

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 525
3260559

BETWEEN ZOE WILSON
Applicant

AND ALLEY CANTINA LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Naoimh McAllister, counsel for the Applicant
Thomas Bankier, for the Respondent

Investigation Meeting: 9 July 2024 in Dunedin

Submissions received: On the day

Final information received: 6 August 2024

Determination: 3 September 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Wilson was employed for a short time (March to June 2023) in a restaurant cafe operated by the respondent (Alley Cantina). Alley Cantina's sole director is Thomas Bankier and his mother, Ruth Bankier is the sole shareholder. These two company positions were previously held solely by a senior family member who passed away in 2021.¹

[2] Alley Cantina, during the time of Ms Wilson's employment, was managed by a general manager who I will call PZ because he is a former employee of Alley Cantina and eventually took no part in providing evidence.

¹ <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/665389>

[3] Ms Wilson claims she was unjustifiably dismissed when PZ handed her a termination notice and asked her to leave the workplace immediately.

[4] Alley Cantina says it relied on a 90 day trial period clause in Ms Wilsons's individual employment agreement (IEA) to dismiss without reasons. The immediate departure is described by Mr Bankier as something he directed because of the 'toxic environment'. Ms Wilson says nothing was discussed with her about reasons for the dismissal and that the 90 day trial period did not apply because PZ had signed a 'waiver' with her before the dismissal occurred.

[5] Alley Cantina says in its statement in reply that the 'waiver' signed by PZ was not valid because Ms Wilson told PZ that it was just for the purpose of needing to bring her cats to New Zealand from Australia (where she had previously lived) and that if she was 'let go' she would not challenge her dismissal. Mr Bankier later in oral evidence called the waiver 'informal' and considered it was unclear as to when it was signed and or that he did not know about it until after the dismissal.

[6] Ms Wilson denies she told PZ that the reason for the 'waiver' was because she wanted to bring her cats to New Zealand from Australia. She says while she may have mentioned her cats in passing to PZ, she says that she explained to PZ that the reason for needing the waiver was because she needed to show a prospective lender she had permanent employment in an application to borrow money to purchase a car. She says she needed a car because PZ wanted her to extend her hours at night longer than the bus service ran and that she had explained this to PZ. Ms Wilson denies that she told PZ that she would not challenge any dismissal despite the 'waiver' being signed.

[7] Ms Wilson claims she was unjustifiably dismissed because there was no process or reasons given for her sudden expulsion from the workplace until after the dismissal when her representative asked for reasons for her dismissal. Alley Cantina then provided a list of performance issues that Ms Wilson says were never raised with her during her employment.

[8] Ms Wilson claims two weeks' paid notice (together with a claim of disadvantage for this), lost earnings as a result of the unjustified dismissal grievance, compensation

for the grievances, costs, and the filing fee. She also queries whether she was paid accurate holiday pay at the end of her employment.

The Authority's Investigation process

Phone conference call - 2 February 2024

[9] I held a phone conference call to identify issues, evidence and the process for the investigation. The purpose of the call was communicated to the parties in standard letters from the Authority. Ms McAllister attended for Ms Wilson and PZ attended. The Authority file notes record that PZ confirmed he had the authority to represent Alley Cantina, that he had been the restaurant manager dealing directly with Ms Wilson, and that in relation to a discussion about the witnesses likely to attend that it would likely be only him because he had signed the 'waiver' that was in dispute and could give evidence about the circumstances of that situation.² I took time (particularly for PZ's benefit when he explained he was unfamiliar with the Authority) to explain the process of the Authority Investigation, indicated issues to be investigated, and evidence that would assist me. I set a timetable for evidence to be provided. A date was set for the investigation meeting.

Notice of Directions – 2 February 2024

[10] I issued Directions³ to summarise the content of the above phone conference call. No evidence was lodged by Alley Cantina. When the Authority Officer prompted about this, the Authority file note records that on 4 June 2024 PZ explained he would be appearing at the investigation meeting but that he was acting on instructions from Alley Cantina not to lodge any evidence.

Communication on 8 July 2024 from Mr Bankier, before the Investigation Meeting

[11] Mr Bankier contacted the Authority less than a day before the Investigation meeting to say he wanted to appear at the Investigation meeting remotely from Australia

² Mr Bankier had also confirmed to the Authority that PZ was the contact for Alley Cantina when it was originally served documents.

³ Directions of the Authority dated 2 February 2024.

and that his mother would also be attending in person. This was the first time that Mr Bankier or anyone other than PZ had communicated with the Authority except the above mentioned response from Mr Bankier when documents were first being served. Mr Bankier indicated PZ would not be attending the investigation meeting due to no longer being an employee and having commitments with a new job.

[12] I had an email sent to Ms McAllister and Mr Bankier to indicate that the Authority would accommodate the remote appearance of Mr Bankier and that any issues about how to deal with a process to hear any evidence from Alley Cantina would be dealt with at the Investigation meeting on the basis of what would be a fair process.

Investigation meeting

[13] I held an investigation meeting in Dunedin that concluded at about 2.30pm. I heard from Ms Wilson, and her mother, Ms Holmewood. A further witness for Ms Wilson was to have appeared remotely but I decided this was unlikely to assist me because that related to an amount, since paid to Ms Wilson by Mrs Bankier, for money Ms Wilson had paid towards an electrician bill for work undertaken at the restaurant. I did not hear from that witness. For Alley Cantina I asked questions of Mr Bankier and Mrs Bankier after having them swear and/or affirm what they would say. I asked them questions based on Alley Cantina's statement in reply and Ms Wilson's documentation lodged. Ms McAllister had the opportunity to ask questions of the witnesses as did Mr Bankier with my assistance. I considered this to be the fairest way to deal with witnesses appearing at the last minute having not previously supplied briefs of evidence. I heard oral submissions.

After the investigation meeting – further information

[14] At the Investigation meeting I asked for some further information to be provided in relation to payslips and Ms Wilson's subsequent earnings. When this was provided, Ms McAllister alerted me to an issue as to whether annual holiday paid had been paid to which Mr Bankier responded. I indicated I would consider holiday pay and required nothing further. Mr Bankier also sent the Authority 'a statement' from a third party. This was not requested by me. He described this as being obtained from Ms Wilson's subsequent employer. I communicated that I would not look at this material as it was

not relevant to the issues I had to determine. I declined Ms McAllister's request to lodge amended claims as a result of Mr Bankier's action.

[15] I reserved my determination.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

The issues

[17] The issues requiring investigation and determination are:

- a. Did Alley Cantina waive the 90 day trial period?
- b. If so, was Alley Cantina justified to dismiss Ms Wilson?
- c. Was Ms Wilson unfairly disadvantaged in her employment by the alleged nonpayment of a notice period under her IEA?
- d. Depending on the above what, if any, remedies are to be awarded to Ms Wilson for compensation under s 123(1)(c)(i) of the Act and lost earnings under s 123(1)(b) of the Act?
- e. Are any grievance remedies to be reduced under s 124 of the Act for employee contribution to the actions that gave rise to the grievance?
- f. Did Alley Cantina breach clause 42.2 of the IEA by not fully paying her a notice period of four weeks and if so what amount remains to be paid?
- g. Was Ms Wilson correctly paid her holiday pay and if not what amount remains to be paid?
- h. Should either party contribute to the other party's costs?

Did Alley Cantina and Ms Wilson agree to waive the 90 day trial period?

[18] Trial periods are set out in s 67A of the Act and include that an IEA may contain that an employer and an employee agree that for a specified period not exceeding 90 days, starting at the beginning of the employment, the employer may dismiss the employee. If the employer does this, 'the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.'

[19] It appears not in dispute that if Alley Cantina did not waive the last part of her 90 day trial period, her employment could have come to an end without her employer needing to then face her grievance that it was unjustified to dismiss her. What is in dispute is whether the waiver is enforceable. If so, Alley Cantina will need to face the grievance brought by Ms Wilson about the end of her employment.

[20] I find that Alley Cantina through PZ agreed to waive what was the remainder of the 90 day trial period that was contained in Ms Wilson's IEA. I make this finding for the reasons that are set out below.

[21] The words in the written waiver signed by PZ were as follows:

To whom it may concern

I am writing this as an official waiver/dismissal of the 90 day trial period in her contract and to validate that Zoe Anne Wilson is a full-time, permanent employee at Alley Cantina working as the Kitchen Manager and that she is currently on salary at 70k per annum at this stage.

Yours sincerely

[PZ] | General Manager

Alley Cantina

[phone number]

[22] The above copy in Ms Wilson's statement of problem has handwritten on it under the date of '5 May 2023'. Another copy sent to Mr Bankier is the same but without the handwritten date.

[23] I accept the straightforward and plausible evidence of Ms Wilson that she required proof of permanent employment to obtain a loan to purchase a car. She explains the purchase of a car as a need arising from PZ asking her to work longer hours after the buses ceased at night. That a lender would require a prospective young borrower to provide proof of permanent employment is entirely credible. Ms Wilson's mother's evidence plausibly supports Ms Wilson's evidence. Alley Cantina appears to raise several defences as to why I should not accept the waiver to be valid, not all of them consistent with the other.

[24] Firstly, in its statement in reply that Mr Bankier confirmed was written by PZ with Mr Bankier's approval, Alley Cantina's position is that Ms Wilson wrote the waiver and presented it to PZ to get her animals over from Australia and said to PZ 'if she was let go she wouldn't use the existence of the waiver to fight against the dismissal'. Mr Bankier was not present and nor was Mrs Bankier. Both live remotely from where Alley Cantina operated. I have not had the benefit of testing PZ's evidence about what was said despite opportunities being given for this to happen. I prefer Ms Wilson's affirmed evidence that she did not say she would not challenge a dismissal despite getting the 'waiver' signed.

[25] Secondly, in Mr Bankier's written response to the grievances raised on Ms Wilson's behalf (and request for reasons for the dismissal under s 120 of the Act)⁴ Alley Cantina's position was explained as '[PZ] thought it would be fine to sign the letter [reference to the waiver] as it had not been formally written by Himself [sic], Thomas Bankier, or [sic] major shareholder of the company.' In other words, the position then appeared to be that PZ somehow thought he couldn't enter the waiver as a binding agreement but did so anyway. Contradicting this is Mr Bankier's oral evidence that PZ had authority to act for the company in managing the restaurant and Mrs Bankier's oral evidence that they trusted the manager to manage the business. I accept the submission for Ms Wilson that she was entitled to understand that PZ had the authority to have signed the waiver document and then to rely on it being enforceable.

[26] Mr Bankier's oral evidence at the investigation meeting appeared to imply that the two copies of the waiver (one with a handwritten date) invalidated the credibility of the waiver. This is inconsistent with Alley Cantina's statement in reply and Mr Bankier's above mentioned response to the grievances neither of which contests the existence of the signed waiver. If the implication is that the waiver was signed after the dismissal this makes no sense. I also heard oral confirmation from Mrs Bankier that she knew about the existence of the waiver before the dismissal and understood Mr Bankier knew this as well. Alley Cantina had ample opportunity to bring evidence to be tested

⁴ Document I, Statement of Problem.

(in particular the evidence of PZ) about the veracity of the waiver. It did not take those opportunities. I prefer the evidence of Ms Wilson.

[27] Even if PZ did not consult with Mr Bankier or Mrs Bankier about signing the waiver, that is a matter for Alley Cantina and PZ particularly given the evidence from the Bankiers that PZ did in fact run the restaurant and staff and was relied on to do so.

[28] Accordingly, based on the above, I find that the waiver was signed by PZ who had authority to bind Alley Cantina, that Ms Wilson was entitled to rely on that authorisation, that the waiver was not signed with any verbal assurance from Ms Wilson that she would not then challenge a dismissal if it occurred, that the waiver represents Alley Cantina's agreement that the 90 day period contained in the IEA did not still apply at the time it dismissed Ms Wilson. This means that Ms Wilson is able to challenge the justification of her dismissal through the grievance she has raised.

Was Alley Cantina justified to dismiss Ms Wilson?

[29] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the dismissal and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[30] Under s 103A of the Act the following factors are considered to measure an employer's fair process leading to a decision to dismiss,

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback.

[31] To prove it is justified to dismiss an employee, an employer needs to prove its decision was fair and reasonable. The New Zealand Court of Appeal has said this includes having “clear evidence upon which any reasonable employer could safely rely or having carried out reasonable inquiries” finds that on the balance of probabilities “grounds for believing ... the employee was at fault.”⁵

[32] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been but rather to examine whether the decision was one that was within the range of what a reasonable employer could have done in the circumstances.

[33] At the investigation meeting both Mr Bankier and Mrs Bankier sought to explain things they were unhappy with about Ms Wilson’s past work performance. Mr Bankier’s list of performance issues include serious criticisms of her work performance and conduct. I am satisfied that none of these things were raised as performance and or disciplinary issues with Ms Wilson during her employment or before she was dismissed.

[34] Both Mr Bankier and Mrs Bankier said they received phone calls from PZ as the manager of the restaurant (and Ms Wilson’s manager) that he was not ‘coping’ with Ms Wilson. This was not evidence provided before the Bankiers chose to indicate their respective attendance at the investigation meeting the day before. Alley Cantina provided no evidence from PZ about this to be verified and tested. While I acknowledge the explanation from both Bankiers that sad circumstances led them to being more involved in the business after a family bereavement, it does not excuse Alley Cantina as a long standing business not to act on what is a basic reasonable process expected of all fair and reasonable employer’s with concerns about an employee’s performance. Mrs Bankier’s oral evidence was to describe a long history in the hospitality business where she explains treating employees well. I accept this was likely. I understand her evidence was based on her being affronted that her history of good practice could now result in this challenge. Mr Bankier also expressed concern that his mother was being challenged in these proceedings. However, as above, there is no evidence any concerns PZ had about Ms Wilson were ever discussed with Ms Wilson before Mr Bankier (as he confirms) instructed PZ to immediately dismiss her because (again his oral evidence)

⁵ *Airline Stewards & Hostesses of New Zealand Union v Air New Zealand Limited* (1990) 3 NZLR 549 (CA) at 556.

there was a 'toxic' environment in the workplace that I take it he attributed to Ms Wilson without any investigation or process. That Ms Wilson was ousted suddenly without explanation is far from what a fair and reasonable employer could have done.

[35] At the investigation meeting, Mr Bankier continued to return to his contention that he understood the 90 day trial period remained valid. Again, in the circumstances of the waiver entered into by PZ I do not accept that Alley Cantina could not have sought and obtained reliable advice about this situation and what it likely meant to Alley Cantina in relation to Ms Wilson's employment.

[36] Accordingly, based on the above I find that Alley Cantina unjustifiably dismissed Ms Wilson.

Was Ms Wilson unfairly disadvantaged in her employment by the alleged nonpayment of a notice period under her IEA?

[37] By the time of the investigation meeting I understand the disadvantage grievance was contained to claiming disadvantage in relation to nonpayment of the notice period by two weeks short. This is based on an alleged breach of the IEA. I find that this is more aptly dealt with under a breach of the IEA as a dispute to which s 129 of the Act applies. I will return to this below to consider whether there has been a breach and what remedy may follow from that.

What if any remedies are to be awarded to Ms Wilson for compensation under s 123(1)(c)(i) of the Act and lost earnings under s 123 (1)(b) of the Act?

Compensation

[38] Alley Cantina's position was not given about remedies. It remained of the view that it had dismissed within the 90 day trial period.

[39] Ms Wilson says the sudden termination of employment had a shocking effect on her. I am satisfied that the way her employment ended contributed to the medical effects provided in evidence. I particularly find it plausible that Ms Wilson suffered loss of dignity and injury to feelings. I find this was likely exacerbated when Ms Wilson

saw the list of things that Mr Bankier communicated to her representative as reasons for her dismissal *after the dismissal*. I accept her evidence that she had brought enthusiasm to her job and that she thought she had got on with her manager PZ. She gave evidence that she remains friends with his partner. In these circumstances, I accept that seeing a list post dismissal of what touches on serious allegations about her work performance and credibility could only have been significantly distressing for her. Ms Wilson's mother gave evidence of what she observed about the effect on Ms Wilson, and I found her evidence plausible and straight forward.

[40] I also find it likely that Alley Cantina's post termination behaviour exacerbated the hurt and humiliation that Ms Wilson likely suffered. Ms Wilson had decided to pay an electrician's invoice after she understood from PZ that Alley Cantina would not pay it. This resulted in it being re-issued against her name. I accept that Ms Wilson became concerned that nonpayment against her name would result in a poor credit rating and this was why she paid the bill of a not insignificant amount of \$668.86 on 27 June 2023. I understood Mr Bankier's oral evidence to be that he was unhappy that Ms Wilson engaged an electrician who had not been used before for the family business. It seems that the electrician who had historically provided services complained to him about this. Alley Cantina, by way of payment by Mrs Bankier, only reconciled this situation some months later in November 2023. I find this unreasonable behaviour exacerbated by what was already an unjustified and humiliating end to Ms Wilson's employment, for a young employee.

[41] I find in the above circumstances that despite the employment being one of short duration, the end to it was, as submitted for Ms Wilson, 'pretty brutal' and was a shock to her emotionally and professionally. I accept she had relocated from Australia when she accepted the role of kitchen manager for Alley Cantina. I accept she was enthusiastic about continuing her role in hospitality. I accept the way that her employment ended likely caused her to feel a sense of having failed and to lose confidence in herself.

[42] Standing back from the above I order that Alley Cantina is to compensate Ms Wilson \$20,000.00 under s 123(1)(c)(i) of the Act for the effect the unjustified dismissal had on her.

Lost wages – s123(b) of the Act

[43] It is submitted for Ms Wilson that she be awarded six months of lost wages beyond the date she was dismissed. Section 128 of the Act provides that where an employee has a personal grievance (as Ms Wilson does here) and where the employee has lost remuneration as a result, the lesser of a sum equal to that lost remuneration or to three months ordinary remuneration is to be paid.⁶ Despite this, the Authority may in its discretion award a sum beyond that calculated above.⁷ I am not satisfied I have reason to exercise my discretion to award a sum of up to six-months. I find an appropriate award for lost earnings is three months, less wages Ms Wilson earned.

[44] The above calculates as \$16,152.00 gross for 12 weeks employment with an addition of the 8% holiday component which is a total of \$17,444.16 gross.

[45] From the above I subtract \$12,133.72 gross which was the earnings Ms Wilson earned in 12 weeks after her employment ended according to the IRD records provided.

[46] Accordingly, Alley Cantina is to pay Ms Wilson the difference in the above which is \$5,310.44 gross being an award for earnings lost as a result of the grievance under s 123(1)(b) and 128 of the Act.

Are any grievance remedies to be reduced under s 124 of the Act for employee contribution to the actions that gave rise to the grievance?

[47] I do not find any reason to reduce the grievance remedy for blameworthy conduct under s 24 of the Act.

Did Alley Cantina breach clause 42.2 of the IEA by not fully paying her a notice period of four weeks and if so what amount remains to be paid?

[48] Ms Wilson's employment was ended with a letter from PZ given to her while she was working a shift on 6 May 2023:

⁶ Employment Relations Act 2000, s 128(2).

⁷ Employment Relations Act 2000, s 128(3).

This letter is to confirm the decision to terminate your employment with Alley Cantina effective immediately.

You are required to return all property, including your copy of the keys. You will be paid any entitlements and outstanding remuneration, including pay, superannuation and holiday pay up to and including the date of this letter.

I wish you well for the future.

If you have any questions about this letter, please contact me directly.

Yours sincerely

[PZ]
Restaurant Manager

[49] A fair reading of the above is that it indicated to Ms Wilson she would not be paid any notice period. Despite this I accept that she was then paid two weeks' notice period (spread across two pay periods) without further explanation. I further accept the submission for Ms Wilson that the IEA allows for a two week notice period for termination within the 90 day trial period but that this did not apply due to the waiver. I also find that that the two week notice period in the IEA for dismissal for 'Misconduct/Sub-standard work' does not apply in the context of an unjustified dismissal.

[50] I find that Ms Wilson should have been paid four weeks' notice period according to her IEA under clause 42.2. She was only paid two weeks. Alley Cantina is to pay Ms Wilson \$2,692.00 gross for the short fall of two weeks' notice period based on a week of 40 hours and a salary of \$70,000.00 equating to \$33.65 per hour.

Was Ms Wilson correctly paid her holiday pay at the end of her employment?

[51] After the investigation meeting both parties provided a set of weekly pay records for the period of Ms Wilson's employment. An issue was then raised as to the accuracy of holiday pay.

[52] My consideration of the pay records before me is that Ms Wilson was not paid an 'as you go' holiday pay which is correct for an employee working the regular salaried hours she was.⁸ Ms Wilson left her employment before 12 months when she would have

⁸ Holidays Act 2003, s28.

become entitled to actual paid time off on leave at the minimum of four weeks per year.⁹ She was therefore entitled to be paid 8% of her total gross earnings less any paid annual leave time taken in advance¹⁰ of which the records show none. In the pay record for the week that Alley Cantina dismissed Ms Wilson she was paid a figure for '8 hours' 'annual leave' being \$269.23 gross, a figure that several weeks later when the final week of the two weeks' notice was paid was then deducted and replaced with a payment of \$1,292.30 gross for holiday pay.

[53] Mr Bankier's post investigation meeting explanation of the above appears to be that that PZ picked up on an apparent error having previous thought Ms Wilson had been paid 'as you go' holiday pay. However, that explanation does not explain the apparent shortfall in the final amount paid for holiday pay. My calculation is that up to the dismissal Ms Wilson had been paid \$13,192.27 gross earnings. Add to this four further weeks (\$5,384.00 gross) for the contractual four week notice period which I have now rectified above. This is a total of \$18,576.27 gross. Holiday pay is 8% of this being \$1,486.10 gross. In the final pay slip Alley Cantina paid Ms Wilson \$1,292.30 'Annual Leave.'

[54] Considering the above I find that the final holiday payment entitlement at the end of the employment has been short paid by \$193.80 gross. I have already dealt with the 8 % holiday pay component for the amount awarded for lost earnings in my calculation above.

Costs

[55] Ms Wilson is entitled to an award as a contribution to her costs together with the filing fee for her application. This is because she has been successful in her claim.

[56] The Authority considers costs based on its usual 'daily tariff' basis unless circumstances or factors, require an adjustment upwards or downwards.¹¹ It is submitted for Ms Wilson that I consider the tariff when determining costs in her favour.

⁹ Holidays Act 2003, s16.

¹⁰ Holidays Act 2003, s23.

¹¹ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

[57] The investigation meeting was held across most of a day. The tariff for preparation and appearances on a day investigation is \$4,500.00.

[58] I award \$4,500.00 to be paid by Alley Cantina to Ms Wilson towards her costs in this matter together with the filing fee of \$71.55.

Summary of outcome

[59] Alley Cantina Limited is to pay Zoe Wilson the following:

- a. Compensation of \$20,000.00 under s 123(1)(c)(i) of the Act
- b. Lost wages of \$5,310.44 gross under s 123(1)(b) of the Act
- c. Notice period (2 weeks) arrears of \$2,692.00 gross
- d. Annual holiday pay arrears of \$193.80 gross
- e. Costs of \$4,500.00
- f. Filing fee of \$71.55.

Antoinette Baker
Member of the Employment Relations Authority