

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Donielle Viegas
AND The Flower House (2005) Limited
REPRESENTATIVES Applicant in person
No appearance for Respondent
MEMBER OF AUTHORITY Yvonne Oldfield
INVESTIGATION MEETING 15 May 2007
DATE OF DETERMINATION 27 June 2007

DETERMINATION OF THE AUTHORITY

[1] The respondent, The Flower House (2005) Ltd, did not provide a statement in reply and did not appear to defend this matter on 15 May. Courier delivery has been confirmed for both the statement of problem and the notice of investigation meeting. I proceed therefore to determine the matter on the applicant's evidence alone.

Employment Relationship Problem

[2] Ms Viegas is a florist who worked in a full time sole charge role in the respondent's Te Atatu business from 30 January 2006 until 17 November 2006 when she was dismissed on the grounds of redundancy. Ms Viegas acknowledges that the Te Atatu shop ceased trading at that time but says that the purported redundancy was neither procedurally nor substantively justified. She says that the respondent did not give notice that the shop was to be closed and did not discuss other options with her.

[3] At the time of her redundancy Ms Viegas was four and a half months pregnant. She had not yet completed a formal parental leave application but had (in the September) told the respondent's director, Silvia Hall, that she was pregnant and wished to take parental leave.

[4] Ms Viegas found it proved impossible to get a new job after she was dismissed and she faced financial difficulties as a result. This was compounded by the fact that, as she understood it, she was no longer eligible for the statutory parental leave payment. Ms Viegas claims lost earnings for the period up until mid March when she had planned to begin parental leave, compensation for hurt and humiliation (\$10,000.00) and compensation for loss of benefit (the parental leave payment). She also says that she did not receive outstanding wages and holiday pay to which she was entitled upon termination.

[5] The issues for determination are therefore:

- i. whether the termination of Ms Viegas's employment was procedurally and substantively justified;
- ii. whether her final pay was correct, and
- iii. what if any remedies she is entitled to as a result.

Was the termination of employment procedurally and substantively justified?

[6] Ms Viegas acknowledged that during 2006 the respondent was facing "*cash flow problems.*" Ms Hall had told her of plans to sell the shop (either as a going concern or by subletting the premises) and Ms Viegas knew it had been advertised for sale. However Ms Viegas understood that it had been taken off the market by early November, when the respondent's accountant assured her that the business was to keep trading. Ms Viegas was therefore taken by surprise on 17 November 2006 when she was handed a letter advising as follows:

"Dear Donielle,

It is with much sadness that we must inform you that due to the sale of the lease for 2a Roberts Road, the shop is being closed permanently today.

As required by law we are to give you two weeks notice, which we intend to pay you along with all outstanding holiday pay as soon as the company is capable.

We thank you for your service to the company and apologise for the short notice. Sadly we were unable to refuse this offer and continue to keep the shop open due to financial restraints.

We wish you well with the arrival of your baby next year."

[7] The doors of the shop were shut and it did not re-open. November is the start of the busiest period for florists and the shop had several weddings booked over the summer season. Ms Viegas told me that even without premises to work out of she could still have completed these orders. This would have provided her with work and avoided letting the customers down. Ms Viegas told me she did not get an opportunity to discuss this or any other alternatives with Ms Hall before or after she received the letter of 17 November.

[8] Ms Viegas told me that Ms Hall did not live in the area and so the sudden closure reflected on Ms Viegas personally. Ms Viegas also told me that she was concerned that Ms Hall appeared to have damaged her good name with malicious gossip about her. Others in the industry told her that Ms Hall had alleged to them that Ms Viegas had stolen money from the respondent. Ms Viegas told me that her concern about this was compounded when two unsolicited offers of work to her (made immediately after the shop closed) were later withdrawn. Ms Viegas said she saw a marked change in the attitude displayed by the employers involved between her first and second conversations with them. One mentioned the rumours and told her that "*there was no smoke without fire.*" Ms Viegas was very upset by this.

[9] Ms Viegas told me she was a specialist wedding florist and expected to get at least casual work over the busy summer period. She continued to ring around florists in the neighbourhood looking for work until near the end of her pregnancy. She attributes her lack of success in part to her pregnancy but also to the damage she believes was done to her reputation.

[10] Regarding the assertion that Ms Hall spread misinformation about Ms Viegas's conduct, I note that the evidence on this point was hearsay. I am not satisfied that the assertion is well founded.

[11] It is unfortunate that Ms Hall did not appear to defend this matter. She may have had an explanation for the abrupt closure of the shop. In the absence of evidence from her however I accept that the redundancy was effected without consultation with Ms Viegas or even fair notice to her. A potential redeployment option (completion of existing orders from offsite) was not discussed. In these circumstances I cannot safely conclude that the termination for redundancy was genuine. Ms Viegas is entitled to both lost earnings and compensation for hurt and humiliation.

Were the wages and holiday pay correct?

[12] Prior to commencing as a full time employee Ms Viegas had worked for the respondent part time for three months. She told me that her wages for that period (\$1,173.09 net) were correct but did not include holiday pay. She started full time on Monday 30 January 2006 and worked until Friday 17 November, a period of 42 weeks. Each week she was paid \$500.00 net by direct credit and \$50.00 cash. In her final week of employment the direct payment was increased to \$850.00 which she was later told included \$350.00 holiday pay.

[13] After 17 November Ms Viegas, her mother and her partner all telephoned Ms Hall requesting payment of holiday pay and notice as promised in the letter of termination. Ms Hall repeatedly promised that she would pay Ms Viegas but the payment never eventuated. Ms Viegas now claims as follows:

- i. That the notice period expressly agreed at the start of her employment was four weeks (not as suggested in the letter of termination, a fortnight.) She said this was required by Ms Hall because Ms Viegas was sole charge and in the event she left the respondent wanted enough time to find a replacement;
- ii. That she is owed outstanding overtime payments totalling \$690.00 net;
- iii. That she took only three days annual leave during her employment, and is owed further outstanding holiday pay.

[14] In the absence of evidence from Ms Hall I accept these assertions. Ms Viegas is owed four weeks pay in lieu of notice and \$690.00 overtime pay.

[15] As for holiday pay this must be calculated at 6% of total earnings less the three days leave Ms Viegas had taken and less the \$350.00 holiday pay she received.

[16] The following table sets out what Ms Viegas received:

Wages for period of part-time work	\$1,173.09 net
Wages for 42 weeks at \$550.00 per week	\$23,100.00 net
Total wages paid	\$24,273.09 net
holiday pay on termination	\$350.00 net

[17] Total earned is as followed:

Wages paid	\$24,273.09
Arrears of overtime pay owed	+ \$690.00
Four weeks pay owed in lieu of notice	+ \$2,200.00
Total net earned	\$27,163.09

[18] Holiday pay owed is therefore:

Six percent of \$27,163.09	\$1,629.79
less three days taken	- \$330.00
less holiday pay received	- \$350.00
net holiday pay owed	\$949.79

[19] Ms Viegas told me that she had planned to work until mid March and then to commence maternity leave. This was seventeen weeks after the termination of her employment. I have already indicated that she was entitled to four weeks pay in lieu of notice. She is therefore entitled to a further 13 weeks lost wages at \$550.00 per week net that is \$7,150.00.

[20] The termination of her employment subjected Ms Viegas to additional stress at a challenging time in her life. For this I conclude that she is entitled to a further sum of \$5,000.00 compensation for hurt and humiliation.

[21] Express statutory provision¹ has been made to ensure that employees who resign or are made redundant during parental leave retain their entitlement to parental leave payment. Similar provision does not appear to have been made in relation to those whose employment is terminated, for whatever reason, before the commencement of leave, and the question of eligibility for payment in such cases has not been tested.

[22] Because she understood that she was not entitled to it Ms Viegas did not attempt to apply for a parental leave payment and as a consequence suffered additional financial stress. She seeks compensation for this. However the payment is a statutory entitlement under the minimum code. It is not an obligation of the employer and cannot be described as a benefit of the employment relationship. I can make no further order for compensation for loss of the parental leave payment.

Costs

[23] The applicant attended the investigation meeting with her partner in support but had no professional representation of any sort. The issue of legal costs does not therefore arise. She is however entitled to be reimbursed for her filing fee of \$70.00.

Summary of Orders

[24] The applicant was unable to tell me her gross wages. She told me that she and Ms Hall only ever spoke in net figures. I had intended to "gross up" the figures but given the extent of the claims, have decided that this risks a degree of inaccuracy. I have therefore calculated the amounts owed in net terms. Ms Viegas also told me that she has made inquiries with Inland Revenue and has been told that no PAYE for her has been received from the respondent. I remind the respondent that in addition to paying the following sums to Ms Viegas it is also obliged to pay the PAYE component of all her remuneration, and of items (i) to (iv), to Inland Revenue. (Item (v) is a tax free compensation payment.)

[25] The respondent is ordered to pay to Ms Viegas the following amounts:

i. Arrears of overtime pay:	\$690.00(net)
ii. Four weeks pay in lieu of notice	\$2,200.00(net)
iii. Outstanding holiday pay	\$949.79 (net)
iv. Reimbursement of wages lost post dismissal	\$7,150.00(net)
v. Compensation for hurt and humiliation	\$5,000.00
vi. Costs	\$70.00

Yvonne Oldfield
Member of Employment Relations Authority

¹ Parental Leave and Employment protection Act, 1987S.71V; s71L (2)