

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 355
5527149

BETWEEN

MARIE LAMONT
Applicant

A N D

E Z STEP LIMITED t/a PET
STOP
Respondent

Member of Authority: T G Tetitaha

Representatives: D Vinnicombe, Advocate for the Applicant
No appearance by or for the Respondent

Investigation Meeting: On the papers

Submissions Received: 4 August 2015 from the Applicant

Date of Determination: 12 November 2015

DETERMINATION OF THE AUTHORITY

- A. EZ Step Limited is ordered to pay Marie Lamont wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$855.00.**
- B. Marie Lamont was unjustifiably dismissed by E Z Step Limited.**
- C. There is an order E Z Step Limited pay lost remuneration of \$9,600 without reduction for contributory behaviour pursuant to ss.123(1)(b), 128 and 124 of the Act.**
- D. There is an order E Z Step Limited pay compensation of \$5,000 without reduction for contributory behaviour pursuant to ss.123(1)(c)(i) and 124 of the Act.**
- E. The application for penalties is dismissed.**
- F. Costs are reserved. If the applicant seeks an order for costs a memorandum shall be filed and served 14 days from the date of**

this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Marie Lamont was employed as a store manager by E Z Step Limited at Pet Stop in Mt Eden, Auckland. She alleges she was underpaid and unjustifiably dismissed.

Facts leading to dismissal

[2] Ms Lamont started her employment on 24 February 2014. She signed an employment agreement that included a trial period ending on 24 May 2014. During the trial period her hourly rate of pay was \$17 per hour. At the end of the trial period her hourly rate of pay was to increase to \$20 per hour.

[3] The respondent is a company with its registered office at 3-5 Gilles Avenue, Newmarket. It owns and operates several pet stores in Auckland known as Pet Stop. The owner of the company was known as 'Connie' a Chinese national. She was assisted at the business by her husband 'Ben', another Chinese national.

[4] During her employment, no concerns about her work performance or conduct were raised by the respondent with her.

[5] Following the end of the trial period, Ms Lamont noticed that her pay rates did not increase. Between 25 July and August 2014, she emailed the respondent asking they provide her with payslips to check her rate of pay and whether her contributions to KiwiSaver were being paid.

[6] Eventually Ms Lamont received a schedule showing her wage payments. Her rate of pay from 24 May through to 20 July 2014 remained at \$17 per hour. This resulted in an underpayment of \$855.

[7] On 9 August 2014, Ms Lamont was handed a letter by Ben, the respondent business owner's husband in the presence of other employees and shoppers. The letter dismissed Ms Lamont due to poor performance. Ms Lamont noted Ben had moved towards another employee speaking Chinese looking at her and laughing.

[8] On 11 August 2014, Ms Lamont raised a personal grievance through her advocate. The respondent did not reply.

[9] Ms Lamont filed a statement of problem on 30 October 2014 in the Employment Relations Authority.

[10] The matter was directed to mediation set down for 23 April 2015 in Auckland. The applicant and her advocate attended. The respondent did not.

Issues

[11] At a teleconference on 20 July 2015, a preliminary issue was determined regarding the absence of the respondent. I have the power to proceed if a party fails without good cause shown to attend or be represented before the Authority pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act). The respondent had shown no good cause for why it did not attend the teleconference despite the Registry attempting to contact it. No statement in reply has been filed nor leave sought to file one out of time. The respondent has failed to attend a directed mediation twice and Registry efforts to contact the respondent have been unsuccessful.

[12] At the teleconference, directions were made for the matter to heard without holding an investigation meeting pursuant to s.174(d) of the Act on the basis that sworn evidence was filed by the applicant. A copy of my Minute was sent to the respondent company's address for service. The respondent has taken no further steps.

[13] Given the above, I exercise my power to continue to hear and determine this matter in the absence of the respondent upon the papers.

[14] The issues for hearing set out in my Minute of 20 July 2015 were:

- (a) Whether there was an unjustified dismissal by the respondent of the applicant;
- (b) Whether penalties should be awarded for the respondent's non-compliance with directed mediation and whether that penalty ought to be paid to the applicant.

[15] An additional issue not referred to in my Minute has arisen from the evidence filed. This is recovery of wage arrears. This was not explicitly raised in the statement of problem filed on 4 November 2014 as part of the problem the applicant wished me to resolve. It is referred to in the statement of problem under facts giving rise to the unjustified dismissal. Given the costs of a separate hearing to recover wage arrears of \$855, the lack of engagement by the respondent and the availability of remedies such as reopening and de novo appeal, I intend to take a pragmatic approach and deal with this issue in this determination pursuant to s160(3) of the Act.

Wage arrears

[16] Ms Lamont has produced her employment agreement which provided for a gross hourly rate of \$17 during the trial period (clause 1(c) and a 'salary' for the position of \$20 per hour gross (clause 4). On a plain reading of the agreement I accept the parties intended her salary to rise from \$17 to \$20 per hour following the end of her trial period on 24 May 2014.

[17] Ms Lamont also produced a wages schedule prepared by the respondent showing payments of her salary at the rate of \$17 per hour for the period 26 May to 20 July 2014. There is a difference of \$855 between the pay she received and the agreed rate of \$20 per hour.

[18] Therefore EZ Step Limited is ordered to pay Marie Lamont wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$855.00.

Was the applicant unjustifiably dismissed by the respondent?

[19] The onus falls upon an employer following dismissal to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[20] In absence of any evidence from the respondent, I accept the applicant was unjustifiably dismissed on 9 August 2014. Her evidence was prior to dismissal the

employer failed to raise any performance concerns depriving her of an opportunity to address any issues raised. Her dismissal was abrupt and immediate.

[21] In the circumstances, Marie Lamont was unjustifiably dismissed by E Z Step Limited.

Remedies

[22] Having found there was a personal grievance of unjustified dismissal, the Authority must order the employer to pay the employee the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration pursuant to s.128 of the Act.

[23] In considering lost remuneration, the employee has an obligation to mitigate loss by seeking alternative paid employment¹. An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of the failure to mitigate there is no statutory requirement to order reimbursement².

[24] Ms Lamont deposes to searches of online job sites such as Trade Me and Seek. She also engaged the services of a personnel and recruitment agency in Auckland. Eventually she secured full time permanent employment on 18 November 2014. She seeks lost wages for a period of 14 weeks at 40 hours per week and \$20 per hour totalling \$11,200 gross.

[25] There is a statutory cap of three months. I have little explanation why a further two weeks' lost wages should be paid beyond the statutory cap. There is evidence Ms Lamont was unfit to work for a 7 day period between 26 August and 1 September 2014.³ In the circumstances, I am only prepared to award three months' gross wages totalling \$9,600.00.⁴

[26] The applicant seeks compensation for hurt and humiliation. She deposes to being embarrassed because termination occurred in front of other employees and shoppers. She had the impression 'Ben' was laughing at her following her dismissal. She produced evidence of stress which she says was caused by the dismissal affecting

¹ *Carter Holt Harvey Ltd v. Yukich* (CA 04/05/05)

² *Finau v. Carter Hold Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

³ Medical Certificate Annexure F Affidavit M Lamont sworn 28 July 2015.

⁴ This is calculated by 40 hour week multiplied by 12 weeks at \$20 per hour.

her health.⁵ Ms Lamont relied upon friends and family to support herself and her child which was humiliating and degrading for her. In the circumstances, the award of \$5,000 is appropriate.

[27] There is no contributory conduct requiring any reduction in remedies.

[28] There is an order E Z Step Limited pay lost remuneration of \$9,600 without reduction for contributory behaviour pursuant to ss.123(1)(b), 128 and 124 of the Act.

[29] There is an order E Z Step Limited pay compensation of \$5,000 without reduction for contributory behaviour pursuant to ss.123(1)(c)(i) and 124 of the Act.

Should penalties be awarded for the respondent's non-compliance?

[30] Ms Lamont seeks a penalty under s.135 of the Act. The basis for awarding a penalty would have to be under s.134A of the Act. Given my determination that this matter was to proceed in the absence of the respondent and the lack of engagement by it, no penalty can be awarded for obstruction or delay to the investigation. Failure to attend directed mediation can be a matter that is taken into account in any award of costs.

[31] The application for penalties is dismissed.

[32] Costs are reserved. If the applicant seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

⁵ See note 3 above.