

gross; payment of all accrued holiday leave totalling \$3,173.84 gross; compensation for hurt of \$8,000; and compensation for loss of benefit for 14 weeks parental leave entitlements totalling \$5,703.32 gross.

- [2] No statement in reply has been received from the Company.
- [3] Efforts by Ms Waara to arrange mediation were thwarted by the Company's failure to respond.

The Investigation

- [4] Notice of a telephone conference of the parties was sent to the Company but again it did not respond. Efforts to make contact with it on the day of the conference were unsuccessful
- [5] I therefore directed the matter to an investigation in Palmerston North on 22 September 2009: notice was sent to the Company's address for service.
- [6] As it happened, the Company's director, Mr Ken Thurston, attended the investigation and represented the respondent.
- [7] The Company's conduct may have implications per s. 181 of the Employment Relations Act 2000.

Ms Waara's Position Summarised

- [8] By written and oral evidence, Ms Waara made clear the following:
- [9] She began working for the Company and other companies operated by Mr Thurston, on a seasonal basis approximately 10 years ago.
- [10] On or about September 2006 Ms Waara was employed in a permanent full-time position.
- [11] In April 2008 Ms Waara was promoted to the position of foreman and her pay increased to \$22.00 an hour.

- [12] Ms Waara says that, in June 2008, Mr Thurston advised her that her pay would be reduced to \$20.00 an hour due to her failure to follow instructions regarding the placement of containers: the applicant believed that charge to be unfair as there was no room to place all the containers where instructed, and she was unable to explain the problem to Mr Thurston. Ms Waara subsequently disputed this action in correspondence by her legal representative (see attachment E to the statement of problem).
- [13] On Monday 30 June 2008 Ms Waara was stood down by Mr Thurston, seemingly as a result of her defending a crew member alleged to have been stealing meat.
- [14] Ms Waara returned to work on 7 July: a new staff person had been appointed in the office and tensions arose between the applicant and that person about the new employee's role. Following an incident, Ms Waara was told by Ms Thurston she was to begin working immediately at another site: the applicant challenged his unilateral direction. Mr Thurston claimed the parties' employment agreement allowed him to make the change and sent Ms Waara home. Mr Thurston rang the applicant on 16 July and directed her to work at the new site from the following day: the conversation became heated and Ms Waara hung up.
- [15] On 17 July Ms Waara sought legal advice. As a result, and amongst other things, she advised Mr Thurston by fax she would not be working at the new site, outlined her understanding of the facts and requested evidence to support his direction she work elsewhere. Ms Waara says her fax marked the beginning of a prolonged period during which she received no communication from Mr Thurston; when contact was made there was a lack of responsiveness by him to the applicant's concerns.
- [16] Ms Waara met with Mr Thurston on 28 July during which he denied receiving her fax of 17 July and was vague about options to resolve the problems.
- [17] In a telephone conversation on 30 July Ms Waara's legal representative spoke to Mr Thurston: he gave his (disputed) account of why Ms Waara had been stood down, offered a new position on a reduced rate of pay and claimed that the rate of \$22.00 an hour previously paid Ms Waara was only temporary.

- [18] Mr Thurston met with the applicant and her representative on 5 August. Ms Waara says Mr Thurston advised he had no choice but for reasons he could not go into could only offer the position at the other site. When Ms Waara's representative attempted to engage Mr Thurston he got up and left the room. Ms Waara no longer felt any trust or confidence in the respondent and declined Mr Thurston's offer. A letter was sent to the Company the same day setting out in full the applicant's employment problem including her claim of constructive dismissal (attachment E to the statement of problem).
- [19] Ms Waara did not receive any final pay following her constructive dismissal: her payslip of 27 July 2008 states she has at least 6.19 hours of annual leave due aside from that wrongly paid during her stand-down.
- [20] Ms Waara immediately commenced searching for new employment, but could only find temporary and irregular engagement.
- [21] By chance Ms Waara spoke with Mr Thurston on 19 September when he offered her her old job back but also said he did not want the return of any of her old crew. The applicant says that she was upset to hear through the local 'grapevine' that Mr Thurston was reputed to have told a prospective employer she was a thief and not to be trusted. However, she did get temporary work with that employer. Ms Waara says that, even now, she still encounters friends and family members who have heard the rumour she lost her job because she was stealing.
- [22] It was around this time Ms Waara learnt she was three months pregnant. She had worked for Mr Thurston during her previous three pregnancies up until her due date and had returned to work soon after. Ms Waara says she would have done the same again but for being forced out of her employment. Ms Waara had not been aware of her parental leave entitlements during her earlier pregnancies but, having recently discovered her entitlement, seeks compensation for what she would have received but for her unjustified dismissal.
- [23] On 19 December 2008 the Department of Labour confirmed the Company had not returned its calls further to her request for mediation assistance.

- [24] The heart of this case is a claim of constructive dismissal: Ms Waara left her employment as a result of a breach of duty by her employer (*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 1 NZLR 372).
- [25] The basis of the breach of duty was unilateral reductions to the applicant's rate of pay and the requirement she work on another site. The Company also failed its obligation to be responsive and communicative.
- [26] By the meeting of 5 August the Company had been placed on sufficient notice Ms Waara was rapidly losing trust and confidence in the employment relationship.

The Company's Position

- [27] The Company's position is nowhere set out in writing but instead is to be understood from the evidence given directly by Mr Thurston at the Authority's investigation on 22 September, and less directly from the questions he put to, and the issues he raised, with the applicant during the same.
- [28] Mr Thurston described the amount of theft at the plant supervised by Ms Waara as "*chronic*" (oral evidence) but stressed there were at no time any accusations against the applicant. The amount of loss was unbearable for the client and something had to be done. I granted Mr Thurston's application for a prohibition of publication of details relating to the amount of loss.
- [29] A major, top to bottom change was required at the site as its management was obviously falling down.
- [30] Mr Thurston accepts there was an employment agreement between the parties (attachment A to the statement of problem) but describes it as a "*casual contract*" (oral evidence).
- [31] Mr Thurston repeatedly put his view that Ms Waara was "*a very, very good person*" (oral evidence) to whom he felt no animosity but there was chronic theft on her shift and a total breakdown of control on site. While there was no reflection on the applicant major steps were required as the customer demanded action be taken.

Discussion and Findings

[32] I took from Mr Thurston's evidence that he largely agreed with Ms Waara's account of the facts but sought to justify his actions on the basis of the size of the problem facing the Company, i.e. that an urgent response was required.

[33] Unlike Mr Thurston, I do not accept that the parties' employment agreement is a casual contract or that it permitted Ms Waara's unilateral relocation. I reach that conclusion because the agreement makes no reference to casual employment, does not invoke s. 66 (Fixed Term Employment) of the Act and does not provide for the termination of employment except by two weeks' notice (clause 6). In other words, it has all the appearance and content of a regular, ongoing employment relationship.

Hourly Rate

[34] While Ms Waara's employment agreement refers to an hourly rate of \$15.50 (clause 3.1) Mr Thurston did not dispute the applicant's claims of her promotion to foreman and being paid \$22.00 an hour. There is no evidence of that promotion or hourly rate being temporary as claimed by the respondent and I am satisfied both the promotion and the rate of pay should be understood in the context of ongoing employment. It follows that the Company unilaterally reduced Ms Waara's hourly rate of pay and she is entitled to recover the difference.

Holiday Pay

[35] I do not accept Ms Waara was paid her holiday pay on an 'as you go' basis because there is no written evidence to support the Company's claim that arrangement was agreed by the parties. The claimed arrangement is disputed by Ms Waara and it is not provided for in the employment agreement which has standard (i.e. permanent employment) leave and holiday arrangements.

Last Two Weeks' Pay

[36] I have no reason to reject Ms Waara's claims she was unilaterally stood down or suspended, that there was no consultation or disciplinary process

preceding the standing down that permitted her any input into the respondent's decision, or that she was paid holiday pay for the period. It follows the suspension was both procedurally and substantively without justification and she should be reimbursed lost holiday pay wrongly deducted during that period.

Unjustified Constructive Dismissal

[37] The same employment agreement detailed Ms Waara's "*normal place of work*" (clause 1) while requiring her "*to work elsewhere from time to time when directed by the company*" (above). Because 'from time to time' is not synonymous with permanent relocation I accept Ms Waara's claim that the Company could not unilaterally require her to permanently relocate to a new site.

[38] It follows that, in the total absence of any performance issues being put to her (relating to Mr Thurston's claims of chronic stock loss) and with out the application of any disciplinary process in respect of the same or any related issue, and in breach of a contractually identified normal place of work, it was not open to the Company to direct Ms Waara to work elsewhere: she could fairly and reasonably conclude that its direction to do so, and the respondent's failure to respond to her concerns, repudiated her fundamental terms and conditions of employment, i.e. she was constructively dismissed.

Parental Leave

[39] Mr Thurston properly did not dispute the claim that, had Ms Waara stayed in employment with the Company, she would have benefitted from paid parental leave. It follows that her unjustified constructive dismissal resulted in, amongst other things, the loss of that benefit: ss. 123 (1) (c) (ii) of the Act applied. It is appropriate that the applicant be paid compensation for loss of benefit for 14 weeks parental leave entitlements totalling \$5,703.32 gross

Remedies

[40] Ms Waara was contractually entitled to wages of \$22.00 per hour: in the absence of her agreement to any reduction it follows she is entitled to recover the outstanding sum of \$1032 gross.

- [41] Ms Waara is entitled to recover her outstanding holiday pay including that wrongly paid out to her during her stand down, i.e. \$3,173.84 gross.
- [42] It follows from the above Ms Waara is owed \$2,838 gross for her two weeks' unpaid wages up to 5 August 2008.
- [43] Ms Waara seeks \$8,000 compensation for hurt in respect of her unjustified dismissal. A significant award is warranted in this instance because of the entirely arbitrary nature of Ms Waara's termination, the extent of her service with Mr Thurston and his companies, and the uncontested evidence of the impact the unjustified dismissal had on her and her family. In all the circumstances I am satisfied the claimed \$8,000 is appropriate.
- [44] Ms Waara seeks 3-months lost remuneration. The applicant gave evidence of mitigating her losses by looking for, and accepting, any work she could find. I accept in the circumstances that an award of 3-months lost remuneration less monies earned during that period is entirely appropriate, i.e. \$10,880 gross.
- [45] I repeat the conclusion set out in par 39 above re parental leave.

Contribution

- [46] There is no evidence of Ms Waara's actions contributing in any way to the situation giving rise to her successful grievance, i.e. the respondent's arbitrary decision resulting in her unjustified dismissal.

Determination

- [47] Ms Waara's claim of unjustified dismissal succeeds and the Company is to pay her the following monies:
- a. Lost earnings of \$1032 (one thousand and thirty two dollars) gross arising out of the Company's unilateral reduction of her hourly rate;
 - b. Payment of accrued holiday leave totalling \$3,173.84 (three thousand, one hundred and seventy-three dollars and eighty four cents) gross;

- c. Two-weeks' wages for the period ending 5 August 2008, namely \$2,838 (two thousand eight hundred and thirty-eight dollars) gross;
- d. From 5 August, three month's lost wages less casual income earned during that period, i.e. \$10,880 (ten thousand, eight hundred and eighty dollars) gross;
- e. Compensation for hurt of \$8,000 (eight thousand dollars); and
- f. Compensation for loss of benefit for 14 weeks parental leave entitlements totalling \$5,703.32 (five thousand, seven hundred and three dollars and thirty two cents) gross.

Denis Asher

Member of the Employment Relations Authority