

**YOUR ATTENTION IS DRAWN TO
THE NON PUBLICATION ORDERS
CONTAINED IN THIS
DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 5
3059272

BETWEEN	UYT Applicant
AND	RUT First Respondent
	V LIMITED Second Respondent

Member of Authority:	Vicki Campbell
Representatives:	Warwick Reid for Applicant Penny Swarbrick for Respondents
Investigation Meeting:	29 July 2019
Submissions Received:	29 July 2019
Additional Information Received:	26 and 19 August, 11 September and 1 November 2019
Determination:	09 January 2020

DETERMINATION OF THE AUTHORITY

A. UYT was unjustifiably dismissed. V Limited is ordered to pay to UYT the following sums within 28 days of the date of this determination:

- a) Lost wages of \$6,852.37 gross under s 123(1)(b) of the Act;
and**

b) Compensation of \$5950 under s 123(1)(c)(i) of the Act

B. Costs are reserved.

Non-publication Orders

[1] At the commencement of the investigation meeting non-publication orders regarding the names and identities of two witnesses were made. After considering the nature of some of the evidence heard at the investigation meeting and taking into account the comments made by the Chief Judge in a recent Employment Court decision, in the interests of justice I have extended the non-publication orders to include the names and identities of the parties and all witnesses.¹

[2] In making these orders I have taken into account that the applicant in this case is young and is at the beginning of her working career, that the employment relationship took place in a small community town and all of those involved in these proceedings whether witnesses or parties, are likely to be easily identifiable and it is highly likely that the nature of the evidence I have heard and which is referred to in this determination may have a lasting adverse impact on the applicant's future job prospects and reputation.

Employment relationship problem

[3] RUT is the sole director and shareholder of V Limited which owns and operates a café in the Coromandel area. UYT worked in the kitchen of the café and says she worked for RUT personally. This is disputed by RUT who says UYT was at all times employed by V Limited.

[4] UYT worked variable hours during the year. The café had a seasonal clientele which meant she worked more hours in the summer and less hours during the quieter winter months.

[5] On 1 January 2019 UYT was told to leave work early which she did. UYT took approved leave on 2 and 3 January and was due to return to work on 4 January.

¹ *Elisara v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].

[6] On 3 January 2019 UYT received a text message from RUT telling her she wasn't needed the following day but to meet with him after work. UYT met with RUT as requested. The discussion in that meeting is disputed although there is no dispute that UYT did not return to work again following that meeting. UYT says she was dismissed and the dismissal was unjustified. RUT says UYT resigned.

Issues

[7] In order to resolve UYT's application I must determine the following issues:

- a) Who was UYT's employer?
- b) Was UYT constructively or actually dismissed?
- c) If there was a dismissal was the dismissal unjustified and if so, what if any remedies should be awarded?

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received although I have carefully considered all submissions and evidence.

Identity of the employer

[9] UYT says she believed at all times during her employment that RUT personally was her employer and that she only came to know of V Limited's existence during these proceedings. RUT denies he was UYT's employer personally and says she was employed at all times by V Limited.

[10] The onus of proving the identity of the employer rests on the employee where the employee puts that fact in issue. The standard of proof is on the balance of probabilities. The question of who the employer was must be determined at the outset of employment. I must objectively assess the employment relationship at its outset and ask who an independent but knowledgeable observer would have said was the

employer. Failure to notify or make an employee aware of the identity of the employer is not conclusive.²

[11] UYT says that at the time she was employed she knew nothing of the company, V Limited. UYT had previously worked at the café (albeit in a casual way and without the payment of PAYE or Holiday Pay) and told me she called in to see RUT in March 2018 and he told her he was offering her a full time contract at an hourly rate of \$21 per hour.

[12] RUT says he gave UYT an employment agreement to review and sign but it was never returned. UYT denies this. I have been provided with a copy of an employment agreement RUT says was given to UYT and have accepted his evidence that it was provided to UYT at the beginning of her employment.

[13] While I am not required to make any findings in relation to the employment agreement I note that it contains a number of inconsistencies with how the employment operated in practice. For example the employment agreement states the employment relationship is casual. That is clearly not the case as the records show UYT worked regular rostered hours. Further the hourly rate set out in the agreement is for payment of each hour worked to be at \$20 per hour. In fact UYT was paid \$19 per hour worked in the beginning and this was increased to \$21 per hour on or about 1 August 2018. However, the name of the parties is clearly set out and records the employer as V Limited.

[14] UYT acknowledges that her payslips record the employer as V Limited but says she never took any notice of that. Further, bank records produced by UYT also record the payer of wages into her bank account as V Limited. RUT told me, and I accept, that the name V Limited was printed on all eftpos receipts. UYT had previously worked in the café and would have been handling eftpos receipts. It is therefore highly likely that she was aware the café was owned by V Limited.

[15] I conclude V Limited was at all times UYT's employer and not RUT personally.

² *Colosimo v Parker* (2007) 8 NZELC 98, 622; *Wilson v Bruce Wilson Painting & Decorating Limited* [2014] NZEmpC 83 at [13], (2014) 11 NZELR 712.

Events leading to the ending of the employment relationship

28 and 29 December

[16] On 28 December 2018 UYT says she burned her right hand while working in the kitchen. Despite the injury she continued to work. UYT says that the next day the burn had blistered and she found it difficult to work.

[17] RUT says he was not aware UYT had a work related injury as she did not disclose it to him until she raised her personal grievance in February 2019.

[18] RUT says UYT left work early on 29 December 2018 without seeking approval. UYT is recorded as leaving work at 1.53 pm instead of her usual finish time of 3 pm. UYT says she went to the pharmacy to purchase products to address the burn on her hand before going home.

[19] UYT told me that because of her injury she arranged to swap her shift on 30 December 2018. RUT disputes this. He says UYT messaged him through Facebook at 7.15 am on 30 December asking him to arrange a replacement for her.

[20] I have accepted UYT's evidence in relation to the events on 29 and 30 December. UYT has provided a copy of a text message she sent to her supervisor on 29 December advising her that she had swapped her shift with a colleague for the following day as she was not feeling well but may be in later in the day.

[21] This text was followed by another text at 7.15 am on 30 December to RUT advising him that she was still not feeling well and did not think she should work that day. There is no mention in the text about asking RUT to arrange a replacement. That seems logical when you consider the 29 December text to her supervisor where UYT advises that she has already arranged a replacement for her early shift.

[22] UYT worked from 5 am to 11 am on 31 December. That night she attended a friends place and says she had a few drinks. She says she was not drunk and was in bed by 12.30am.

[23] A work colleague gave evidence which I have accepted on balance as being truthful. The evidence was that before midnight on 31 December 2018 the colleague and UYT were in contact by telephone and that UYT was incoherent and acknowledged she had consumed illegal substances.

1 January 2019

[24] UYT attended work on 1 January 2019 at her usual start time. UYT says she had personal relationship problems that morning before her shift started which affected her emotionally. UYT says when she arrived at work it was busy and she put her head down and got on with her job. Her supervisor approached her and enquired about how she was at which time UYT says she began crying. After explaining what had happened before her shift UYT says she returned to her duties. In her written evidence UYT says another worker began giving her instructions which she found difficult to deal with and left the workplace to catch her breath and get her emotions under control.

[25] UYT says a third colleague approached her and she told the colleague what had taken place that morning. This caused UYT to start crying again. Once she had regained her composure UYT says she returned to the workplace and RUT told her to go home.

[26] RUT told me 1 January was extremely busy and he had observed UYT leaving her workstation often. He told me other employees were commenting on her behaviour and he was having to deliver food to customers to cover when she was absent. He told me that when he did see UYT she had a vacant look on her face, her eyes were red and she looked dishevelled in her appearance as if she had been unwell and lacked sleep. He found her unable to do basic tasks in the kitchen and she was very emotional.

[27] RUT says he assessed UYT as being unfit to be at work, that UYT agreed with his assessment when he raised this with her and she agreed to leave work early.

4 January 2019 meeting

[28] As stated earlier in this determination UYT was on approved leave on 2 and 3 January 2019. During her absence on 2 January, a colleague advised RUT that UYT had been taking drugs on 31 December 2018 and was still under the influence of those drugs when she was working on 1 January.

[29] RUT notified UYT on 3 January that she was not needed for work the following day but asked her to meet with him after work.

[30] UYT attended the meeting and says that at the outset of the meeting RUT told her she could either resign or he would have to let her go. UYT says she asked if she could work out two weeks' notice but this was declined.

[31] RUT denies UYT's evidence. He says he discussed with UYT the issue of her attending work while under the influence of drugs. He was of the understanding that she had told her colleagues she had taken half a pill, meaning she had taken ecstasy. He says during their discussion on 4 January UYT conceded she had been under the influence of ecstasy when she attended work on 1 January.

[32] RUT says he told UYT that he was considering whether he needed to commence a formal process to investigate her apparent attendance at work under the influence of drugs. He told her the likely outcome of such an investigation given her disclosure to her colleagues and her admission to him was a disciplinary process with a serious risk of the summary termination of her employment.

[33] RUT says UYT told him she did not want to participate in a disciplinary process and it was agreed she would not return to work. RUT points to a previous disciplinary process where UYT's performance issues were raised with her to support his evidence that UYT knew how a disciplinary process could go and chose to resign rather than be subjected to such a process.

Conclusion

[34] There is clearly a dispute as to whether UYT was dismissed by RUT on 4 January or she resigned. There were only two witnesses to the conversation between RUT and UYT. Given the dispute I must decide whose evidence I prefer and this necessarily involves assessing credibility.

[35] In assessing credibility I have assessed what the witnesses have said, how those who were at the investigation meeting expressed their evidence and how it was said. I have considered how reasonable, plausible and probable the evidence is and what corroboration there is.

[36] Overall I found RUT's evidence to be more credible and I have preferred it to UYT's. RUT's evidence appeared more consistent. Although all witnesses appeared reliable, RUT's evidence was more plausible.

[37] In his evidence RUT told me that at the meeting on 4 January:

...I explained to [UYT] that I didn't want to ruin her reputation, but that if it was found she had been at work under the influence of drugs, I wouldn't be able to keep employing her. I offered to her that if she didn't want to go through that process that I could accept her resignation...

[38] RUT was indicating to UYT what a possible outcome could be if he implemented a disciplinary process. This was said in the context of information he had received from UYT's work colleagues and UYT's own admission that she had attended work under the influence of drugs.

[39] From the evidence I heard at the investigation meeting it is apparent UYT had consumed a significant amount of drugs during her New Year's Eve celebrations and she was fully aware that when she attended work on 1 January her behaviour was being influenced by the drugs she had consumed. This means UYT was aware it was highly likely a disciplinary process would likely end in her dismissal as indicated by RUT.

[40] I find it is more likely than not that UYT believed that irrespective of which option she took she would be leaving the employment relationship. She was either facing a disciplinary process which would likely end in her dismissal or she had to resign.

[41] RUT says by her conduct of leaving the meeting UYT took the resignation option. However, a verbal resignation must be clear, unequivocal and unambiguous. There is no evidence of a clear, unequivocal and unambiguous resignation by UYT. In text messages between UYT and RUT five days after the meeting (on 9 January 2019) RUT asks UYT to stop telling people she had been dismissed. Clearly when UYT left the meeting she believed she had been dismissed.

[42] Even if RUT believed on 4 January that UYT had resigned, between 4 and 9 January he became aware that UYT did not believe she had resigned, rather that she had been dismissed.

[43] RUT should have treated UYT's departure on 4 January cautiously. When he became aware UYT was texting her friends stating that she had been dismissed he had an obligation to check in with UYT and confirm his understanding that she had resigned. Instead he instructed her to stop telling people she had been dismissed.

[44] An employer acting fairly and reasonably in these circumstances had a duty to take positive action to check the status of the relationship. Where there is doubt about whether an employee genuinely wished to end the employment relationship RUT had an obligation to ensure that his understanding was based on what UYT actually intended rather than on what might be inferred from equivocal words and conduct.³

[45] Supporting her view that she had she had been dismissed, RUT refused to allow UYT to work out a notice period after she had asked to do so. No payments have been made for any notice period so there can be no argument that RUT believed there was an agreement for payment in lieu of notice.

[46] For all of the foregoing reasons I have concluded UYT did not resign from her employment on 4 January 2019. RUT's failure to clarify UYT's actual intentions between 4 and 9 January choosing instead to rely on an ambiguous resignation was not an action an employer acting fairly and reasonably could take. UYT was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

[47] In resolution of her personal grievance UYT claims lost wages for a period of three months from 4 January 2019 and compensation of \$10,000 under s 123(1)(c)(i) of the Act.

Lost wages

[48] Section 128 of the Act provides for reimbursement where it is found an employee has a personal grievance and has lost remuneration as a result. If the section applies then the Authority must, whether or not it provides for any of the other remedies, order the employer to pay the employee the lesser of a sum equal to lost remuneration or to 3 months' ordinary time remuneration.

[49] I am satisfied UYT lost wages as a result of her unjustified dismissal. UYT told me she wandered around the town enquiring about work opportunities but was unable to find work. Between 7 and 9 January RUT tagged UYT into a local job opportunity. At the investigation meeting UYT explained she did not follow this up or approach other cafés in the town that were looking for employees.

³ *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164 at [32].

[50] Unable to find work in her local area UYT took on casual work in Auckland following her dismissal. I am satisfied UYT took appropriate steps to mitigate her loss. UYT seeks three months lost wages under s 123(1)(b) of the Act amounting to \$8,061.62 gross. This amount reflects an average of the hours UYT would have earned if she had remained in her employment and the income she received for her casual work in February and March 2019.

Compensation

[51] UYT seeks payment of \$10,000 compensation under s 123(1)(c)(i) of the Act. In her written evidence UYT says RUT was telling people she had been taking drugs and this meant she would not be able to find work in her local area. Ironically UYT's own evidence is that she was quite open about her drug use. I have concluded her use of illegal substances was already well known by those she worked with and others in the local area. It is doubtful anything RUT had to say would diminish UYT's reputation in that regard.

[52] UYT's evidence of hurt and humiliation is largely supposition and unsupported by any factual evidence. Given the lack of any supporting evidence I find an appropriate award in this case to be \$7,000.

Contribtuion

[53] I have found UYT has established a personal grievance. I am therefore required under s 124 of the Act when deciding the nature and extent of the remedies to be provided to consider the extent to which UYT's actions contributed towards the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies accordingly.

[54] RUT and V Limited submit that UYT's conduct on 1 January was significant due to her attending work in a condition that rendered her a hazard to herself and others (given the kitchen environment) and was unable to do her job.

[55] There is no dispute that on 1 January UYT was send home after she was observed not coping with her work. At that time RUT did not know why UYT was not able to work.

[56] When other employees raised concerns that UYT had been working under the influence of drugs on 1 January RUT became concerned enough to conclude a

disciplinary process may be necessary. At the meeting on 4 January RUT says UYT acknowledged she had taken drugs on 31 December.

[57] While the employment agreement offered to UYT was not signed by her, it addressed the use of drugs at clauses 10.4 and 16.4. Clause 10.4 sets out a non-exhaustive list of actions that may constitute serious misconduct including being at work in a state of intoxication (whether drugs or alcohol) as to prevent or impede the proper performance of duties.

[58] Clause 16.4 provided for UYT to be drug tested at V Limited's expense and if a positive test was returned the clause provides for disciplinary action to be taken up to and including dismissal.

[59] I have found earlier that it is more likely than not that UYT had received a copy of the proposed employment agreement so she would have been aware V Limited and RUT took the issue of being impaired by drugs at work seriously.

[60] Further, UYT had previously been issued a warning when she worked while hungover and had spent considerable time during the working day in the toilet vomiting.

[61] I have found earlier in this determination that it is more likely than not that UYT had consumed substances on 31 December which contributed to her being unable to complete her duties on 1 January 2019.

[62] I find UYT's conduct blameworthy and her remedies will be reduced accordingly. UYT's remedies should be reduced by 15 percent to reflect her contribution to the situation that gave rise to her unjustified dismissal grievance. Accordingly V Limited is ordered to pay to UYT the following sums within 28 days of the date of this determination:

- a) Lost wages of \$6,852.37 gross under s 123(1)(b) of the Act; and
- b) Compensation of \$5,950 under s 123(1)(c)(i) of the Act.

Costs

[63] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so UYT shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. RUT and V Limited 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.

[64] 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