

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 98
3169975

BETWEEN SORELLE ROCK

AND DJ INVESTMENTS 2019
 LIMITED

Member of Authority: Antoinette Baker

Representatives: Paul Matthews, advocate for the Applicant
 No appearance for the Respondent

Investigation Meeting: 24 February 2023

Submissions received: On the day from the Applicant

Determination: 2 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From January to April 2021 Ms Rock was employed by the respondent (DJ) in a small retail clothing shop. The sole director of DJ is Ms Daryl Fane. Ms Rock claims she was dismissed from her employment on 12 April 2021 for reasons that were not justified. Either that she was not subject to a 90-day trial period (a reason she says was initially given as the ground to terminate her employment) or that she was a permanent employee and not ‘casual’

as claimed by DJ in its defence to her claim of unjustified dismissal. She seeks lost wages, compensation, costs and the Authority filing fee as a result of the unjustified dismissal.

[2] Ms Rock also claims that DJ breached its agreement to provide her with 37.5 hours of work per week and seeks a remedy of reimbursement for the hours short of this. She claims the balance against four weeks of her employment when her hours were less than 37.5 hours per week.

[3] DJ denies the claims based on Ms Rock being a 'casual' employee with no ongoing expectation of employment. It also says there was no agreement to provide 37.5 hours per week.

The Authority's investigation

[4] For the Authority's investigation witness statements were lodged by the applicant and her mother. Both were heard from at the investigation meeting. DJ did not appear at the investigation meeting and did not file any evidence as timetabled although material had previously been submitted with its Statement in Reply. To the extent relevant, this material has been considered and weighed against sworn and affirmed evidence from the applicant and her mother.

[5] In January 2023 the Authority was notified that DJ was no longer represented.

[6] Ms Daryl Fane emailed the Authority in January 2023 to say DJ was in liquidation; about to be put into liquidation; that she could not participate in the investigation because she was stressed about the financial consequences of the business closing; that the Authority could refer to her 'accountant'.

[7] In reply the Authority advised Ms Fane that DJ remained on the New Zealand Companies Office Register (the Register); that it would not be following up with a third-party to check the business situation as was her suggestion; and that while DJ remained on the register the scheduled investigation meeting would proceed, restating the date for the scheduled investigation meeting as 24 February 2023. At that stage Ms Fane was not appearing on the Register as director of DJ. She replaced a previous director of DJ at the beginning of February 2023.

[8] The Authority further communicated to Ms Fane that the matter would proceed as scheduled but if an adjournment was to be requested this would need to be supported by evidence; that before making a decision whether to adjourn the applicant would be asked for comment.

[9] Nothing further was heard from Ms Fane or anyone for DJ after these January 2023 emails with the Authority. DJ did not take the opportunity to supply any evidence beyond material that had been provided with its Statement in Reply.

[10] The Authority has the power to proceed if any party fails to attend an investigation meeting “without good cause”¹. When no one appeared for DJ on 24 February 2023 at the investigation meeting, I considered the above circumstances. I did not find they supported a situation where there was “good cause” for the nonappearance. Accordingly, I continued with the investigation meeting and now make this determination.

[11] On Monday 27 February 2023 Ms Fane emailed the Authority at 9.20am in the morning with an attached medical certificate to say she would not appear at the investigation meeting. It was apparent that this related to that day. When the Authority indicated to her that the meeting had already occurred as scheduled on the previous Friday, she offered to get a medical certificate to apply to Friday 24 February 2023 and asked for the matter to be put off

¹ Employment Relations Act 2000, Schedule 2, clause 12.

until she was able to participate. The Authority responded that the meeting had already occurred, and a determination was reserved.

[12] 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 specified orders made. It has not recorded all evidence and submissions received.

The issues

[13] The issues are:

- (a) Was DJ justified to terminate Ms Rock's employment?
- (b) If not, what if any remedies are to be awarded to Ms Rock for:
 - i. lost earnings under s 123(1)(b) of the Act
 - ii. compensation under s123(1)(c)(i) of the Act
- (c) Should any remedies be reduced for blameworthy conduct by Ms Rock that contributed to the situation giving rise to the grievance?
- (d) Did DJ breach an agreement to offer and pay Ms Rock for up to 37.5 hours per week and if so, what is the wage arrears to be ordered for this breach?
- (e) Should there be an order for costs and filing fee?

Was DJ justified to terminate Ms Rock's employment?

[14] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair. Minor defects

in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[15] Under s103A(3) of the Act the following factors are considered to measure an objectively reasonable employer's fair process leading to a decision to dismiss:

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback

[16] In addition to the above other factors may be considered² but procedural unfairness alone will not support an unjustified dismissal if they are only minor and did not result in an employee being treated unfairly.³

Was DJ substantively justified to dismiss because this was within a 90-day trial period?

[17] It is Ms Rock's evidence that on 12 April 2021 Ms Fane contacted her when she was off work sick. Ms Fane asked her to come into the shop. Ms Rock went into the shop. She says she had not thought she was being called in about anything serious, just asked to 'swing by'. When she did, she says that Ms Fane told her that after meeting with 'head office' (Ms Rock presumes 'head office' is the business that has the brand DJ operated its business under) she could no longer afford to employ Ms Rock. Ms Rock says she was told her employment had come to an end under a '90-day trial' period.

² Section 103A (4) of the Act.

³ Section 103A (5) of the Act.

[18] Section 67A of the Act says that an employment agreement can include provision for a trial period of 90 days or less; that the employer can dismiss an employee during that period on notice; and the employee ‘is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.’ However, an employer may only rely upon a trial period to dismiss an employee if the employee had not been previously employed by it. This has been held to mean that such a provision must be in a written employment agreement that has been entered into before the commencement of the employment.⁴

[19] I accept as likely that Ms Rock was initially told her dismissal was based on a 90-day trial period. Through her representative she raised a personal grievance in an email to Ms Fane on 23 April 2021. Ms Fane’s initial response to the grievance includes that “Sorrelle like all my employees are on a casual and are on 90 days.”⁵ This response is consistent with relying on the 90 days to dismiss. It appears that a later communication from DJ’s then representative to Ms Rock’s representative accepted that DJ did not have an employment agreement in place before Ms Rock commenced employment. The 90-day trial was not then referred to as a reason to justify ending the employment without cause.

[20] Accordingly, and for the sake of completion DJ was not justified to end Ms Rock’s employment without cause on the basis of a 90-day trial period situation.

Was Ms Rock employed to work on a casual as-and-when-required basis?

[21] DJ has stated in its Statement in Reply a defence that Ms Rock was not unjustly terminated because she was ‘casual’.

⁴ *Smith v Stokes Valley Pharmacy* (2010) 7 NZELR 444 at [85].

⁵ Email from Daryl Fane to Ms Rock’s representative dated 23 April 2021 in response to the raising of a grievance earlier that day.

[22] There is no definition of ‘casual’ in the Act or associated legislation. The Courts⁶ have considered what ‘casual’ employment may mean when deciding whether an employee and employer have agreed that beyond a day or period of work there is no ongoing expectation of offering and accepting further work. Relevant to this question includes what the pattern of work, and whether the type of work was subject to external work demand.

[23] For me to be satisfied that DJ was justified to terminate Ms Rock’s employment with immediate effect on the 12 April 2021 I would need to be satisfied she was working on an as and when required daily basis. This is because I accept the submission on Ms Rock’s behalf that even if this was the nature of the employment (which I understand Ms Rock does not accept) it would need to be consistent with a notice period given there was at the time a likely forward planned roster. I do not understand Ms Fane indicated any notice period on the 12 April 2021 and Ms Rock was terminated immediately.

[24] Ms Rock gave to me plausible oral evidence that rosters were made up by Ms Fane by putting days of work on a wall calendar a month in advance; that Ms Fane then would verbally ask Ms Rock perhaps weekly to vary the roster generally to suit her family needs. Ms Rock’s evidence is that she was happy to be flexible. The Statement in Reply refers to DJ stating that the rosters were completed weekly. Either way I accept that there were rosters completed ahead of time throughout the period of Ms Rock’s employment.

[25] It is plausible that such a roster would be necessary in a small retail shop with constant opening hours where there was only one other person usually supplementing Ms Rocks’ hours to give her a break. I find there would be a need to have a level of certainty for a retail shop to have someone always present and serving. For example, this is different to someone employed to work serving tables whenever a caterer offered them work at a wedding it had booked. That might then involve a singular event due to external client demand. There is no

⁶ *Lee v Minor Developments Ltd* EmpC AC52/08, 23 December 2008; *Jinkinson v Oceana Gold (NZ) Ltd* (2009) ERNZ 225.

shop front to be kept open pending that demand. I find that an as-and-when-required arrangement on a daily basis with no ongoing obligation to offer work or accept work is not consistent with one person serving in a regularly open retail clothes shop, as I understand was the role of Ms Rock for DJ.

[26] I have considered the pattern of hours and weeks worked for the whole period of Ms Rock's employment. To do this I have considered the incomplete set of payslips (the last two payslips are missing); Ms Rock's IRD records showing identified earnings with DJ; and Ms Rock's bank records showing payments to her from DJ. From this analysis I find that the pattern of employment is not consistent with an as-and-when-required daily basis. This is because Ms Rock appears to have worked and been paid for twelve consecutive weeks for hours over 20 hours each week with two exceptions. These is the first week of 10.75 hours which I accept was during a time Ms Rock says she was working out her notice period with a previous employer, and one week in February 2021 when she worked only 9.5 hours. This pattern is not consistent with her being only needed on a day-to-day basis. It has the regularity of part time permanent work.

[27] I also find it inconsistent with DJ's position that Ms Rock held a set of keys to the shop which she had to return when DJ ended her employment. An employee who could expect no further work beyond each day is unlikely to be given a set of keys to take home.

[28] The individual employment agreement (IEA) copy provided to me has handwritten next to Clause 11 'Hours of Work' the words "casual employment [sic] only." The word 'casual' on its own does not explain work that was on an as-and-when-required daily basis. This is a word often used loosely in general parlance to describe employment that could be permanent part time or intermittent part time.

[29] Correspondence between representatives and the Statement in Reply include reference to others involved in the business who DJ said were witness to Ms Rock agreeing to be

employed on a 'casual' basis. DJ chose not to provide this evidence in a way that it could be tested on oath or affirmation. However, reading the quotes from what appear to be the words of these people I find nothing to assist me. This is because 'casual' is apparently used to focus on the issue of how many hours per week Ms Rock was employed to do rather than whether she agreed to work on a daily basis with no ongoing expectation of employment.

[30] At clause 12 of the IEA there is handwritten, "holiday pay as you go" and while there is an 8% inclusive holiday pay rate on the payslips, I do not find this is definitive of the sort of employment DJ wants me to accept existed here. While there are legal restrictions on paying an inclusive rate of holiday pay⁷ it is not uncommon to see the arrangement put in place for work that may not easily fit the category of irregular and intermittent or fixed term work. I also note here that Ms Rock's evidence is that she did not agree to an inclusive holiday pay rate being paid. She says she did not see payslips during her employment showing this until after her employment ended. I find some likelihood that this was the case here.

[31] Ms Rock's evidence is that she was told by Ms Fane on 12 April 2021 that DJ could not afford to keep her on after discussing this with "head office". Emails from Ms Fane to the Authority in January 2023 appear to indicate that 'head office' may be some form of head franchisor and that the retail shop that DJ operated has now been closed due to issues in that commercial relationship. This is consistent with Ms Rock's evidence that she was told by Ms Fane there was an economic reason to let her go. I accept as valid the submission for Ms Rock that if there was an economic reason to let Ms Rock go then a restructuring process is what a fair and reasonable employer could have done. DJ did not undertake any sort of restructuring process.

[32] There are no other reasons put forward to justify DJ's ending Ms Rock's employment. Accordingly, standing back and considering the above I find that DJ was not justified to

⁷ Section 28 Holidays Act 2003

dismiss Ms Rock on the sole basis that it had no ongoing obligation to offer her work beyond the 12 April 2021.

[33] I will now consider the remedies that Ms Rock claims.

Remedies for unjustified dismissal

Lost earnings under s 123(1)(b) of the Act

[34] Ms Rock claims 23 weeks of lost earnings due to the unjust dismissal from the date of being dismissed (12 April 2021) to the 8 September 2021 when she obtained further employment. This is calculated at the hourly rate of \$21 per hour (the rate she was being paid at the time of termination) based on 37.5 hours per week. This calculates as a total of \$18,112.50 gross.

[35] I accept this amount should be paid to Ms Rock by DJ because she has provided evidence that she tried to obtain further work to mitigate her loss. She has provided job applications and IRD records to support this claim.

Compensation under s123(1)(c)(i) of the Act

[36] Ms Rock submits she should be paid \$20,000.00 in compensation as a result of being unjustifiably dismissed.

[37] Ms Rock says the sudden termination of employment had a shocking effect on her. She enjoyed the job and thought she had a good relationship with Ms Fane. Ms Rock's mother gave credible evidence that Ms Rock was very distressed on the day her employment was terminated and that she observed the ongoing effect of depression, lost confidence and not socialising or connecting with friends because she could not afford to. Ms Rock's mother

felt that this was due to not wanting to continually ask her for money due to her sudden lack of income to support herself. Ms Rock lived with her mother for financial support and describes only getting relief when she slept and that she had angry outbursts at family members.

[38] I found Ms Rock presented her evidence in a credible manner. She was straight forward and visibly appeared upset when describing to me how embarrassed and upset she was at having to bring her claim to this forum. She described feeling ashamed to have to air this matter in the open and worried what people may think or say of her.

[39] I accept the submission that DJ's post termination behaviour exacerbated the hurt and humiliation that Ms Rock likely suffered. I accept DJ took what has been submitted as a brutal approach to pursuing Ms Rock through a debt collector for clothes she had not paid for from the retail shop. DJ in its Statement in Reply says she did not ask to take these clothes. Ms Rock says she understood she was expected to wear the shop clothes and that she would be obliged to pay these clothes off but was not aware of anything specific about how this would happen. I accept as likely that it is common in this type of branded clothes shop that there is an expectation that employees wear the product they are selling. DJ despite having the opportunity to do so, has not presented any evidence to support the policy or agreement it says it had in place about employees wearing and purchasing clothes from the shop.

[40] In bringing Ms Rock's employment unjustifiably to a sudden end, any form of understanding or policy that at termination the clothes would have to be paid for in full, was unexpectedly brought forward. I can understand and accept Ms Rock's evidence that she was left in a difficult financial situation in terms of repaying for the total cost of the clothes all at once being a figure just under \$700.00. Ms Rock confirms she has now paid for the clothes, but her name remains on a bad credit register due to DJ's immediate pursuit of full payment. I find this action to have unreasonably added to Ms Rock's financial and emotional distress and

was not what a reasonable employer could have done, particularly in the circumstances where a personal grievance had been raised.

[41] I consider in the above circumstances that DJ's unjustified dismissal of Ms Rock caused her considerable distress as a young employee trying to obtain financial independence. I find that DJ is to pay Ms Rock \$18,000.00 in compensation for this.

[42] I do not find there is any reason why I should reduce any of the grievance remedies for blameworthy conduct under s 24 of the Act.

Did DJ breach an agreement to offer and pay Ms Rock for up to 37.5 hours per week and if so, what is the wage arrears to be ordered for this breach?

What was agreed to verbally about hours of work?

[43] Ms Rock says she began working for DJ on a 'trial shift' on 5 January 2021. Her friend told her that she knew Daryl Fane wanted to employ someone at the DJ run shop on part time hours. Ms Rock contacted Ms Fane and after completing a 'trial day' on 5 January 2021 she says Ms Fane agreed to employ her on part time hours topping them up with additional cleaning hours at her partner's workshop. This other work never eventuated. In any event it appears this would have been with another employer. Ms Rock appeared to be vague about understanding how it all would have worked.

[44] While Ms Rock says that Ms Fane was always saying to her that she would try to get her more hours of work this did not happen. DJ's Statement in Reply refers to the hours never being fixed and that they varied according to business needs.

[45] Ms Rock confirmed to me that she did not challenge the situation about not getting 37.5 hours per week. Her evidence also includes that she wanted to be flexible about any changes made to hours each week by Ms Fane and that she felt a bit intimidated by Ms Fane.

[46] Overall, I am not satisfied that I have very much before me that is consistent about what was verbally agreed to beyond the apparent common ground that when the employment commenced Ms Fane indicated there were only part time hours available. The pattern of weekly hours worked seems to support this. For the week ending 28 February 2021 Ms Rock worked 38 hours and then in March she completed three weeks of hours exceeding 40 hours per week. There appears to be some common ground that the longer hours related to times Ms Fane and her family were away. In any event there are only four weeks that were not less than 37.5 hours and they went largely unchallenged by Ms Rock who while indicating she felt a bit intimidated by Ms Fane also says in her evidence that she was happy to be flexible.

[47] Based on weighing the above I am not satisfied there was a verbal agreement about 37.5 hours per week.

What was agreed to about hours in the employment agreement?

[48] There are two things in writing that refer to Ms Rock being employed for 37.5 hours per week. Firstly, there is a handwritten reference about this in the IEA that was signed in February 2021 when Ms Rock needed this document to support a bank loan application to enable her to buy a car. Ms Rock's evidence is that when the bank asked for a copy of her IEA she rang Ms Fane who told her where to find an agreement template in the shop and what to fill in. Ms Rock says Ms Fane told her to just sign off for her on the document. DJ in its material before the Authority seems to suggest Ms Rock was dishonest and of her own volition filled in the IEA.

[49] After hearing from Ms Rock, I do not find her to have likely been dishonest about this document and that I find her evidence credible in that it was a document she needed to be completed and Ms Fane gave her instructions over the phone.

[50] I have already referred to the handwriting against hours of work in the IEA where it refers to 'casual' employment. I find it likely this was written sometime after the IEA that Ms Rock sent to the bank (and did not keep a copy). I find this because other handwriting on this document includes words that are consistent with the writer giving a view about what was agreed to about hours, an issue which by then had likely become live: "No Sorelle wrote for the bank not me" next to the "37.5 hours" initialled by Ms Rock.

[51] Secondly, Ms Rock says that there is support to an agreement to 37.5 hours per week in an email to Ms Rock from Ms Fane dated 11 February 2021 which includes:

Sorelle was employed on the 5th January as a full time staff member with hours ranging anything from 37 hours a week.

The email is plausibly in the nature of one that would be written by an employer for an employee needing to present evidence of employment to support a loan application.

[52] Standing back and considering the evidence I have been presented with about what may have been agreed to in writing I not satisfied that the evidence satisfies me that 37.5 hours per week was a clear agreement. There are too many inconsistencies against the context of Ms Rock's loan application. While there are words to indicate 37.5 hours per week these appear to have been in the context of neither party signing and initialling things in the IEA at the same time due to what I accept was a remote arrangement over the phone. Ms Rock was focused on getting her loan application completed. In saying this I make no finding about either party's intentions or integrity other than that they each likely inadvertently created a messy situation that is difficult now to decipher as to what was agreed.

[53] Weighing the above, I am not satisfied that I can find a breach of any agreement to provide 37.5 hours per week and I have not awarded the remedy claimed.

Should there be an order for costs and filing fee?

[54] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Ms Rock has been successful in her claim that she was unjustifiably dismissed. She should not have been put to the cost of bringing this matter before the Authority and is to have an award to contribute towards her costs in doing so.

[55] The investigation meeting took the morning of the 24 February 2023. The current tariff of costs generally applied for a one-day Authority investigation meeting is \$4,500.00.

[56] DJ is ordered to pay half of the daily tariff usually applied being \$2,250.00 as a contribution to Ms Rock's costs, together with the Authority filing fee of \$71.56.

Summary of orders

[57] DJ Investments 2019 Limited is ordered to pay Sorelle Rock the following amounts:

- a. \$18,112.50 gross under s 123(1)(b) of the Act
- b. \$18,000.00 compensation under s 123(1)(c) of the Act
- c. \$2,250.00 in costs
- d. \$71.56 for the Authority filing fee.

Antoinette Baker
Member of the Employment Relations Authority