New Zealand Employment Relations Authority Decisions

Lewis v Kennett (Christchurch) [2016] NZERA 339; [2016] NZERA Christchurch 124 (1 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 124
5620128

BETWEEN BARBARA ANNE LEWIS Applicant

A N D ANNE KENNETT trading as ANNIES CLEANING SERVICE Respondent

Member of Authority: David Appleton

Representatives: Applicant in person

Respondent in person Investigation Meeting: 26 July 2016 at Christchurch Submissions Received: 26 July 2016 from both parties Date of Determination: 1 August 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Lewis claims unjustified dismissal and unjustified disadvantage in her employment. Ms Kennett denies that she dismissed Ms Lewis and denies that Ms Lewis was subjected to unjustified disadvantage in her employment.

Procedural point

[2] The day after the investigation meeting Ms Lewis emailed the Authority saying that Ms Kennett had omitted to explain during the investigation meeting that three of her other employees had left her employment, and making brief statements about the circumstances of their leaving. I decline to take the contents of this email into account, as Ms Lewis had the opportunity to make these points during the investigation meeting, when Ms Kennett could have replied to them directly. In

addition, the comments are not relevant to the issues that the Authority has to investigate in respect of Ms Lewis' claims.

Brief account of events leading to termination of employment

[3] The respondent operates a cleaning business, cleaning homes and, it is understood, businesses.

[4] Ms Lewis started working for Ms Kennett in around July 2015. Ms Lewis produced a copy of a casual employment agreement with her name on it, and Annies Cleaning Services identified as the employer, although the agreement was not signed. According to Ms Lewis, she became a full time permanent employee sometime between July 2015 and March 2016. Ms Lewis says this occurred when her work became more regular and predictable.

[5] Schedule A to the casual employment agreement states that the hours of work would be between 8am and 6pm, Monday to Friday, unless by arrangement. The hourly rate of pay was $15, plus 8% holiday pay.

[6] Ms Lewis complains about a number of actions by Ms Kennett towards her, which she says amounted to disadvantages in her employment. These alleged actions are as follows:

(a) being verbally abusive;

(b) wagging her finger at her; (c) hitting her on the arm;

(d) threatening to take money out of her wages to pay for a broken vacuum cleaner;

(e) not fixing the broken vacuum cleaner, causing it to be more difficult to use;

(f) not paying her for a day of sick leave; (g) not paying her for two public holidays; (h) not giving her tea breaks;

(i) not giving her lunch breaks;

(j) not giving her a work shirt with her name on;

(k) not giving her timesheets, and then giving her three days' worth which

she had to fill in on her time;

(l) being made to visit clients in her own time; (m) not paying for travel time;

(n) leaving an abusive message on her cell phone; and

(o) being telephoned by Ms Kennett at 4am in the morning.

[7] With respect to the alleged dismissal, Ms Lewis' evidence is that she arrived back from holiday on Easter Monday of 2016, very late, and suffering from vomiting and diarrhoea. She was due to work the following day, Tuesday 29 March. Ms Lewis says that Ms Kennett called her around 6am to arrange the working day and Ms Lewis accidentally hung up on Ms Kennett. Ms Kennett rang again and Ms Lewis decided not to answer the phone.

[8] Ms Lewis says that she eventually telephoned Ms Kennett at around 2pm to tell her that she was ill, with vomiting and diarrhoea. Ms Lewis says that she said that she would be in the following day and that Ms Kennett replied *don't bother*.

[9] It is Ms Lewis' evidence that she regarded those words as a dismissal. She said that she then waited for a few days expecting to hear from Ms Kennett, but did not do so. She then tried to call Ms Kennett herself, and visited her home, but could not make contact.

[10] On Monday 4 April Ms Lewis wrote a letter of grievance in the following terms:

Dear Anne,

I am writing to advise you of a personal grievance for unjustifiable dismissal.

I am seeking:

• three months of wages including sick leave not paid.

• $10,000 for distress, anxiety and injury to feelings.

• holiday pay for Easter as I usually work Monday-Friday and up to 55 hours a week for several months now, which is not casual work it is full time employment.

I am seeking a meeting to mediate with the Ministry of Business

Innovation and Employment.

Please contact me in writing to organise this by no later than Friday,

8 April 2016.

Yours sincerely, B A Lewis

[11] Ms Lewis' statement of problem was lodged with the Authority on Friday

8 April 2016.

[12] According to Ms Kennett, she rang Ms Lewis at around 7.15am on Tuesday

29 March, and Ms Lewis hung up on her twice. Ms Kennett then texted Ms Lewis, to which she received no reply. Ms Kennett texted her again, and still had no reply. At

1.40pm Ms Lewis called Ms Kennett to say that she was not coming in to work which, according to Ms Kennett, "left her in the lurch". Ms Kennett says Ms Lewis knew that she should have called in sick at 6am that morning, to give Ms Kennett time to arrange a replacement.

[13] Ms Kennett's evidence is that, when she heard that Ms Lewis was suffering with vomiting and diarrhoea, she said "you may as well have tomorrow off as well". Ms Kennett says that this was because she knew that they would be visiting a client with young children, and another with a catering business, and she did not think it would be hygienic for Ms Lewis to clean in those premises when she had been suffering from vomiting and diarrhoea.

[14] Ms Kennett said that she did not expect Ms Lewis to turn up on that Wednesday, because of what she had said, but was surprised when she did not turn up or get in touch the following day, Thursday 31 March. Ms Kennett says that she did not try to call Ms Lewis at all at any time.

[15] Accordingly to Ms Kennett, Ms Lewis would turn up at her house at around

7.30am so that they could go to visit their cleaning clients, whereas Ms Lewis says that she expected to be rung and told what time to start and where they were going. Ms Kennett said that she did not receive any calls, or was not aware of any calls from Ms Lewis.

The issues

[16] The Authority must consider the following issues: (a) Whether Ms Kennett dismissed Ms Lewis;

(b) If she did dismiss Ms Lewis, whether that dismissal was justified or unjustified;

(c) Whether the alleged actions and omissions of Ms Kennett in respect of

Ms Lewis amounted to a disadvantage in her employment; and

(d) Is Ms Lewis owed any arrears of pay?

Did Ms Kennett dismiss Ms Lewis?

[17] Having heard evidence from both Ms Lewis and Ms Kennett, it appears to me that a misunderstanding arose between them. Ms Lewis believed that she had been dismissed by Ms Kennett's words on Tuesday 29 March 2016. However, both Ms Kennett and Ms Lewis agreed that they had not had any quarrel leading up to that day, and so there is no reason why Ms Kennett would have dismissed Ms Lewis.

[18] I believe that it is likely that Ms Kennett was stressed and annoyed by the time that Ms Lewis called her on 29 March, as she was having to deal with cleaning clients' premises without any help. It is likely, therefore, that she snapped at Ms Lewis and did not make herself clear as to what she wanted Ms Lewis to do. I do not, however, believe that Ms Kennett intended to dismiss Ms Lewis on that day, nor that her words amounted unequivocally to a dismissal, even on Ms Lewis' evidence. I do not accept, therefore, that Ms Kennett dismissed Ms Lewis on 29 March 2016.

[19] It is not clear to me who would normally make contact with whom, and it is possible that their usual routine got disrupted because of Ms Lewis' holiday. However, s.4 of the Employment Relations Act 2000 (the Act) makes clear (at s.4(1A)(b)) that the duty of good faith owed between employer and employee requires them to be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

[20] Ms Lewis believed that she had been dismissed and so arguably believed that she no longer owed a duty of good faith to Ms Kennett, but still tried to make contact with Ms Kennett. Ms Kennett, on the other hand, did not know that Ms Lewis believed that she had been dismissed, but noticed on Thursday 31 March that Ms Lewis had not been in touch. She also was not in touch on Friday 1 April. It appears that Ms Kennett did not get in touch with Ms Lewis even after she had received Ms Lewis' letter of personal grievance cited above.

[21] Ms Kennett was Ms Lewis' employer and, although her business is small, she still owed employer's duties to Ms Lewis, including the duty to be communicative. It is therefore surprising that Ms Kennett did not attempt to get in touch with Ms Lewis to find out what was causing her absence from work. If she had, it is perfectly possible that Ms Kennett and Ms Lewis could have easily resolved their misunderstanding and Ms Lewis could have started work again, perhaps as early as Thursday 31 March.

How and when did Ms Lewis' employment end?

[22] The concept of dismissal was considered by the Court of Appeal in *EN Ramsbottom Ltd v. Chambers*1. Adopting dicta from other reported cases it held that a "dismissal" is a unilateral act by the employer which terminates the employment contract2. *Ramsbottom* also cited *Wellington etc Clerical etc IUOW v. Greenwich (t/a Greenwich & Assocs Employment Agency and Complete Factors Centre)*3 which defined "dismissal" as "the termination of employment at the initiative of the employer".

[23] In the Employment Court case of *Iritana Horowai Ngawharau v. The Porirua Whanau Centre Trust*4 the Employment Court quoted from the Fair Work Australia case of *Sharpe v. MCG Group Pty Ltd*5 and considered that the principles discussed in that case could have equal application in any consideration of the meaning of "termination at the initiative of the employer" in a New Zealand jurisdiction.

[24] In *Sharpe,* it was noted*:*

1 [2000] NZCA 183; [2000] 2 ERNZ 97

2 Referred to in *Principal of Auckland College of Education v. Hagg* [1997] NZCA 410; [1997] ERNZ 116 at 124

3 [1980] ERNZ Sel Cas 95 at 103

4 [2015] NZEmpC 89

5 [2010] FWA 2357

[24] ... Essentially, termination at the initiative of the employer involves as an important feature, that the act of the employer results directly or consequentially in a termination of the employment, so that the employee does not voluntarily leave the employee relationship.

[25] In *Ngawharau*, the Court also quoted from the Australian case of *Wheinberger v. Huxley Marketing Pty Ltd*6 in which Justice Moore stated*:*

I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is a probable consequence of the employer's conduct.

[26] In the current case, I consider that termination did occur at the initiative of the employer in the sense referred to in Sharpe because Ms Kennett's conduct by failing to contact her employee, in breach of her duty as an employer, resulted directly, or consequentially, in termination of the employment. By Ms Kennett failing to get in touch with Ms Lewis during the period between 31 March and 4 April, she was in fundamental breach of her implied duty of trust and confidence toward Ms Lewis. That fundamental breach was capable of being a repudiation of the contract.

[27] My analysis is that Ms Lewis accepted the repudiatory breach (in a legal sense) by treating herself as having been dismissed when she wrote her personal grievance letter on 4 April 2016, the date when the employment ended. Whether one calls this a constructive dismissal is essentially academic.

Was the dismissal justified?

[28] Having found that Ms Kennett's failure to contact Ms Lewis during the period from 31 March to 4 April constituted an action which resulted in the termination of employment, which amounts to a dismissal, I must now go on to consider whether that resulting dismissal was justified or not.

[29] Section 103A of the Act provides:

103A Test of justification

(1)In applying the test in subsection (2), the Authority or the court must consider-

(a) whether, having regard to the resources available to

the employer, the employer sufficiently investigated

6 [1996] 67 IR154

the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or

taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the

employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(2)In addition the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(3)The Authority or the court must not determine a dismissal or an action to be justifiable under this section solely because of defects in the process followed by the employer if the defects were-

(a) minor; and

(b) did not result in the employee being treated unfairly.

[30] It is almost inevitable that, where employment ends by reason of an employer's repudiatory breach of the employment agreement, the Authority is going to find that no fair and reasonable employer could have acted in that way in all the circumstances. Therefore, I am obliged to find that the termination of Ms Lewis' employment was unjustified, both procedurally and substantially.

Was Ms Lewis subjected to unjustified disadvantage in her employment?

[31] When I took evidence from the parties with respect to the various allegations made by Ms Lewis, some of the allegations were admitted by Ms Kennett and others were denied. However, when I stand back, it appears to me that many of the issues complained about by Ms Lewis arose from day to day disagreements that often arise between parties working closely together, sometimes under stressful circumstances. It is clear that Ms Kennett had many complaints about Ms Lewis.

[32] Whilst, no doubt, it was annoying for Ms Lewis to have a finger wagged at her, or for her to have to work with a broken vacuum cleaner, I am not satisfied that these issues caused any disadvantage in Ms Lewis' employment that is capable of amounting to a personal grievance. Other issues raised by Ms Lewis were resolved after she had addressed them with Ms Kennett (such as getting a shirt with her name on, and the timesheet issue).

[33] There is, in any event, a more significant hurdle to the disadvantage claims made by Ms Lewis. Section 114 of the Act makes clear that an employee who wishes to raise a personal grievance with her employer (which s.103 of the Act makes clear includes a claim of unjustified disadvantage) must do so within the period of 90 days beginning with the date on which the action alleged to amount to the personal grievance occurred, unless the employer consents to the grievances being raised out of time.

[34] The Authority saw the letter of personal grievance written by Ms Lewis and it makes no mention of any of the actions complained of by her. It refers only to an unjustifiable dismissal.

[35] It was clear from Ms Lewis' evidence that many of the issues she now complains of were not complained about to Ms Kennett at the time by her. Some, as noted above, were resolved when they were raised. Ms Lewis also could not tell me when most of the issues arose, or could do so in only approximate terms.

[36] Ms Lewis does raise the alleged disadvantageous actions in her statement of problem, and Ms Kennett has not objected to the raising of any issues out of time. However, I cannot accept that Ms Kennett should be deemed to have consented to the grievances being raised out of time, as Ms Kennett was not represented, and any consent of that sort must be informed.

[37] As Ms Lewis has not applied for leave to raise her personal grievance out of time in respect of her disadvantage claims, and as it is not at all clear which, if any, of the personal grievances have been raised within time, I decline to find that Ms Lewis has a valid personal grievance in respect of any of the alleged actions of the respondent. I do not include issues relating to unpaid arrears of pay, however.

Is Ms Lewis owed any arrears of pay?

[38] It is clear that Ms Lewis should have been paid for two public holidays (25 and 28 March 2016) as Monday and Friday would otherwise have been working days for her (I refer to s.49 of the Holidays Act 2003).

[39] It is also clear that Ms Lewis should have been paid for having taken Tuesday

29 March 2016 off sick, and for the period 30 March to 1 April exclusive (three days)

while she was waiting to be contacted by Ms Kennett.

[40] Ms Kennett argued that Ms Lewis was a casual employee and therefore not entitled to sick leave, or to expect to work on any given day. I reject this argument. The Employment Court made clear in *Jinkinson v. Oceana Gold (NZ) Ltd7* that regularity of work and continuity of the employment relationship are indicative of ongoing employment as opposed to casual employment. The Employment Court said, at [52]:

The common theme of these cases8 is that, where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those

expectations.

[41] It is quite clear that, although Ms Lewis' hours varied from week to week, there was a regularity of work and a continuity of the employment relationship which created an expectation of work, which strongly indicates ongoing rather than casual employment. This seems to be the case from early on in the relationship. Between

13 July 2015 and 5 October 2015 Ms Lewis worked between 15 and 30 hours each week, and from around 24 January these hours increased to between 40 and 55 hours each week. I note also that Ms Kennett planned the servicing of her clients around the expectation that Ms Lewis would be available.

Remedies

[42] Having found that Ms Lewis was unjustifiably dismissed, I now turn to consider what remedies are due to her.

[43] Section 123 of the Act provides:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the

employee's employer, including compensation for—

7 [2009] ERNZ 225

8 The Court having reviewed some Canadian cases on the subject.

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[44] Ms Lewis claims the loss of three months' wages. She said in her evidence to the Authority that she had not been able to secure any work since she ceased to be employed by Ms Kennett in early April 2016. When questioned, however, Ms Lewis said that she has a shoulder injury which she is trying to obtain cover for under ACC, and that this is putting off employers. She also said that she is a registered nurse but does not wish to pursue that line of work, and that she has given up doing cleaning work. She is seeking administration work. Ms Lewis said that she worked for Ms Kennett doing cleaning with the shoulder injury, "but put up with the pain".

[45] When I consider this evidence, I am not satisfied that Ms Lewis has taken all practical and reasonable steps to find alternative employment, and I am therefore not satisfied that she has mitigated her loss. In addition, I believe that there was a reasonable chance that Ms Lewis would have had to have stopped working for Ms Kennett in any event, given that she had been suffering from a shoulder injury which caused her pain.

[46] Altogether, I am not satisfied that Ms Lewis has suffered a loss of remuneration of three months' pay as a result of the dismissal. Her ongoing loss of wages is either as a result of a failure to mitigate her loss, or her shoulder injury, (or a combination of both) rather than the personal grievance. I believe that it is likely that Ms Lewis should have been able to have secured alternative employment within four weeks of ceasing to work for Ms Kennett, or would have had to have ceased working for her anyway because of the shoulder pain, within a similar timeframe.

[47] Accordingly, I award Ms Lewis four weeks' pay. Averaging out the number of hours Ms Lewis worked in total over the number of weeks she worked gives an average of 28.83 hours a week. At $15 per hour gross, this makes $432.45 gross a week. Four weeks' loss of wages therefore amounts to $1,729.80 gross.

[48] Turning to compensation for humiliation, loss of dignity and injury to feelings under s.123(1)(c)(i) of the Act, Ms Lewis seeks $10,000 compensation. When asked

how she arrived at this figure, she said that this was a figure that her lawyer told her to write down.

[49] In her oral evidence to the Authority, Ms Lewis said that she felt useless because of all that had happened whilst

employed by Ms Kennett. However, I understood that this was also because of her inability to work, caused by her shoulder injury. No doubt, not being able to secure work because of a shoulder injury is depressing, but that cannot be blamed on Ms Kennett.

[50] I accept that Ms Lewis would have felt a degree of humiliation, loss of dignity and injury to her feelings by not having been contacted between 31 March and

4 April, having believed that she had been dismissed. As a result, I believe that it is appropriate to award Ms Lewis compensation, although I cannot be satisfied that the hurt, humiliation, loss of dignity and injury to her feelings directly attributable to Ms Kennett's actions was anything but mild. I therefore fix this sum at $2,500.

[51] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise

have been awarded accordingly.9

[52] I believe that Ms Lewis misunderstood Ms Kennett when she believed she had been dismissed on 29 March 2016. That misunderstanding, however, is not through any blameworthy action on either party.

[53] Ms Lewis says that she did try to contact Ms Kennett at some point, but was unable to do so. The blameworthy action that ensued lies with Ms Kennett for not having taken proactive steps to contact her employee.

[54] I do not consider that it is appropriate to reduce the remedies awarded to

Ms Lewis pursuant to s.124 of the Act.

Orders

[55] I order Ms Kennett to pay to Ms Lewis the following sums:

9 Section 124 of the Act

(a) $172.98 gross in respect of Easter Friday and Easter Monday 2016; (b) $86.49 gross in respect of her sick day taken on 29 March 2916;

(c) $259.47 gross in respect of the period from 30 March to 1 April 2016. (d) $1,729.80 gross in respect of four weeks' lost wages;

(e) $2,500 gross in respect of compensation under s.123(1)(c)(i) of the

Act.

Costs

[56] As neither party was represented, I make no orders as to costs, save that Ms Kennett is to reimburse Ms Lewis with the Authority's lodgement fee of $71.56, together with photocopying charges of $5.20.

David Appleton

Member of the Employment Relations Authority