

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 501
3151225

BETWEEN SIMONA PASZTOROVA
 Applicant

AND PETER MORLEY SUTHERLAND
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Ronald Jones, advocate for the Applicant
 The Respondent in person

Investigation Meeting: 8 September 2022 at Nelson

Submissions Received: At the Investigation Meeting

Date of Determination: 4 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Simona Pasztorova was employed by Peter Morley Sutherland in his Serious Straws (Hat) shop until her “resignation” on 10 March 2021. Ms Pasztorova states that during that time she was in a sole charge position responsible for opening the shop, serving customers, stocktaking and completing the end of day transactions. Ms Pasztorova says that on 15 February 2021, Mr Sutherland rang her before she had arrived at the shop, in an agitated state asking for the location of a money box containing banking and then complaining about the state of the shop, saying that the hats were not displayed correctly and the shop was messy.

[2] When Ms Pasztorova arrived at work, she could see nothing wrong with the display and accordingly texted Mr Sutherland asking him to come in and show her what he thought was wrong and how he wanted the hats displayed. Mr Sutherland arrived angry and aggressive and

berated her in front of customers. She went home on sick leave and when she returned to work, she was told her three days a week had been reduced to one day a week which would be a Sunday. She felt that this unilateral change along with the behaviour she had experienced meant she had no option but to resign, which she did on 10 March 2021. She says under the circumstances her resignation was a dismissal.

[3] Ms Pasztorova claims that as a result of her dismissal and Mr Sutherland's treatment of her leading up to it, she had suffered financial and emotional harm and claims lost wages together with compensation for hurt and humiliation, loss of dignity and injury to feelings. She also claims costs.

[4] Mr Sutherland denies the claims. He said although there was no written employment agreement there were clear oral terms and in all his years of working, he had never felt a need for a written employment agreement for any of his employees. He said that whilst he may have been upset when he was called to the shop, he had not acted as described by Ms Pasztorova.

[5] He confirmed he had reduced Ms Pasztorova's days to one day a week, namely a Sunday but said this was on the basis she wished to work less time anyway and he would have put her back to her normal hours once she had proved she was capable of doing the job.

The Authority's Investigation

[6] The Authority heard from Ms Pasztorova, her partner Mark Hardcastle and from Mr Sutherland. All witnesses affirmed their evidence and spoke to the written briefs they had filed. They answered questions from the Authority and from Ms Pasztorova's representative, Mr Ronald Jones.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specify the orders made. It has not recorded all evidence and submissions received.

The Issues

[8] The issues the Authority needs to determine are as follows:

- (a) What impact did the lack of a written employment agreement have on the employment relationship?
- (b) If Mr Sutherland's purported behaviour on 15 February 2021 was as Ms Pasztorova described, and if so, was it the action of a fair and reasonable employer?
- (c) Did the unilateral changes to her working hours, coupled with the events of 15 February 2021 amount to a repudiation of the employment agreement by Mr Sutherland and if so, was Ms Pasztorova unjustifiably dismissed?
- (d) If Ms Pasztorova was unjustifiably dismissed, what remedies should flow?

Discussion and Analysis

[9] Ms Pasztorova and Mr Sutherland broadly agreed with what happened on the 15 February 2021. Mr Sutherland rang Ms Pasztorova prior to her starting work at 10.00 am asking where the takings had been put. She told him where it was and also told him she would be in the shop in approximately 10 minutes. Mr Sutherland went on to say that the shop was a mess and that the hats were not displayed properly. In addition to his evidence at the investigation meeting, Mr Sutherland explained that if the hats were not stacked properly or set out properly, they could be damaged and lose value. It was clear he was quite passionate and particular regarding all matters relating to the hats.

[10] Ms Pasztorova then explained when she arrived at the shop, she could see nothing wrong and certainly nothing wrong with how the hats were displayed. She contacted Mr Sutherland asking him to come in and explain why the hats were not straight.

[11] It is here the parties' evidence differs somewhat. Ms Pasztorova says when Mr Sutherland arrived, he screamed at her, saying you never listen, you're the worst employee

I've ever had, the hats are not straight. She says he berated her in front of customers. Mr Sutherland then left.

[12] Mr Sutherland denies he screamed. However, he said he had thought he had a limited but good relationship with Ms Pasztorova. He says when he arrived, he saw that the hats had not been straightened from the day before. He says he was angry when she texted him asking him to show her what was wrong. He said that looking after the hats was Ms Pasztorova's responsibility and she should know what to do without asking him. He says an employee should not have called him to the shop asking him to tell them how to do the job they should know how to do. He said he told her the hats were messed up and ruined. He said he told her it was her job is to look after the hats and if you leave them out of shape you ruin them. He says he went through and started stacking hats, but people came into the shop and he left.

[13] Ms Pasztorova gave compelling evidence as to how she suffered as a result of Mr Sutherland's actions. In the days leading up to her resignation she was suffering nightmares, sleepless nights, skin problems and vomiting. Her GP had placed her on medication, and she was told to take two weeks leave because of the stress. She said when she returned to work only to be told that her three days a week had been reduced to one day a week, and that day would be a Sunday, she simply could not continue on. She felt unwell and so emotionally distressed, she believed she had no alternative but to leave her employment.

[14] Her evidence was supported by her partner Mark Hardcastle. He says on 15 February 2021 his partner phoned him crying and upset. He says she informed him that Mr Sutherland had been in the shop and had been acting in a very aggressive and intimidating manner, bullying her and belittling her in front of customers. He said when he went to her, he could see she was not fit for work. She was crying, shaking and scared. Later that afternoon, he found her hiding sobbing and distressed.

[15] He says that when Ms Pasztorova returned to work on the Sunday, she could see the hats were not sorted and were a mess and immediately became anxious and panicked. When he spoke to her, he advised her to close the shop and come home.

[16] He explained that when she returned to work the next day, the shop had already been opened by someone else. It was shortly thereafter it was explained to her that she was only to work on the Sunday.

[17] Having listened to both parties, I prefer Ms Pasztorova's evidence as to what transpired when Mr Sutherland visited the store. As I have said above, Mr Sutherland was passionate and particular about his hats and in giving evidence at the investigation meeting, he angrily commented that he should not have to tell an employee how to do their job. Mr Sutherland's behaviour during the investigation meeting, tended to support Ms Pasztorova's claim. I find he approached the discussion in the shop in a confrontational manner and unfairly berated Ms Pasztorova, belittling her in front of customers.

[18] Mr Sutherland was candid about cutting Ms Pasztorova's time back. He said she would need to prove herself again. He said he could not justify having her working two days in a row when others had to do her job for her. He said he needed to see evidence she was looking after the hats and if and when that happened, he would have increased her hours again. He confirmed he did not consult with her about the changes. He said he had been an employer for a considerable number of years and in essence did not agree with the concept of written employment agreements. He felt that they were too long and cumbersome. He confirmed the reduction in working days was a reaction to what he says he saw on 15 February 2021. He reiterated he did not want his hats ruined. In cross-examination he confirmed that there had been no formal raising of performance issues. He said there had been problems which he had written in the daybook. However, this book was not produced in evidence and according to Mr Sutherland, only contained comments such as, "please leave hats tidy etcetera".

Summary

[19] In breach of the Employment Relations Act 2000, Mr Sutherland did not provide Ms Pasztorova with a written employment agreement. The lack of an employment agreement certainly did not help matters, and Mr Sutherland's actions in accusing Ms Pasztorova of being a poor employee and belittling her in front of customers, were not the actions of a fair and reasonable employer.

[20] Further, if Mr Sutherland had performance issues with Ms Pasztorova, one would have expected them to be put to her so that she was clear as to what the concerns were and would have the chance to respond to any allegations prior to any findings made. She had the right also to have a representative present at any disciplinary meeting. None of these steps were in place. There was nothing fair and reasonable about Mr Sutherland's approach to any issue he may have had over the hats.

[21] Ms Pasztorova had been working for Mr Sutherland for some two years. Her hours were seasonal but with her working 24 hours a week at the time her employment terminated. Mr Sutherland was not entitled to unilaterally reduce those hours to three or four hours of work just on a Sunday. This is especially so as the evidence, including Mr Sutherland's own evidence, established the reason for reducing the hours was in retaliation for what he considered poor performance on Ms Pasztorova's part. It was not open for Mr Sutherland to conclude there were performance failures in the absence of any investigation or process. Neither was it open for him to unilaterally reduce Ms Pasztorova's hours, again with a complete absence of consultation relying on untested allegations of performance failings. Ms Pasztorova was constructively dismissed and that dismissal was unjustified.

[22] The legal principles relating to claims of constructive dismissal are well settled. In *Auckland Shop Employees IUOW v Woolworths (NZ) Limited*¹ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign. There must be a causal link between the employer's conduct and the tendering of the resignation² and the possibility of resignation and response to that conduct should be foreseeable.³

[23] In a situation where Ms Pasztorova had not been provided with an employment agreement, had been berated unfairly in front of the customers, and had her work hours reduced by two thirds, it was entirely foreseeable that these breaches of duty by Mr Sutherland as her employer, would lead her to resign. There is clear causation between the above breaches and the termination of employment. As said above, there is no justification for the dismissal and

¹ *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* [1985] 2NZLR 372 (CA) at 374

² *Z v A* [1993] 2ERNZ 469

³ *Weston v Advkit Para Legal Services Limited* [2010] NZEmp at 140

indeed none was offered at the Investigation Meeting. This is not unusual because Mr Sutherland's defence was that there had been no dismissal.

[24] As indicated above, the evidence of the effect Mr Sutherland's actions had on Ms Pasztorova was detailed and harrowing. It warrants a significant award. Accordingly I award a sum of \$20,000 pursuant to s 123(1)(c)(i) of the Act.

[25] It was eight months before Ms Pasztorova was finally offered new employment. Her evidence was that she worked 24 hours a week at \$23 per hour. Her normal weekly pay was therefore \$552 per week. Although Ms Pasztorova was without work for some eight months, the evidence from both her and Mr Sutherland was that her employment was seasonal and was likely to end in about three months following her dismissal. Accordingly I award a sum of \$6,624 on account of lost wages.

[26] **Summary of Orders:**

- (a) Mr Sutherland is to pay Ms Pasztorova \$6,624 less PAYE within 28-days of this determination
- (b) Mr Sutherland is to pay Ms Pasztorova the sum of \$20,000 as compensation in terms of s 123 (1)(c)(i) of the Act.

Costs

[27] Costs are reserved. The parties are encouraged to resolve any issues of costs between themselves but if they are not able to do so and an Authority Determination on costs is needed, Ms Pasztorova as the successful party may lodge a memorandum on costs within 14-days of the date of issue of this determination. From that date Mr Sutherland will have 14-days to lodge a new reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.⁴

Geoff O'Sullivan
Member of the Employment Relations Authority

⁴ www.era.govt.nz/assets/Uploads/practice-note-2.PDF