

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 138
5420708

BETWEEN CHERI WAITOA
 Applicant

AND DADDY O'S LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Teresa Wilson, Advocate for the Applicant
 No appearance from or by the Respondent

Investigation Meeting: 3 September 2013 at Wellington

Determination: 5 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Cheri Waitoa was employed by the respondent, Daddy O's Ltd (Daddy O's), as a Duty Manager in its restaurant/bar located on Manners Street in Wellington.

[2] On 27 May 2013 Ms Waitoa lodged a statement of problem with the Authority alleging she was unjustifiably disadvantaged by Daddy O's actions when it unilaterally altered terms and conditions of her employment. In early August 2013 Ms Waitoa amended her statement of problem and additionally claimed she was further unjustifiably disadvantaged by (a) Daddy O's failure to act in good faith whilst bargaining for a written employment agreement during her employment, and that it issued two separate warnings to her in respect to the same event. Ms Waitoa further claims she has been unjustifiably constructively dismissed.

[3] Ms Waitoa seeks reimbursement of lost wages and compensation for hurt and humiliation associated with the employer's actions.

The Authority's investigation

[4] Daddy O's has not responded in any meaningful way to Ms Waitoa's application although I am satisfied that Daddy O's had adequate notice of the investigation and an opportunity to participate in it.

[5] On 5 June and again on 14 June 2013 the Authority made contact with Daddy O's Operating Manager, Ms Te Pae Reti-Rickit. Ms Reti-Rickit advised on each occasion that a statement in reply to Ms Waitoa's application would be provided.

[6] By 25 June 2013 the Authority had not received the anticipated documentation and a Notice of Direction and Notice of Investigation were issued. The parties were directed to attend mediation which I understand was attended but they were unable to resolve matters.

[7] On 5 August 2013 the Authority was advised that Daddy O's was legally represented and leave was requested to provide a statement in reply. On 23 August 2013 counsel for Daddy O's advised that she was no longer instructed to act.

[8] Daddy O's did not attend the investigation meeting on 3 September 2013. On the day of the meeting the Authority called Daddy O's business address at 10.10am and again at 10.15am but on each occasion the call went unanswered. No good cause has been shown as why there was no appearance at the Authority's investigation by or on behalf of Daddy O's. Pursuant to clause 12 of Schedule 2 of the Act, the Authority proceeded with its investigation as if Daddy O's had duly attended or been represented.

Summary of relevant facts and events

[9] Ms Waitoa reports that the restaurant/bar was a relatively new business for the owners of Daddy O's. Ms Waitoa was interviewed by Ms Reti-Rickit on 25 March 2013. She says she was not given a written employment agreement but was offered and accepted the position of Duty Manager. She says it was agreed that she would be paid \$19.00 per hour, the role was full time and she would report to Ms Reti-Rickit. Ms Waitoa commenced working for Daddy O's on 1 April 2013.

[10] In early to mid-April Daddy O's expanded its opening hours. Ms Waitoa agreed to extend her hours of work to suit Daddy O's operational needs. Her days of

work were increased and she worked Wednesday to Monday inclusive, usually starting at 4pm and finishing when the restaurant/bar closed between 11pm and 3am. Her weekly hours of work were between 51-53.

[11] Ms Waitoa says towards the end of April she detected a change in Ms Reti-Rickit's attitude towards her. She says in or around this time Ms Reti-Rickit employed a personal friend and there was some speculation amongst staff that Ms Waitoa's responsibilities were being directed towards the new employee. Ms Waitoa says she began to have growing concerns about her future employment Daddy O's following a series of incidents occurring in the workplace. I have set these matters out in further detail below.

The employment agreement

[12] On Monday 29 April 2013 at 8.34pm Ms Reti-Rickit sent an email to Ms Waitoa's personal email address. The email stated:

*Hi,
Your contract is attached. Have a read through and please have it
signed by Wednesday before shift.
Thanks.*

[13] Ms Waitoa says she was unaware of the message until the following day she had difficulty opening the document attached to the email and was unable to review the contents.

[14] When Ms Waitoa arrived at Daddy O's for her next shift on Wednesday, 1 May 2013 Ms Reti-Rickit handed her a written employment agreement and asked her sign it. Ms Waitoa says she had little time to review the document but says it was immediately apparent that the employment agreement did not reflect how she had been working or the terms agreed at the beginning of her employment. The written agreement given to Ms Waitoa stated the position was casual with no guaranteed hours of work and the recorded rate of pay was \$18.00 per hour. Ms Waitoa says that she told Ms Reti-Rickit that the document needed to convey that the position was full time and that the recorded pay rate should be \$19.00 per hour. She says Ms Reti-Rickit was happy to make the appropriate corrections to the document.

[15] Ms Waitoa says that at the end of her shift Ms Reti-Rickit approached her again and told her that the discussed changes to the agreement had been made and produced another employment agreement and asked her to sign it. Ms Waitoa reports

that she had no opportunity at all to review the agreement. She told Ms Reti-Ricket that she wasn't comfortable signing the agreement without reading it first and asked to take the document home to read and consider. She told the Authority she wanted to discuss the employment agreement with her mother who has some experience with contracts.

[16] Ms Waitoa says Ms Reti-Ricket was unresponsive to her preference to take the document away. She states Ms Reti-Ricket informed her that the owners of Daddy O's had instructed her to have Ms Waitoa sign the employment agreement that evening and insisted she do so. Ms Waitoa says Ms Reti-Ricket was forceful in her approach and repeated her request several times. Ms Waitoa says she felt very pressured by Ms Reti-Ricket's demand to sign the employment agreement and did so. Ms Waitoa states that she asked for a copy of the employment agreement but was told she would receive it later in the week.

[17] Ms Waitoa says she asked for a copy of the signed agreement on 6 May 2013 and again on 10 May 2013. On 11 May she was given a template form of an employment agreement but the document did not contain her signature. Nor did the agreement reflect all the changes Ms Reti Ricket had agreed to amend. Ms Waitoa says the hours of work were stated as between "25-35" hours per week and the rate of pay continued to state \$18.00 per hour. She says she was not ever furnished with a signed copy of the employment agreement.

The warning

[18] Ms Waitoa reports that she commenced her shift on 8 May 2013 early. She says she had planned to ensure that the bar was properly cleaned and take a meal break before her shift formally started at 4pm. She says the owners of the restaurant arrived as she had completed the cleaning tasks and asked her to perform some additional work and she was unable to take a meal break.

[19] Later in the evening the chef prepared a meal for her which she paid for. She says while eating Ms Reti-Ricket asked her to come into the office and informed her that the owners had instructed her to give her a verbal warning for consuming food in front of customers. Ms Waitoa reports that she was not provided with any opportunity to explain the circumstances or have those considered before the warning was issued

to her. She considers the warning was unfair in circumstances where there was no one to provide cover for meal breaks.

Changes to days and hours of work

Saturday 11 May 2013

[20] On her arrival at work on Saturday, 11 May 2013, Ms Waitoa noticed that her name had been removed from the roster to work Sunday 12 May. She approached Ms Reti-Rickit and asked why she was not required to attend work the following day. She was advised that Daddy O's had employed a person called Kura and that Daddy O's needed to give Kura hours of work. Ms Waitoa says she was concerned that the Sunday shift had been taken away from her without discussion but considered it was "*just a one off*" and did not take the matter further.

Monday 13 May 2013

[21] On Monday 13 May 2013 and prior to her beginning her shift Ms Waitoa received a text message from Ms Reti-Rickit which referred to the previous Saturday night shift and said:

Hi, so last night the glasses were all badly water marked and the tables were gross in smudgy..bar flies everywhere and rubbish left in the staff room..not good. Don't worry about coming in today ...

[22] Ms Waitoa was concerned about the text and in particular that her hours of work were being reduced without her consent. She says she rang the call centre for the Ministry of Business, Innovation and Employment. Having obtained information as regards hours of work she responded to Ms Reti-Rickit by text stating: "*As I usually work Mondays and I haven't been asked for or agreed to have today off, I do expect to be paid for today. Cheers*"

[23] Ms Reti-Rickit replied: "*I determine the roster and the days and its not a fixed roster. You are required for 25 hours per week.*"

[24] Ms Waitoa sent an email to Ms Reti-Rickit later that afternoon as follows:

I am writing to request a meeting to discuss personal grievances under section 103,(1) b of the Employment Relations Act 2000:

The issues involved are as follows:

1. Employment contract signed under duress without time for proper review and consideration
 2. Failure of employer to take due care on several issues
 3. Unjustifiably accused of failing to perform duties
 4. Discrimination
- ...

[25] Ms Waitoa further advised that she wished to have the issues resolved as soon as possible and requested the parties met the following day. The email concluded with the following:

The main outcome i would like from this meeting is a renegotiation of the terms of my individual employment contract, as i have now had the time and opportunity to seek advice regarding this. Also just to discuss in detail the other issues as i see them which I brought up, above.

Tuesday 14 May 2013

[26] Ms Waitoa brought a support person with her to the meeting. Daddy O's was represented by Ms Reti-Rickit and Daddy O's marketing person, Ms Catherine Eden.

[27] Ms Waitoa said at the beginning of the meeting she raised her concern that she considered Ms Reti-Rickit's friend was replacing her. She says Ms Reti-Rickit denied that this was the case.

[28] The discussion moved to hours of work. Ms Waitoa states that Ms Reti-Rickit informed her that she would no longer be rostered to work on Mondays and Wednesdays and further that she [Ms Reti-Ricket] would likely work the Sunday shift in the future.

[29] Ms Waitoa says that she protested the change in the roster and advised that changes to her hours of work needed her agreement. Ms Waitoa says Ms Reti-Rickit replied "*I am your employer and I determine the roster. You are only required for 25 hours per week as stated in your contract, which you signed.*"

[30] Ms Waitoa says Ms Reti-Rickit refused to engage in any further discussion on the matter and made it clear that her decision as to Ms Waitoa's hours of work was final despite Ms Waitoa's objections. Ms Waitoa says the meeting rapidly disintegrated into a "*verbal slinging match*".

[31] Ms Waitoa says towards the end of the meeting Ms Reti-Ricket handed her a letter dated 10 May 2013 which contained notice of a written warning and referred to

the incident regarding consuming food in front of customers and the subsequent verbal warning she had received on 8 May 2013. Ms Waitoa says her support person advised that Daddy O's could not warn Ms Waitoa again for something that had already been dealt with. Ms Waitoa says Ms Reti-Rickit seemed uncertain about the issue and withdrew the written document.

[32] Ms Waitoa states that the only matters agreed during the meeting were that she [Ms Waitoa] would provide to Ms Reti-Rickit a list of changes she required to the employment agreement and that Ms Reti-Rickit would provide a job description. She says the agreement was that each would exchange those documents before her next rostered shift on 16 May 2013.

Communications between the parties after 16 May 2013

[33] On 16 May Ms Waitoa sent Ms Reti-Rickit an email setting out terms and conditions contained in the employment agreement that she had concerns about. By mid-afternoon no job description had been received from Ms Reti-Rickit and Ms Waitoa sent a further email which asked amongst other things that matters to be resolved expediently and advised she was not able to return to work until a resolution is achieved.

[34] Ms Reti-Rickit responded the following day and advised that Ms Waitoa's issues had been addressed and resolved on 14 May at the meeting but noted if there were any other issues she should raise these. No reference to the dispute as to Ms Waitoa's hours of work was made.

[35] On Saturday 18 May Ms Reti-Rickit sent a further email:

You have been rostered on since Thursday 16th and as you have missed two of your shifts since then I feel it is important to discuss things, clear the air and move forward. Your statement about feeling bullied is unfounded, you're not turning up for work is causing us hardship. Please could you come meet with me on Tuesday at 3pm to resolve these matters.

[36] Ms Waitoa says Ms Reti-Rickit's email responses of 17 and 18 May were dismissive and side-stepped the issues that had been raised both in her email of 13 May and during the meeting of 14 May 2013. She considered she could no longer constructively engage with Ms Reti-Rickit as regards her concerns. On 21 May her representative sent an email to one of the owners of Daddy O's, Ms Karen Mclean.

She asked Daddy O's attend mediation with a view to resolving matters. No response was received from Ms Mclean.

[37] On 28 May she received a further email from Ms Reti-Rickit which advised she had failed to attend work or the meeting scheduled for 21 May. The email concluded: *We need to know the status of this employment relationship to progress forward.* Ms Waitoa's representative responded on the same date and asked Daddy O's to review all communications sent on it.

[38] Ms Reti-Rickit sent a final email on 29 May 2013 which stated Ms Waitoa's concerns had been "sorted except for the re-negotiation of parts of the employment agreement" and that if she failed to report to work the following day her employment was terminated.

[39] No formal resignation was proffered but Ms Waitoa did not return to work. Her evidence is that she was not paid after 11 May 2013.

Issues

[40] The Authority is required to determine:

- (1) What were the terms and conditions of Ms Waitoa's employment?
- (2) Was Ms Waitoa constructively dismissed?
- (3) Was Ms Waitoa unjustifiably disadvantaged
 - (a) by the warnings received; and
 - (b) by Daddy O's actions to vary terms and conditions of employment and were those actions in breach of its obligations of good faith?
- (4) What if any remedies should be awarded?

What were the terms and conditions of Ms Waitoa's employment?

[41] Ms Waitoa provided a copy of the template employment agreement given to her on 11 November 2013 but as noted Ms Waitoa was not provided with a copy of the agreement she signed. In these circumstances I consider there is some doubt is cast on what document Ms Waitoa signed on 1 May 2013 and the nature and content of that document.

[42] I have no evidence of an executed employment agreement between Daddy O's and Ms Waitoa and I do not accept that the terms contained in the template form employment agreement reflect an agreed variation to Ms Waitoa's terms and conditions of employment.

[43] It is also clear that Ms Waitoa strongly protested the contents of the template employment agreement during the meeting of 14 May 2013 and the meeting concluded with the matter of an agreed variation to terms of employment as unresolved. Ms Reti-Rickit appears to have acknowledged that aspects of the written agreement remained extant as evidenced by her statement of 29 May 2013 that she considered Ms Waitoa's concerns had been "*sorted except for the re-negotiation of parts of the employment agreement*";

[44] Daddy O's has not contested Ms Waitoa's application. In the absence of any challenge from Daddy O's I am unable to conclude that Ms Waitoa's terms and conditions of employment were anything other than those agreed at the time she commenced employment on 1 April 2013. These were varied by agreement when Daddy O's extended its hours of operation.

Was Ms Waitoa constructively dismissed?

[45] A constructive dismissal is where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. Ms Waitoa's primary contention is that Daddy O's constructively dismissed her by breaching fundamental terms of her employment which resulted in her leaving. She refers also to the warning she received and the employers approach as regards bargaining for a variation to terms of employment as examples of conduct designed to have her resign.

[46] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held that constructive dismissal includes, but is not limited to cases where:

- An employer gives an employee a choice between resigning or being dismissed;
- An employee has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;

¹ (1985) ERNZ Sel Cas 136

- A breach of duty by the employer causes an employee to resign.

[47] The Arbitration Court in *Wellington Taranaki and Marlborough Clerical etc IUOW v Greenwich*² observed that:

The termination by the employee may be described as a resignation but this is not entirely accurate. It is really a leaving, or a justified going apart, by the employee.

[48] Later in the same judgement the Arbitration Court stated:

The existence of a formal resignation by the employee does not necessarily prevent a finding of constructive dismissal. Such an action, following repudiation by the employer, is classified as a dismissal because the employee is held entitled to terminate the contract by reason of the employer's misconduct.

[49] The Court held that the essential questions to be addressed in constructive dismissal cases are:

- a. What were the terms of the contract?
- b. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[50] The breach of duty relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.³

Did Daddy's breach a fundamental term of Ms Waitoa's employment and if so was the breach serious enough to warrant the employee leaving?

[51] Ms Waitoa reports that her hours of work were reduced somewhere between one half and one third.

[52] It is well established that a unilateral and substantial variation to an employee's terms and conditions of employment is a breach that can render a resignation as a constructive dismissal.

[53] I consider the actions of Daddy O's on 14 May 2013 whereby it reduced Ms Waitoa's hours of work (and corresponding remuneration) in circumstances where she did not agree to the reduction was a fundamental breach of her terms and conditions of employment. I consider the breach was serious enough that on any objective basis it

² (1983) ERNZ Sel Cas 95 (AC).

³ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140).

was foreseeable that Ms Waitoa would leave Daddy O's as a consequence of the employer's actions. I cannot regard Daddy O's actions in this respect were those of a fair and reasonable employer. On these findings alone I consider Ms Waitoa was constructively dismissed and she has a personal grievance.

[54] For the sake of completeness I accept on balance Ms Waitoa's evidence that Ms Reti-Ricket's correspondence following the meeting of 14 May 2013 cannot be regarded as an authentic attempt by Daddy Os to address Ms Waitoa's concern about its reduction to her hours. In reference to Ms Reti-Ricket request on 17 May 2013 that the parties met "*to clear the air*" and to raise any further matters which have not been resolved Ms Waitoa notes that Ms Reti-Ricket prefaced those comments with a statement that the matters raised in the meeting had been resolved. I accept that Ms Reti-Ricket does not make specific reference to the alteration to her hours of work or that Daddy O's was open to reversing its decision as regards the matter.

Was Ms Waitoa unjustifiably disadvantaged by Daddy O's actions to obtain a variation to terms and conditions of her employment and were its actions in breach of its good faith obligations?

[55] An employer and an employee are required to deal with each in good faith. The concept of good faith includes an obligation by parties not to do anything to mislead or deceive each other⁴.

[56] Further, s.63A of the Employment Relations Act (the Act) applies to an employer bargaining for terms and conditions of an individual employment agreement with an employee if no collective agreement covers the work done, or to be done, by the employee. Section 63A(2) of the Act requires an employer when bargaining with an individual in these circumstances to do at least the following things:

- a. provide to the employee a copy of the intended agreement under discussion; and
- b. advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
- c. give the employee a reasonable opportunity to seek that advice; and
- d. consider any issues that the employee raises and respond to them.

⁴ S.4(1)(b)

[57] If the template employment agreement Ms Waitoa provided to the Authority is a copy of the agreement Ms Waitoa was given to sign on 1 May 2013, it is clear that Daddy O's did not comply with any of its obligations pursuant to s. 63A(2). Daddy O's did not provide any opportunity to allow Ms Waitoa to read the agreement, consider its contents and take advice if she desired. I find on the evidence that Daddy O's unfairly obtained Ms Waitoa's agreement by misleading Ms Waitoa as to its substance of the agreement. Its insistence that she execute the document immediately further precluded her from ascertaining its true contents and obtaining advice on the matter. I find that Daddy O's approach to secure a signed employment agreement with Ms Waitoa was not conducted in good faith nor were these the actions of a fair and reasonable employer. Ms Waitoa was unjustifiably disadvantaged by Daddy O's.

[58] Having ostensibly obtained Ms Waitoa's consent to vary terms of employment, albeit unfairly, I consider Daddy O's continued to unjustifiably disadvantage Ms Waitoa by its reliance on the agreement to justify reducing Ms Waitoa's hours of work and rate of pay. I note that those actions formed the factual matrix on which Ms Waitoa was constructively dismissed. As a consequence I do not regard this aspect of Ms Waitoa's claim as separate to her claim for unjustified dismissal.

Was Ms Waitoa unjustifiably disadvantaged by the warnings received?

[59] Ms Waitoa claims she was unjustifiably disadvantaged by the verbal warning she received on 8 May 2013 and further disadvantaged by a written warning issued to her during the meeting of 14 May 2013 in respect to the same matter. It is apparent from Ms Waitoa's evidence that Daddy O's withdraw the written warning at the conclusion of that meeting and therefore I am not required to determine whether that action was justifiable.

[60] Section 103A of the Act requires the Authority to assess the employers actions against what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[61] Section 103A(3) sets out minimum standards of procedural fairness when an employer is considering taking action against an employer. At the very least the employer should investigate the circumstances in which the area of alleged concern occurred, raise with the employee the concern it has, allow the employee a reasonable

opportunity to respond and genuinely consider the employee's explanation before taking any action.

[62] I accept Ms Waitoa's evidence that she was given no opportunity to respond to the employer's concerns and that she was simply told of the warning. I accept that it is likely that Daddy O's had limited resources as to HR advice however it is clear that Daddy O's failed to comply with s.103A and allow Ms Waitoa any opportunity to explain herself. Daddy O's actions unjustifiably disadvantaged Ms Waitoa in that way.

Remedies

[63] I have found Daddy O's unjustifiably disadvantaged by its procedure preceding the verbal warning. I have also found that Daddy O's constructively dismissed Ms Waitoa when it breached fundamental terms of employment. There is no evidence to suggest Ms Waitoa contributed to any of the situations which led to her personal grievance claims.

Lost remuneration

[64] Ms Waitoa amended her claim for remedies towards the end of the Authorities investigation and seeks payment for the loss of wages for 13 May 2013 when she was instructed not to attend work and 3 months' lost wages as compensation for her unjustified dismissal.

[65] Ms Waitoa appraised the Authority of her efforts to find work including registration with an employment agency. She deposed that she has recently earned \$829.00 (nett) from temporary work although it appears the work was performed at least three months after her dismissal. I accept that Ms Waitoa has sought to mitigate her loss.

[66] There is no evidence to suggest Ms Waitoa contributed to any of the situations which led to her personal grievance claims.

[67] I have found Ms Waitoa's rate of pay was \$19.00 (gross) per hour and that she worked between 51-53 hours per week in the 4 weeks' preceding her constructive dismissal. For the purpose of calculating loss of wages the average hours of work per week were 52. I award reimbursement of \$12,844 (gross) being equal to three months' loss of wages.

Compensation for humiliation, loss of dignity, and injury to the feelings

[68] I have taken a global approach to compensation for hurt and humiliation associated with Ms Waitoa's personal grievance claims. Ms Waitoa described her humiliation on telling her family of her dismissal and her need to seek financial assistance from her mother as a result.

[69] Further, Ms Waitoa presented at the investigation as extremely thin. She says that in the weeks leading up to her dismissal and immediately following, her distress as a consequence of her employer's conduct was such that she was unable to sleep or eat properly and she says she lost over 10 kilograms during the month of May. I accept her evidence that she was significantly distressed and humiliated by Daddy O's unjustifiable actions and dismissal of her.

[70] I order Daddy O's to pay \$6,000 under s.123(1)(c)(i) of the Act as compensation for Ms Waitoa's loss of dignity, humiliation and injury to feelings as a result of its actions.

Costs

[71] Costs are reserved.

Summary of Orders

[72] Daddy O's on Manners is to pay Ms Waitoa:

- i. payment of \$152 (gross) as reimbursement for the loss of wages on 13 May 2013; and
- ii. pursuant to s.128(2) the sum of \$12,844 (gross) being equal to three months' wages; and
- ii. pursuant to s.123(1)(c)(i) the sum of \$6,000 as compensation for humiliation, loss of dignity and injury.

Michele Ryan
Member of the Employment Relations Authority