

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 136
5323687

BETWEEN MAREE JOAN LEE
Applicant

AND AA TRADE & ENTERPRISE
LTD
Respondent

Member of Authority: M D Loftus

Representatives: Mr Rex Hancock, Advocate for Applicant
Mr Aiman Almazroey, on behalf of the Respondent

Investigation Meeting: 12 September 2011 at Christchurch

Submissions Received At the investigation meeting

Determination: 15 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Maree Lee, claims that she was unjustifiably dismissed by the respondent, AA Trade & Enterprise Ltd (AATE), on 21 September 2010.

[2] AATE accepts that it dismissed Ms Lee but contends that its actions were justified given the uncertain future it faced as a result of a sudden loss of clientele after the earthquake of 4 September 2010 hit Christchurch.

Background

[3] AATE is in the business of catering for the needs of foreign students whilst they are in New Zealand and administers items such as school placements and/or accommodation. The clientele is predominantly Middle Eastern, and in particular, Saudi Arabian.

[4] Ms Lee was engaged as a student homestay co-ordinator on 17 May 2010. In this capacity she was responsible for administering the placement of students with various accommodation providers and ensuring that appropriate payments were made. She was initially engaged to work 25 hours per week though her contract was never signed. There is a dispute as to why this was the case though it does not affect the determination of this claim. There is also evidence in two of Ms Lee's e-mails (7 July and 3 August) but once again these need not be canvassed in order to determine this matter. Indeed, the company are adamant that any concerns it had were insignificant and had absolutely no bearing on its decision to terminate Ms Lee's employment.

[5] AATE's business was relatively new and the company states that it was struggling. This is a claim with which Ms Lee concurs.

[6] On 3 August AATE's Manager, Mr Almazroey, approached Ms Lee and explained the situation. The outcome was an agreement, albeit reluctantly entered into by Ms Lee, that her hours reduce to 10 per week. There was also an agreement that she would, for the foreseeable future, work from home. This would, to some extent, fit with an earlier request Ms Lee had made to be allowed to perform some of her work from home and would benefit the company by reducing its overheads.

[7] She confirmed the arrangement in an email sent later that day. Contained therein are the following passages:

...
I have no choice but to find another job This is no reflection on you and I fully understand your situation. But I HAVE to earn \$330 per week to live. ...

So I have to get a job that pays me what I need but I also want to continue to work for you.

...
So initially my plan is to continue to work for you from home as you have requested. When I find another job I will still continue to work for you and I want to do that without being paid.

I have several reasons for this (which are then explained)

...
So in short I will work the reduced hours you have requested and when I find other work I will continue to work for you as Home Stay Coordinator without pay at least until such time as something in either of our circumstances changes.

...

[8] On 4 September the first of what turned out to be a number of earthquakes rocked Christchurch. AATE claims the effect on the business was substantial. Not

only did they lose access to their office but the Saudi Arabian Consulate advised its citizens to leave the area. Most did, thus depriving AATE of the bulk of its clientele.

[9] Initially AATE adopted a wait and see attitude in the hope that the situation would quickly revert to that which had existed prior to 4 September. It didn't and by 21 September AATE moved to reduce its costs.

[10] A decision was made to reduce the company's staff from 3 to 2 and Mr Almazroey decided that Ms Lee would be the one to go. He justified this decision by stating that he concluded that Ms Lee was unable to perform all tasks required by AATE, while the other two staff could. He accepts that Ms Lee was never consulted about the reduction and he never discussed his selection rationale with her.

[11] Mr Almazroey says he then telephoned Ms Lee to advise her of the decision, which was by then a fait-accompli, though there is some disagreement as to how the conversation progressed.

[12] Ms Lee states that the telephone conversation was quite a long one and commenced with Mr Almazroey raising a performance issue with her. Apparently Mr Almazroey had continued to pay an accommodation provider after a student had vacated. Ms Lee claims that he blamed her for the overpayment as it is alleged she had not advised the student's change of residence. She claims the first intimation of her impending dismissal came when Mr Almazroey said *you should use the next two weeks to get yourself organised* or words to that effect. Ms Lee claims that Mr Almazroey then went on to say that he understood this would place her in a difficult financial situation but that he would give her some money from his own resources. She replied by saying that she didn't want his money and the conversation then turned to small talk before Mr Almazroey ended it with advice that he would follow up the conversation with an email.

[13] Ms Lee states that whilst she wasn't certain at that stage, she had the impression that she had been fired. She says that impression was confirmed by the subsequent email.

[14] Mr Almazroey accepts that the conversation was relatively long and that a number of issues were discussed before, he states, he advised Ms Lee that AATE could no longer afford to retain her because of the earthquakes and the fact that they had led to a number of their students leaving town. He states that he did make a

comment about two weeks notice but was unable to be specific about exactly what he said. He also accepts that he did advise that he would confirm the conversation by email, which he subsequently did.

[15] The email he then sent reads:

*Dear Maree
I am writing to inform you that this is your final two weeks as per today with AATE ends by 4 October 2010. Good luck.*

Aiman

[16] Ms Lee was hurt by the confirmation of her fear that she was to be dismissed and replied with the first of a series of emails she sent that evening. Her first email reads:

Aiman I need you to understand that I am absolutely, completely and utterly humiliated by this. I have never in my entire working life been sacked and especially not for doing a bad job. I am well known for being very good at my job and I don't know why it didn't work while I was working for you. I found instructions unclear and was never really sure what exactly was expected of me. I am not blaming you for that – obviously I simply didn't fill you expectations – that is humiliating enough in itself.

However, do not tell me you love me and think of me as a sister while you pull out from under me the only thing I have at the moment that keeps me going.

You may just have well stuck a knife in my heart.

I have tried SO hard to do what you wanted but I never was clear what that was.

Whatever – DO NOT pretend to be my friend while you do this to me.

[17] She followed that up with a second missive that advised:

You can stick your good luck. I have no contract so need no notice – I will cease to work for you from today. I do not want any money or gifts from you.

[18] There was another email two minutes later that advised:

I will return all property belonging to you tomorrow – please also return mine. Don't worry – you owe me nothing.

[19] The following day Ms Lee's daughter, Erin, telephoned Mr Almazroey. She states that she advised who she was and that she was calling as her mother was extremely distressed. She says she advised Mr Almazroey that he simply could not

fire her as he had done – he needed a process. She says that Mr Almazroey started to justify his actions and whilst she stopped him almost immediately she gained the impression that his concerns related to her mother's performance and were not related to the financial state of the business. She says that before ending the conversation she reiterated her mother's distress and stated that she (Erin) believed her mother should take the matter further.

[20] Mr Almazroey states that they had a general discussion before Erin essentially said *give us some money or we will take legal action* or words to that effect. He says he replied by advising that he had already offered money to Ms Lee but that she had rejected it. He says that was her decision and therefore he would no longer discuss it with someone else.

Determination

[21] Notwithstanding AATE's acceptance it dismissed Ms Lee, the first issue that requires determination is whether or not a dismissal actually occurred. It is well accepted that a dismissal does not occur until the employment actually ceases (refer *GFW Aqua Products v. Gibson* 1995 2 ERNZ 323 (CA)). The termination envisaged by Mr Almazroey, and the one for which he gave notice, was to take effect on 4 October 2010. The cessation of employment, however, occurred on 21 September. The reason it did so was that Ms Lee chose to leave forthwith. The termination was therefore occasioned by her actions and occurred before the date envisaged by AATE, which, according to Mr Almazroey, caused some consternation as it left the company in a short term lurch.

[22] The conclusion that this was not a dismissal does not, however, necessarily end the matter. Section 122 of the Employment Relations Act 2000 states that nothing in either the Act or an employment agreement prevents a finding that a personal grievance is of a type other than that alleged.

[23] Ms Lee has claimed an actual dismissal. I have concluded that did not occur but two other possibilities remain. The first is that she was constructively dismissed and the second is that she was unjustifiably disadvantaged.

[24] Whilst a trite summary of somewhat more complicated law, a constructive dismissal results when an employee feels compelled to resign as a result of an action of the employer. I cannot consider that to be the case here. There was nothing

indirect about AATE's intentions. They were going to dismiss Ms Lee but they were doing so, in their mind, for reasons of redundancy which implies no fault. Ms Lee therefore had a choice. She could have remained and worked out her notice. She chose not to but was not compelled to do so. I cannot, therefore, conclude that this was a constructive dismissal.

[25] A decision to dismiss will undoubtedly lead to a loss of employment. That is clearly disadvantageous. However, and as was said earlier, the rationale behind the decision to issue notice was redundancy. I accept that the company was in a parlous state and in this respect note Ms Lee's admissions to that effect and her acceptance that the situation was further affected by the fact the industry in which AATE operated was seasonal and, notwithstanding earthquakes, September would have seen a downturn in any event. Accepting, therefore, that the situation would have provided a substantive justification for the redundancy that would undoubtedly have ensued had Ms Lee not resigned, I turn to the procedural aspects.

[26] Section 4(1A)(c) of the Employment Relations Act requires that an employer considering a decision likely to have an adverse affect on the continuation of an employee's employment provide that employee with access to all relevant information and give the employee an opportunity to comment before a final decision is made.

[27] AATE accepts it did not comply with the requirements of s.4(1A)(c). The decision was made prior to Mr Almazroey's 21 September telephone call to Ms Lee and there was no input from her. To make such a potentially disadvantageous decision without complying with the legal requirements must be unjustified and for that reason I conclude that Ms Lee was unjustifiably disadvantaged in her employment.

[28] As an aside, and before concluding, it should be noted that AATE contends that it did consult Ms Lee over her possible redundancy. It says this occurred during the discussion leading up to the reduction of hours that occurred on 3 August. I do not accept that approach. The situation as it was then was addressed by the agreement that Ms Lee remain employed, albeit, on reduced hours. Full and complete termination is an additional and very different outcome requiring further consultation especially as the situation had also changed dramatically. AATE's justification for the decision to dismiss is based upon a loss of clientele caused by the 4 September

earthquake. That event, and its consequences simply, could not have been discussed or even contemplated in early August.

Remedies

[29] My conclusion that Ms Lee was disadvantaged by an unjustified action of the employer means she has a personal grievance. That raises the question of remedies. She initially claimed the reimbursement of wages lost as a result of her dismissal and \$20,000 compensation for hurt and humiliation. The conclusion that Ms Lee was not dismissed, but resigned, removes the question of reimbursing wages lost as a result of a dismissal. That said, and as an aside, even had she been successful the award would not have been great. Her earnings were \$140 a week and she had found new employment, paying a greater amount, within eight weeks.

[30] Ms Lee claims \$20,000 as compensation under s.123(1)(c)(i) of the Act. When asked to justify the claim her response was short – *I was advised to do so by my advocate*. That is not a response that is likely to justify an award, especially the large one sought here. That said, it is clear from the emails that Ms Lee sent soon after receiving written confirmation of her impending dismissal that she was, at least at that time, hurt. Confirmation also comes from Erin's evidence. A degree of hurt is understandable. Anyone advised of their imminent termination would feel some pain especially, as occurred here, when the message was potentially contradictory. On one hand Ms Lee was being told the dismissal was by reason of redundancy which is a no fault situation, whilst on the other a criticism of her performance was also discussed. That she was confused is clear from the content of her subsequent emails. She has not, however, produced evidence of prolonged or on-going hurt.

[31] In such a situation I consider an award, albeit a small one, is justified and accordingly award to Ms Lee the sum of \$1,000.

Orders

[32] For the reasons given the following orders are made:

- (i) Ms Lee has a personal grievance, albeit not the one claimed, in that she was disadvantaged by an unjustified action of her employer, AA Trade & Enterprise Ltd;

- (ii) AA Trade & Enterprise Ltd is to pay to Ms Lee the sum of \$1,000 as compensation for humiliation, loss of dignity and injury to feelings pursuant to s.123(1)(c)(i) of the Act.

Costs

[33] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Ms Lee wishes to seek costs, she is required to file her application within 28 days of this determination. A copy shall be served on the respondent who is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority