New Zealand Employment Relations Authority Decisions

Numan v The Rockpool Limited (Christchurch) [2018] NZERA 1074; [2018] NZERA Christchurch 74 (25 May 2018)

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 74
3020935

BETWEEN NINA NUMAN Applicant

AND THE ROCKPOOL LIMITED Respondent

Member of Authority: Helen Doyle

Representatives: Roland Samuels, Advocate for Applicant

James Hobcraft, Advocate for Respondent

Investigation Meeting: 12 April 2018 at Christchurch

Submissions received: 26 April and 2 May 2018 from Applicant

27 April 2018 from Respondent

Determination: 25 May 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A Nina Numan was unjustifiably dismissed from her employment with The

Rockpool Limited (Rockpool).

B. **Rockpool is ordered to pay to Nina Numan taking contribution into account:**

(a) The sum of $2,154.43 gross being reimbursement of lost wages under s123(1)(b) of the Employment Relations Act 2000 (the Act).

(b) The sum of $442.25 gross being reimbursement of one weeks unpaid notice under s123(1)(b) of the Act.

(c) The sum of $6,400 without deduction being compensation under s 123(1)(c)(i) of the Act.

C. **I have reserved the issue of costs and set a timetable for an exchange of submissions.**

Employment relationship problem

[1] Nina Numan says that she was unjustifiably dismissed from, and unjustifiably disadvantaged in, her employment as a bar manager with The Rockpool Limited (Rockpool), a food and beverage establishment in Christchurch. Further that she was not treated in accordance with the statutory obligations of good faith.

[2] Ms Numan seeks reimbursement of lost wages for a period of seven weeks, compensation, penalty for a breach of good

faith and a contribution towards her costs.

[3] Rockpool in its statement in reply says that Ms Numan is prevented by s 67B (2) of the Employment Relations Act 2000 (the Act) from bringing a claim for unjustified dismissal. Further, Rockpool does not accept that Ms Numan was disadvantaged in her employment and says that she received training, assistance and support as other staff members in her position receive. It says that she was paid notice in lieu of working her shifts although following the investigation meeting it was established that payment for the notice period had not in fact been made. Rockpool says that there is no merit in Ms Numan's claims.

The Issues

[4] The Authority needs to determine the following issues: (a) How did the relationship end?

(b) Is Ms Numan prevented from pursuing a claim of unjustified dismissal?

(c) If Ms Numan is not prevented from pursuing a claim of unjustified dismissal then was her dismissal justified?

(d) Was there a full and fair investigation undertaken by Rockpool?

(e) Could a fair and reasonable employer have concluded there was serious misconduct on the part of Ms Numan?

(f) Could a fair and reasonable employer have reached the decision to dismiss? (g) Was Ms Numan disadvantaged in her employment by:

(i) the absence of verbal and written warnings that she could potentially lose her position and/or

(ii) not being able to work out her notice period.

(h) Should a penalty be awarded for alleged breaches of good faith?

(i) If Ms Numan was unjustifiably dismissed and/or disadvantaged then what remedies should be awarded and are there issues of contribution and mitigation?

[5] An additional issue was raised at the investigation meeting and maintained in Mr Samuels final submission that Ms Numan was not paid for all hours that she worked. This submission was on the basis that when Rockpool supplied records to the Authority they showed times clocked out by Ms Numan rounded down to the nearest quarter of an hour. Mr Samuels has submitted that this unjustifiably disadvantaged Ms Numan. The Authority will make some comments regarding that and if necessary reserve leave for any response from Rockpool.

The investigation meeting

[6] Rockpool was represented by one of its employees, James Hobcraft at the investigation meeting. Information was provided by Rockpool but it elected not to call any witnesses to give evidence. Mr Hobcraft did however question Ms Numan who was the only witness the Authority heard from.

[7] I have therefore in determining this matter had regard to the evidence of Ms Numan, the statement of problem and statement in reply and attachments to those documents, together with additional information provided and the submissions from both parties.

The ending of the relationship

[8] One of the issues for determination is whether Ms Numan worked for Rockpool on

20 May 2017 before the employment agreement was signed and was not therefore an employee as defined in s 67A (3) of the Act..

[9] It is common ground that Ms Numan commenced her rostered shifts on 9 June 2017 as a bar manager. She worked variable hours each week and was paid an hourly rate of $16 per hour. The issue that lead to her termination arose on 3 September 2017 and I'll set that out.

3 September 2017

[10] On 3 September 2017 Ms Numan was at work in the evening. She said that it was very quiet. She went onto Facebook and posted a status as follows:

Someone come join me at work. free drink and quality banter will be provided.

[11] Ms Numan felt unwell and spoke to her duty manager Scott about 10pm who advised her to go home and take the following day, 4 September 2017, off to see a doctor. He asked her to return to work on Tuesday 5 September 2017. Ms Numan deleted the status and went home. In answer to a question from the Authority she said that no-one had attended at the bar as

a result of the Facebook status.

5 September 2017

[12] On Tuesday, 5 September Ms Numan arrived for her 6pm shift and served a few customers. Scott then asked her to have a "chat" having come into work although he was off duty. Ms Numan sat down with Scott at a table in the restaurant and Scott told her he was terminating her employment, effective immediately, and that he did not need to give her a reason. He did however say it was because of the status on Facebook and there had been some issues with the stock take and drinks being recorded as wastage.

[13] Ms Numan said she asked Scott if she was being accused of theft and stealing alcohol and that he responded "no". Ms Numan said that she advised Scott that all free drinks she hands over the bar get put on her tab and she pays for them out of her own pocket. She said that Scott responded he knew that but he was doing what he had been told to do.

[14] Ms Numan said that she was advised by Scott that he would pay out one week's notice on top of her annual leave, but that she was not allowed to finish her shift and had to go home immediately. She said that she did not receive a termination letter until 8 September when it was emailed to her. The letter of termination which was dated 5 September 2017 and provided as follows:

Dear Nina,

It is with regret that we have to advise you that we have chosen to exercise our right under Clause 7 of your Employment Agreement and pursuant to s67A and B of the Employment Relations Act 2000 and terminate your employment. (7.3 During the trial period the employer may terminate the employment for any reason (including giving notice or termination) and the employee will not be able to challenge the dismissal as a personal grievance or in any other legal proceedings.)

We are required to give you one week's notice however we believe your behaviour has fallen under serious misconduct which in turn means we retain the right to dismiss your employment without notice.

We thank you for working with us and confirm a Certificate of Employment and reference will be provided should you wish to have one.

Yours sincerely, Scott Raumati

The Rockpool Ltd

Is Ms Numan prevented from pursuing a claim of unjustified dismissal because of a trial period in her employment agreement?

[15] The employment agreement contained a trial period/probation period in clause 7. It provided as follows:

7.1 The employee shall be employed on a trial basis for the first 90 calendar days of employment commencing on the employee's first day of work to enable the employer to determine the employee's suitability for permanent employment. For Employees who have worked for the Employer previously, a 90 day probation period shall apply.

7.2 Where the conduct or performance of the employee during the trial period is likely to affect continued employment, the employer shall advise the employee specifying the area of dissatisfaction, the

improvement required, and the period of time by which that improvement is to be achieved.

7.3 During the trial period the employer may terminate the employment for any reason (including giving notice or termination) and the employee will not be able to challenge the dismissal as a personal grievance or in any other legal proceedings.

7.4 Where the employment is terminated in accordance with this Clause the employee shall receive one week's notice of termination. However, the employer shall retain the right to dismiss the employee without notice for serious misconduct.

7.5 Notwithstanding Clause 7.3 and 7.4, Clause 13.1 in this employment agreement and any applicable policies of the employer relating to training or disciplinary or performance management procedures will not apply during the Trial Period but the employer may, in its sole discretion, apply some other training or disciplinary or performance management process.

[16] The trial provisions in the Act are found in ss. 67A and 67B. Section 67B (2)

provides:

An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceeding in respect of the dismissal.

[17] Reliance is placed by Ms Numan on the meaning of an employee in s 67A(3) of the

Act being an employee who has not been previously employed by the employer. Section

6(1)(a) of the Act defines an employee as any person of any age employed by an employer to do any work for hire or reward under a contract of service. That definition excludes a volunteer who does not expect to be rewarded for work and receives no reward.

[18] Ms Numan says that she was employed by Rockpool before her employment agreement was signed when she undertook some work in the nature of a trial on 20 May 2017. An employment agreement will not contain an effective trial period if the employee has previously been employed by the employer.

[19] The other issue on which reliance is placed is that Ms Numan was not permitted to work out her notice period and there was no provision for payment in lieu of notice in the trail provision. It appeared from the letter of termination that Rockpool placed reliance on the

conduct being serious misconduct when the notice was not paid. Section 67B(1) of the Act provides as follows:

This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

When was the employment agreement signed?

[20] The employment agreement provided with the statement of problem was signed by Ms Numan and Georgina Whittaker. Ms Whittaker is a director of Rockpool. The date that the agreement is signed is 7 June 2017. Ms Numan's evidence is that she did not sign that agreement on that date, which was two days before she commenced her employment. She says that she signed it during her first shift on 9 June 2017 but after she had commenced work. Further Ms Numan says the date is not in her handwriting. She said that another duty manager Anna was present and that Ms Whittaker was not present when she signed the agreement and that she did not actually sign the agreement until after she had started work.

[21] Mr Hobcraft provided clock in records on behalf of Anna for 9 June after the conclusion of the investigation meeting that show her clocking out that day before Ms Numan clocked in for her shift. Mr Samuels in response said that Mr Hobcraft appeared to accept Anna's signature is on a job description dated 9 June 2017 which Ms Numan said she signed in the presence of Ms Childs. When I compare the signature on that document to another

Ms Childs purportedly signed1 the signatures do not seem the same. Mr Hobcraft had only

been employed by Rockpool for about six weeks at the time of the investigation meeting and Ms Childs was no longer working at Rockpool at the date of the investigation meeting. I do not place weight on identification of who signed that document on behalf of the employer in circumstances where there is no evidence from the individual who is said to have signed the employment agreement.

[22] What can be taken from all of this is that there is a signed employment agreement that is dated 7 June 2017. It may be that the exact date and time of signing and signature is

1 I refer to the document dated 7 April signed by Ms Childs that states Ms Childs was present with Ms Whittaker on 7 June 2017 when Ms Numan signed her employment contract.

overtaken by determination of other issues. On that basis I shall return to this matter if necessary.

Was Ms Numan an employee for the purposes of s 67A (3) of the Act?

[23] Ms Numan visited Rockpool on a social basis before she was employed there. Occasionally she would help staff out in an informal manner. Ms Numan said that she heard Rockpool were looking for staff on 19 May 2017 she completed an application for employment which was provided as part of the documentation to the Authority. The application is dated 19 May 2017. Ms Numan says that she was then asked to work a trial at Rockpool on the evening of 20 May 2017 before she formally commenced being allocated shifts. She said that she did not clock in at that time because she had not been given a clock in number but that she undertook work in the nature of a bar person. Initially she was only to work for four hours but it turned out to be work for eleven hours.

[24] Ms Numan said that she recorded her hours in the staff communication book. She says that she was paid for the hours that she worked on 20 May 2017 in accordance with her first payslip for the week ending Sunday 11 June 2017 and she confirmed that the pay period was weekly and ended on the Sunday of each week.

[25] That payslip shows Ms Numan was paid ordinary hours of 40 at the hourly rate of

$16 per hour with a total gross pay of $640.00. After deduction of tax and employee KiwiSaver contributions Ms Numan received a net pay of $518.76. That was a higher net pay than Ms Numan received for the next five weeks according to

information provided by Mr Hobcraft showing net payments to Ms Numan from Rockpool's business account.

[26] I have had regard to the other hours that Ms Numan says she was paid for within that pay period to see if there is a correlation between them, the hours Ms Numan says she worked on 20 May and payment for 40 hours work. The clock in and out record shows that Ms Numan clocked in at 5.36 pm on 9 June which was her first rostered shift and out at

4.40am on 10 June which is a total period of ten hours and 28 minutes. She then clocked in at

5.58pm on 10 June 2017 and out at 4.31am on 11 June 2017 which is 10 hours and 33 minutes. The records do not show her working again until 15 June 2017 which falls outside of the pay period in question. If those hours are added together with the 11 hours that

Ms Numan says she worked on 20 May they add up to about 31.6 hours which is less than 40 hours she was paid for.

[27] Mr Hobcraft in his submissions says that the pay for the first pay cycle was simply an administrative error in Ms Numan's favour. He states that a temporary worker was administering the system and she made errors with several other pays during that time. He explains that the payroll system is not linked to the clock-in system and requires manual entry, and the default hours worked are 40 hours per week and that was what was erroneously left in the system when finalising the pay that week.

[28] On receipt of that submission Mr Samuels then provided a Facebook message from a manager at Rockpool that he says establishes Ms Numan was asked on 3 June 2017 to work that evening from 6pm to close and that she agreed. On that basis he says that accounts for the 40 hours subsequently paid. I do note an earlier Facebook message from the same person on 2 June asking if Ms Numan could work Saturday 10 June, a date which was after 9 June. The fact that Ms Numan did work that shift persuades me notwithstanding the messages have not been tested in the usual way to give them some weight.

[29] Ms Numan additionally produced a copy of a text message that she had sent to her mother on 23 May 2017. It provided as follows:

Mam I got the job I've been wanting for ages!!!

Did a 4 hour trial on Saturday night which turned into an almost 11 hour shift. Went in just now to see whats going on and the guy said I got it.

[30] Ms Numan was questioned by Mr Hobcraft about a possibility that she was referring to other employment opportunities in sending a text message to her mother, but Ms Numan did not accept that was in fact the case.

[31] The evidence supports that before the text message was sent to her mother Ms Numan had already filled in an application for a position at Rockpool on 19 May 2017. The day on which Ms Numan says that she worked, 20 May 2017, was a Saturday. I find given those matters it is more likely than not Ms Numan is referring to Rockpool when she sent a text to her mother. The text message is consistent with her evidence that she undertook bar work in the nature of a trial on 20 May 2017 and was then offered a role.

[32] Weighing both the text message and the Facebook message I find that Ms Numan in all likelihood worked at Rockpool before either 7 or 9 June 2017. It is less likely that the payment made to Ms Numan for the week ending 11 June 2017 can be explained on the basis of an administrative error. It is more likely I find that the payment for that period reflected work undertaken not only on and after 9 June 2017 but also before that date. I do not therefore find that the work Ms Numan performed was as a volunteer. Given those findings I do not need to determine whether the employment agreement was signed on 7 or 9 June 2017.

[33] Ms Numen was employed to do work for reward before she signed the employment agreement containing the trial provision and was not an employee within the meaning of s 67A(3) of the Act. Ms Numan is not therefore precluded from bringing a personal grievance in respect of her dismissal.

Notice Period

[34] A further difficulty arises for Rockpool because of the statutory requirements of notice. Although Ms Numan initially thought she would be paid the notice period in lieu of working that did not occur. Clause 7.4 does not refer to payment in lieu but rather one week's notice of termination.

[35] Rockpool in its letter of 5 September confirming the dismissal appeared to then rely on a view that Ms Numan's conduct was serious misconduct and that they retained a right to dismiss her without notice.

[36] In *Smith v Stokes Valley Pharmacy (2009) Ltd* 2 Ms Smith was given no notice of her termination which was summary in nature. The then Chief Judge Colgan stated, when considering ss. 67A and 67B together with parties employment agreements, the following about notice:

The sections are intended to complement parties' agreements and, indeed, require, for their effective operation, those agreements to address certain issues. I conclude that one of those issues is the requirement of notice and it would be irrational to interpret the statutory reference to notice as being other than the contractual notice in any particular case. Nor can the statutory requirement for notice be interpreted as its antithesis, no notice, which is the essence of summary dismissal. That, too, is consistent with the general nature of the trial

2 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111; [2010] ERNZ 253 at [107]

provision sections. Although there may be instances of misconduct or serious misconduct during a trial period for which an employer may dismiss an employee summarily and justifiably, that is a long established feature of employment law and is not addressed by this legislation. Rather, trial provisions or trial periods conclude for reasons of unsatisfactory work performance or incompatibility or reasons of that sort. These are ones that the law had traditionally treated as giving grounds for dismissal on notice and not summarily.

[37] To retain the protection of s 67B(2) of the Act Rockpool would have had to have given Ms Numan under s 67B(1) of the Act notice of her termination before the end of the trial period which was expressly agreed to be one week's notice. Instead Ms Numan was summarily dismissed without notice.

[38] I find that for this reason also Ms Numan is not precluded from bringing a personal grievance in respect of the dismissal.

If Ms Numan is not prevented from pursuing a claim of unjustified dismissal then was her dismissal justified?

Procedural fairness

[39] Mr Hobcraft properly conceded that if Ms Numan was not prevented from pursuing her grievance of unjustified dismissal then the dismissal did not satisfy the procedural fairness factors set out in s 103A of the Act. The reason for the dismissal I accept was the Facebook status and the offer of free drinks in that status.

[40] I set out below some aspects of procedural unfairness. A fair and reasonable employer could be expected to follow the procedure agreed in the employment agreement. It was not suggested to Ms Numan in accordance with the procedure in clause 13.2 in the employment agreement that she bring a support person or a representative with her to the meeting on 3

September 2017. Ms Numan did not know before the meeting about the nature of the allegation she was facing.

[41] When she understood at the disciplinary meeting that the concern was about the Facebook status and the reference to free drinks she raised a concern about whether she was being accused of theft. Her evidence was that Scott responded "no". There was no information for Ms Numan to be able to answer concerns about stock recorded as wastage and any view that Rockpool may have about her responsibility.

[42] Ms Numan said that she explained to Scott that she put all drinks provided free of charge on her own tab and paid for them herself and her evidence was to the effect that he agreed she did that. There was no further investigation undertaken of any explanation. There could not be genuine consideration of any explanation because from what Ms Numan was told the decision to dismiss had been made by others and Scott was simply passing on that information with reliance placed on the trial provision. The procedural failings were not of a minor or technical nature. They were fundamental. Rockpool did not act as a fair and reasonable employer could have done in all the circumstances at the time.

Substantive fairness

[43] I have considered substantive fairness. Clause 11 of the employment agreement refers to house/work rules. It provided that the employee must comply with these. One of the examples of serious misconduct in the house rules is providing the employer's products and/or stock to anyone free or below the required price.

[44] Providing free drinks to customers at a food and beverage establishment could be conduct that amounts to serious misconduct as it could seriously undermine the trust and confidence in an employee. On its face the Facebook status suggests that was what Ms Numan was offering.

[45] The explanation from Ms Numan was that she always paid for the drinks that she did not charge her customers for by putting them on her tab and that would have been her intention if there had been a response to the status. She had a staff tab and the evidence supports that for the period between 9 June and 5 September 2017 she made purchases for the sum of $405.00 before the staff discount was applied.

[46] Further and materially Ms Numan said in her evidence that it was common practice amongst staff to put drinks given to customers without charging them onto their tabs. Ms Numan's evidence about the exchange she had with Scott at the time she was dismissed was that he agreed with her that he knew she put such drinks on the tab. Ms Numan said in her evidence that she was unaware of the house rule that it was not acceptable for drinks for customers to be paid for by a staff member on their own tab because they would be at a discounted price. Ms Numan confirmed there were cameras in the bar and

restaurant area.

[47] Sometimes there is an overlap between a lack of procedural fairness and substantive fairness. This is such a case because the explanations were to the effect that Ms Numan's intention with the Facebook status was to pay for the "free drinks" but at the staff discounted rate. It is readily apparent that Ms Numan's explanations needed to be investigated further and until that occurred conclusions about the Facebook status and any misconduct as a result could not safely be reached by a fair and reasonable employer.

Could a fair and reasonable employer have reached the decision to dismiss?

[48] I have found that there was serious procedural unfairness on the part of Rockpool and that as a result a fair and reasonable employer could not safely reach conclusions about any misconduct from the Facebook status.

[49] For these reasons the decision to dismiss was not one that a fair and reasonable employer could have reached in all the circumstances.

[50] Ms Numan has a personal grievance that she was unjustifiably dismissed and she is entitled to consideration of remedies which I will turn to after considering the remaining claims.

Unjustified action causing disadvantage

Absence of warnings

[51] Ms Numan did not receive verbal and written warnings that she could potentially lose her position. That claim is focussed on clause 7.2 of the trial period/probation period provision and the requirement for advice to be given to the employee about the areas of dissatisfaction and improvement required. I have not found the trial period to be effective in part because dismissal was summary in nature. I do not in those circumstances find a separate grievance of unjustified disadvantage as the claim is absorbed into and has been dealt with as part of the unjustified dismissal claim.

Not permitted to work out notice period

[52] Ms Numan wanted to work out her notice period but was told that she could not. She was advised she would be paid a week in lieu. There was however no payment for notice.

[53] There appeared no justification for promising a payment by way of notice in lieu and then not following through. Disadvantage was caused because a promised and expected payment was not made.

[54] A grievance of unjustified action causing disadvantage is made out. The appropriate remedy would be to put Ms Numan in the position that she would have been had the payment been made. That is reimbursement of a week's wages.

Clock in and clock out records

[55] I turn now to the issue raised belatedly by Mr Samuels on receipt of the clock in and out records about rounding down of the time Ms Numan clocked out to the nearest

15 minutes. I accept that on its face there could be an issue of a failure to pay for all time worked. I am however conscious that Rockpool have not had an opportunity to respond about this matter and that the evidence disclosed that Ms Numan was not paid solely in reliance of the clock in and out records. It seemed Ms Numan may have recorded her hours elsewhere. If that is the case then I would need a copy of that record and copies of all of the payslips. I have assessed the rounding down over all shifts worked by Ms Numan affected about 4.25 hours.

[56] If Mr Samuels wishes to pursue this matter then he is to advise the Authority and Mr Hobcraft within ten working days from the date of this determination. Mr Hobcraft can then respond to the matter.

Penalty for a breach of good faith

[57] A penalty for a breach of good faith is sought. Mr Samuels clarified that it was sought under s4A(b) of the Act that the failure was intended to undermine an individual employment agreement.

[58] Rockpool sought to rely erroneously as it transpired on a trial provision in dismissing Ms Numan for her Facebook status which caused concern. As a result its process was unfair and not in accordance with good faith requirements. I do not find however the evidence supports that Rockpool intended to undermine the individual employment agreement. Rather it appears that it genuinely believed the trial period was effective. The threshold for a penalty is high and I do not find it is reached in this matter. There is no award for a penalty.

Remedies

Lost Wages

[59] Ms Numan's Inland Revenue Department (IRD) records show that between 9 June and

5 September 2017, a period of 12 weeks and 4 days, she received a gross amount of $6855 from Rockpool. Averaged out that is earnings of $552.82 gross per week. Ms Numan said that about six days after her dismissal she was able to obtain other employment.

[60] Under s 128 of the Act if Ms Numan has lost remuneration as a result of the personal grievance she is entitled to the lesser of a sum equal to lost remuneration or 3 months ordinary time remuneration. I find that the causal link between the dismissal and lost remuneration after 1 February 2018 was broken because Ms Numan left her employment in Christchurch in late January 2018 and went to live and work in Taupo. The consequences of that decision to shift should not be visited on Rockpool. Ms Numan had been at the time of the investigation meeting after that shift without work for seven weeks.

[61] I have assessed loss of income by considering earnings over the period from

6 September 2017 to 31 January 2018 which is a period of 21 weeks. Over that period the IRD records show earnings of $8,916 which averaged out over 21 weeks is $424.58 gross per week. The loss therefore is the difference between $552.82 gross per week being the average earnings Ms Numan received at Rockpool and $424.58 gross per week being subsequent earnings for the 21 weeks after dismissal. The loss is therefore $128.24 per week which multiplied by 21 is $2693.04 gross. Subject to any order as to contribution reimbursement of lost wages is $2693.04 gross.

Unpaid notice

[62] Ms Numan is entitled to reimbursement of one weeks' notice which is $552.82 gross.

Compensation

[63] Ms Numan seeks compensation for humiliation, loss of dignity and injury to feelings. She said that she was embarrassed to have a conversation with Scott in the restaurant area where patrons could see it was not a friendly chat. Mr Hobcraft's questioning of Ms Numan supported a more confidential meeting room may have been problematic but I accept there

was an element of embarrassment because of the meeting location. Ms Numan said that she cried in her car following advice of her dismissal and that she loved her job at the Rockpool. She said that the day after the dismissal she suffered from severe stomach cramps that she put down to stress.

[64] Ms Numan said that she was not allowed to return to Rockpool socially. She was advised about this from her advocate and from someone at Rockpool. There was no direct evidence that this was the formal position from Rockpool but I accept that Ms Numan had previously enjoyed socialising at her place of work and that enjoyment did not continue..

[65] The situation was difficult for Ms Numan and she was hurt and humiliated. I do weigh she was able to find alternative employment within a fairly short period.

[66] Subject to any order of contribution then a suitable award of compensation is $8000.

Contribution

[67] The Authority is required under s124 of the Act to consider where it determines an employee has a personal grievance the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance. If the actions require then the Authority must reduce the remedies that would otherwise have been awarded.

[68] It is not until this stage that the Authority has to reach certain conclusions about the nature of the conduct for which Ms Numan was dismissed and whether to a degree she was in the wrong.

[69] Having heard from Ms Numan I am not satisfied that the intention of the Facebook status and its reference to free drinks, which she would have known would be accessible to those she worked with, was intended to dishonestly deprive Rockpool of revenue. Rather I find on the balance of probabilities Ms Numan naïvely and unwisely believed that she was entitled to provide drink free of charge and put them on her own tab to pay later. I do, having heard the evidence, conclude it was likely that Ms Numan had formed a view from the conduct of others that it was acceptable behaviour to put the drinks on her tab.

[70] It is unsurprising that her status caused Rockpool concern particularly as it was posted at or about the same time as there had been a staff meeting to discuss staff drinks, over pours

and loss of stock. Ms Numan did not attend the meeting but her evidence supported that she was aware of the memorandum about the concerns to be discussed. Further her intention to supply product below cost was an example of serious misconduct.

[71] Taking all these matters into account the above remedies are to be reduced by 20% for contribution.

Orders

[72] Taking contribution into account The Rockpool Limited is ordered to pay to Nina

Numan the following:

(a) Reimbursement of lost wages in the sum of $2154.43 gross under s123 (1)(b)

of the Act.

(b) Reimbursement of a week's wages in lieu of notice in the sum of $442.25 gross under s 123 (1)(b) of the Act.

(c) Compensation for humiliation, loss of dignity and injury to feelings in the sum of $6,400 without deduction under s 123 (1)(c)(i) of the Act.

Costs

[73] I reserve the issue of costs. Mr Samuels has until 8 June 2018 to lodge and serve submissions as to costs and Mr Hobcraft has until 22 June 2018 to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority
