

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 146
5536047

BETWEEN ALICIA McCORMACK
Applicant

A N D SARAH NIU
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Thompson, Advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 6 October 2015

Oral determination
Delivered: 6 October 2015

Written determination
Issued: 7 October 2015

ORAL DETERMINATION OF THE AUTHORITY

[1] This determination is a written record of an oral determination delivered on 6 October 2015.

Employment relationship problem

[2] Alicia McCormack says that she was unjustifiably dismissed from her employment. Ms McCormack seeks reimbursement of lost wages for a period of twenty six weeks in the sum of \$17,784.00 together with the employer contribution for Kiwisaver of 3%, compensation of \$15,000 and payment of costs and disbursements.

[3] Sarah Niu in her statement in reply said that Ms McCormack was dismissed justifiably following an initial trial of three months as she did not perform to the

required expectations. Ms Niu says that Ms McCormack was given verbal warnings on 6 May 2014, 12 May 2014 and a written warning on 13 June 2014 regarding performance issues being below the required standard.

[4] Very recently on 2 October 2014 Ms Niu advised the Authority that she was made aware by a lawyer she was not the respondent and that the respondent was a company Fei Yang Trade Limited (Fei Yang). There was no reference to that in the statement in reply although there is correspondence on the file that supports solicitor David Liu had been instructed by Ms Niu to respond to the raising of a personal grievance claim by Ms McCormack. The Authority was then advised Ms Niu had instructed two further legal representatives. Neither raised that Ms Niu was not the employer of Ms McCormack.

Progress to investigation

[5] After the statement of problem and the statement in reply were lodged with the Authority, the Authority held a telephone conference on 13 February 2015. Mr Thompson, Ms Niu and her support person, Stephen Woods attended that telephone conference. The parties were directed to participate in mediation and a subsequently issued notice of direction provided that the Authority would conduct an investigation meeting in Christchurch on 24 June 2015 if mediation was unsuccessful. A timetable for statements of evidence and other documents not already before the Authority was also set at that meeting.

[6] The Authority was subsequently advised that mediation was unsuccessful and statements of evidence were received from Ms McCormack and her mother Tui McCort in accordance with the timetable set.

[7] On 15 June 2015 the Authority received a letter from a solicitor, Janelle Liu requesting an extension of the time to lodge and serve statements of evidence and an adjournment of the investigation meeting. Ms Liu advised that Ms Niu was unaware that the Authority had set down a date for an investigation meeting and that Ms Niu was currently unrepresented and wanted to engage Ms Liu to represent her on the matters. Ms Liu referred to time constraints for preparation and advised that Ms Niu would not be in New Zealand on 24 June 2015. She said that Ms Niu was leaving the country on 22 June 2015 for approximately six weeks and returning on 10 August 2015. Copies of electronic tickets were provided.

[8] Mr Thompson opposed the adjournment referring to Ms Niu's attempts to delay matters as disingenuous and stating that the matter was not a complicated one. The Authority placed some weight on the fact that Ms Niu would be overseas and the difficulties that would involve in properly investigating the employment relationship problem. An adjournment was granted on the basis that another date would be set in October 2015 and any further application for an adjournment would not be viewed favourably.

[9] Both parties agreed to an investigation meeting taking place on 6 October 2015 and a further notice of direction dated 25 June 2015 provided that Ms Niu was to lodge and serve statements of evidence and all relevant documents by no later than 4pm on 22 September 2015.

[10] On 1 September 2015 Ms Liu advised that she no longer had instructions to act for Ms Niu and formally sought leave to withdraw as counsel. Leave was granted. Ms Liu gave the name of another solicitor who was representing Ms Niu, Vivian Zhang, and was asked to ensure that any further correspondence be sent to Ms Zhang.

Further documents provided by Ms Niu

[11] A Senior Authority Officer communicated with Ms Zhang by email on 23 September 2015 to advise that Ms Niu's statement of evidence and documents were overdue. Ms Zhang advised that she did not have instructions in the matter. Ms Niu then provided a large number of documents.

[12] The Senior Authority Officer and Mr Thompson considered the documents and confirm that the majority of documents provided by Ms Niu were already on the Authority file or privileged, either because they were without prejudice communications or communications between Ms Niu and her legal representatives. The one document that the Authority was able to see was an employment agreement which had already been provided on behalf of Ms McCormack. There was no statement of evidence provided.

[13] On 2 October 2015 Ms Niu emailed the Senior Authority Officer and advised that Fei Yang had no *fresh or further evidence* to give to the Authority and that she would not be able to attend the hearing either as representative for Fei Yang owing to work commitments. She advised that Fei Yang is prepared to accept the Authority's ruling on the day.

[14] The Senior Authority Officer pointed out to Ms Niu in an email that same day that she runs a risk by not turning up to the investigation meeting that the Authority could determine that she was the employer and not the company referred to.

[15] On the day of the investigation meeting Ms McCormack was represented by Mr Thompson but there was no appearance on behalf of Ms Niu.

[16] The Authority had already been advised that an appearance on behalf of Ms Niu was unlikely however, I delayed the commencement of the meeting for a short time.

[17] Pursuant to clause 12 of the Second Schedule of the Employment Relations Act 2000 (the Act) I then proceeded to hear evidence from Ms McCormack and her mother.

Relevant provisions of the employment agreement

[18] The employment agreement refers to the parties as Hotel 115 which is not a limited liability company and Alicia McCormack. Ms McCormack was employed in the role of receptionist. There is no reference in the employment agreement to the company that Ms Niu now maintains employed Ms McCormack Fei Yang. Ms Niu signed the employment agreement as employer on 28 March 2014.

[19] Ms McCormack had commenced employment on 24 March 2014, the day before she was presented with the employment agreement.

[20] The individual employment agreement was then signed by Ms McCormack on 25 March 2014.

[21] The employment agreement contains a trial provision in Schedule 1 that provides as follows:

Employment is subject to a trial period of three months during which time the Employee's performance will be reviewed at the completion of the first month. The Employee will be entitled to whatever training, supervision, support and resources during this period as may be deemed necessary by the Employer, and will be advised that the performance review meeting of the work performance in relation to the standards required of them. The Employer will clarify the standards required with reference to the Employee's position description.

The Employer may extend the trial period to enable the Employer to conduct additional performance reviews. Notice of the extension of the trial period and the length of the extended trial period will be given to the Employee in writing before the completion of the initial trial period.

One week's notice of termination of employment may be given after three investigation/disciplinary meetings (which will have followed each performance review), and issued two written warnings and then after the final performance review the Employer considers that the Employee has failed to meet the required standards.

Where the Employer terminates the agreement under this clause the Employer may elect to pay one week's wages in lieu of notice.

[22] Under the employment agreement Ms McCormack was to be paid \$18 per hour.

Identity of the employer

[23] Ms McCormack dealt with Ms Niu in obtaining her position of Hotel Receptionist with Hotel 115 who she said owned and operated the Hotel. She confirmed in her evidence that she had never been told that Fei Yang was her employer although she did accept that payments made to her bank account while she worked at Hotel 115 were in the name she thought of Fei Yang. I have viewed the pay slips Ms McCormack received but there is no reference on them to that company. Ms Niu signed the employment agreement and the letter of dismissal which was not on letterhead.

[24] I find that Ms Niu objectively assessed was the employer of Ms McCormack. There was no suggestion until late last week that she was not Ms McCormack's employer.

[25] I am satisfied that Ms McCormack was employed by Ms Niu.

Was Ms McCormack unjustifiably dismissed?

Background

[26] Ms McCormack says that the first time there was any suggestion of issues with her performance was on Friday 13 June 2014. On that day she was asked by Ms Niu to see her at the end of her shift. She said that was the first time that she had been required to visit the offices of Ms Niu and she was initially very nervous.

[27] I put to Ms McCormack that it had been raised in the statement in reply and in some correspondence from Mr Liu, who had been instructed at the commencement of matters by Ms Niu, that there had been earlier meetings in March and warnings issued. Ms McCormack categorically denied that and I found her evidence on that point credible. Consistent with the evidence is a letter that Ms McCormack wrote to Mr Liu on 8 July 2014 in which she denied the March meetings occurred; she asked for, and requests have continued to be made by Mr Thompson, evidence about the earlier meetings or information about any warning. No information was provided.

[28] I am satisfied that the first meeting with Ms Niu about anything resembling concerns or complaints was on 13 June 2014. When Ms McCormack entered the office on that day Ms Niu advised her that there were guest complaints. There was no information provided and Ms McCormack said that she was somewhat surprised as she thought she had been doing a very good job. Ms McCormack was also informed that another staff member was scared of her and found her hard to approach. Again Ms McCormack was surprised. Ms Niu advised that Rahul who works in housekeeping was the one with concerns.

[29] Ms McCormack said that she was unaware that Rahul would feel this way as she thought they both got on very well. Ms Niu advised her not to tell Rahul that she had been notified of his concerns. At the end of the meeting Ms McCormack said that she was not aware the conversation was a warning and she was not provided with any letter or notified the discussion had been or was disciplinary in nature. She understood there may be some follow up in the way of a further meeting but I am satisfied there was nothing in writing or any verbal statement in the nature of the warning provided to her.

[30] Ms McCormack returned to the hotel after the meeting and had a brief conversation with another employee who said she would speak to Rahul to find out what was going on. That employee informed Ms McCormack that Rahul had not been spoken to by Ms Niu and there was a degree of confusion regarding the comment. Ms McCormack thought it appropriate that she then text Rahul and he advised that he had not spoken to Ms Niu about her or about any other staff member. While Ms McCormack was confused she decided it was best to simply continue to do her work and she put the situation down to a misunderstanding.

[31] Ms McCormack said that between 13 June and 23 June 2014 she did not see or speak to Ms Niu about the earlier meeting.

[32] On 23 June 2014 at the commencement of her shift Ms McCormack was told by Juliana, the front office manager, that she was required to see Ms Niu in her office. Ms McCormack said that when she arrived in the office she saw an envelope on Ms Niu's desk and commented *oh no what is this*. Ms Niu advised Ms McCormack that she had made a decision and was going to let her go.

[33] Ms McCormack advised Ms Niu that she was over her 90 day trial period and a debate took place as to whether the period was outside the 90 days. Ms McCormack advised Ms Niu that she did not understand what she had done wrong and Ms Niu responded that her partner Mr Woods said that Ms McCormack did not make conversation with him and that she had only smiled. Ms McCormack denied that was the case and said she did talk to Mr Woods. She took the letter and left the office in tears. Ms McCormack returned to the hotel approximately one hour later to hand in her uniform and name badge.

Test of justification

[34] Section 103A of the Act provides the test of justification as to whether a dismissal was justifiable. It requires that justification be determined on an objective basis by the Authority applying the test *whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred*.

[35] In applying the test the Authority must consider the resources available to the employer. It must also consider whether the employer raised the concerns before dismissing, whether there was sufficient investigation of the allegations against the employee before dismissing and whether there was a reasonable opportunity for the employee to respond to the concerns and have that explanation or response considered by the employer before dismissal.

[36] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if those were minor and did not result in the employee being treated unfairly. A fair and reasonable employer will also comply with good faith obligations including the provision of information relevant to the continuation of employment.

Reason for dismissal

[37] Ms McCormack was unaware of why she had been dismissed. The letter of dismissal is very short and provides as follows:

Dear Alicia McCormack

I thank you for meeting last week. We have considered your comments and have evaluated your performance over the period of probation.

We regret to inform you that we are unable to continue employing you after the probationary period. We have come to a conclusion that your competencies does not meet the requirement of the task assigned.

While we wish you best of luck in for your future endeavors we wish to pay you two weeks equal salary. Your discontinuation will be of immediate effect.

*Yours sincerely
Sarah Niu*

Trial probationary period

[38] I do not find that the trial period of three months provided for in Schedule 1 of the employment agreement can be relied on in this case. It does not for completeness meet the requirements of s.67A of the Act. Ms McCormack commendably with the assistance of a family member set out the reasons that the trial period in Schedule 1 of the employment agreement could not be relied on in a letter to Hotel 115 two days after her dismissal on 25 June 2014. Ms McCormack noted in the letter that her performance was not reviewed at the completion of the first month of employment. She wrote that she was not advised of her work performance in relation to the standards required of her. The standards were not clarified in respect of her position description and she did not have three investigations/disciplinary meetings and two written warnings which the provision requires.

Process

[39] I find that there was an absence of a fair process and the requirements as set out in s.103A (3) of the Act have not been met in this case. There was no investigation of the allegations against Ms McCormack. It was unclear before Ms McCormack entered Ms Niu's office on the occasions on 13 June and 23 June 2014 what the allegations were. Ms McCormack was unable to have a reasonable

opportunity therefore to respond to them and there was no genuine consideration of her explanation. There was an element of pre-determination because the letter of dismissal had already been written.

[40] I do not find the defects in the process were minor. They did result in Ms McCormack being treated unfairly and she was unable to ascertain the reasons for her termination other than there being some reliance placed on the trial period in her employment agreement and performance issues and that she did not talk to Ms Niu's partner.

Substantive justification

[41] There was no evidence before the Authority of previous warnings given to Ms McCormack. The one issue that Ms McCormack could recall being given as to why her employment was being terminated about Mr Woods' interaction was a minor one. I do not find that a fair and reasonable employer could have in all the circumstances dismissed Ms McCormack for that matter and I have already referred to the probation period in Schedule 1 not being able to be relied on in the circumstances.

[42] I find that the termination of Ms McCormack's employment was unjustifiable both procedurally and substantively.

[43] Ms McCormack has a personal grievance and is entitled to remedies.

Remedies

Lost wages

[44] Ms McCormack's employment was terminated with immediate effect with two weeks wages but she was later paid a further two weeks wages as the employment agreement provided for one month's notice which took payment for wages to 21 July 2014. Ms McCormack explained in her evidence that as a result of the termination and her view of the unfairness of it she suffered a relapse in what had been previously well controlled depression and had to seek medical advice. Ms McCormack said it put her into a position where even though she had made a conscious effort to look for work via the internet, newspapers and through Work and Income New Zealand she

had a fear of the interview process because of a loss of confidence and also a fear of starting and keeping another job.

[45] I am satisfied there were attempts to obtain employment although for some months there were not a large number of applications. I also heard from Ms McCormack's mother about her efforts to obtain a further job. Ms McCormack has a child and is currently on the sole parent support benefit having been unable to obtain employment apart from some casual work over the January to March 2015 period. I am in this case minded to exercise my discretion under s.128 of the Act and order Ms Niu to pay to Ms McCormack a sum greater than three months ordinary time remuneration. I find that Ms McCormack's loss of confidence arising from her unjustified dismissal in all likelihood impacted significantly on her ability to be successful at interviews and ultimately obtain a new position.

[46] I intend to award five months lost wages from 23 June 2014 to 25 November 2015, less the one month's notice payment made. I accept Mr Thompson's averaging out as correct of the weekly wages Ms McCormack obtained during her time at Hotel 115. He has calculated the average hours at 38 x \$18 to be \$685.00 gross per week. The period between 23 June and 24 November 2014 is 22 weeks and the calculation for that period is \$15,070.00 less \$2,736.00 which is the sum of \$12,334.00 gross.

[47] I order Sarah Niu to pay to Alicia McCormack the sum of \$12,334.00 gross being lost wages under s.123(1)(b)(i) of the Act.

Kiwisaver

[48] I accept that Ms McCormack was paid a 3% Kiwisaver employer contribution. I have calculated that contribution on the above gross amount of lost wages in the sum of \$370.02.

[49] I order Sarah Niu to pay to Alicia McCormack the sum of \$370.02 being a lost benefit under s.123(c) (ii) of the Act.

Compensation

[50] I find that the effect on Ms McCormack of the dismissal was quite significant. Her evidence as to the effect on her was supported by Ms McCort. Ms McCort said in her evidence that since the dismissal Ms McCormack had struggled in everyday life

and that she worries about her daughter's health and says that her daughter has lost confidence which has impacted on her applying successfully for new roles. Ms McCort said that when she is unsuccessful in such applications her confidence is further diminished as a result. Ms McCort gave evidence that Ms McCormack had enjoyed very much her role at Hotel 115 and her confidence had increased as a result. I accept that not knowing why she was dismissed has caused Ms McCormack significant emotional distress. Although Ms McCormack had previously suffered from depression before her dismissal, it had been managed. I accept that the termination of her employment played a role in her suffering a relapse of depression and needing to obtain further medical assistance and medication for that.

[51] I find that indicative of the impact of the dismissal on Ms McCormack was the fact that on the day her employment was terminated she was tearful and on her return home she accidentally crashed into the fence at the home she shares with her mother and daughter. Ms McCort said she was sure Ms McCormack would bounce back from her termination but that has not happened and I accept that Ms McCormack still struggles to find the energy and motivation to get through each day. There have been financial difficulties.

[52] In all the circumstances I am of the view that an award of compensation should reflect the impact the termination of Ms McCormack's position has had on her. In assessing this I have taken into account that the employment was for a comparatively short period, however that has to be weighed against the impact that the termination has had on her which I find is significant.

[53] In all the circumstances I find an appropriate award under this head for compensation is the sum of \$12,000.

[54] I order Sarah Niu to pay to Alicia McCormack the sum of \$12,000 without deduction, being compensation under s.123(1)(c)(i) of the Act.

[55] I do not find that Ms McCormack contributed to her personal grievance.

Costs

[56] The investigation meeting and the delivery of this determination occupied just over half a day, which included a period of adjournment. I accept that there are reasons in this case for increasing the tariff from the half day amount of \$1,750.00.

There was a late adjournment request in this case which resulted in some additional costs, there were changes by Ms Niu in her legal representation which necessitated additional correspondence and communication and there was a need for Mr Thompson to pursue, as it transpired unnecessarily, a large number of additional documents submitted shortly before the investigation meeting by Ms Niu.

[57] I am of this view that in this case a suitable award of costs is the sum of \$2,500 together with the filing fee of \$71.56.

[58] I order Sarah Niu to pay to Alicia McCormack costs in the sum of \$2,500 together with the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority