

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 63
5325765

BETWEEN LAUREN SMITH
 Applicant

A N D MUNCHIES ON MARSDEN
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Shannon Hollis, Counsel for Applicant
 Robyn Scott, Advocate for Respondent

Investigation meeting: 23 February 2012 at Greymouth

Date of Determination: 13 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lauren Smith worked as a shop assistant at a dairy/takeaway shop owned and operated by Munchies on Marsden Limited (Munchies on Marsden) in Greymouth from 14 August 2010 until 3 September 2010.

[2] Over the course of her employment, Ms Smith worked five shifts of four hours each on Thursday afternoons and/or Saturday mornings. She was also paid for Saturday, 4 September 2010 although did not work on that day. Ms Smith did not have a written employment agreement with Munchies on Marsden.

[3] Ms Smith says that she was unjustifiably dismissed on 3 September 2010 after she was questioned by one of the directors of Munchies on Marsden, Carrie Coghlan at her home in the presence of a policeman about some money that she was told was missing from the shop. She said that Ms Coghlan advised her that she had been recorded on security footage walking to the till in the shop and taking money referring

to a sum of \$400 as the amount missing. Ms Smith said she denied taking any money but was told by Ms Coghlan that she could not work at the shop any longer and was asked for and duly returned her keys.

[4] Ms Smith said that she then asked to and was allowed to view the security footage. She said in evidence that what she was doing at the till was placing coins in it to pay for a piece of fish that she had purchased. Ms Smith said that the security camera footage did not show her taking money out of the till.

[5] Ms Smith said that Robyn Scott, another director of Munchies on Marsden, then telephoned her on the evening of 3 September 2010 and said that the company had gone about things the wrong way and asked her how things could be resolved. Ms Smith said that she was offered her job back but she was extremely upset and humiliated by the accusation and told her that she could not work at the shop again.

[6] Ms Smith seeks reimbursement for a sum equal to her lost wages and payment of compensation. She also wanted a written employment reference but that is not one of the remedies the Authority is able to grant under the Employment Relations Act 2000.

[7] Munchies on Marsden do not accept that Ms Coghlan said anything to Ms Smith that amounted to a dismissal on 3 September 2010. Ms Coghlan says that Ms Smith was asked for the keys on 3 September 2010 to enable Ms Scott to open up the store the following day, Saturday, 4 September 2010 to view 12 hours of security footage so it could be ascertained what amount of money was missing. She does not accept she referred to an amount of money missing in her conversation with Ms Smith.

[8] Ms Scott does not accept that she told Ms Smith that the company had gone about things the wrong way or offered Ms Smith her role back. Ms Scott says that during the telephone call with Ms Smith it was Ms Smith who stated firmly that she did not want to return to the shop and did not want any casual work. Munchies on Marsden say that it did not dismiss Ms Smith and Ms Smith would not engage in the investigation process. Munchies on Marsden do not accept there should be any remedies awarded to Ms Smith.

The issues

[9] The Authority is required to address the following issues:

- Was Ms Smith a casual or permanent part time employee;
- Was Ms Smith dismissed or did she resign or advise that she would not accept further assignments;
- If Ms Smith was dismissed, then was the dismissal following a full and fair disciplinary investigation that disclosed conduct on the part of Ms Smith that amounted to serious misconduct;
- Was the decision to dismiss Ms Smith a decision that a fair and reasonable employer would have reached in all the circumstances at the time the dismissal occurred;
- If the Authority concludes that there was a dismissal and it was unjustified, then what remedies should be awarded and are there issues of contribution and mitigation?

[10] The Authority, in assessing justification if it finds there was a dismissal, needs to apply the test of justification in s.103A of the Employment Relations Act 2000 inserted by the Employment Relations Amendment Act (No 2) 2004 because, if there was a dismissal in this case, it occurred before 1 April 2011.

Was Ms Smith a casual or permanent part time employee?

[11] Ms Scott and Ms Smith had been former work colleagues and friends. There was a discussion between them about Ms Smith working some hours at the store. It was agreed that Ms Smith could work a few hours on Thursdays and Saturdays. The employee who worked there at the time on Thursdays wanted to reduce her hours by four and Ms Scott usually worked the Saturday morning shift so Ms Smith could cover for her on that day. Ms Smith had three children at the time of the discussion about available hours; one was a newborn baby so the proposed work and hours suited her.

[12] The arrangement had an air of informality about it. Ms Scott talked about wanting Ms Smith to see how work went with her other commitments and she

referred to a trial period. There was nothing in writing about the relationship because Ms Scott said she was not aware of the requirement if it was simply a casual arrangement. It has been recognised in Employment Court judgments that, whilst how the parties categorise an employment relationship is important, it is also important to consider how it worked in practical terms to ascertain the true nature of the relationship.

[13] The Employment Court in *Jinkinson v. Oceana Gold (NZ) Ltd* [2009] ERNZ 225 considered the distinction between casual employment and ongoing employment and stated:

The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between the period of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

[14] Munchies on Marsden had two shifts of four hours each that would be worked by Ms Smith on Thursday afternoons and Saturday mornings. Ms Smith gave evidence that she simply turned up to these shifts to work. I find that, unless she had a good reason not to, such as childcare issues or sickness, then Munchies on Marsden expected Ms Smith to turn up and work these shifts. The shifts had consistent start and finish times for Thursday between 1pm and 5pm and for Saturday between 8am and noon. That there was an expectation that Ms Smith would perform both shifts is strengthened by the fact that Ms Scott paid Ms Smith at the end of the Thursday shift out of the daily till takings for both the Thursday shift and the Saturday shift yet to be worked for the week ending 5 September 2010.

[15] The Authority does not have a significant work history to consider in ascertaining whether there was a consistent and regular pattern of work. For the first week, Ms Smith only worked on the Saturday morning and then for the second week only on the Thursday afternoon but for the remaining two weeks Ms Smith worked, or would have worked but for the relationship ending, both the Thursday and Saturday shifts. This was not a relationship where Ms Smith only attended at the workplace if she was telephoned and offered hours.

[16] I am not satisfied, in this particular case, that the arrangement was of the nature that there was no mutual expectation of continuity of employment. Although

only a very limited time, the evidence satisfied me that both Munchies on Marsden and Ms Smith had a mutual expectation of some continuity of employment for shifts, as set out, on Thursdays and Saturdays.

[17] In conclusion, I find the evidence supports Ms Smith was more likely employed in a permanent part time role for eight hours per week on Thursday afternoon and Saturday morning rather than a casual, as and when required, basis.

Was Ms Smith dismissed or did she resign?

[18] Ms Scott, in her evidence, said that she became concerned that there were noticeably low takings on 2 September 2010. She viewed the security footage with her two daughters, both directors of Munchies on Marsden, Carrie Coghlan and another daughter also called Lauren, to see if trade had been steady. Ms Scott concluded that trade had been steady.

[19] On the security footage viewed, they noticed that Ms Smith's behaviour at the till at about 4.20pm looked suspicious and they thought it appeared she had removed notes from the till and tucked them into her sweatshirt sleeve. It was decided that they would involve the Police the following morning, on Friday, 3 September 2010.

[20] Constable Peter Jackson was assigned to look into the matter and he duly attended at the dairy. It was decided that Constable Jackson would accompany Ms Coghlan to see Ms Smith at her home. Constable Jackson was alerted to the till tape not working at the time so there was an issue as to what the actual shortfall, if any, was. Constable Jackson advised that the owners of Munchies on Marsden should view the entire 12 hour footage from 2 September 2010 to get a clearer indication of what was sold against what the takings were.

[21] There is a dispute about the conversation that took place between Ms Coghlan, Constable Jackson and Ms Smith at her home.

[22] Ms Coghlan said that when she arrived at Ms Smith's home she explained to her that the takings were low for 2 September 2010 and that this was an issue that would need to be investigated. Ms Coghlan said that she asked for Ms Smith's keys to the shop because they were short on keys and her mother needed the keys to open up to view the security footage on Saturday 4 September 2010.

[23] Ms Smith said that she was dismissed by Ms Coghlan at her home. She said that when Constable Jackson and Ms Coghlan arrived she was at home with her children and her baby was asleep. She said that she was told by Ms Coghlan that money had gone missing from the shop and that she had been recorded by the security camera walking to the till and removing the money and walking away. She recalled an amount of \$400 being mentioned by Ms Coghlan. She said that Ms Coghlan stated that she would not be able to work at the shop again and asked for her keys back. Ms Smith duly gave the keys to Ms Coghlan and said in her evidence at the Authority's investigation meeting that she was not in a position to give an explanation for what she may have been doing at the till in the absence of viewing the footage. She insisted that she view the security footage at the shop. There was a dispute about whether Ms Coghlan invited her to do so or whether Ms Smith insisted that she do so. I find it more likely that Ms Smith asked to view the footage.

[24] On the day of the investigation meeting, Ms Hollis produced for the first time a job sheet from Constable Jackson. I accept that the reason for the late production of this job sheet was because it was only made available to Ms Hollis the day before the investigation meeting. One of the documents attached to the statement in reply in this case was an email from Constable Jackson dated 15 October 2010 to Ms Coghlan. That email stated, amongst other matters, that:

While I was present, at no point during your conversation with SMITH do I recall you telling her that her employment was terminated.

[25] The job sheet provided:

COGHLAN told SMITH that Munchies were no longer going to employ her. SMITH returned the shop keys she was in possession of.

[26] The two documents, therefore, appear to contradict each other. I find that the job sheet would have been prepared, if not contemporaneously with the events at a time more proximate to them than the email of 15 October 2010. The job sheet, in my view, is more likely to be an accurate record of what occurred than the later email from Constable Jackson that he may well have written without checking back on the job sheet. I also note that the letter in which Ms Hollis raised Ms Smith's personal grievance on 23 September 2010 is largely consistent with the job sheet and the advice that Ms Smith was given at her home that she would not be able to work for the company any more and was asked for her keys.

[27] The other disputed matter is whether Ms Coghlan advised Ms Smith of the amount of money she believed was missing. Ms Coghlan says that she did not advise Ms Smith of an amount. Ms Smith was adamant that she did. The job sheet provides amongst other matters that Ms Coghlan told Ms Smith that takings were down by at least \$400.00. Almost the exact words *at least \$400 had gone missing* is in the letter of 23 September 2010 raising a personal grievance notwithstanding the job sheet was never seen until the day before the investigation meeting on 22 February 2012. I find it more likely than not that there was reference to an amount of money that Ms Coghlan believed had gone missing.

[28] In conclusion I find it more probable than not that Ms Coghlan dismissed Ms Smith at her home before Ms Smith viewed the security footage at the shop. The dismissal occurred when Ms Coghlan advised Ms Smith that she no longer had a job at Munchies on Marsden and, consistent with that, asked her to return her keys which she did. I do not find that there was any discussion about a stand down at that stage whilst an investigation was undertaken and/or that there was to be a full viewing of the security footage for the whole of the day in question to ascertain what exactly was missing. Ms Coghlan already I find had formed a view about the amount of money missing.

If Ms Smith was dismissed, then was the dismissal following a full and fair disciplinary investigation that disclosed conduct on the part of Ms Smith that amounted to serious misconduct?

[29] The employer in this case was entitled to talk to Ms Smith about concerns it had about her opening the till when there were no customers present against a background where it believed its takings were low for Thursday, 2 September 2010.

[30] I have found though that Ms Smith was dismissed without any real process at all and certainly not one that was full and fair. The allegation was a very serious one of theft. Ms Smith was not clearly advised of the allegation she was facing, she was not advised to obtain a representative and she did not have a proper opportunity to offer an explanation. Ms Coghlan attended at Ms Smith's home with a policeman and dismissed Ms Smith.

[31] The parties in an employment relationship have a statutory obligation to deal with each other in good faith – s. 4 Employment Relations Act 2000. This includes an obligation not to mislead or deceive each other and an obligation to provide access to

information and an opportunity to comment on it before making a decision likely to have an adverse effect on the continuation of employment. These good faith obligations require different considerations to those that may exist in a criminal type investigation and/or questioning by the police.

[32] Ms Coghlan was not in a position to know how much money, if indeed any had gone missing from the till, because the till tape was broken. The only way that this could be ascertained with any degree of accuracy would have been to have carefully gone through the security footage and recorded each item sold as best they could from the footage. That was not something that had been undertaken at the time of Ms Smith's dismissal. Notwithstanding this I have found that she told Ms Smith at least \$400 was missing. That was not a statement made in good faith. The Authority did not see any documentation to support a calculation of loss in takings where the till tape was not working on the day in question although Ms Scott gave evidence that after the footage was viewed in its entirety and sales totalled there was a discrepancy of approximately \$300. Ms Scott said that trade should have been higher than usual on 2 September 2010 that day because there was a hockey tournament on. Ms Smith produced a newspaper article from the day in question at the Authority investigation meeting that supported Greymouth received a dumping of hail described as a freak storm. Ms Smith said that the weather deterred people going out and about that day.

[33] The second good faith issue is about the security footage which is no longer in existence so the Authority has not had an opportunity to view it. The job sheet records the Constable advising Ms Coghlan that there was no actual [security] footage showing money taken by Ms Smith and he advised Ms Coghlan that the only way for the police to proceed would be if there was an admission. When they attended though at Ms Smith's house Ms Smith was told that she was seen on the security footage taking something from the till. She denied the allegation but putting to Ms Smith a statement that she was seen taking something from the till when this was at its best unclear and at its worst untrue was inconsistent with good faith obligations in an employment relationship.

[34] Ms Smith's explanation for going to the till when there were no customers present was that she was paying for a piece of fish, albeit an explanation given after she was dismissed. Both Ms Coghlan and Ms Scott accepted the security footage

showed her eating a piece of fish that day. There was some suggestion she had written that fish up in the IOU book. Both Ms Coghlan and Ms Scott properly acknowledged that the reference to \$3 in the IOU book without an item beside it could have been from the previous week. The amount was followed by entry for a can of drink (crossed out) and there was nothing on the security footage to suggest that that had been consumed on 2 September 2010. Ms Smith denied writing anything in the IOU book on 2 September 2010 and I do not find objectively assessed that a fair and reasonable employer would have placed reliance on the entry in the IOU book to exclude an explanation that Ms Smith was paying for the fish.

[35] Ms Smith's evidence was that the security footage did not show her removing anything from the till and her actions on the footage were consistent with her placing coins into the till for the piece of fish that she had purchased. In this regard, her evidence is different from that of Ms Coghlan and Ms Scott. They say that it appeared from looking at the footage that Ms Smith had removed notes and placed them under the band of her sweatshirt. As already set out this is inconsistent with Constable Jackson's view of the footage where he records in his job sheet amongst other matters a discussion with Ms Coghlan:

I told her the circumstances point towards her committing a theft but there was no solid evidence to back up this – no accurate till tape, no actual footage showing money taken – the only way we could take it to Court would be if SMITH admitted the offence.

[36] The Constable also records in his job sheet that he advised Ms Coghlan that she should have the till camera moved forward approximately 2 metres so that it provided a better view of what was going on whenever someone went into the till. Charges were never laid against Ms Smith.

[37] The procedure in this case was not that which a fair and reasonable employer would have undertaken, given the seriousness of the allegation of theft and the potential consequences of such an allegation being almost inevitable dismissal.

[38] I am not satisfied that, in this case, there was a full and fair disciplinary investigation carried out that disclosed conduct on the part of Ms Smith that amounted to serious misconduct.

Was the decision to dismiss Ms Smith a decision that a fair and reasonable employer would have reached in all the circumstances at the time the dismissal occurred?

[39] I am not satisfied for the reasons outlined above that a fair and reasonable employer would have reached a decision in all the circumstances at the time to dismiss Ms Smith.

[40] Ms Smith has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

Remedies

Contribution

[41] The Authority is required to under s.124 of the Employment Relations Act 2000 to consider the extent, if any, to which Ms Smith contributed to her personal grievance and if required reduce any remedies awarded accordingly. Although I have not had to consider whether Ms Smith did what was alleged, stole money from the till, for assessing contribution I am required to reach some conclusion about that on the balance of probabilities.

[42] Ms Smith's action in opening the till when there were no customers present could have been viewed as suspicious. It required some explanation. Ms Smith said that she was putting in coins to pay for a piece of fish. She was seen eating a piece of fish that day. There was no rule against Ms Smith cooking and consuming a piece of fish in the shop as long as anything eaten was recorded in the IOU book or paid for. I was not satisfied that the fish was recorded in the IOU book. The evidence about that was unreliable. Ms Smith had an explanation for opening the till and I am not satisfied on the balance of probabilities the security footage showed Ms Smith clearly removing anything from the till so as to conclude she was stealing money. In conclusion I do not find that she contributed to her personal grievance and make no deductions from the amounts I shall go on to award.

Lost wages

[43] Ms Smith said that she was offered her position back on the evening of 3 September 2010 but Ms Scott denies that she ever offered Ms Smith her job back. I accept Ms Scott's evidence in this regard. Ms Smith said that, after her dismissal, she

did not attempt to look for other employment because she was so upset and humiliated that anyone could think that she had stolen money she could not motivate herself to look for work. She was extremely worried about who had been told in the small Greymouth community and that, in those circumstances, did not look for other employment and did not go out.

[44] Ms Smith took no steps to mitigate her loss. She also went onto the domestic purposes benefit for a time after her dismissal. The evidence about lost wages was somewhat unsatisfactory. I accept that in the small Greymouth community Ms Smith genuinely felt she could not work for fear of what people thought or knew of her dismissal. In those circumstances, I think it fair and reasonable to make an award that fairly recognises these difficulties but takes into account the change of circumstances and the fact that Ms Smith did not attempt to mitigate her loss. I do not find that the lost wages attributable to the grievance should be greater than eight weeks.

[45] Ms Smith was paid \$17.55 per hour and worked eight hours per week. That is a weekly gross sum of \$140.40 that I shall then multiply by eight for eight weeks lost wages.

[46] I order Munchies on Marsden Limited to pay to Lauren Smith the sum of \$1123.20 gross being lost wages for a period of eight weeks under s. 123 (1) (b) of the Employment Relations Act 2000.

Compensation

[47] Ms Smith said that Ms Coghlan's partner had told others at her partner's work that she had stolen money. There was some dispute about how this came about. It was properly accepted in this case that Ms Smith was not responsible for the actions/statements of her partner at various times during this matter and that must go both ways. I was not satisfied otherwise from the evidence that the directors of Munchies on Marsden told others in the community about what had occurred.

[48] What was apparent from the evidence was the significant effect the dismissal had on Ms Smith. Margaret Smith said that her daughter had previously been an outgoing person but became quiet and withdrawn after her dismissal as well as tearful and angry. She moved to a house which was secluded and lost contact with friends and only visited with family. She lost weight because she stopped eating and had difficulty sleeping. Even as at the date of the investigation meeting, Margaret Smith

said her daughter still did not really go anywhere, although she was not really aware of what was said around town. Ms Scott in her evidence said that Ms Smith was withdrawn and had problems prior to her dismissal. I have considered carefully her evidence in this regard.

[49] I find that this is a case where Ms Smith did suffer considerable humiliation and loss of dignity because of her dismissal and I accept that she became reclusive because of a fear of what people may have heard or what has been said. Ms Smith said that she wanted Ms Scott and the other directors to accept that she did not steal the money and the lack of a proper and fair process in this case I find contributed to a considerable sense of distress on Ms Smith's part. I accept that Ms Smith may have had some personal issues before her dismissal but nevertheless I find that the impact of the dismissal on her was significant in an emotional and physical way and calls for an award that reflects the distress suffered. Notwithstanding the employment was only for a short time, the award would have been higher if I had been satisfied that the directors of Munchies on Marsden had spoken in the community of the circumstances surrounding the dismissal but I am not satisfied about that matter.

[50] In all the circumstances, I find that a fair and reasonable award would be the sum of \$7,000.00.

[51] I order Munchies on Marsden Limited to pay to Lauren Smith the sum of \$7000 without deduction under s. 123 (1)(c)(i) of the Employment Relations Act 2000 being compensation for humiliation, loss of dignity and injury to feelings.

Costs

[52] I reserve the issue of costs. Ms Hollis has until 18 May 2012 to lodge and serve submissions as to costs and Ms Scott has until 1 June 2012 to lodge and serve submissions in reply.

Summary of findings and orders

- I have found that Ms Smith was unjustifiably dismissed.
- I have ordered Munchies on Marsden to pay to Ms Smith \$1123.20 gross being lost wages for an eight week period.

- I have ordered Munchies on Marsden to pay to Ms Smith the sum of \$7000 without deduction being compensation for humiliation, loss of dignity and injury to feelings.
- I have reserved the issue of costs and timetabled for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority