

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Elizabeth Mary Sim (Applicant)
AND Random Imports Limited (Respondent)
REPRESENTATIVES Alan Clarke, Advocate for Applicant
Gary Bignell, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 10 May 2006
DATE OF DETERMINATION 1 June 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Elizabeth Sim, commenced working for Random Imports Limited on 10 November 2004 as manager of its store in Dunedin. The store officially opened on or about 23 November 2004 and sold items in the nature of gifts.

[2] The respondent, Random Imports Limited (“Random”), is a duly incorporated company and is involved in the business of importing.

[3] Ms Sim was interviewed for, and appointed to her position by a director of Random, Gary Bignell. Mr Bignell made Ms Sim aware that some of the stock in the store belonged to a business partner of his, Philip Tait.

[4] To differentiate between the stock in the shop belonging to Random, and the stock belonging to Mr Tait, different types of price labelling was used and there were two different numbers on the till to identify if the stock that had been sold was Random’s or Mr Tait’s.

[5] At the end of each day Ms Sim would fax off *day sheets* to Random’s head office in Oamaru where an accounts person would sort out the necessary payments that were required to be made to Mr Tait and retained by Random. Ms Sim was told to bank all cash money into Random’s bank account.

[6] Ms Sim was told by Mr Bignell that under no circumstances was she to hand any money over to Mr Tait. She was also advised that Mr Tait had no say in the operation of the shop and that she should only take orders from Mr Bignell and the other director of Random, Stephanie Bignell. Ms Sim was advised that it was not part of her role to discuss any details of the business with Mr Tait.

[7] On 20 January 2005 Ms Sim says that she was either made redundant or constructively dismissed when she was advised by Mr Tait that he was taking over the store, was her employer and would be paying her wages.

[8] Ms Sim said that she was unable to get clarification of the situation despite telephoning Gareth from the Oamaru office of Random on several occasions. Toward the end of the day Ms Sim advised Random that in the circumstances where she saw she was no longer working for Random and had a new employer she was going to leave and expected to be paid two weeks pay in lieu of notice. She handed in her keys and said she was very upset.

[9] The following day Ms Sim was advised by Gareth that it was simply a managerial change and her employer was still Random. Ms Sim said that she expected Mr Bignell to telephone her and clarify the situation but that he did not. Ms Sim did not return to work for Random.

[10] Mr Bignell does not accept that Ms Sim was dismissed and says there was no change in her employment or her terms and conditions. He says that Ms Sim's actions in walking out left the shop severely understaffed.

[11] Ms Sim also seeks to recover salary arrears in the sum of \$411.00, underpayment for working on four public holidays in the sum of \$119.50, payment for four alternative holidays which were not taken in the sum of \$480.00 and arrears for holiday pay on the additional sums of \$60.63.

[12] Mr Bignell disputed the salary arrears but accepted that there was an underpayment made to Ms Sim for working on public holidays. He was unsure about any liability for Random to pay Ms Sim for the four alternative days.

The issues

[13] I shall firstly determine whether there is salary and other money owing to Ms Sim. Initially Ms Sim asked a Labour Inspector, Mr Calvert, to assess what was owing to her. The Labour Inspector provided a very helpful assessment of what he considered was owing to Ms Sim. Mr Bignell did not agree with the assessment so Mr Calvert advised Ms Sim to include the recovery matter with her other claim in the Authority. Mr Calvert has closed his investigation.

[14] I shall then turn to consider Ms Sim's personal grievance. I told the parties during the investigation meeting that I was not bound by the description of the employment relationship problem in the statement of problem (section 160(3) of the Employment Relations Act 2000). I advised them after listening to the evidence that I may find the grievance was in the nature of an unjustifiable action causing disadvantage rather than a grievance that Ms Sim had been unjustifiably dismissed.

[15] Both Ms Sim and Mr Bignell understood therefore that the issues for determination in terms of the personal grievance are:

1. Was Ms Sim unjustifiably dismissed from her employment with Random?
 - Was Ms Sim made redundant from her employment?
 - Was Ms Sim constructively dismissed?
2. Was Ms Sim's employment affected to her disadvantage by an unjustifiable action of Random?

What monetary amounts do Random owe Ms Sim?

Salary arrears

[16] On 8 December 2004 Ms Sim signed an individual employment agreement with Random. It provided the following with respect to her salary:

7.1 Annual Salary

The Employee's salary shall be \$600 per week gross, or \$31,200 per annum, which shall be paid weekly on Tuesday into a bank account nominated by the Employee.

[17] Ms Sim said that she expected to be paid a salary which would equate to \$600.00 per week. Ms Sim however continued to be paid at her previous hourly rate of \$14.00 for the weeks after 12 December 2004 until her termination. Ms Sim did raise the issue with Random on several occasions but she still continued to be paid an hourly rate.

[18] There were some weeks after 8 December 2004 when Ms Sim was paid more than \$600.00 but some weeks when she was paid less. Giving appropriate credits where due, when Ms Sim worked in excess of 40 hours per week and was paid in excess of \$600.00, the Labour Inspector concluded that Ms Sim had been underpaid by \$411.00 gross.

[19] Mr Bignell says that the Labour Inspectors assessment is incorrect because of the Hours of Work clause which provides:

6.1 Full Time Hours with an obligation to perform overtime as necessary but without extra payment

The Employee's normal hours of work shall be 40 hours per week, between the hours of 8.45am to 5.45pm on 5 out of a 7 day week. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. The Employee's salary fully compensates them for all hours worked.

[20] Mr Bignell also felt that the bonus clause in the employment agreement was relevant. I do not see that provision as being relevant. In any event payment of a bonus was solely at the discretion of Random.

[21] I do not find that clause 6.1 read in conjunction with clause 7.1 changes or modifies Ms Sim's salary of \$31,200.00 per annum to an hourly rate if she works less than 40 hours per week. Very clear words would have needed to be used if that was the intention in clause 6.1.

[22] Random agreed to pay Ms Sim a salary of \$31,200.00 per annum. Ms Sim may work 50 hours one week and 30 hours another week but she is entitled to be paid \$600.00 gross per week. I would imagine had Ms Sim's employment continued beyond 20 January 2005 the hours worked by her would have averaged out at about 40 per week.

[23] I accept the Labour Inspector's calculation of salary arrears for the period after the agreement was signed until the termination of Ms Sim's employment is correct.

[24] Ms Sim is owed the sum of \$411.00 by Random for salary arrears.

[25] I order Random Imports Limited to pay to Elizabeth Sim the sum of \$411.00 gross being salary arrears.

Extra payment for working on a public holiday

[26] Mr Bignell accepted that Ms Sim was entitled to time and a half for working on four public holidays in accordance with section 50 of the Holidays Act 2003 and Ms Sim's own employment agreement.

[27] I find that Ms Sim is owed the sum of \$119.50 for time worked on those days.

[28] I order Random Imports Limited to pay to Elizabeth Sim the sum of \$119.50 gross being an extra payment for working on a public holiday.

Alternative holidays

[29] Ms Sim was entitled to an alternative holiday for the four public holidays that she worked. She did not take her alternative holidays whilst she was still employed by Random. Payment for the alternative holiday was calculated by the Labour Inspector in accordance with section 60(2)(b) of the Holiday Act 2003 at the rate of Ms Sim's pay for her last day at work being \$120.00.

[30] I find that Ms Sim is owed \$480.00 for a payment for her alternative holidays.

[31] I order Random Imports Limited to pay to Elizabeth Sim the sum of \$480.00 gross being payment for alternative days for working on a public holiday.

Holiday pay on additional amounts found to be owing to Ms Sim

[32] I agree with the Labour Inspectors calculation as to the holiday pay on the additional amounts that I have found to be owing to Ms Sim.

[33] I find that Ms Sim is owed holiday pay on top of that which she has already received in the sum of \$60.63.

[34] I order Random Imports Limited to pay to Elizabeth Sim the sum of \$60.63 gross being holiday pay on additional amounts found to be owing to Ms Sim.

Was Ms Sim unjustifiably dismissed?

The background to the termination of employment

[35] Ms Sim said that she had received a letter from Mr Bignell shortly after her employment commenced to the effect that if she had any queries about the day to day running of the shop she was to refer those to Gareth. Ms Sim said that Mr Bignell had indicated that he did not want to be bothered by the day to day running of the store.

[36] Ms Sim did not have a copy of the letter and Mr Bignell disputed that there was one. I have no reason not to accept Ms Sim's evidence that she thought she was to discuss any issues about the day to day running of the shop with Gareth. I also accept Mr Bignell's evidence that Ms Sim had also contacted him on several occasions to discuss difficulties that she had with Mr Tait.

[37] On Tuesday 18 January 2005 Ms Sim was advised by Gareth that some changes may be made about the operation of the store and that Mr Tait may be taking over the shop. Ms Sim understood that a meeting was to take place the following week and that it would be made official after that meeting.

[38] On Wednesday 19 January 2005 Ms Sim voiced her concerns to Gareth about the possible changes and said that the staff in the store felt unhappy and unsettled. Gareth advised Ms Sim to wait and see exactly what would happen.

[39] On 20 January 2005 Mr Tait arranged to meet with Ms Sim in the morning. Ms Sim was unsure about what was to be discussed and telephoned Gareth. He was unable to advise her but asked Ms Sim to call him after the meeting to let him know what it was about.

[40] Mr Tait met with Ms Sim in the staff room. He advised her that he was taking over the shop and that an employee from his other store, Kay, was going to co-ordinate between the two stores. Ms Sim asked Mr Tait who was paying the wages for her and the other staff in the shop and he replied that he was. Mr Tait also confirmed to Ms Sim that he was her employer.

[41] Ms Sim was advised that there would be a name change for the shop. Ms Sim was asked by Mr Tait about the wages the staff received, the rosters, various accounts such as power and telephone for the shop and other matters. Mr Tait said he thought Mr Bignell was generous and that there could be less hours required to be worked in the future.

[42] Ms Sim telephoned Gareth and told him what had taken place during the meeting with Mr Tait and that she believed Mr Tait was now her employer. She talked about the name change and that she was worried about Mr Tait's instruction not to bank any money into Random's bank account. Gareth said that he did not know what was going on and would talk to Mr Bignell about the situation.

[43] Ms Sim then sent a facsimile to Andrea from Random's office seeking reimbursement of some items that Ms Sim had purchased for the shop and that Andrea clarify that she was not to bank any money into Random's bank account.

[44] Ms Sim then talked to Gareth by telephone sometime after 2pm. She asked him to come to Dunedin to help sort things out and help protect Mr Bignell's interests. Gareth advised Ms Sim that the price on the stock that belonged to Random was not to be changed unless he approved it. A customer coming to the counter meant that the conversation had to be cut short.

[45] Kay then came back into the shop. She wanted to know about positioning of electric plugs for lights. She also wanted Ms Sim to go over a catalogue with her to sort out items for the shop and get her ideas on changing things around in the shop. Kay also advised Ms Sim that Mr Tait wanted the shop filled up.

[46] Ms Sim was very alarmed and felt that if she discussed these matters with Kay she would be giving the impression that she was accepting Mr Tait as her new employer.

[47] Ms Sim telephoned Gareth at about 3.15pm. She told him that she considered her employment terminated and that she believed she had been made redundant and did not wish to work for Mr Tait. Ms Sim told Gareth that she had no option but to leave the store and advised him she wanted two weeks pay in lieu of notice. Ms Sim also asked for a reference. Ms Sim said that she indicated to Gareth that she would be willing to stay on until the end of the day to enable him to

get down to Dunedin from Oamaru and that he responded that the problem had now become Mr Tait's.

[48] Ms Sim then handed her key to Kay and left the store. Ms Sim says at that time she was very distressed and close to tears.

[49] On 21 January 2005 Ms Sim telephoned Gareth. He advised that he had spoken to Mr Bignell and that he was furious. Gareth advised that it was all a mistake and that Random was still Ms Sim's employer but there was a managerial change. Gareth indicated that either he or Mr Bignell would get back to her. Ms Sim said that although she had Mr Bignell's telephone number she was too upset to telephone him. Ms Sim expected Mr Bignell to contact her and reassure her himself of the situation.

[50] Ms Sim was not contacted by either Mr Bignell or Gareth and a few days later was paid her final pay.

[51] Mr Bignell said he felt very angry that Ms Sim had just walked out of her employment. He felt that he had always been quite clear with her that she was not to listen to Mr Tait and that she could have telephoned him about her concerns as she had done on a number of previous occasions. He did not feel on that basis that he had to telephone Ms Sim.

Was Ms Sim redundant?

[52] A redundancy occurs when the position filled by an employee is, or will become, superfluous. Ms Sim believed that her employer had changed from a company to an individual. I find that it was intended that Mr Tait would undertake a management role for the shop and in that respect take over from Mr Bignell. I am satisfied that Ms Sim however would still to continue to be employed by Random and that her position was not superfluous as at 20 January 2005.

[53] Ms Sim was not made redundant on 20 January 2005.

Was Ms Sim constructively dismissed?

[54] The question to be asked is whether the resignation was caused by a breach of duty on Random's part. If the answer to that question is yes, then was the breach of duty by Random of sufficient seriousness to make a risk of resignation reasonably foreseeable.

[55] I accept that Ms Sim resigned because she thought she was to be employed by Mr Tait and that the situation was not clarified by Random. Ms Sim had not had a good relationship previously with Mr Tait.

[56] Ms Sim says that the breach of duty was that Random did not respond with explanations to her concerns or provide sufficient support following the actions of Mr Tait on 20 January 2005.

[57] There is an implied duty of trust and confidence in an employment relationship. There is also a duty on the parties to be active and constructive in establishing and maintaining an employment relationship in which the parties are responsive and communicative.

[58] Random failed to be communicative and responsive to Ms Sim because they did not consult with Ms Sim adequately to prepare her for the change in management from Mr Bignell to Mr Tait.

[59] I do not believe that Mr Bignell anticipated Mr Tait would approach Ms Sim in the manner in which he did and advise her that he was now her employer but when Random became aware that he had, it had obligations to Ms Sim to reassure her. There was no reassurance given to Ms Sim on 20 January 2005 when she thought her employer had changed.

[60] I have to be satisfied however that there was a breach of sufficient seriousness to make a risk of resignation reasonably foreseeable.

[61] There were three telephone calls to Gareth following the meeting with Mr Tait. The first was only about three hours before the final call that Ms Sim was resigning. Gareth did not know what was happening and said he would get in touch with Mr Bignell. The middle call had to be cut short so that Ms Sim could serve a customer and the final call was when Ms Sim said that she was resigning. There did not appear to have been time to discuss whether Gareth had managed to get hold of Mr Bignell.

[62] Ms Sim accepted that if Random was still her employer she would have to stay at work. Ms Sim knew the next day on 21 January 2005 that it was all a mistake and that Mr Bignell was furious about Mr Tait's actions. She also knew that Random was still her employer and it was a managerial change. Ms Sim then wanted to talk with Mr Bignell for reassurance about the situation and I am satisfied was told that either Mr Bignell or Gareth would get back to her. I am not satisfied in these circumstances that there was a breach by Random of sufficient seriousness to make a risk of resignation reasonably foreseeable.

[63] I do not find that Ms Sim was unjustifiably constructively dismissed.

Unjustified Action Causing Disadvantage

[64] I find that there were two unjustifiable actions on the part of Random.

[65] The first was the action of breaching the duty to be responsive and communicative when Random did not consult or advise Ms Sim sufficiently about the impending change in management of the store. This was particularly significant in the circumstances where there was a clear distinction between Mr Tait's stock and that of Random's and Ms Sim was expected to undertake certain procedures in terms of recording sales and depositing cash. It was also important, because Mr Bignell knew of previous difficulties in the relationship between Ms Sim and Mr Tait.

[66] The second was the actions of Random when it knew that Mr Tait had advised Ms Sim that he was now her employer. Mr Bignell intentionally decided not to respond directly to Ms Sim at all and in doing so I find breached a duty to be responsive and communicative and the implied term of trust and confidence that exists in an employment relationship.

[67] I do not find that these actions were justifiable in the circumstances.

[68] Ms Sim was disadvantaged by these unjustified actions because she was taken by surprise on 20 January 2005 when she talked to Mr Tait and did not know what was expected of her in terms of depositing cash and other procedures. She was no longer certain or secure about the state of her employment. She did obtain some reassurance the following day but was not telephoned as promised by Mr Bignell.

Determination

[69] Ms Sim does not have a personal grievance that she was unjustifiably dismissed but Ms Sim has a personal grievance that her employment was affected to her disadvantage by the above unjustifiable actions of Random and is entitled to remedies in terms of that grievance.

Remedies

[70] I do not find that Ms Sim is entitled to an award for loss of wages given my findings about the claim of unjustified dismissal. Ms Sim is entitled to a payment of compensation for the humiliation, loss of dignity and injury to feeling that she suffered on 20 January 2005.

[71] I accept that Ms Sim was very upset about the situation on 20 January 2005. She describes herself as being in a state of shock. Ms Sim was placed in a very difficult position by Mr Tait as she was very professional and loyal toward Random. She was being asked to do things contrary to what she had been instructed by Mr Bignell and it is not surprising that she was so confused. It was less clear to me why Ms Sim did not attempt to make contact directly with Mr Bignell before leaving her employment particularly when she knew of Mr Bignell's attitude toward Mr Tait and had talked to him previously about Mr Tait. I do accept though that she thought Gareth was the person to whom she should direct her queries.

[72] On 21 January Ms Sim was reassured by Gareth about the situation. He acknowledged that she was upset and said that he could understand why. I believe that Mr Bignell should have telephoned Ms Sim directly on that day. The injury to Ms Sim's feelings would have been greatly reduced if Mr Bignell had talked to her. I do give Mr Bignell credit for not denying that Mr Tait acted in the manner that he did and for his acknowledgement that it was inappropriate.

[73] In all the circumstances I am of the view that a fair and reasonable amount for Ms Sim for compensation is the sum of \$2,500.00.

[74] I order Random Imports Limited to pay to Elizabeth Sim the sum of \$2,500.00 without deduction under section 123 (c) (i) of the Employment Relations Act 2000.

Costs

[75] Mr Clarke advised that he was not charging Ms Sim for his services so I make no award in terms of any costs Ms Sim incurred for representation. In terms of expenses I find Ms Sim is entitled to reimbursement of the filing fee she paid when she lodged her statement of problem in the sum of \$70.00.

[76] I order Random Imports Limited to pay to Elizabeth Sim the sum of \$70.00 being the filing fee incurred by her.

Summary of findings and orders made

- I have ordered Random Imports Limited to pay the sum of \$411.00 gross to Elizabeth Sim for salary arrears.
- I have ordered Random Imports Limited to pay the sum of \$119.50 gross to Elizabeth Sim for extra payment for working on a public holiday.
- I have ordered Random Imports Limited to pay to Elizabeth Sim the sum of \$480.00 gross for a payment for alternative holidays for working on four public holidays.

- I have ordered Random Imports Limited to pay to Elizabeth Sim the sum of \$60.63 gross being holiday pay on the above sums.
- I have not found Elizabeth Sim has a personal grievance that she was unjustifiably dismissed either by virtue of redundancy or constructively.
- I have found that Elizabeth Sim has a personal grievance that her employment was affected to her disadvantage by unjustifiable actions of Random Imports Limited.
- I have ordered Random Imports Limited to pay to Elizabeth Sim the sum of \$2,500.00 without deduction under section 123 (c)(i) of the Employment Relations Act 2000.
- I have ordered Random Imports Limited to pay to Elizabeth Sim the sum of \$70.00 being the filing fee.

Helen Doyle
Member of Employment Relations Authority