

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 378/09
5146680

BETWEEN AMANDA TE WHATA
 Applicant

AND DRIVE THRU COFFEE
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Rowland-Ingram, for Applicant
 Alistair Rowe and Marisa Bidois, for Respondent

Investigation Meeting: 24 June 2009

Further Information and 29 June, 1 July and 9 July 2009
Submissions Received:

Determination: 29 October 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Te Whata worked as a barista in Drive Thru's coffee kiosk business from 25 July until her dismissal on 21 October 2008. She says her dismissal was unjustified and seeks remedies consequent to such a finding by the Authority. She also says she was disadvantaged by the repeated unjustified actions of her employer throughout her employment for which she seeks remedies.

[2] Drive Thru says Ms Te Whata's employment was fixed term in nature and but for her dismissal would have ended on 31 December 2008. It says while the process of dismissal was not formal her dismissal was justifiable because Ms Te Whata knew Drive Thru was concerned about her performance – it says she had received a number of warnings prior to her dismissal about lateness and wearing the correct uniform – and the issues which led to her dismissal were serious enough to warrant dismissal.

Drive Thru denies any unjustified actions which cause Ms Te Whata disadvantage in her employment.

[3] The issues for the Authority to resolve are:

- (i) Was Ms Te Whata's employment fixed term?
- (ii) Was Ms Te Whata warned about lateness and if so were those warnings fair and reasonable?
- (iii) Was Ms Te Whata unjustifiably disadvantaged in her employment?
and
- (iv) Was Ms Te Whata's dismissal fair and reasonable?

Fixed term employment

[4] Clause 3.1 of the employment agreement provides:

3.1 Fixed Term Individual Employment Agreement

*This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties agree that this is a fixed term employment agreement. This agreement will commence on 25.07.2008 and will end on 31.12.2008. The Employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely **License with Car Wash to be review**. The parties also confirm that the Employee has been advised by the Employer when discussing this agreement, the reasons for the employment ending in this way.*

[5] The parties executed this agreement on 30 July 2008. Immediately above Ms Te Whata's signature sits the following declaration:

*I, **Amanda Houltham** [Ms Te Whata's former name], declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed a reasonable time to do so.*

[6] Ms Te Whata told me she was given the agreement on 25 July, that she took it home with her and read through it with her mother, returned it to work and signed it without amendment.

[7] Ms Te Whata's challenge to the fixed term nature of the agreement is that the fixed term provision was not expressly drawn to her attention and discussed with her. Section 66 does not place such an obligation on an employer offering a fixed term

agreement. Section 66 requires that a genuine reason for the fixed term¹ exists and that the reason is advised to the worker² before agreement is reached.

[8] I am satisfied that Ms Te Whata was given a fair opportunity to peruse the proposed employment agreement before she entered it and that the agreement clearly sets out its fixed term nature, the fixed term itself and the reason for the fixed term. I am satisfied that the reason was genuine; the drive thru café is located on leased premises in a car wash yard and I accept that lease is subject to review.

[9] For these reasons I find Ms Te Whata's employment was subject to a genuine fixed term.

Prior warnings

[10] To justify Ms Te Whata's dismissal Drive Thru seeks to rely on warnings it says were issued during her employment and which put her on notice of her employer's concerns and the possible disciplinary consequences of such continued conduct. Drive Thru says the warnings fall into two categories – informal and formal. Paul Medarov, the owner of the business and Ms Te Whata's boss, said he had warned her informally on several occasions about lateness and her personal appearance and these warnings had escalated to formal verbal warnings on 9 August and 4 September. Mr Medarov says the first warning concerned lateness to work, the second leaving the café unlocked.

[11] Ms Te Whata accepts during her employment Mr Medarov emphasised the importance of commencing work on time and being professional. She says no warnings were issued to her and that she was not given a fair chance to comment on the 4 September incident.

[12] I am satisfied that Mr Medarov had concerns about Ms Te Whata's timely attendance at work, that he drew these concerns to her attention and put in place a method to avoid late attendance (dealt with in more detail below).

¹ Section 66(2)(a) Employment Relations Act 2000

² Section 66(2)(b) Employment Relations Act 2000

[13] I am not satisfied that the voicing of these concerns amount to the issuing of disciplinary warnings. I am not satisfied the issues were fairly put to Ms Te Whata or that she was given a fair opportunity to provide a response – this is what would have been required to characterise these discussions as disciplinary warnings.

Unjustified actions

(i) Racist and derogatory comments

[14] Ms Te Whata said in evidence that Mr Medarov made racist and derogatory comments to her which caused her embarrassment. She said she reacted to the comments by giving Mr Medarov a look which indicated the comments were “*not ok*” but did not feel she was able to argue with him.

[15] Mr Medarov recalls making comments about gangs to Ms Te Whata by way of general observation about an item in the news. He says these comments were not personal, that he did not intend to offend her and is truly sorry if he did. He says he was unaware of any offence caused because Ms Te Whata said nothing to that effect at the time.

[16] There is a dispute about the nature of the comments which is difficult to resolve given the lack of detail in the evidence; there was no evidence of the dates or times of these events and no detail of the context in which the comments were made. I find it is likely Mr Medarov made an off hand comment which Ms Te Whata found offensive but I am not satisfied any breach of the employment agreement occurred which could be said to amount to a disadvantage.

(ii) Opening time

[17] Ms Te Whata says she was disadvantaged in her employment by being required to attend work five minutes before her start time.

[18] I find Mr Medarov told Ms Te Whata she should be at work five to ten minutes before her start time to ensure the kiosk was able to open at 6am. I am satisfied that in giving her that instruction he intended that Ms Te Whata complete the

set up necessary to open the kiosk. I am satisfied on the evidence received that these tasks required more than opening the door of the kiosk and putting on a uniform and that Ms Te Whata had to perform substantive duties such as making the first coffee. She is entitled to be paid for this work.

[19] The claim for wage arrears for the early start times has not been quantified. If the parties cannot resolve this issue themselves then Ms Te Whata has leave to provide further evidence to the Authority to support her claim.

[20] In regard to Ms Te Whata's claim that she suffered an unjustified disadvantage in being required to attend work 5 minutes earlier than the start time in her employment agreement, there is no evidence that she was disadvantaged by this. It is commonsense that if Drive Thru wanted the kiosk opened at 6am ready to serve customers the necessary preliminary duties would have to be completed before 6am.

(iii) Lunch breaks

[21] The parties' written employment agreement provides that Ms Te Whata was entitled to a half hour lunch break from 11.30am or such other time as agreed. She says Mr Medarov told her she would have to take that break on the premises and the kiosk would have to remain open. Ms Te Whata also said she was told she could close the kiosk to take a break if the kiosk was clean and there were no customers.

[22] Mr Medarov says Ms Te Whata agreed on the first day to take a paid lunch break which meant she would remain on the premises during her break. He also said she received two paid 15 minute breaks as required by law.

[23] I find it is more likely that Ms Te Whata agreed to take a paid break. There is no evidence she asserted a 30 minute lunch break off the premises during her employment. For example, the issue was not raised on one occasion when Ms Te Whata left the kiosk unattended to purchase lunch. This was reported to Mr Medarov who confronted Ms Te Whata. Ms Te Whata's response was she had locked the kiosk before she left, she was away only a few minutes and there were no customers. This explanation is consistent with the arrangement Mr Medarov said the parties had entered. There are no grounds upon which to find a disadvantage.

(iv) Closing time

[24] Ms Te Whata says she is owed overtime payments for work after 2pm, her contracted finish time. She says she worked late because she had to wait for Mr Medarov or a member of his family to collect the day's takings and close the kiosk. This claim has not been quantified.

[25] Mr Medarov says Ms Te Whata never worked late and was told she could leave at 2pm.

[26] There is no evidence to support Ms Te Whata's claim that she has worked unpaid overtime. There is no basis upon which to make a finding in her favour.

Unjustified dismissal

[27] The following is Mr Medarov's account of the events immediately leading up to Ms Te Whata's dismissal. He says he attended the kiosk at about 8.30am on Tuesday, 21 October and said to Ms Te Whata that he needed to speak with her later in the day. He then returned at 2pm, the usual closing time for the business and the end of Ms Te Whata's working day. Mr Medarov put several concerns to Ms Te Whata about her work performance and asked her to comment on them. It is fair to say the concerns were expressed in very general terms – that he had received customer complaints about her, the business had lost money during her employment and her lateness had cost the business money. He then took her through the serious misconduct provisions in the employment agreement and put to her that her actions amounted to serious misconduct and he could dismiss her. Mr Medarov asked Ms Te Whata how she felt about this and she had nothing to say. He then dismissed her.

[28] Ms Te Whata says Mr Medarov attended the work place early on the morning of 21 October and before he left called out to her in front of her co-worker "you and I need to sit down and have a serious talk". He then returned to the workplace at 2.10pm and dismissed her for seriously dishonouring his name by not opening on time and failing to follow instructions. Ms Te Whata asked Mr Medarov to put the reasons in writing and he said he would bring all the documents the following day. He also

said she had the choice of finishing work the next day, Friday of that week or in two weeks. Ms Te Whata elected two weeks. The following day she attended work. At the end of the working day Mr Medarov attended the workplace and told her he was terminating her employment immediately. A long conversation followed ending with Ms Te Whata handing over her keys and leaving the kiosk.

[29] On either account the dismissal was unjustified. There is no dispute that the details of Mr Medarov's concerns were not fairly put to Ms Te Whata. This is important because without the details of those concerns (for example, when complaints were received, details of complaints, dates of alleged lateness, evidence of loss linked to lateness) Ms Te Whata could not provide an explanation; it is very difficult to meaningfully refute an assertion made without factual basis. There is also no dispute that the meeting was not fairly constituted. Ms Te Whata was entitled to fair notice of the meeting so that she knew what Mr Medarov wanted to discuss with her and could bring a representative if she wished.

[30] The failure to comply with these very basic elements of procedural fairness leaves Drive Thru unable to support its claim that its decision to dismiss Ms Te Whata was justified; because Drive Thru did not go through a fair and reasonable decision making process it cannot demonstrate the decision to dismiss was fair or reasonable.

[31] For these reasons I find Ms Te Whata's dismissal was unjustified.

Contribution

[32] Having determined Ms Te Whata has a personal grievance I must now consider whether she has contributed to the situation which gave rise to her personal grievance to such an extent that any award of remedies should be adjusted to reflect that contribution³.

[33] Several events occurred immediately prior to Ms Te Whata's dismissal which I find are likely to have contributed to the situation which gave rise to her personal grievance. On 18 October Ms Te Whata was 35 minutes late for work. On 20 October Ms Te Whata called in sick to work 20 minutes after her start time. Also on

³ Section 124 Employment Relations Act 2000

20 October Ms Te Whata drew to Mr Medarov's attention an advertisement he had placed in the local paper for a barista in Botany for the week day hours Ms Te Whata was employed.

[34] Mr Medarov denies any connection between the advertisement and Ms Te Whata's position. He said in evidence that the advertisement was placed on 15 October and related to premises he intended to open, also located in the Botany area. I accept this is the case; there is no evidence to suggest otherwise.

[35] I find Ms Te Whata's lateness to work on 18 and 20 October contributed to Mr Medarov's decision to dismiss her. On both accounts of the dismissal lateness is a significant factor. It is likely these most recent incidents of lateness were at the forefront of Mr Medarov's mind.

[36] Ms Te Whata says she was late on 18 October because she was unwell and she telephoned in sick 20 minutes after her usual start time on 20 October because she over slept due to ill health. There is some dispute over the details of these explanations, but putting those disputes to one side and accepting Ms Te Whata's account, her conduct was less than could reasonably be expected. She understood, and accepted it had repeatedly been drawn to her attention throughout her employment, that punctuality was a very important part of her position. Arriving at work late, without prior advice, and calling in sick after the start time is not consistent with the duties she had agreed to perform.

[37] Ms Te Whata sought to minimise her actions by saying she was unwell and that it was unfair to be dismissed for being unwell. I agree it would be unfair, in these circumstances, to be dismissed for being unwell but that is not why she was dismissed. She was dismissed for being late to work. I do not accept, on the evidence, that she was so unwell that she was unable to telephone prior to her start time and advise her employer she would not be late to work or unable to attend work.

[38] For these reasons I find Ms Te Whata contributed in a blameworthy manner to the circumstances which gave rise to her dismissal and any remedies should be reduced by 50%.

Remedies

[39] Ms Te Whata has established a personal grievance for unjustified dismissal and is entitled to an assessment of remedies sought.

[40] Ms Te Whata seeks reimbursement of lost wages totalling \$6552.00 (12 weeks at \$546 per week). She says it was impossible to find alternative employment and she enrolled in a hairdressing course in November, incurring a student loan. She also seeks \$15,000 to compensate the hurt and humiliation suffered as a consequence of her dismissal.

[41] I accept Ms Te Whata made reasonable efforts to find employment after her dismissal. I have found her employment agreement would have expired on 31 December 2008. Ms Te Whata is entitled to reimbursement of wages for the balance of her employment agreement that is, 22 October to 31 December 2007. This order is made pursuant to section 123(1)(b) of the Act.

[42] Ms Te Whata gave evidence that her dismissal had a negative impact emotionally and financially. She said she felt embarrassed and ashamed to have to tell friends and family that she had been dismissed. I accept this was the case. Ms Te Whata is entitled to an award of \$2000 pursuant to section 123(1)(c)(i) of the Act.

[43] Drive Thru says it deducted \$83 from Ms Te Whata's final pay in order to replace the kiosk telephone she broke during her employment. Ms Te Whata should have an opportunity to comment on this matter.

Costs

[44] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If this is not possible, then Mr Ingram should apply to the Authority, within 14 days of the date of this determination, for a costs timetable to be set.

Marija Urlich

Member of the Employment Relations Authority