

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 205  
5448438

BETWEEN            AMY WALKER  
                                 Applicant  
  
A N D                GAEL and PETER WATSON  
                                 Respondents

Member of Authority:     David Appleton  
  
Representatives:           Georgina Burness, Advocate for Applicant  
                                 Phil Butler, Advocate for Respondents  
  
Investigation Meeting:     18 September 2014 at Kaikoura  
  
Submissions Received:     from Applicant  
                                 from Respondent  
  
Date of Determination:     8 December 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.     The applicant was unjustifiably dismissed and is awarded remedies, subject to a reduction for contribution, in accordance with this determination.**
- B.     Costs are reserved.**

**Employment relationship problem**

[1]     Ms Walker claims that she was unjustifiably dismissed from her position as Junior Assistant in the Top Shop fish and chip shop in Kaikoura on Thursday, 16 January 2014.

[2]     In her Statement of Problem and her brief of evidence, Ms Walker gave a number of examples of alleged conduct by the manager of the Top Shop, Mr Richard

Hill, which she says generally made her life difficult whilst working there. However, at the start of the investigation meeting, Ms Burness confirmed on behalf of Ms Walker that the examples given were not individual claims of unjustified disadvantage. It is understood that this decision not to pursue individual disadvantage claims in respect of the examples given is because Ms Walker did not raise personal grievances with respect to the incidents cited within the statutory time limit set out in s.114 of the Employment Relations Act 2000 (the Act).

[3] Ms Walker says that she was dismissed after she had given notice to resign by text message to Mr Hill. Ms Burness confirmed that Ms Walker was not, however, pursuing an unjustified constructive dismissal claim against the respondents.

[4] Although the respondents deny that the text message giving notice was ever received by Mr Hill, they also deny that Ms Walker was dismissed, claiming that she either resigned by her conduct by failing to turn up for work for several days or, alternatively, abandoned her employment. They also deny the incidents cited by Ms Walker and say that they were completely unaware that Ms Walker was unhappy.

### **Brief account of events leading to the termination of the employment**

[5] Ms Walker started working for the respondents on 5 September 2013. She had previously worked at another fish and chip shop in Kaikoura called Cooper's Catch for around two years when Mr and Mrs Watson purchased Cooper's Catch and the Top Shop. At the time of her employment coming to an end, Ms Walker was 17 years old. The Top Shop was managed by Mr Hill and Ms Walker's hours varied each week from around 11 to 20.

[6] Ms Walker signed an offer of employment and a comprehensive employment agreement on 5 September 2013. The employment agreement contained the following material terms:

#### **2. *The Position and the Duties***

##### **2.1 *Position***

*The Employee is being employed as Junior Assistant for the Top Shop.*

##### **2.3 *Reporting***

*The Employee shall report to Gael or Peter.*

...

**3.1 Individual Agreement of Ongoing and Indefinite Duration**

*The Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment shall commence on 5 September 2013 and shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.*

...

**7. Wages/Salary/Allowances**

**7.1 Hourly Rate**

*The Employee shall be paid according to an hourly rate which shall be \$14 per hour for all hours worked. The Employee's pay shall be paid weekly on Thursday by direct transfer.*

...

**15.2 General Termination**

*The Employer may terminate this agreement for cause, by providing **4 weeks'** notice in writing to the Employee. Likewise the Employee is required to give **4 weeks'** notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.*

...

**15.6 Abandonment of Employment**

*In the event the Employee does not show up for work on the rostered day, without any notification to the Employer, a cell phone message is not classed as contact, you need to talk to the person in charge on the day, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate immediately without the need for notice of termination of employment, unless a reasonable explanation can be offered to the employer.*

[7] The dispute between the parties arose on Thursday, 16 January 2014 when Ms Walker was rostered to work a shift commencing at noon. It appears that a series of text messages were exchanged between the parties although, at the investigation meeting, neither Ms Walker nor Mr Hill were able to produce a complete set of text messages because of limitations in the storage capacity of their respective mobile phones.

[8] In addition, Mr Hill says that he did not receive some of the text messages that Ms Walker states that she sent him. The Authority saw evidence of one text message sent by Ms Walker to Mr Hill which Mr Hill says he did not receive. As a result of this, the Authority exercised its power under s.160(1)(a) of the Act to obtain telephone records for the mobile phones of Ms Walker and Mr Hill.

[9] What appears to be uncontroversial is that Mr Hill sent a text message to Ms Walker on or shortly after noon to ask whether she was far away and Ms Walker replied saying *no, I'm not coming in I'm over feeling unappreciated and being put last even tho I have been there the longest*. Mr Hill then either tried to call Ms Walker and/or sent her a text message to ask her to ring him and Ms Walker says that she sent a text message back saying she was upset and crying and could not call him. Mr Hill says that he did not receive this text message.

[10] Ms Walker says that she then sent another text message to ask a question *why did Holly have more hours than me*. Holly was a member of staff who also worked at the Top Shop, having started approximately a week and a half previously. Ms Walker says that Mr Hill did not reply to this although Mr Hill says that he did not receive that text message either.

[11] Ms Walker says she then sent a text message back around 4pm to say that she was sorry and that she wanted to hand in her notice and finish the week. This is the text that the Authority saw a copy of on Ms Walker's mobile phone, but which, again, Mr Hill says he did not receive.

[12] When she did not receive a reply from Mr Hill to this particular text message, Ms Walker says she called Mrs Watson to tell her that she had not shown up for work that day and to try to tell her her reasons for not doing so. Ms Walker said that she told Mrs Watson how she felt that Mr Hill had been treating her. She says that Mrs Watson agreed that Mr Hill could be hard to talk to and could be grumpy and difficult to work with. She says that Mrs Watson, however, kept interrupting her when she was talking and then told her that, by not showing up on that day, Ms Walker had lost her job.

[13] Ms Walker says that Mrs Watson then started to lecture her and asked her what would happen if Ms Walker needed a reference as she would have to tell them that Ms Walker had not shown up for work when she was not happy and had left Mr Hill by himself. Ms Walker says that Mrs Watson then told her that she had been replaced and they did not need her to finish the rest of the week. When Ms Walker started crying, she says that Mrs Watson started laughing at her. When Ms Walker asked her about the warning procedure in her contract, she says that Mrs Watson laughed again and said that, because Ms Walker had not shown up, she had lost her job. At that point, Ms Walker wanted to terminate the call and so hung up.

[14] At around 7.45pm that evening, after the phone call with Mrs Watson that Ms Walker says took place, she received a text message from Mr Hill saying *sorry m8, r u coming back, we can sort it out*. Ms Walker's evidence is that she did not respond because she felt that Mr Hill had only texted her in this way because his mother had been rude to her on the phone, and she felt that she could not return after that. She then found out that another person had been hired to replace her.

[15] It is the evidence of Mrs Watson that she had heard from Mr Hill during the day that Ms Walker had not turned up but that she had not received the telephone call from Ms Walker until the following week at the earliest. Ms Walker had been rostered to work Friday, 17<sup>th</sup> to Sunday, 19<sup>th</sup> January but, Mrs Watson said, when Ms Walker did not turn up on those days and made no contact, Mrs Watson assumed that Ms Walker had resigned. It was at that point that Mr Hill took steps to find a replacement and this was why she told Ms Walker that she had been replaced when she eventually received her telephone call.

[16] The Authority heard evidence from Ms Walker's partner, Mr Thompson, who said that he was present when Ms Walker had the telephone conversation with Mrs Watson and, although he could not hear clearly what Mrs Watson was saying, he had a very clear memory that this conversation had happened in the afternoon of Thursday, 16 January.

[17] The telephone records obtained by the Authority after the investigation meeting, which took a few weeks to be produced by the telephone provider, confirmed that a number of texts passed between the mobile phones of Ms Walker and Mr Hill on 16 January. The contents of those texts were not available from the telephone records.

[18] However, the records show that a call was made from Ms Walker's mobile telephone to the land line of the Cooper's Catch fish shop, where Mrs Watson was working, on 16 January 2014 at 16.51, which lasted 4 minutes and 10 seconds. There is no record of any call from Ms Walker's mobile to the Cooper's Catch number after that date.

[19] In response to this telephone record evidence, Mr and Mrs Watson produced affidavit evidence to say that they were both out of the shop on that day, at that time, visiting the owner of a local business called Aromas to discuss purchasing it, and so

Mrs Watson could not have received the call. An affidavit was also received from a Mr Michael Cameron who confirmed that he met with Mr and Mrs Watson in the New Year to discuss selling his business, but could not recall the date.

[20] The mobile telephone for Mr Watson was later produced to the Authority and this seemed to confirm that he had sent a text on 16 January 2014 at 3.55 that read *Peter here r u at home*, which appears to have been sent to a recipient identified as *Mike aromas*. He also seems to have received a text on 16 January 2014 at 3.59 from a sender identified as *Mike aromas* that read *yep come round in 10 minutes*.

[21] An affidavit was also received from a Ms Carter, who used to work for the respondent at their Cooper's Catch shop, and who deposed that she had never taken a call from Ms Walker, which the respondents were suggesting must have been the case in respect of the call made by Ms Walker on 16 January. Ms Carter also deposed that she recalled Mr Watson flying into a rage when he found out that Ms Walker was not coming into work on 16 January 2014, saying

*Where does she live? I'll go round there. I'll ring her. She can't f\*\*\*ken do this! That's it, shes fired. She can F\*\*k off!*

[22] In response to this affidavit Mrs Watson and Mr Watson each lodged a further affidavit. They each, inter alia, denied that Mr Watson had said the words alleged or had reacted as alleged by Ms Carter.

### **The issues**

[23] The key issues to be resolved are:

- (a) Did Mrs Watson terminate Ms Walker's employment on 16 January 2014 without allowing Ms Walker to work out her notice or did Ms Walker fail to get in contact with the Watsons until several days later?
- (b) If Ms Walker had failed to get in touch with the Watsons until the following week, does that constitute either a resignation or an abandonment of employment?
- (c) If, on the other hand, Ms Walker's employment was terminated by Mrs Watson on 16 January 2014, was that termination unjustified and, if so, is Ms Walker entitled to lost wages for a period limited to one

week, or four weeks as set out in her employment agreement at clause 15.2? Is Ms Walker also entitled to compensation under s.123(1)(c)(i) of the Act?

**Was Ms Walker's employment terminated by Mrs Watson on 16 January 2014?**

[24] There is a conflict of evidence between the parties as to when the conversation between Ms Walker and Mrs Watson took place. Having considered the conflicting evidence, I am satisfied on a balance of probabilities that the call took place as asserted by Ms Walker, on 16 January 2014. This is because:

- (a) There is an independent record of a call made from Ms Walker's mobile telephone to the land line of the Cooper's Catch fish shop on 16 January 2014 at 16.51, which lasted 4 minutes and 10 seconds;
- (b) There is no other record of a call from Ms Walker's mobile number to the Cooper's Catch land line for the period from 17 January to 30 January 2014;
- (c) Whilst Mr Watson appears to have arranged to meet with Mr Cameron in the afternoon of 16 January, there is no independent evidence that Mr Watson did meet Mr Cameron at that time or that Mrs Watson accompanied him;
- (d) Mr Cameron's affidavit states that Mr and Mrs Watson met him but he could not recall when the meeting was, and he no longer had the text messages he had exchanged with Mr Watson;
- (e) The text message on Mr Watson's mobile did not identify the number the message was sent to, and received from, just the words *Mike aroma*. Clearly, such contact identifiers can be changed on a mobile telephone;
- (f) Even if Mr and Mrs Walker had both visited Mr Cameron around 16.10 they could both have been back at Cooper's Catch by 16.51, in time for Mrs Watson to have answered Ms Walker's call;

- (g) Ms Walker and Mr Thompson are more likely to have a clear memory of the date of the conversation than Mrs Watson is, given that it led directly to the immediate loss of Ms Walker's job;
- (h) Ms Walker's text message stated that she wanted to *finish the* week. This suggests that Ms Walker would have come into work the next day, if she had not been told by Mrs Watson that she had been dismissed; and
- (i) Mrs Watson's evidence was less credible, in that she states in her brief of evidence that Mr Hill did not receive Ms Walker's second and third text message (which contained Ms Walker's resignation) but she also states that she told Ms Walker during their telephone call that she did not need to resign as *she had already done that in her text message*. Mrs Watson could not have known about that text message in which Ms Walker resigned at that time if Mr Hill had not received it. It is not credible that the first text message from Ms Walker alone led Mrs Watson to conclude that she had resigned.

[25] Mr Butler for the respondent had asked the Authority to seek telephone records for the Cooper's Catch telephone number, stating that Mr and Mrs Watson *believe the records will identify the call they received [from Ms Walker, at a later date than 16 January]. If the records are accurate it should not be either of the numbers Ms Walker indicated she had used [her own or her friend's]. However, she may have used her partners, her parents, another friend's phone. Our clients are confident the call will be shown.*

[26] However, on the basis that the telephone records already obtained showed a call from Ms Walker's mobile to the Cooper's Catch land line on the day and at the time she had previously indicated in her evidence, and as the Watsons were unable to identify what other phone number Ms Walker could have called them on, and when, I declined to order further records on the basis that such an exercise was effectively asking the Authority to engage in a fishing expedition.

[27] Therefore, on a balance of probabilities, I find that Mrs Watson did dismiss Ms Walker by telephone on the afternoon of 16 January 2014.

## Was Ms Walker's dismissal unjustified?

[28] Section 103A of the Act provides as follows:

### **Section 103A Test of justification**

- (1) *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the court must consider—*
  - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
  - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
  - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
  - (a) *minor; and*
  - (b) *did not result in the employee being treated unfairly.*

[29] Even on Mrs Watson's own evidence of her conversation with Ms Walker, which she says took place several days after 16 January, she told Ms Walker that she had no need to resign as *she had already done that in her text message and by not returning to work*. I have found that Ms Walker rang Mrs Watson on 16 January. By her words on that day, which included telling Ms Walker that she had been replaced, Mrs Watson terminated Ms Walker's employment summarily, without giving Ms Walker any opportunity to explain why she had not turned up for work that day, or to explain why she had got so upset.

[30] This failure by Mrs Watson was clearly in breach of the duty of good faith owed by an employer to an employee, and also in breach of the duties set out in

s.103A of the Act. I find that no fair and reasonable employer could have acted in the way that Mrs Watson acted in all the circumstances, and that the dismissal was therefore unjustified.

[31] It is worth stating that clause 15.6 of the employment agreement relied upon by the respondents does not obviate the need for the respondents to follow a fair and reasonable process of investigation, as required by s.103A of the Act, and by their duty of good faith.

## **Remedies**

[32] Section 123(1) of the Act provides as follows:

### ***123 Remedies***

- (1) *Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
- (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;*
  - (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;*
  - (c) the payment to the employee of compensation by the employee's employer, including compensation for—*
    - (i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
    - (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen;*

[33] Section 128 of the Act provides as follows:

### ***128 Reimbursement***

- (1) *This section applies where the Authority or the court determines, in respect of any employee,—*
- (a) that the employee has a personal grievance; and*
  - (b) that the employee has lost remuneration as a result of the personal grievance.*
- (2) *If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
- (3) *Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a*

*result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[34] Ms Walker has not pursued an unjustified constructive dismissal claim. Given that she had given notice, had she not been unjustifiably, summarily dismissed, she still would not have earned wages from the respondent for longer than the period of her notice. Although she was obliged to give one month's notice under the terms of her employment agreement, she gave one week's notice by text, mistakenly on her evidence. Although the respondents could have required Ms Walker to have worked one month's notice, they did not. Therefore, I find that Ms Walker is only entitled to reimbursement of one week's pay, as that is the limit of her loss.

[35] Evidence from the respondent shows that Ms Walker worked an average of 17.45 hours a week in the 19 weeks prior to her dismissal. At an hourly rate of \$14, that equates to \$244.26 gross. This is the sum I award to Ms Walker in respect of her lost wages.

[36] Turning to compensation for humiliation, loss of dignity and injury to her feelings, I must separate the effects on Ms Walker of her upset at her perception of her treatment by Mr Hill, which is not the subject of this determination, from the effects of her dismissal, as it is only the latter that I can take into account.

[37] Ms Walker's evidence was that she found it very distressing being terminated and that she was upset, and crying on the telephone. I accept this evidence. I also take into account Ms Walker's young age at the time, which is likely to have exacerbated the distress she felt at being dismissed summarily. I believe that an award of \$5,000 is an appropriate award under s.123(1)(c)(i) of the Act.

[38] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[39] There is no doubt that Ms Walker deciding not to come to work on 16 January 2014, with no notice to Mr Hill, contributed to the situation that gave rise to the personal grievance. Whilst she lost track of time, it was still a blameworthy act, as

she owed a duty to her employers to turn up for work or give adequate notice to warn them if she could not. Whilst Ms Walker was genuinely upset, having perhaps worked herself up into a distressed state while discussing her concerns with her friend, and whilst she was of a young age, a better approach would have been for her to have attended work and explained to Mr Hill, or to Mr or Mrs Walker, her concerns once she had calmed down.

[40] I appreciate that this was difficult for Ms Walker, but I cannot ignore the contributory effect of her failing to come to work on 16 January. I believe that it is appropriate to reduce Ms Walker's remedies by 25%.

### **Penalty**

[41] In her submissions, Ms Burness sought a penalty be imposed because, Ms Walker asserts, she was not given an employment agreement prior to commencing employment. However, this was not sought in the statement of problem, and it would not be just to impose a penalty when the respondent was unable to lead any evidence about the matter. I therefore decline to impose a penalty.

### **Orders**

[42] I order the respondents to pay to Ms Walker the following sums:

- (a) The gross sum of \$183.19; and
- (b) The sum of \$3,750 pursuant to s.123(1)(c)(i) of the Act.

### **Costs**

[43] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. However, if the parties are unable to agree within 28 days of the date of this determination, Ms Walker or her representative may, within a further

14 days, serve and lodge a memorandum setting out what costs are sought from the respondents, and the respondents or their representative shall have 14 days within which to serve and lodge their reply.

David Appleton  
Member of the Employment Relations Authority