

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 276
3075092

BETWEEN CHLOE ARMSTRONG
Applicant

AND BB ICY LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Duncan Allen, counsel for the Applicant
No appearance by or on behalf of the Respondent

Investigation Meeting: 16 July 2020

Submissions 16 July 2020 from the Applicant

Date of Determination: 28 June 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Chloe Armstrong worked for BB Icy Limited (BB Icy) as a store manager at its premises in Coastlands Mall for 6 weeks until 17 August 2019 when she resigned.

[2] Ms Armstrong says she felt she had no other choice but to resign following a series of actions taken by BB Icy which she says breached the terms of her employment. In this way Ms Armstrong says her resignation was really a constructive dismissal, or, if it is not, she was unjustifiably disadvantaged by BB Icy's actions.

[3] In either event, she seeks one week's lost wages, compensation for distress and humiliation, penalties for various breaches, and costs.

[4] BB Icy does not accept Ms Armstrong's claims.

The Authority's investigation

[5] Ms Armstrong's statement of problem was lodged with the Authority in September 2019. BB Icy responded to Ms Armstrong's claims through its director, Mr Chang Xi, in a statement in reply filed on 7 November 2019.

[6] On 28 January 2020 the parties were each sent a Notice of Investigation (the Notice) advising of the date, time and location of the Authority's investigation. Amongst other things, the Notice advised that should the respondent not attend the meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

[7] Mr Xi further corresponded with the Authority in early June 2020 and sent an unsigned written statement in preparation for the Authority's meeting. However, neither Mr Xi nor anyone else on BB Icy's behalf attended the Authority's investigation meeting. At the beginning of the meeting the Authority sought to contact Mr Xi on the number provided in the statement in reply for the purpose of contacting the respondent, but the call went unanswered.

[8] I am more than satisfied BB Icy was aware of the claims made against it by Ms Armstrong and aware that it was required to attend the Authority's investigation to answer to these. No good reason has been provided as to why the meeting could not continue in BB Icy's absence. I therefore proceeded with the investigation meeting on 16 July 2020 pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000.

[9] Ms Armstrong's representative advised at the beginning of the investigation meeting that BB Icy had ceased to trade. The Authority understands an objection to the removal of the company from the Companies Registrar has been made on behalf of Ms Armstrong until the determination is issued. The Authority has more recently become aware that BB Icy has been into liquidation. Section 248 of the Companies Act 2003 does not provide an express prohibition precluding the Court from entering judgement.¹

The events leading to Ms Armstrong's resignation

[10] BB Icy's head office is based in Christchurch and Ms Armstrong's contact with management was largely via phone and through a messaging service.

¹ See *Pacific Holding Ltd v Hudson NZ Ltd & Ors*, HC Auckland, CIV 2005-404-531 at [73] and adopted in *Park v K & C Howick Ltd t/a Howick Kim's Club (in liquidation)* unreported, D King, 14 August 2007, AA247/07.

[11] Ms Armstrong began her employment on 7 July 2019. Her employment agreement provided she would be paid weekly, on Wednesdays, at the rate of \$19 (per hour).

[12] Ms Armstrong says that there were difficulties with her wages “*from the get go*”. Her first wages were due on 10 July 2019. She says however, that they were not paid until the 16th of July and at a lower rate than stipulated in her employment agreement. She says the failure was repeated again the following week whereby wages due on 17 July 2019 were not paid until 20 July 2019 and again, paid below the contractual rate. Ms Armstrong says she notified management of the issue she was assured that her wages would be paid but no advice was given as to when exactly this would occur. I shall return to this matter.

[13] The second matter concerns rest and meal breaks. The employment agreement between the parties required Ms Armstrong to follow the guidelines in BB Icy’s “Break Schedule”. That document outlined meal and rest break entitlements as prescribed at s 69ZD of the Act, and provided examples as to when breaks should be taken. Ms Armstrong worked five days per week between Monday and Sunday. The duration of her rostered shifts varied between 6 and 10 & ¼ hours, albeit she generally began a shift at 8:45 a.m. and finished at 6:00 p.m. A sizeable length of most shifts were worked alone, and on occasions Ms Armstrong worked an entire shift on her own. Ms Armstrong says more often than not she was not able take breaks in accordance with the Break Schedule and the Act.

[14] The following event of concern occurred in the mid-afternoon of 7 August 2019 when Ms Armstrong experienced an event requiring medical attention. She made arrangements to attend a medical appointment at 5:30 p.m. that evening, and contacted her manager to advise she would need to leave work between 5 and 5.15 p.m. Several messages were subsequently exchanged between the pair. Amongst other things, her manager asked if she had a medical certificate, and sent the following:

7/08/2019 3.57PM

[Manager’s name]

... are you not able to work 15 minutes more to make sure the store is open until mall close time [at 5.30pm]. I understand you are in pain but you didn’t ask [another staff member] for cover and/or talk to us if you knew you were already going to leave so we could try and sort cover. Otherwise we could get fined thousands of dollars for closing early”.

[15] A subsequent message from the manager reiterated BB Icy’s position that she could not vacate the store while the Mall remained open. Ms Armstrong remained at work. At 5.20 p.m.

Mr Xi spoke with Ms Armstrong over the phone. She says she was criticised for not obtaining cover and felt she had to provide details of the medical issue. She says the conversation lasted 10 minutes by which time it was 5.30 p.m. and Mr Xi told the applicant she could leave.

[16] The next incident involves an email sent by BB Icy to Ms Armstrong on 14 August 2019. The email recorded “*This is your first warning in relation to performance issues*”. The email noted the warning followed “*multiple unofficial warnings given to you in relation to this issue*” categorised the following acts by Ms Armstrong as unacceptable:

- Use of personal mobile phone during working hours
- Incorrect uniform
- Wearing of nail polish
- Not carrying out all duties well, faithfully and diligently
- Unprofessional conversation with and in front of customers

[17] The document went on to set out BB Icy’s expectations, and advised the warning would be placed on her file. If Ms Armstrong wanted to discuss matters she was told she should contact one or other of the managers who signed off on the email.

[18] Ms Armstrong says the concerns regarding nail polish and the conversation with a customer had been previously canvassed with her manager in July 2019. She says neither issue was signalled as being disciplinary at that time, and she thought the issues had been resolved. Ms Armstrong says the remaining listed items had not been mentioned at all before she received the warning.

[19] Finally, wages due that day (Wednesday, 14 July 2019) were not paid. Ms Armstrong says she immediately informed management and was told the issue would be fixed. However, three days passed and the wages remained unpaid.

[20] At 8.10pm on Saturday 17 August 2019 Ms Armstrong sent the following email:

Kia Ora Chang

Due to the breach of my contract, regarding late pays, and not getting the legal breaks required I am leaving without completing my resignation period.

I will [complete] the last roster for pays, but other than that I will not be returning to my position as manager of Shake Shed as of today.

[21] The outstanding wages were paid on Tuesday 20 August 2019.

The issues

[22] As foreshadowed, Ms Armstrong's primary claim is that her resignation was a consequence of BB Icy's ongoing breaches of various duties.

[23] In deciding whether a resignation prompted by a breach of duty by the employer could be construed as a constructive dismissal, the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW (Inc)*² found two questions need to be considered. The first is whether there has been a breach of duty on the part of the employer. The Court found all the circumstances leading to the resignation needed to be examined and the inquiry should not be limited to the way in which the employee resigned. The Court held that if there has been a breach, the next question is whether the breach of duty was of sufficient seriousness that it was reasonably foreseeable the employee would resign.³

[24] To determine whether Ms Armstrong was constructively dismissed I must examine:

- (a) whether BB Icy's conduct towards Ms Armstrong breached a duty (or duties) owed to her; and
- (b) if there was a breach of duty (or duties) were these sufficiently serious that it was reasonably foreseeable Ms Armstrong would resign in response, and .
- (c) if the circumstances leading to Ms Armstrong's resignation can be properly regarded as a constructive dismissal, were BB Icy's actions justifiable in the circumstances in any event.

[25] If Ms Armstrong's resignation was not brought about by a constructive dismissed, was Ms Armstrong unjustifiably disadvantaged by one or more of BB Icy's actions.

Evidence

[26] Although BB Icy did not attend the Authority's meeting I have reviewed its written responses in respect of the events at issue, alongside Ms Armstrong's written and oral evidence on the same matters.

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 169

³ Above at n3, pg 172

[27] Prior to the investigation meeting each party lodged copies of text messages and other contemporaneous documents which have assisted me to reach conclusions on some aspects of Ms Armstrong's claim. Other matters of dispute will require findings on credibility. Applying a common sense approach I have assessed all the information provided and determined what is more likely to have occurred than not.

Constructive dismissal

Did BB Icy breach a duty?

Meal and rest breaks

[28] In the documentation provided by BB Icy, it concedes there were occasions on which Ms Armstrong was not able to take meal breaks. But it says the fault lay with Ms Armstrong as she was responsible for devising the staff rosters at the Coastlands Mall location.

[29] Sent to her by her manager, Ms Armstrong produced a copy of a group chat message containing a formula for rostering staff according to recent sales patterns. Increases to the number of staff on a particular shift would only occur if the sales threshold for that time period had been previously met. Ms Armstrong was advised the formula could not be changed. I accept her evidence that she was restricted by BB Icy's rostering policy and did not control the rosters as BB Icy suggests. Notably also, the formula makes no provision for rest and meal breaks in accordance with the Act.

[30] Five weekly roster/timesheets relevant to the period of Ms Armstrong's employment were provided, although one weekly roster was missing.⁴ In the timesheets provided Ms Armstrong is recorded as working a total of 23 days. Of these it is clear she worked entirely alone for the duration of 5 shifts over the same timeframe.

[31] No evidence was produced by BB Icy as to how it ensured Ms Armstrong could take a meal break over these shifts, and additional messages exchanged between Ms Armstrong and her manager suggest BB Icy's view regarding the legal requirements for rest and meal breaks as more flexible than the Act allows. On one particular day Ms Armstrong informed the manager that no staff were available and asked "*should I just do the day all by myself.*" The

⁴ Seven weekly roster documents were produced, however documents 4 & 8 were identical and documents 5 and 6 were nearly identical and recorded the same dates. I could not be satisfied these were different timesheet/roster and have not treated these as such.

manager replied “*If you are able to do that yeah.*”⁵ The message went on to indicate staff in Christchurch worked up to 9 p.m. without meal breaks from time to time. On another occasion when no staff were available to work Ms Armstrong was told to “*just try grab your [10 minute rest breaks] if its quiet just grab something to eat something out back*”.⁶

[32] When Ms Armstrong was working alone, no meal break could have been properly taken without closing the store for the duration of the break which, as I understand it, was prohibited by BB Icy. It follows that there were at least five instances in which Ms Armstrong was not able to take a meal break at all over the course of her shift. Those omissions were each a breach of various provisions of s 67ZD of the Act,⁷ and the terms of the employment agreement. BB Icy says it always paid for meal breaks that could not be taken. This response misses the point. BB Icy was required to ensure Ms Armstrong was provided with a meal break under the Act. That it paid her to continue to working does not alter the breach, it was always obliged to pay Ms Armstrong while she worked.

[33] Ms Armstrong further points to the limitations of BB Icy’s rostering system noting weekday sales often precluded staff from working until later in the day so that even when meal breaks were able to be taken, they were not accessible at reasonable times. Ms Armstrong raised this matter with her manager.⁸

[34] BB Icy furnished a copy of a group chat exchange where Ms Armstrong’s manager queried why she is not taking breaks when there is an overlap of staff on shifts. The rosters do demonstrate staffing overlaps, however I accept Ms Armstrong’s evidence that (on at least 11 occasions) the overlap occurred after Ms Armstrong had commenced work at 8.45 a.m, and had worked 6 & ¾ hours alone. In each of these instances her lunch meal break did not and could not occur until 3.30 p.m. at the earliest. Under this shift pattern entitlement to take a meal break in accordance with s 69ZE(6) should have happened before 1 p.m.

[35] I have been given no basis on which I could conclude it was unreasonable and impracticable for BB Icy to comply with the obligation to provide meals breaks in accordance

⁵ Group Chat message dated 18/07/2019

⁶ Group Chat message dated 4/08/2019

⁷ Section 67ZD (3) to (7) depending on length of time Ms Armstrong worked before a meal break became available

⁸ Group Chat message – no date

with s 69ZE(6) and I find there were 11 instances where BB Icy failed to provide a meal break in accordance with the law.

[36] Ms Armstrong gave equally compelling evidence about the difficulty in obtaining 10 minute rest breaks when she worked alone. She says they were allowed to put up a “*back in 10 minutes*” sign to allow for work related errands and toileting, but she was discouraged from leaving the store for personal reasons. Ten minute rest breaks were not recorded as taken or not, so it has been difficult to assess the frequency of the breaches.

[37] On balance, I find it unlikely that BB Icy was more compliant in its approach to rest breaks than it was with meals breaks and I accept Ms Armstrong evidence that she was not consistently provided with rests breaks in accordance with s 67ZD.

The medical event on 7 August 2019

[38] BB Icy alleges Ms Armstrong left the workplace despite its request to have her stay until 5.30 p.m. Given the range of matters contained in the written warning issued to Ms Armstrong a week later, had Ms Armstrong left work early I consider it likely that this matter would have featured in that correspondence if it was a concern for BB Icy. Nothing of this nature was recorded in the warning, and I do not accept the assertion.

[39] I note further that the messages sent to Ms Armstrong reflect a relatively high level of pressure was exerted on Ms Armstrong to remain at work. BB Icy had no right to seek to detain Ms Armstrong in the workplace as I find it did.

[40] I am satisfied Ms Armstrong communicated her situation to BB Icy sufficiently for it to be aware she had an health related concern that required urgent attention. There is no evidence to support an inference that Ms Armstrong often found pretext to arrive late or leave early as reason for it to have doubt Ms Armstrong’s account as to her health at the time or the genuineness of her request to leave work early.

[41] I note BB Icy did not furnish any supporting information to establish the negative consequences suggested by Ms Armstrong’s manager would occur if Ms Armstrong did not remain at work. But even if those assertions are correct the onus lay with BB Icy to mitigate any resulting consequences if she left the store.

[42] I must find BB Icy's response to Ms Armstrong's request to leave work to obtain medical assistance was unreasonable. I agree with the submission that its actions were a breach of the (implied) duty on BB Icy to treat Ms Armstrong fairly.

The written warning

[43] In an unsigned affidavit Mr Xi said the warning given to Ms Armstrong was an informal email and not a formal letter warning. Whatever the mechanism of delivery I am satisfied that BB Icy and Ms Armstrong both objectively viewed the warning as a disciplinary action at the time it was issued. No other explanation as to why it would remain on her file was given. Nor did BB Icy elaborate on when it is said to have given "*multiple informal warnings*" to Ms Armstrong on the matters listed.

[44] With the exception as to the two issues Ms Armstrong says had been discussed and resolved earlier, I find she was not given a prior opportunity to comment on the issues for which was warned and I accept she was unaware the employer was contemplating issuing a warning until after she had received it.

[45] A disciplinary warning may put an employee's ongoing employment at risk. BB Icy's decision to issue a warning without discussion not only failed to comply with the minimum procedural fairness standards at s 103A(3) of the Act, it also breached its duty to act in good faith when contemplating a decision that will or is likely to have adverse effect on the continuation of the employee's employment.⁹

Failure to pay wages on time

[46] An employer's failure to pay wages to an employer as contractually agreed is undoubtedly a breach of their employment.

[47] BB Icy accepts that wages were, on occasion, paid after they were due but says this was because Ms Armstrong did not supply timesheets when she should have.¹⁰ Again, there is no evidence to support that allegation and, similar to previous findings, I consider it more likely this matter would have been recorded in the written warning if there was any substance to it.

Was the breach (or breaches) so sufficiently serious that it was reasonably foreseeable Ms Armstrong would resign in response?

⁹ Employment Relations Act 2000, s 4(1A)(c)

¹⁰ Email dated 10 September 2019 attached to the Statement in Reply.

[48] The law accepts there are cases which may involve a series of breaches to an employee's terms of employment which are not individually sufficient to establish the employer has repudiated the contract but the cumulative effect of those events may.

[49] In respect of each of the events referred to by Ms Armstrong I have found BB Icy breached either a statutory and/or contractual duty owed to her. However a breach of a legal obligation by an employer does not inevitably lead to an employee's constructive dismissal. An assessment as to seriousness of the breach requires consideration as to the nature of the breach and the effect of it in the particular circumstances.

[50] I have no doubt that the overall effect of BB Icy's ongoing breaches, particularly in such a relatively short space of time had a corrosive effect on the relationship for Ms Armstrong. BB Icy had failed to address her concerns regarding rest and meal breaks and had acted unreasonably in respect of the medical incident and the warning. I accept her testimony that BB Icy's failure to pay her wages on time, or to promptly remedy that matter, for the third time in six weeks, was the final straw for her. She says the wages she received from BB Icy met her immediate outgoings but did not go much further. Her evidence is that she already felt anxious about BB Icy's approach to payment of wages but the third instance was particularly distressing and she was unable to pay that week's rent.

[51] A failure by an employer to pay wages but which is then subsequently and quickly remedied may not always result in a finding that the breach of this nature was a repudiation of the contract. But Ms Armstrong's hourly rate of pay was marginally above the then minimum wage rate. Her financial stability was dependent on her wages being paid on time. A breach of the obligation to correctly pay wages when due in the particular circumstances, can objectively be regarded as serious and significant.

[52] It was open to Ms Armstrong, at this juncture, to perceive she could no longer have trust and confidence in BB Icy to comply with the necessary statutory and contractual obligation it owed towards her going forward. She was entitled to treat her employment agreement as having been repudiated by BB Icy, and resign. Her response in this way was reasonably foreseeable and it follows that I must find Ms Armstrong's resignation was a constructive dismissal.

Was the dismissal justified?

[53] Whether a dismissal is justified is determined by an assessment in accordance with s 103A(2). BB Icy has not demonstrated that its actions and how it acted in the lead up to Ms Armstrong's dismissal were what a fair and reasonable employer could have done in the circumstances at the time of the dismissal.¹¹ Ms Armstrong was unjustifiably dismissed.

[54] This conclusion means it is not necessary to examine whether Ms Armstrong was unjustifiably disadvantaged by each of the events discussed in this determination.

Remedies

[55] There is no evidence to support a finding that Ms Armstrong contributed to her dismissal. It follows that the findings set out below are not subject to reductions based on contribution under s 124 of the Act.

Lost wages

[56] Having found Ms Armstrong was unjustifiably dismissed s 128(2) of the Act requires the Authority to award the lesser of either a sum equal to her actual loss or a sum equal to 3 months' ordinary pay.

[57] Ms Armstrong was out of work for a week. She seeks the sum equivalent to 25 hours of work as the minimum hours she would have been provided with under the employment agreement with BB Icy. I calculate the sum to be \$475.00 (gross).¹²

Compensation

[58] Ms Armstrong's evidence concerning the effect of the actions and events described in this determination was credible and consistent. The rapid disintegration of the employment relationship, for which I find Ms Armstrong was blameless, was distressing for her at the time and impacted on her confidence. I accept she felt particularly humiliated by BB Icy's response to her health incident for which she felt she was required to disclose personal information as a consequence, and further embarrassed by having to ask her family for money.

[59] Taking into account the current range of compensation awards for unjustified dismissal grievances alongside the short duration of her employment and that she was able to obtain

¹¹ Employment Relations Act 2000, s 103A.

¹² 25 hours at the rate of 419 per hour = \$475.00

employment relatively quickly after the dismissal I find the effects of her dismissal were relatively short lived but not inconsequential.

[60] I consider \$12,000 in compensation is appropriate in this matter.

Penalties

[61] Ms Armstrong seeks penalties for the breach of provisions in her employment agreement regarding the payment of wages, and rest and meal breaks, and the Act in relation to rest and meal breaks. In *Salt v Fell*¹³ the Court observed that where a remedy had been granted in respect of a personal grievance:

... it will be unusual for a penalty to be imposed in respect of the same conduct on the basis that it is also a breach of an employment agreement. There would need to be “special facets of the breach calling for the punishment of the employer on top of compensation for the employee”.¹⁴

[62] I have already accepted BB Icy’s approach to the payment of wages and rest and meal breaks breached its obligations. Those failures were material to my finding that Ms Armstrong was constructively dismissed as a consequence. I am unwilling to order penalties in respect of conduct for which compensation has already been awarded and where no special facets have been identified as warranting additional punishment of the employer. Ms Armstrong’s claim for a penalties is declined.

Costs

[63] Ms Armstrong has been largely successful with her claims before the Authority and it is appropriate BB Icy contribute to Ms Armstrong’s costs.¹⁵

[64] Applying the Authority’s notional tariff to assess costs, BB Icy must contribute \$2,250 towards costs incurred by Ms Armstrong to have her claims investigated by the Authority over the course of half a day or thereabouts and to reimburse \$71.56 as the filing fee to lodge her claims with the Authority.

Summary of orders

¹³ *Salt v Fell* [2006] ERNZ 499

¹⁴ *Salt v Fell*, n 8 at [124]

¹⁵ The Notice of Investigation sent to both parties in this matter advises “...any legal costs incurred by the other party may be awarded should you not be successful in bringing or defending this claim.”

[65] BB Icy Limited is ordered to Ms Chloe Armstrong the following;

- (a) \$12,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$475.00 calculated as lost wages minus any tax payable, pursuant to s 128 of the Employment Relations Act 2000; and
- (c) \$2,250 as a contribution towards Ms Armstrong's costs; and
- (d) \$71.56 as reimbursement of the Authority's filing fee.

Michele Ryan
Member of the Employment Relations Authority