



# New Zealand Employment Relations Authority Decisions

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## Patrick v Browns Limited (Auckland) [2016] NZERA 650; [2016] NZERA Auckland 372 (14 November 2016)

Last Updated: 2 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 372  
5583339

BETWEEN EMILY PATRICK Applicant

AND BROWNS LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Allen Goldstone, Advocate for Applicant

Kirsten Lloyd, Representative for Respondent

Investigation Meeting: 25 & 27 October 2016 at Auckland

Submissions received: 25 & 31 October from Applicant

28 October 2016 from Respondent

Further information provided by Respondent 3 November

2016

Determination: 14 November 2016

**DETERMINATION OF THE AUTHORITY**

### **Employment Relationship Problem**

[1] The Applicant, Ms Emily Patrick, claims that she was constructively dismissed by the Respondent, Browns Limited (Browns), on 3 November 2016.

[2] Ms Patrick also claims that she was unjustifiably disadvantaged by Browns and that there was a breach of the good faith provisions of the [Employment Relations Act 2000](#) (the Act). Ms Patrick also claims that she is owed statutory holiday entitlements and payment of monies by Browns.

[3] Browns denies that Ms Patrick was constructively dismissed or unjustifiably disadvantaged during her employment and claims that she resigned under positive circumstances and did not bring any issues to its attention at any time during her employment.

[4] Browns claims that it has paid all monies owing to Ms Patrick in respect of salary and holiday entitlements, but confirms that it did not pay her notice period.

### **The issues**

[5] The issues for determination are whether or not Ms Patrick was:

- constructively dismissed by Browns on 3 November 2014
  - unjustifiably disadvantaged by Browns during the period of her employment;
  - is owed any statutory entitlement and/or her notice period
- Browns breached the good faith duty it owed to Ms Patrick during her employment

#### **Note**

[6] At the Authority's investigation held on 25 October 2016 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[7] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by [s.174](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result

#### **Background facts**

[8] Ms Patrick commenced employment at Browns on 26 March 2014 in the position of

Barista.

[9] Ms Patrick was provided with, and signed, an individual employment agreement (the Employment Agreement) which confirmed the date of commencement as 26 March 2014. Hours of work and other terms and conditions were set down as follows:

#### **5. Hours of work**

*(a) The Employee's usual hours of work shall be five days per week including one weekend day, with a degree of flexibility in order to meet the needs of the business, and with no minimum guaranteed hours. Such hours are to be worked on the days and times as advised in the roster posted by the Employer from time to time.*

*(b) Rest breaks (paid) and meal breaks (unpaid) will be allowed as agreed with the Employer and included in Schedule 1. Such breaks are subject to the requirement to maintain continuing customer service at busy times.*

#### **6. Wages**

*(a) The pay rate will be \$18 per hour*

...

*(e) Deductions may be made from and Employee's wages/salary and/or final pay in the following circumstances:*

- *Where applicable, for time lost through sickness, accident, the Employee's default and/or negligence and absence without pay.*

...

- *From final pay.*

- *Where the Employee has not provided the Employer with proper notice pursuant to the termination provisions in this Agreement (in this situation an amount equal to the shortfall in notice may be deducted).*

#### **10. Termination**

*(a) Notice: employment may be terminated by either party giving one week's notice.*

#### **17. Employment Relationship problems, personal grievances and disputes**

*(a) Any personal grievance, dispute over the application or interpretation of this Agreement, or any other employment relationship problem which may arise will be resolved using the procedures in the [Employment Relations Act 2000](#).*

*(b) Any issue that arises should first be discussed with the Employer. If it cannot be resolved, the Employee or his/her representative or the Employer may seek mediation assistance by contacting the nearest branch of the Department of Labour.*

[10] Clause 20 under the heading *Acceptance of Employment* stated:

*I Emily Patrick (the Employee) confirm that I have read, and I understand the above conditions, that any issues of concern have been explained to me to my satisfaction and I agree to abide by them. I also confirm that I have read the Company Rules of Conduct (where applicable) and agree to abide by them.*

*I acknowledge that I am entitled to seek independent advice and I have been given a reasonable opportunity to seek such advice before signing this Agreement.*

*It is understood that from the date this Agreement is signed, all previous conditions of employment, contracts and agreements are superseded.*

[11] Browns is a family owned business and at the time Ms Patrick was employed it consisted of Browns Espresso Bar (the Café) which has since been sold, a jewellery store, a clothes store, and a restaurant (no longer operating). All the businesses were located adjacent to each other in Remuera, Auckland. Ms Patrick worked in the Café exclusively.

[12] Mr and Mrs Bilkey, and their daughter, Ms Kirsten Lloyd, are directors and involved in the daily operation of Browns. Mrs Bilkey manages the jewellery store, Mr Bilkey has responsibility for handling the payroll requirements and an overall operational responsibility for all of the areas of the Browns' operation, and during the time Ms Patrick was employed, Ms Lloyd managed the Café, although all three directors would assist in the Café as required from time to time.

#### *Rest and Meal Breaks*

[13] During the course of her employment, Ms Patrick said she found it difficult to take meal and rest breaks as she was, on many occasions, the sole barista at the Café and she worked through her breaks, occasionally taking a short break when the volume of customers had dropped. She said she had raised this issue verbally on many occasions with Ms Lloyd. However, the situation had not been resolved.

[14] Ms Lloyd explained that it was difficult to allow staff to take their breaks during the busy customer times, which was between 12 noon and 2 p.m. and she explained that there were rules regarding meal breaks. The staff were not allowed to eat their meals behind the counter and they were requested not to sit at large tables which were to be left available for the café's customers. However, the members of staff were expected to take breaks either prior to the busy morning period or after 2 p.m. when it was quieter

[15] Both Ms Lloyd and Mr Bilkey said that Ms Patrick was able to take a break and this would be covered by other employees or Ms Lloyd, however on the occasions when Ms Patrick was not able to take a break, she was paid for the whole period of time which she worked.

#### *Rosters*

[16] The Café employees worked in accordance with rosters which were emailed to them weekly by Ms Lloyd.

[17] Ms Patrick claimed that the rosters were not issued in a timely manner, which made it difficult for her to accommodate her own personal arrangements as she would not know in a timely manner when her rostered shifts were to take place. She said she had raised this issue on several occasions with Ms Lloyd, but there had been no resolution to the problem.

[18] Ms Lloyd said that although Ms Patrick had discussed the rosters with her on occasion, these occasions had predominantly concerned Ms Patrick's requests that the roster accommodated her personal requirements which included a month's leave of absence in August 2014 to enable her to visit the UK, leave for a trip to Queenstown, and Ms Patrick's wish to leave early on a Thursday to take drama lessons.

[19] In addition Ms Patrick had asked not to be rostered to work on a Friday or Saturday when her partner was not working, which Ms Lloyd said Browns had tried to accommodate this request despite the weekends being the busiest times in the Café.

[20] Ms Lloyd said she believed she had issued the rosters in a timely manner, and that the time she recalled Ms Patrick raising the timing of the roster issue during the week commencing 13 October 2014.

#### *Bullying*

[21] Ms Patrick said that during her employment she had found her interactions with the three directors of the company, Mr and Mrs Bilkey and Ms Lloyd, difficult and abrasive, citing Mr Bilkey as being particularly difficult for her to work with.

[22] Both Ms Lloyd and Mrs Bilkey said that they had enjoyed a good working relationship with Ms Patrick and they also enjoyed informal socialising times after the working day. Mr Bilkey said that he had not believed there had been problems in his and Ms Patrick's relationship and had not been aware that she had been unhappy in some aspects of her work.

[23] Ms Patrick referred to two incidents in September 2014 involving interactions between Mr Bilkey and two other ex-employees. Ms Heni Hasan and Ms Barbara Smith- Klement. Although these incidents had not directly involved her, Ms Patrick said she had voiced her opinion at the time and that Mr Bilkey had been rude in response.

[24] One cited incident involved an ex-employee who was not available to give evidence therefore her witness statement was set aside as its contents could not be tested. The other cited incident involved Ms Barbara Smith-Klement who said she had been unable to hear the discussion between Ms Patrick and Mr Bilkey.

[25] Ms Patrick cited some other incidents which although minor in nature, had been occasions when Mr Bilkey's interactions with her and other Café employees had been unacceptable. An incident which had particularly upset her had been an instruction that she was to move her car from the public parking area outside Browns premises.

[26] During one weekend prior to the termination of her employment, Ms Patrick said that she had arrived at work in a car which she had parked outside the Café in a public parking space. On entering the Café, Mr Bilkey had asked her to remove the car and leave the space available for a customer to park in. Ms Patrick said she had pointed out that she was entitled to park where she had and left the car parked there for the day. However, it had involved an altercation with Mr Bilkey.

[27] Mr Bilkey confirmed that he had had a discussion with Ms Patrick about not parking in front of the Café on the day, which had been a Sunday and free public parking was available outside the Café. However, he said he had offered to allow Ms Patrick to park her car in a reserved parking space at the rear of the Café. Ms Patrick had chosen not to do so.

[28] Ms Patrick said that she had reached a point during the course of her employment where she felt she had no alternative but to resign. Accordingly, on 3 November 2014 she resigned by email dated that day. The email stated:

*Hi Kirsten*

*I am writing to inform you of my one week's notice from today, 3-11-2014.*

*I have thoroughly enjoyed working for Browns Café and building a rapport with the regular customers.*

*I will be sad to leave and lose contact with the local community. If you wish to discuss this with me, please feel free to do so.*

*Best regards*

*Emily Patrick*

*Time sheets and breaks*

[29] Mrs Bilkey sent an email to all the employees on 5 August 2014, the heading was

*Timesheets and in it stated:*

*Hi there, just a few reminders please about timesheets. Your sheets must be correct. You are required to take a 30 minute break which is unpaid. If you choose to work through then you will not be paid. If you are called upon during your break you are entitled to complete your break afterwards. You need to arrive several minutes prior to your starting time to be ready for work when you clock in. Please do*

*not discuss your wages, etc with your fellow workers – this is confidential information.*

*Staff Tip Jar Incident 4 November 2014*

[30] Just prior to 3 November Ms Lloyd had sent an email to all employees. The exact date that the email was sent has not been ascertained, but Ms Lloyd believed it may have been sent on or about 3 November 2014. The email was responded to by Ms Irena Freilekhman, an ex-employee, on 3 November 2014 at 1.33 p.m. which appears to support this timing.

[31] In the email Ms Lloyd referred to a number of day-to-day issues concerning the Café and said:

*No tips. We don't believe our customers should pay more than we charge. We are going to leave a charity box for any coins left. Please explain to customers that we don't want tips. No tip jar is to be left out.*

[32] The following day, 4 November 2014, Mrs Bilkey arrived at the Café and went in to obtain a coffee, her normal practice at the beginning of every working day. She said she had been disappointed when she went in to the Café and saw the staff tips jar still in place on the counter.

[33] She asked Ms Patrick why it was still there and asked where the charity collection buckets had been placed. Ms Patrick had explained she had moved them to the back of the café. Mrs Bilkey said she had then started walking down the Café to obtain the charity buckets.

[34] Ms Patrick says that Mrs Bilkey had arrived at the Café and arbitrarily taken the staff tip jar from the counter and confiscated the contents. Because she felt that Mrs Bilkey has spoken to her in a rude and disrespectful manner she had followed her to the rear of the Café.

[35] Following an exchange between Ms Bilkey and Ms Patrick, Ms Patrick had taken off her apron and thrown it down. She had returned to the front of the Café counter filled out her timesheet and taken it to Mr Bilkey in the clothing store, and told him that she would: “*not do anymore*”. Mr Bilkey told her that if she did not work her notice period, she would not be getting paid for that week.

[36] After Ms Patrick had left Browns premises she realised that she had left behind the two milk steaming jugs which were her personal property, and so returned to retrieve them.

[37] Upon being informed that Ms Patrick had left, Ms Lloyd had gone to the Café to take over the barista duties. When Ms Patrick had appeared in the Café and demanded the return of her milk jugs, Ms Lloyd said she was in the process of using them to heat milk.

[38] There was a heated altercation between Ms Patrick and Ms Lloyd which resulted in the milk jugs being moved abruptly across the counter towards Ms Patrick and the milk spilling. Ms Patrick said the milk jugs when she had taken hold of them had been hot.

[39] Ms Patrick, who had been shouting in front of the customers who were in the Café, had then been told to leave the Café by Ms Lloyd and Mr Bilkey. A further heated exchange of words had taken place on the pavement outside the Café between Mr Bilkey and Ms Patrick. Ms Patrick had then left and had reported the incident to the Police. There had been no further action taken by the Police in regard to the incident.

[40] Ms Patrick said she had consulted her doctor following the incident and a medical certificate had been issued stating that Ms Patrick would be unfit for work for seven days from 5 November 2014 due to illness.

## **Determination**

### **Was Ms Patrick constructively dismissed by Browns? Constructive Dismissal**

[41] An employee is usually entitled to resign from their employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required; the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:<sup>1</sup>

*Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.*

[42] There is no obligation on the employer to dissuade the employee from leaving, although he or she may choose to do so in some cases. An employee who has resigned has not been dismissed.

[43] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[44] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there

<sup>1</sup> 5/12/00 AC 94/100, AEC 106/00 at para 21

had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.<sup>2</sup>

[45] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>3</sup> there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.

[46] Ms Patrick is claiming a breach of duty on the part of Browns. The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*<sup>4</sup>. The Court of Appeal in examining the question of constructive dismissal observed:

*In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[47] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and

2 *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ

965 (at pp 112-113: p 985)+

<sup>3</sup> (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

4 [\[1994\] NZCA 250](#); [\[1994\] 2 NZLR 415](#); [\[1994\] 1 ERNZ 168 \(CA\)](#)

- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[48] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*<sup>5</sup> observed in describing this type of constructive dismissal:<sup>6</sup>

*It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*

[49] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employer, made in circumstances where he or she had no other option.

#### *Breach of Duty*

[50] Ms Patrick claims that the issues which resulted in her being forced to resign from her employment fell into three main areas: inability to take a break late issue of rosters, and bullying.

[51] Although Ms Patrick claimed to have raised these issues with Ms Lloyd on several occasions, Ms Lloyd's evidence was that she could not recall any of the issues being raised either formally or in such a manner that she believed there was a real concern on Ms Patrick's part, apart from the timing of the roster issue which had been raised on the week commencing

13 October 2014.

[52] I accept that the nature of the Café operation made it difficult for Ms Patrick as the main barista to take breaks at certain times of the day. I further accept her evidence that she found it easier to not take a break during the periods when customer demand had slowed.

[53] Whilst Ms Patrick states that she raised this issue with Browns, Ms Lloyd and Mr

Bilkey's evidence does not support this having been raised as a concern, although it appeared

that they had been aware that Ms Patrick did not always have a break during her working day.

<sup>5</sup> [\[1983\] ACJ 965](#)

6 at [975]

[54] Ms Lloyd said that Ms Patrick had raised the late issue of the rosters with her as being of concern during the week commencing 13 October 2014. She disputed that the rosters were not issued in a timely manner and pointed to the fact that Ms Patrick regularly raised roster issues, but these were to accommodate Ms Patrick's wishes, namely by:

- Avoiding rostering Ms Patrick on a Friday or Saturday although these were the busiest days in the cafe

- Arranging for temporary barista cover during the August 2014 period in order

that Ms Patrick could take a month's leave of absence to visit the UK;

- Accommodating Ms Patrick's period of leave in Queenstown; and

- Setting the roster to allow an early finish whenever possible on Thursdays when Ms Patrick attended a drama class

[55] I find that the timesheets and spreadsheet provided by Ms Patrick to support Ms Lloyd's evidence that the discussions about the rosters were to accommodate Ms Patrick's preferences for days of work and leave.

[56] Ms Patrick said that she had found the relationship with the three directors of Browns to be of a bullying and stressful nature. The evidence of Ms Bilkey and Ms Lloyd contradicted Ms Patrick's evidence and they alleged that they believed they had a good relationship with her. Mr Bilkey stated that he believed his relationship with Ms Patrick was satisfactory and was not aware that she regarded it as unacceptable.

[57] There is no evidence that Ms Patrick raised the alleged bullying as a concern with any director of Browns prior to her resignation.

[58] Ms Patrick cited the evidence of other ex-employees in support of her claims.

[59] I note as relevant to the ex-employees' evidence that the five witness statements contained identical paragraphs regarding the difficulty of taking breaks and the fact that they all stated in them that: "*if I pushed too hard to take breaks due to me I would probably be forced out of my job*". During the course of the Investigation Meeting it was confirmed that Mr Goldstone had prepared all the witness statements.

[60] I therefore have considered carefully the ex-employees verbal evidence during the

Investigation Meeting to ascertain credibility in regards to their evidence.

[61] Ms Sophie Hemus was employed for approximately one year during 2014 to 2015. She only worked weekends because she was still at school, approximately one day a week on either a Saturday or Sunday. Ms Hemus said it was difficult for her to take rest and meal breaks.

[62] However, her timesheets for the period of her employment confirmed that she had taken breaks on most days. In addition, Ms Hemus explained that Mr Bilkey would query why she had not taken a full one half hour break if it had not been entered on her timesheet and would reprimand her for not having taken the break as required.

[63] Ms Smith-Klement also said she found difficulty taking her breaks during the course of her employment, however when cross-examined, she confirmed it had been her responsibility to take a break.

[64] All the ex-employees claimed that they had found the three directors difficult and abrasive in their manner, however despite Ms Green and Ms Smith-Klement saying that this had made working conditions intolerable, both confirmed under cross-examination that they had taken extensive leaves of absence and had voluntarily returned to employment at Browns afterwards.

[65] Given the nature of the employment and the availability of alternative employment of a similar nature, I find the fact that they voluntarily resumed employment at Browns to undermine their evidence that they had found bullying to be prevalent in the workplace.

[66] A constructive dismissal applies in circumstances in which the employee, following a serious breach of duty by the employer, is left with no option but to resign. In this case I find that Ms Patrick had various alternatives open to her other than resigning as set out in clause

17 (b) of the Employment Agreement.

[67] Specifically whilst Ms Patrick said that she raised all of the issues verbally with Browns, there is no agreement from Browns on this other than an acknowledgement that the roster issue had been raised on one occasion, and there is no documentary evidence to support Ms Patrick's contentions.

[68] If Ms Patrick had raised concerns that she wished to have Browns address regarding her perceived problems and in the event that they could not be resolved, she could have followed the process set out in clause 17 (b) of the Employment Agreement which states that: "*the employee may seek mediation assistance by contacting the nearest branch of the Department of Labour*". However Ms Patrick chose not to follow this course of action.

[69] I find that during Ms Patrick's employment at Browns, whilst there may have been what Ms Patrick perceived to be inconsiderate conduct causing some unhappiness or resentment on her part, I find no breach of duty such as to constitute: "*dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*".

*Was the breach sufficiently serious so as to make it reasonably foreseeable by the employer?*

[70] As a result of the alleged breaches of duty by Browns, the risk of Ms Patrick resigning must have been reasonably foreseeable to Browns. The evidence of Ms Lloyd and Mrs Bilkey was that they believed they had a good relationship with Ms Patrick and that she was happy in her employment.

[71] There is no evidence that they were aware that Ms Patrick had such serious issues about the lack of breaks, late issue of rosters or bullying that she would resign. On the contrary there is evidence that Ms Lloyd, as a reasonable employer, did try to accommodate Ms Patrick's requests for two leaves of absence and days of working during the period of her employment.

[72] I find that Brown's evidence in this respect to be supported in the letter of resignation dated 3 November 2014 in which there is no indication that Ms Patrick was forced to resign as a result of a breach of duty on the part of Browns given the wording of the letter in which Ms Patrick stated "*I have thoroughly enjoyed working at Browns*" and "*I will be sad to leave*".

[73] I determine that Ms Patrick was not constructively dismissed by Browns.

### **Was Ms Patrick unjustifiably disadvantaged by Browns?**

[74] Ms Patrick is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable the disadvantage grievances and states:

*That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[75] The elements of s 103(1)(b) are:

a. An action

b. The action was unjustifiable

c. The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

### *Rest and Meal Breaks*

[76] Whilst there is some uncertainty about whether or not the parties had discussed a financial recompense in return for Ms Patrick not taking a break, an employee is entitled to take rest and meal breaks pursuant to s. 69ZD of the Act.

[77] It is the responsibility of the employer to ensure employees are able to take breaks during the working day.

[78] Irrespective of whether or not the employer and employee in this case had reached a compromise regarding the taking of breaks, not ensuring that either Ms Patrick was provided with rest and meal breaks and/or compensatory measures were agreed in accordance with s.69ZEA of the Act was a breach of duty.

[79] I determine that Ms Patrick was not consistently able to take rest and meal breaks throughout her working day at Browns, and that this affected her terms and conditions of employment to her disadvantage.

### *Rosters*

[80] I do not find that the evidence supports Ms Patrick being unjustifiably disadvantaged by the late issuing of rosters.

### **Did Browns breach the duty of good faith owed to Ms Patrick**

[81] The duty of good faith as set out in s.4 (1A) of the Act requires both parties to an employment relationship to be responsive and communicative in their dealings with each other.

[82] I have not found that Ms Patrick was constructively dismissed; she voluntarily resigned from Browns on 3 November 2014. As observed, there is no indication in the letter of resignation to indicate that Browns breached the statutory duty of good faith it owed Ms Patrick.

## **Is Ms Patrick owed monies by Browns?**

### *Unpaid wages*

[83] Ms Patrick resigned on 3 November 2014 and gave a contractual one weeks' notice of termination.

[84] The following day, 4 November 2014, following the incident with the staff tip jar, Ms Patrick left her duties as barista in the Café, she filled her in her timesheet and took it to Mr Bilkey telling him she would: "*not do anymore*" after which she left Browns.

[85] At that point I find that Ms Patrick's employment with Browns ended. She had clearly indicated her intention to leave her employment without completing her period of notice.

[86] Browns had not paid Ms Patrick for the final week of her employment.

[87] Pursuant to [s. 5 \(1\)\(a\) of the Wages Protection Act 1983](#) an employer may only make deductions from a workers wages with the written consent of the employee.

[88] The Employment Agreement stated at clause 10(a) that Ms Patrick was required to give one weeks' notice, and at clause 6(e) that deductions may be made from an employee's final pay when an employee had not provided the employer with proper notice pursuant to the termination provisions.

[89] Ms Patrick had signed the Employment Agreement and I find that Browns was entitled to deduct from her final pay payment in respect of one week's notice commencing 4 November 2014, other than for the time worked on 4 November 2014 prior to her walking out which terminated her employment.

### *Holiday pay*

[90] From the information provided by Browns and accepted by Ms Patrick I find that the final holiday pay of \$393.91 included in her final pay slip was correct and consequently there is no outstanding holiday pay.

## **Remedies**

### *Unpaid wages*

[91] I have found that Browns was entitled to deduct from Ms Patrick's final pay payment in respect of one week's notice commencing 4 November 2014, other than for the time worked on 4 November 2014.

[92] Browns deducted an amount of \$845.00, calculated at 42.25 hours at \$20.00 per hours which Ms Patrick disputes. Based on Ms Patrick's weekly earnings, as supplied by Browns, I find this to be a reasonable amount to be deducted. However Ms Patrick did work on the first day of her notice period and I find that the amount should be reduced by 20%.

[93] I order that Browns pay Ms Patrick the sum of \$169.00 in settlement of the unpaid wages claim.

### *Unjustifiable Disadvantage*

[94] I have found that Ms Patrick was unjustifiably disadvantaged in her employment by Browns not ensuring that she was consistently able to take rest and meal breaks.

[95] I order that Browns pay Ms Patrick the sum of \$750.00 as compensation pursuant to s.123(c)(i) of the Act.

## **Costs**

[96] Costs are reserved. Given the extent to which both parties have been successful, I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them.

[97] If they are unable to do so, the Applicant may file and serve memorandum to costs within 28 days with reply submissions from the Respondent to be lodged within 14 days of the days of receipt. I will not consider any costs submissions outside that time frame.

[98] Should costs be sought, the parties are advised that all submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**

**Member of the Employment Relations Authority**

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