

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 301
5540519

BETWEEN HAYLEY TUNNELL
 Applicant

A N D THE RIV LTD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Ken Usmar for the Applicant
 Bernard Gittings for the Respondent

Investigation Meeting: 24 September 2015

Submissions Received: 24 September 2015

Oral Determination: 24 September 2015

Record of Oral
Determination: 29 September 2015

ORAL DETERMINATION OF THE AUTHORITY

- A. The Riv Limited is ordered to pay to Ms Tunnell the amount of \$320.76 being arrears of wages within 28 days of the date of this determination.**
- B. The Riv Limited is ordered to pay Ms Tunnell \$7,020 being three months' lost remuneration under section 128(2) of the Employment Relations Act 2000 within 28 days of the date of this determination.**
- C. The Riv Limited is ordered to pay Ms Tunnell \$4,000 compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

D. Costs are reserved.

Employment relationship problem

[1] Ms Hayley Tunnell claims one or more conditions of her employment were affected to her disadvantage by an unjustifiable action by The Riv Limited (The Riv), that she is owed arrears of wages and that she was unjustifiably dismissed from her employment. The claims are denied by The Riv.

[2] As permitted by s.174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Tunnell and The Riv but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Unjustifiable disadvantage claim

[3] The claim for unjustified disadvantage was withdrawn at the commencement of the investigation meeting.

Arrears of wages claim

[4] This matter was resolved at the commencement of the investigation meeting by agreement. The Riv has agreed to pay Ms Tunnell the amount of \$297 gross being 16.5 hours of work at the hourly rate of \$18 per hour. In addition, Ms Tunnell is entitled to the calculation of holiday pay on this amount which equates to \$23.76.

[5] The Riv Limited is ordered to pay to Ms Tunnell the amount of \$320.76 being arrears of wages within 28 days of the date of this determination.

Unjustifiable dismissal claim

[6] On 3 September 2014, Ms Tunnell signed a written employment agreement accepting an offer of employment to work for The Riv as night chef commencing on 8 September 2014. The night chef role was a sole charge role. During October 2014, Ms Tunnell was rostered to work on morning shifts. This was followed by a return to some night shifts.

[7] Ms Tunnell met with Mr Gittings on 10 November 2014 when Mr Gittings raised concerns about Ms Tunnell's performance. Mr Gittings met with Ms Tunnell again on 3 December 2014. Mr Gittings offered Ms Tunnell the position of raw cake maker. That role could only guarantee 20 hours each week but there was the prospect of more hours being offered in the kitchen to make up to the 30 hours.

[8] Following a period of sick leave, Ms Tunnell rang Mr Gittings raising concerns about being rostered to work less than 30 hours. Mr Gittings advised Ms Tunnell they would meet the following day. Ms Tunnell met with Mr Gittings the next day and as a result of that meeting, Ms Tunnell was given four weeks' notice of the termination of her employment by reason of redundancy.

Issues

[9] The issues for determination by the Authority are:

- (a) Was Ms Tunnell unjustifiably dismissed from her employment by reason of redundancy;
- (b) If so, what if any remedies should be awarded?

Was Ms Tunnell unjustifiably dismissed from her employment by reason of redundancy?

[10] Ms Tunnell says that on 16 December 2014 she was called over to speak to Mr Gittings who told her he was making her position redundant and provided her with four weeks' notice of the termination of her employment.

[11] A fair and reasonable employer is expected to comply with its statutory obligations which include a duty of good faith and the four procedural fairness tests set out in section 130A(3) of the Employment Relations Act 2000 (the Act). Failure to do so undermines an employer's ability to justify its actions and how it acted.

[12] Section 4(1A) of the Act requires an employer who is proposing to make a decision which will adversely impact on an employee's ongoing employment to provide that employee with relevant information and an opportunity to comment on it before a final decision is made.

[13] The parties, through their employment agreement, have agreed on the definition of redundancy in the following terms:

18.1 Where the employee's position becomes surplus to the employer's staffing requirements due to changes in the employer's business operations with no alternative position available to the employee the employer may determine, following consultation with the employee, that the employee's position is redundant.

18.1.1 Where the employee's position becomes redundant under Clause 18.1 the employee shall receive four weeks notice of termination.

[14] Ms Tunnell was engaged to work as a night chef and worked on other shifts as required. Mr Gittings says Ms Tunnell was not performing adequately in the night chef role and by agreement she was rostered to work morning shifts as a sous chef so that she could be closely supervised and have training.

[15] Ms Tunnell disputes this is the case and says that as far as she was aware she was performing adequately. Ms Tunnell acknowledged that she was working morning shifts for about a month and was then working a combination of day and night shifts but she believed this was because that was what she was rostered to work.

[16] Mr Gittings says he met with Ms Tunnell at least three times and discussed with her the fact that he did could not sustain her hours given that she was not working in the job she was employed to work in. Mr Gittings says he met with Ms Tunnell on 27 September, 10 November and 3 December 2014 and that during all three meetings he raised concerns about being able to sustain Ms Tunnell's hours.

[17] Ms Tunnell denies she met with Mr Gittings on 27 September 2014. Ms Tunnell agrees that they did meet on 10 November and 3 December 2014 but denies they discussed possible redundancy nor was there any mention of her position not being sustainable.

[18] The evidence about what was discussed in the meetings between Mr Gittings and Ms Tunnell is heavily disputed. I have therefore reached my conclusions on the facts on what is more likely to have occurred and on the balance of probabilities.

[19] Mr Gittings has been unable to produce supporting evidence that the meeting on 27 September 2014 took place. I am satisfied that on 10 November 2014, it was more likely than not that Mr Gittings did not discuss with Ms Tunnell concerns he may have had about sustaining Ms Tunnell's hours. Mr Gittings gave Ms Tunnell a letter he had written prior to the meeting on 10 November 2014. This letter addresses issues relating to Ms Tunnell's performance but does not address any issues with respect to the sustainability of her role.

[20] It was common ground that on 3 December 2014 Ms Tunnell was offered the role of raw cake maker. The position was for a maximum of 20 hours per week. Mr Gittings says Ms Tunnell rejected this offer. Ms Tunnell says she accepted the offer because it came with a promise that her 30 hours would be made up with additional shifts in the kitchen.

[21] I find it is more likely than not that Ms Tunnell did agree to undertake the raw cake making role but that when she turned up to undertake a trial of that position, she was told it was no longer available to her.

[22] By his own admission, when Mr Gittings gave Ms Tunnell notice of the termination of her employment on 15 December 2015, this was the first time he indicated to her that termination of employment was a possibility.

[23] I find The Riv breached its section 4 good faith obligations under the Act. Ms Tunnell was not given any substantive information before being made redundant, much less an opportunity to comment on relevant information before she was dismissed. No information was given to Ms Tunnell as to why she and no other employees were being made redundant.

[24] I am satisfied on the balance of probabilities that there was no prior consultation with Ms Tunnell that her position may be disestablished. I am satisfied that when Mr Gittings gave notice to Ms Tunnell that her position was redundant and her employment would terminate he had failed to provide her with the opportunity to respond to a proposal that he would terminate her employment before reaching his final decision.

[25] The Riv's actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances. These are not mere technical breaches and renders the dismissal unjustified.

Remedies

[26] I have found Ms Tunnell was unjustifiably dismissed. As required by section 124 of the Act, I have considered whether Ms Tunnell contributed to the actions giving rise to her personal grievance and have determined that she did not.

[27] Ms Tunnell seeks payment of three months' lost wages as a result of her dismissal in the amount of \$7,020 gross. Ms Tunnell believed she had secured alternative employment in January 2015 but this proved not to be the case. It was not until April 2015 that Ms Tunnell successfully entered into a new employment relationship. I am satisfied Ms Tunnell took adequate steps to mitigate her loss.

[28] I am also satisfied that Ms Tunnell suffered significant emotional distress as a result of her unjustified dismissal.

Orders of the Authority

[29] The Riv Limited is ordered to pay Ms Tunnell \$7,020 being three months' lost remuneration under section 128(2) of the Act and \$4,000 compensation under section 123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered.

[30] The payments must be paid within 28 days of the date of the record of determination.

Costs

[31] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Tunnell shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Riv shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority