhouse Cafe denies Ms Lock was dismissed either actually or constructively. It says Ms Lock left her job freely and voluntarily. The Farmhouse Cafe also says Ms Lock did not give proper notice of her intention to return to work after parental leave so it blames her for any problems which occurred regarding her return to work.

[28] In addition The Farmhouse Cafe also says that it had concerns about Ms Lock's performance both before she went on parental leave and in respect of the couple of days that she worked after returning from parental leave. It was therefore reluctant to have her back at work. However, it is clear that no performance management process was ever implemented nor was Ms Lock ever disciplined or warned about any alleged performance related issues.

Issues

[29] The issues to be determined by the Authority include:

- (a) Was Ms Lock dismissed?
- (b) If so, was her dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) What if any costs should be awarded?

Was Ms Lock dismissed?

[30] Because The Farmhouse Cafe denies Ms Lock was dismissed she bears the onus of proving on the balance of probabilities that her employment ended as the result of a dismissal instead of at her initiative as her employer claims.

[31] I am satisfied that Ms Lock's employment ended as a result of The Farmhouse Cafe's actions. It is evident that Ms Lock had been attempting to return from parental leave from 03 August 2013. As at 17 September Ms Lock had not been allowed to return to her pre-parental leave days and hours of work and no arrangements had been made for her to do so for the remainder of that month.

[32] I accept Ms Lock's evidence that she considered that she did not have a job to return to and that the work she had been doing before her parental leave was no longer available. I do not accept The Farmhouse Cafe's evidence that Ms Lock's employment ended because of a free or genuine resignation by her.

[33] I find that Ms Lock understandably concluded that her normal pre parental leave job was not available to her because The Farmhouse Cafe would not let her return to work when requested, it did not provide her with regular days or hours of work, it did not put her on the roster, it told her she had to work limited hours but did

not explain why, it did not respond to her concerns that its actions were causing her childcare difficulties, it criticised her performance whenever she pressed to return to her normal job and it failed to provide details of its concerns about her performance when asked to do so.

[34] Although Farmhouse Cafe did not expressly dismiss Ms Lock, a dismissal may still occur where a sending away of an employee occurs at the employer's initiative. I find that that was the case here.

[35] It was The Farmhouse Cafe's ongoing acts and omissions towards Ms Lock, both in not allowing her to return to her pre-parental leave days and hours of work and in criticising her performance during meetings at which she was trying to discuss her return to work and not responding to her request to have sufficient advance notice of her days and hours of work to enable her to arrange childcare which caused her to conclude she could not return to her normal pre parental leave job.

[36] I find that The Farmhouse Cafe's actions amounted to a constructive dismissal of Ms Lock.

Was Ms Lock's dismissal justified?

[37] Having established that Ms Lock was dismissed, the onus now passes to The Farmhouse Cafe to establish on the balance of probabilities that Ms Lock's dismissal was justified.

[38] Justification is to be assessed in light of the s.103A justification test in the Act. This test requires the Authority to objectively determine whether The Farmhouse Cafe's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Ms Lock was dismissed.¹

[39] When considering the justification test, the Authority must consider whether the four procedural fairness tests in s.103A (3) of the Act have been complied with in addition to any other factors the Authority considers appropriate. A fair and reasonable employer is also expected to comply with its good faith obligations under the Act.

¹ Section 103A of the Act.

[40] I find The Farmhouse Cafe is unable to discharge the onus of establishing that its actions and how it acted were justified. Ms Lock had a statutory right to return to work from her parental leave but The Farmhouse Cafe did not let that occur contrary to the provisions of the PL&EPA.

[41] I find that any issues arising from the lack of clarity over the date she was due to return were caused by The Farmhouse Cafe's failure to provide Ms Lock with statutory notice under the PL&EPA about:

- a. her entitlement to take parental leave which should have been provided within seven days of her January letter expressing her desire to take maternity and extended parental leave;
- b. The defects in her parental leave notice around her intention to take extended parental leave which deprived her of an opportunity to correct such defects, and which I find led to ambiguity between the parties over her exact return to work date;
- c. Whether or not her job would be kept open or not kept open which had to be supplied in writing within 21 days of her commencing her leave.

[42] A fair and reasonable employer would fully and properly comply with its statutory obligations under the PL&EPA. It is obvious that The Farmhouse Cafe did not comply with any of its PL&EPA obligations. It admitted as much.

[43] The Farmhouse Cafe's excuse for not doing so is that it was unaware of its obligations. Such an explanation is not justified. The minimum protections provided by employment legislation apply to all employees. It is up to employers to ensure they are aware of their legal obligations to employees. If an employer is not sure of what is required then a fair and reasonable employer would take advice to ensure it complied with its statutory obligations. Ignorance of the law does not excuse an employer from meeting its statutory obligations to all employees.

[44] It is also obvious that The Farmhouse Cafe did not comply with any of the four procedural fairness tests in s.103A (3) of the Act. It also breached its good faith obligations to Ms Lock under s.4 of the Act. A fair and reasonable employer would have fully and properly complied with these statutory obligations so The Farmhouse Cafe's failure to do so means it cannot justify Ms Lock's dismissal.

[45] Accordingly I find that The Farmhouse Cafe's actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time Ms Lock was dismissed.²

What if any remedies should be awarded?

Mitigation of loss

[46] Ms Lock provided the Authority with evidence that she has taken appropriate steps to mitigate her loss. Notwithstanding her attempts to mitigate her loss she has been unable to find alternative work. Ms Lock claims three months' lost remuneration. I am satisfied that she lost at least three months remuneration as a result of her unjustified dismissal and that it is appropriate for her to be compensated for that loss.

Lost remuneration

[47] The Farmhouse Cafe is ordered to pay Ms Lock \$6,825 being three months' lost remuneration under s.128 (2) of the Act. This is calculated on the basis of Ms Lock being paid \$15 per hour for 35 hours per week.

Distress compensation

[48] Ms Lock has suffered considerable distress. She was clearly very distressed during the Authority's investigation meeting when asked to explain the effects of The Farmhouse Cafe's failure to allow her to return from parental leave. She cried and had difficulty speaking when explaining the impact her dismissal has had on her. Her evidence was supported by her partner.

[49] Ms Lock and her partner had been relying on her income and she was used to contributing to the family's finances. Ms Lock gave moving evidence about the impact on her emotionally and financially. She has also suffered health problems.

[50] The Farmhouse Cafe is ordered to pay Ms Lock \$6,500 under s.123 (1)(i)(c) of the Act to compensate her for the humiliation, loss of dignity, and injury to feelings she has suffered as a result of her unjustified dismissal.

² Section 103A of the Act.

Contribution

[51] Having determined that Ms Lock has a dismissal grievance, s.124 of the Act requires the Authority to consider the extent to which her actions contributed towards the situation that gave rise to her grievance and to reduce remedies accordingly.

[52] I find that Ms Lock did not contribute to the situation which gave rise to her grievance. She sought and obtained advice from the Department of Labour in respect of both written communications she had with The Farmhouse Cafe regarding firstly her intention to take parental leave, and secondly her intention to return to work.

[53] I find that had Ms Lock been given the appropriate notices that her employer was required to issue to her under the PL&EPA then she would have been properly informed about the requirement to provide a specific return to work date in respect of her wish to take extended parental leave. I find that the issues which arose over her return to work are the entirely caused by The Farmhouse Cafe's failure to comply with its obligations under the PL&EPA.

[54] I find Ms Lock was responsible in taking the steps she believed were necessary to protect her job whilst on parental leave and to return to work after her extended parental leave had ended. I find that Ms Lock did not contribute to the situation which gave rise to her grievance, so there is to be no reduction made to her remedies.

Other

[55] The only claim before the Authority for investigation was an unjustified dismissal personal grievance claim. In the absence of any wage arrears and/or breach of contract claims before the Authority no orders are made in respect of the unilateral reduction in Ms Lock's hourly rate which occurred from 06 January to 19 April 2013.

What, if any, costs should be awarded?

[56] Ms Lock as the successful party is entitled to a contribution towards her actual costs provided she can provide proof of the actual costs she incurred.

[57] The parties are encouraged to resolve costs by agreement. If that is not possible then Ms Lock has 14 days from the date of this determination to file a costs

memorandum, The Farmhouse Cafe has 14 days to respond, with Ms Lock having a further 7 days within which to reply.

[58] This costs timetable will be strictly enforced so any departure from it requires the prior approval of the Authority.

Rachel Larmer
Member of the Employment Relations Authority