

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 617
3163541

BETWEEN LAUREN SHANNON
 Applicant

AND FREDA WILEY LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Kirsten Westwood, advocate for the Applicant
 Gary Tayler, advocate for the Respondent

Investigation Meeting: 21 November 2022 at Napier

Oral Determination: 21 November 2022

Written Record Issued: 24 November 2022

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lauren Shannon claims she was unjustifiably dismissed by the Respondent, Freda Wiley Limited on 3 October 2021. She also claims various sums to cover unpaid wages and reimbursements due. There was also a claim for penalties but this was withdrawn. Freda Wiley admits the dismissal was unjustified¹ but denies the claims for outstanding monies.

[2] Freda Wiley was not present at the investigation but that was a conscious decision and the Authority was advised the respondent would not be attending. The purported reason was that "...the company has ceased trading and has no money to meet any orders".² In the

¹ Statement in Reply at [1.1]

² E-mail Gary Tayler (Respondent's advocate) to the Authority dated 1 November 2022

circumstances I considered it appropriate to continue as I was urged to do by the respondent in its email advising non-attendance.

Background and Analysis

[3] Freda Wiley operated a coffee cart and Ms Shannon commenced work on 31 July 2021 when she performed some preparatory tasks prior to the business opening on 2 August. She subsequently signed a written employment agreement on 5 August 2021. It contained a trial period clause, and it was that that was relied on for the subsequent dismissal which was advised in writing at 12:31 on 3 October 2021.

[4] Ms Shannon responded to advice of the dismissal with two emails. The first said, "That's perfectly fine because I was going to hand my resignation in anyway..." The second, which came some 20 minutes after the notice of dismissal, starts with, "Hahah I just reread it again and saw the effective immediately. This actually works out perfectly for me! I'm going to be starting an amazing job soon anyway..."

[5] Ms Shannon's evidence is these were sent in a fit of anger and did not reflect reality. She did not have another job at that point but was fortunate enough to see and respond to an advert soon after and be offered an immediate start. Given the evidence I accept her explanation.

[6] That the dismissal cannot be justified has, as already said, been conceded by the Freda Wiley. That concession is appropriate given that reliance on the trial period cannot succeed for at least two reasons. The first is the written agreement was signed after the date of commencement. The second is that the requisite notice period was not paid, and to that I shall return.

[7] There must also be questions about the substantive rationale for the dismissal which purports to have been based upon serious concerns about Ms Shannon's performance. One has to question whether forgetting to put out advertising placards; a failure to put an electrical charger on or using the wrong water might actually constitute serious misconduct.

[8] Turning now to the monetary claims. The most significant of those is a claim for the contractual notice period. The trial period clause is clear and states its provisions override all other termination clauses in the agreement and that there is a mandatory two-week notice

period. Despite the trial period provision being invoked notice was not paid and it remains payable. Ms Shannon has estimated that given her average weekly hours she would most likely have worked 83 hours in a two week period and the amount due is \$1,826. I accept that.

[9] The next claim relates to the fact Ms Shannon's employment agreement states the hourly rate shall be \$22 while that actually paid was \$20. The residue being sought is \$571.40 plus holiday pay on that amount of 45.71. For Freda Wiley it is argued that this amount is not payable given Ms Hammond, Freda Wiley's sole director and shareholder, sent Ms Shannon a text approximately a fortnight after commencement stating an error had been made by her accountant and the rate should have been \$20 an hour. Ms Shannon replied, "All is good, I understand" and it is on that basis Freda Wiley denies the claim.

[10] I conclude, however, that that is not acceptable. The employment agreement contains a provision that requires any change or amendment be recorded in writing and agreed by both the employer and employee. Given Ms Shannon's evidence that notwithstanding the exchange of texts, she subsequently asked for an amended employment agreement, or failing that, payment of the specified wage the fact there is no written amendment signed by the parties means the original hourly rate must be held to remain applicable. This claim shall therefore succeed.

[11] The third claim was for the residue of pay owing for time worked on the final day and is in the amount of \$36.80. In the absence of time and wage records, s 122 of the Act leads me to conclude that that is payable. The final amount sought is for reimbursement of two incidental payments Ms Shannon made for Freda Wiley and which she can evidence. The amount claimed, \$62.76, is payable.

[12] Turning now to remedies for the unjustified dismissal. They come in two parts. The first is lost wages where s 128 of the Act requires I order the payment of three months, or if the actual loss is less, that amount. In this instance, Ms Shannon was fortunate and obtained replacement employment during the notice period I have already deemed payable. It follows there is no loss and therefore there will be no order for wages.

[13] The second component is compensation. Ms Shannon has given evidence of the hurt she felt, her angst at losing a job she enjoyed, and the loss of trust in employers she suffered as a result. There is also evidence of trouble sleeping and other upsets and anxieties. Having considered that evidence and current trends in respect to compensatory payments balanced by

the alacrity with which replacement employment was found, I consider \$12,000 to be an appropriate sum.

[14] It is here I should also make further comment about the reason why Freda Wiley is absent and its claim of impecuniosity which it supported by producing a bank statement showing a nil balance. Noting that, I caution Ms Hammond that that may not be sufficient. Given a portion of these orders relate to unpaid wages, that is something for which Ms Hammond may yet find herself personally liable. I also note having perused the companies register and having heard comments offered on behalf of Ms Shannon that there may be some issues in respect to the corporate veil, though that is not something that need be dealt with at this stage.

Conclusion and Orders

[15] For the above reasons I conclude Ms Shannon has a personal grievance in that she was unjustifiably dismissed. I also conclude she is owed various amounts for unpaid wages and reimbursements.

[16] As a result I order Freda Wiley Limited pay Ms Shannon:

- (a) \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- (b) A further \$2,542.67 (two thousand, five hundred and forty two dollars and sixty seven cents) as reimbursement of unpaid wages, holidays pay and incidental expenditure.

[17] At the request of Ms Westwood costs are reserved. Should she wish to seek costs a memorandum is to be lodged after which Freda Wiley will have two weeks to respond.

Michael Loftus
Member of the Employment Relations Authority