

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 251  
5377527

BETWEEN            MICHAEL WILDBORE  
Applicant

A N D                RACHEL JERARD  
Respondent

Member of Authority:     Christine Hickey

Representatives:         James Pullar, Counsel for Applicant  
No appearance for Respondent

Investigation meeting:    14 November 2012 at Christchurch

Submissions Received     14 November 2012 from Applicant

Date of Determination:    15 November 2012

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**DETERMINATION OF THE AUTHORITY**

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- A. Michael Wildbore was unjustifiably dismissed.**
- B. Rachel Jerard is to pay Michael Wildbore \$429.72 (net) in unpaid wages.**
- C. Rachel Jerard is to pay Michael Wildbore \$2,220.22 (net) in lost remuneration.**
- D. Rachel Jerard is to pay Michael Wildbore \$1180.26 (net) in holiday pay.**
- E. Rachel Jerard is to pay Michael Wildbore the sums for employee Kiwisaver contributions, employer Kiwisaver contributions, and Student Loan repayments withheld from his wages and not forwarded to the IRD.**

**F. Rachel Jerard is to pay Michael Wildbore \$8000.00 in compensation for humiliation, loss of dignity and injury to his feelings.**

**G. Rachel Jerard is to pay Michael Wildbore \$71.56 as reimbursement for the Authority filing fee.**

**H. Costs are reserved.**

### **Employment relationship problem**

[1] Michael Wildbore claims that on 19 March 2012 he was unjustifiably dismissed by Rachel Jerard from his job at EAT Café. By way of remedies he claims lost wages for 31 days, unpaid wages for his last 6 days, holiday pay for the whole period, sums unpaid and owed for PAYE, Student Loan repayments, some of his employee contributions to Kiwisaver and Ms Jerard's employer contributions to Kiwisaver for the whole period of his employment. He also claims \$8,000.00 as compensation for humiliation, loss of dignity and injury to his feelings caused by the alleged unjustified dismissal.

[2] Ms Jerard has not filed a Statement In Reply. She did not participate in a telephone conference convened by the Authority which took place on 19 October 2012, although she was initially connected to the conference.

[3] I am satisfied that Ms Jerard was served with the Statement of Problem, the Notice of Direction issued on 19 October 2012 and the Notice of the Investigation Meeting which was set for Wednesday, 14 November 2012. The Notice of Investigation Meeting included advice that if Ms Jerard did not attend the meeting that the Authority *may without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*

[4] Ms Jerard did not attend the investigation meeting. It was due to start at 9.30 a.m. Because Ms Jerard was not present I delayed starting the meeting until 9.37 a.m. in case she was running late. However, Ms Jerard did not attend the meeting. Section 173(2) of the Employment Relations Act 2000 (the Act) allows me to proceed to investigate a matter in the absence of a party. I proceeded to investigate Mr Wildbore's problem in the absence of Ms Jerard. I heard affirmed evidence from Mr Wildbore and received written submissions from Mr Pullar. The investigation meeting concluded at 10.20 a.m.

**Issues**

[5] The issues I need to resolve are:

- a. Whether Mr Wildbore was unjustifiably dismissed; and
- b. If so, what remedies he is entitled to.

**Background**

[6] Mr Wildbore was initially employed by Ms Jerard in March 2011 on a casual basis and was paid \$14.00 per hour in cash.

[7] In May 2011 Mr Wildbore's employment became more regular and he began working approximately 6 hours per day from 9 a.m. to 3 p.m., Monday to Friday and occasional Saturdays. He was still paid \$14.00 per hour and began to receive pay directly into his bank account weekly from 23 May 2011. The *Transaction Description* in his bank statements reads *JERARD RPS eat cafewages*. I am satisfied that Mr Wildbore's wages were paid by Ms Jerard.

[8] Mr Wildbore did not receive an employment agreement and did not receive any pay slips. His weekly pay was for varying amounts and was paid up until 13 March 2012 with the exception of a Christmas shut down period during December 2011 and early January 2012, with his last payment in 2011 being on 23 December and his first payment in 2012 being on 23 January.

[9] Mr Wildbore undertook some kitchen duties and some front of house duties. His career aim was to become a chef and in 2010 he had successfully completed the first year of a two-year Certificate in Cookery course at the Christchurch Polytechnic Institute of Technology (CPIT). He passed the course with Distinction. He was interested in getting more experience in food preparation in the kitchen.

[10] Around Christmas 2011 Ms Jerard told Mr Wildbore that after Christmas she would expect him to do more food preparation in the kitchen and less of the *kitchen hand/coffee runner tasks*. Mr Wildbore says that Ms Jerard told him she would hire another staff member to allow him to concentrate on the food preparation tasks.

[11] In early February 2012 Ms Jerard approached Mr Wildbore and told him that he had to begin to help the chef with food preparation. This meant an increased workload for Mr Wildbore.

[12] Some weeks later he asked Ms Jerard for a pay rise due to his increased workload. Ms Jerard told him she would consider it.

[13] Soon after that Ms Jerard instructed Mr Wildbore to undertake additional food preparation tasks. He expressed concern to her that he would not be able to complete all of the new tasks alongside the ones he already had. Approximately a week after that Mr Wildbore asked Ms Jerard whether she had made a decision about a pay rise. She responded that she was still thinking about it.

[14] On Monday 19 March 2012 Ms Jerard approached Mr Wildbore twice about his work rate. The second time was in the kitchen where Mr Wildbore was preparing salad. She told him it was taking too long. He explained that was because he kept getting called out of the kitchen to assist the front of house staff. Ms Jerard got a piece of paper and asked Mr Wildbore to list what work he had done that morning. Sarah Thomas, the chef, Melissa Wild, and one other staff member were also present in the kitchen.

[15] Mr Wildbore asked Ms Jerard why she had not hired another staff member as she had told him she would do around Christmas time. He also asked her whether she had decided whether he would get a pay rise.

[16] I am satisfied that Ms Jerard then said to Mr Wildbore *there's the fucking door*. Mr Wildbore asked if she was *trying to get rid of me?* Ms Jerard replied *No I'm not, if you don't like it there's the door*.

[17] Towards the end of the day Mr Wildbore walked to the back of the café to say his farewells for the day. Ms Wild, another staff member was there with Ms Jerard. When Mr Wildbore said 'goodbye' Ms Jerard said *where do you think you are going – I am letting you go*. Mr Wildbore replied *of course you're letting me go, it's past 3 o'clock*.

[18] Ms Jerard responded *I don't think you understand what I mean. You're not coming back tomorrow and you are collecting your holiday pay on Wednesday*. Mr Wildbore asked *why?* In response Ms Wildbore said *the way you talked to me was*

*serious misconduct*. When Mr Wildbore asked how what he said could be serious misconduct and Ms Jerard said *Eh, Mel?* and laughed.

[19] Mr Wildbore then left the café and has not returned. He asked for his holiday pay to be paid to his bank or brought to the mediation. However, he has not received his holiday pay.

[20] The parties attended mediation but were not able to reach agreement.

### **Determination**

[21] A dismissal is the termination of an employment relationship at the employer's initiative<sup>1</sup>. In this case it is clear that Ms Jerard dismissed Mr Wildbore with the words *I am letting you go and you're not coming back tomorrow*.

[22] The test for whether a dismissal is justifiable is that contained in section 103A of the Employment Relations Act 2000 (the Act): was the decision to dismiss one which a fair and reasonable employer could have made in the particular circumstances at the time the decision to dismiss was made?

[23] In applying the justification test section 103A(3) of the Act requires the Authority to consider a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. Factors include whether the employer:

- i. Sufficiently investigated the allegations, having regard to available resources;
- ii. Raised its concerns with the employee before dismissal;
- iii. Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal; and
- iv. Genuinely considered the employee's explanation before dismissal.

[24] Section 103A(5) says that the Authority may not determine a dismissal to be unjustifiable solely because of defects in the process of dismissal if the defects were minor and did not result in the employee being treated unfairly.

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<sup>1</sup> *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95

[25] However, the full Court of the Employment Court in *Angus & McKean v. Ports of Auckland Ltd*<sup>2</sup> held that failure to meet all four tests would result in a dismissal being unjustified.

[26] In this case there is no doubt that Mr Wildbore's dismissal was unjustifiable. Ms Jerard failed to meet any of the four procedural tests set out in section 103A(5):

- i. Ms Jerard did not investigate the allegation of serious misconduct before she made the decision to dismiss Mr Wildbore.
- ii. Ms Jerard dismissed Mr Wildbore before she raised her concern with him about his alleged serious misconduct.
- iii. Mr Wildbore was not given any opportunity to respond to the allegation of serious misconduct before he was dismissed.
- iv. Ms Jerard did not consider any explanation from Mr Wildbore for his conduct because he had no opportunity to provide any explanation to her.

[27] Another factor which renders the dismissal process unfair is that Mr Wildbore had no prior warning of the fact that Ms Jerard intended to raise a concern with him that could lead to his summary dismissal. That meant that he had no opportunity to seek representation.

[28] Overall, the manner in which Mr Wildbore was dismissed renders the decision to dismiss one which a fair and reasonable employer could not have made in all the circumstances.

### **Remedies**

[29] I note that Mr Wildbore was not supplied with any payslips during his employment and has not received copies of them despite having requested them from Ms Jerard. Accordingly the conclusions and the calculations below have been made based solely on information provided by Mr Wildbore.

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<sup>2</sup> [2011] NZEmpC 160.

[30] **Unpaid wages** - Mr Wildbore has not been paid for the six days of the last week of his employment with Ms Jerard – 12, 13, 14, 15, 16 and 19 March 2012.

[31] Based on Mr Wildbore's bank statements from 23 May 2011 to 13 March 2012 he was paid an average of \$71.62 per day, net. Therefore, Ms Jerard owes Mr Wildbore  $6 \times \$71.62 = \$429.72$  (net) in unpaid wages.

[32] **Lost wages** - Mr Wildbore remained unemployed from 20 March 2012 until 2 May 2012 when he managed to secure temporary work at \$14.00 per hour for 45 hours per week. He works as a concrete labourer for Firth. I am satisfied that Mr Wildbore made reasonable attempts to mitigate his loss by searching for work after his dismissal. I accept that he had lost confidence in his ability to secure and retain employment in the hospitality industry and so targeted his job search efforts to other industries. I consider that to have been reasonable in the circumstances.

[33] I accept that Mr Wildbore applied for a number of jobs online and on 18 April 2012 enrolled with the Randstead agency, which placed him in his current job. Mr Wildbore acted reasonably to mitigate his loss of income after the dismissal.

[34] Section 128(2) of the Act means that I must award the lesser of the sum equal to lost remuneration as a result of the unjustified dismissal or 3 months' ordinary time remuneration.

[35] I am satisfied that between 20 March and 1 May 2012 inclusive Mr Wildbore lost 31 working days' wages at \$71.62 per day – a total of \$2,220.22 net. I am satisfied that if he had not been dismissed Mr Wildbore was likely to have remained employed at EAT Café until at least 1 May 2012. Therefore, Ms Jerard must pay Mr Wildbore \$2,220.22 net in lost remuneration.

[36] **Holiday pay** - Mr Wildbore gave evidence that he had not received any holiday pay or taken any paid annual leave during his employment. He sought \$1,180.28 (net) as holiday pay based on 8% of the total wages received.

[37] Under section 123(1)(b) of the Act I can order that Mr Wildbore is reimbursed for any amount of money other than wages he has lost as a result of his personal grievance. I calculate that Mr Wildbore received \$14,323.48 in wages paid plus the \$429.72 he should have received for his last 6 days being a total of \$14,753.20 (net),

of which 8% is \$1180.26 (net) in holiday pay. He has not been paid any holiday pay; therefore, Ms Jerard must pay Mr Wildbore \$1180.26 net as holiday pay.

[38] **PAYE, Student Loan repayments and Kiwisaver contributions** - Again I note that Mr Wildbore has been disadvantaged by a lack of records from the respondent allowing him to accurately calculate a number of matters, including, for example, how much PAYE was withheld from each week's pay and should have been accounted for to the IRD.

[39] Mr Wildbore was able to obtain some information from the IRD. The records also show that no PAYE was received by the IRD for the months of February and March 2012. The amounts received in wages over those months make it clear that PAYE was deducted before payment was made to Mr Wildbore.

[40] I am satisfied that during Mr Wildbore's employment Ms Jerard deducted amounts from his wages that were to be paid to the IRD towards his student loan. It is unclear whether the correct amounts for Mr Wildbore's Student Loan repayments were accounted for to the IRD for the period May 2011 to January 2012. However, it is clear that no amount was paid towards the student loan in February or in March 2012.

[41] IRD information also shows that no employee contributions towards Kiwisaver were paid on Mr Wildbore's behalf by Ms Jerard for the periods May, June and July 2011 and February and March 2012. I consider it most likely that Ms Jerard deducted the required amounts from the wages before paying them to Mr Wildbore. In addition, Ms Jerard made no employer contributions to Mr Wildbore's Kiwisaver account over the entire period of employment.

[42] Under sections 123(1)(b) and 123(1)(c) of the Act I may order Ms Jerard to pay Mr Wildbore reimbursement for sums lost and compensation for the loss of any benefit he lost as a result of the personal grievance. Amounts withheld from his wages for Student Loan and employee contributions to Kiwisaver not paid to the IRD must be paid to Mr Wildbore by Ms Jerard. She must also pay him the amount she should have paid in the employee contribution to Kiwisaver.

[43] **Compensation** - Mr Wildbore has claimed \$8,000.00 as compensation for humiliation, loss of dignity and injury to his feelings. He submits that the dismissal has caused him considerable humiliation, loss of dignity and injury to his feelings.

[44] Mr Wildbore's evidence is that the lack of any justifiable reason for his dismissal is something that continues to bother him. He says that he is still not sure why he was dismissed or what he might have said that could be considered serious misconduct. Ms Gerard's lack of response to his questions about why he was being dismissed and how what he said or did amounted to serious misconduct has caused him *stress and anxiety* and *made[me] feel useless..*

[45] He said that he was *highly upset* on the day of his dismissal. He was embarrassed and humiliated at being dismissed so cavalierly by Ms Gerard in front of Melissa Wild. It is submitted that he was also publicly shamed by the discussion earlier in the day when Ms Gerard's *implicitly seeking his resignation* when she said *there's the f\*\*\*ing door then* in front of three of his colleagues, including Sarah Thomas and Melissa Wild.

[46] Mr Wildbore's *dream* was to become a chef and he had been working towards that since the age of 14. During 2010 while he was studying at CPIT he also worked as *an unqualified commis chef* at the Heritage Hotel. After the 22 February 2011 earthquake when his course at CPIT was cancelled for a period of time and the Heritage Hotel was closed he obtained employment in Ms Gerard's café. That was his first permanent job in his chosen field. He told me that he had always intended to go back to finish his course at CPIT. However, since being dismissed his confidence has suffered significantly and he fears that he is *useless and crap* within his chosen field.

[47] Although he now has work his dismissal continues to worry him. He described how it preys on his mind at idle moments in his current work as a concrete labourer and can make him go from feeling *really, really happy* to *really down*. He said *I start downgrading myself*. Mr Wildbore presented a letter from his GP, Dr Helen Wood, who describes him consulting her on 27 August 2012 *suffering from fluctuations in his mood and especially low mood*.

[48] Mr Wildbore was visibly upset at the meeting when he described to me the ongoing effects of the dismissal on his state of mind.

[49] I consider that Mr Wildbore has suffered significant humiliation, loss of dignity and injury to his feelings as a result of the unjustified dismissal. He is a young man who was in his first permanent job in an area that he hoped would be his future career. He has lost confidence to pursue his first choice of career. His dismissal

continues to affect him significantly almost eight months later. I consider it reasonable that Ms Jerard should pay him \$8,000.00 as compensation under section 123(1)(c)(i) of the Act.

[50] **Contribution** - Under section 124 of the Act I must consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance when I consider the nature and extent of remedies. Although Mr Wildbore and Ms Jerard may have had a robust discussion in the kitchen at around 11.30 a.m. on 19 March 2012 I do not consider that Mr Wildbore's actions, in the way he spoke to Ms Jerard or what he spoke to her about, contributed to his unjustified dismissal and therefore I do not reduce the remedies at all.

### **Costs**

[51] Ms Jerard must pay Mr Wildbore the \$71.56 he paid to file his claim.

[52] My decision on legal costs is reserved. I note for Ms Jerard's information that the unsuccessful party is generally required to make a reasonable contribution to the successful party's legal costs. The parties are encouraged to agree on costs. If that is not possible Mr Pullar has 14 days from the date of this determination to file and serve a memorandum on the matter. Ms Jerard shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey  
Member of the Employment Relations Authority