

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 363/08  
5124172

BETWEEN Cheryl Bogun  
AND Bill Davis t/a Outdoor  
Sportsworld

Member of Authority: Janet Scott  
Representatives: Sue Caswell for applicant  
Bill Davis in person for Respondent  
Investigation Meeting: 25 September 2008 at Rotorua  
Telephone evidence received 9 October  
Determination: 22 October 2008

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**DETERMINATION OF THE AUTHORITY**

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[1] Ms Bogun submits she was unjustifiably dismissed from her employment by the respondent. To remedy her claimed grievance she seeks lost remuneration, compensation for hurt and humiliation, penalties for breaches of the duty of good faith and for a breach of s.65 of the Employment Relations Act 2000 and costs in the matter.

[2] Mr Davis for the respondent denies that he dismissed Ms Bogun. He says that Ms Bogun walked out of her employment leaving him in the lurch at the busiest time of the year for his business.

**Background**

[3] Mr Davis told me he that he knew Ms Bogun's husband Terry well. He likes and respects him and considers him a good friend. He said he had no hesitation in employing Ms Bogun because of the good relationship he had with Mr Bogun.

[4] It was his evidence that he employed Ms Bogun as a retail assistant at \$15 per hour. In the initial period of her employment Ms Bogun worked Monday – Tuesday and Thursday and Friday. She had another commitment on Wednesdays and could not work that day.

[5] There was also a requirement that Ms Bogun would work weekends. Mr Davis' evidence was that Ms Bogun was required to work one Saturday in three. Ms Bogun's recollection on this point was that she was required to work weekends "*as required*".

[6] It is noted on this point that the business was only rarely open on Sundays and it is Mr Davis' evidence that staff were never required to work on Sundays or statutory holidays. Sometimes he worked alone on a Sunday and otherwise staff who worked did so because they volunteered to do so. Staff never worked on statutory holidays.

[7] Ms Bogun commenced employment with the respondent on 3 September 2007. From 12 December 2007 Ms Bogun commenced working five days a week and she continued to work Saturdays as required.

[8] It was Ms Bogun's evidence that, in December 2007, there was a discussion between her, Mr Davis and Ms Osborne (another retail assistant). Ms Osborne agreed to work weekends for her. Ms Osborne agrees that she came to an arrangement with Ms Bogun to work Saturdays for her. She said she did because she wanted to be helpful as Ms Bogun had health problems. However, she also said it could never have been a permanent arrangement and would only last until the school year got underway. She said she is a teacher with numerous additional responsibilities and she leaves her employment with Outdoor Sports World each year in late February. Thereafter she works there on a casual, intermittent basis only.

[9] Ms Bogun did not remember that the agreement reached would be short term only. She thought it was an open-ended arrangement.

[11] The events that led to Ms Bogun's departure from her employment at Outdoor Sportsworld occurred on 23 January 2008. Mr Davis told the Authority that the business does 25% of its annual business in 14 days before school starts each year. He described this period as pandemonium. He said he has round table meetings with staff to work out hours for the purpose of ensuring that staff get as much rest as possible prior to this very busy time of year. He said he called a staff meeting on the morning of 23 January. There seems to be no disagreement between witnesses that the purpose

of that meeting was to discuss who would be working on the coming Saturday and to discuss whether or not to open the following Monday (Auckland Anniversary Day).

[12] Mr Davis said that at this meeting Ms Bogun said she wasn't working weekends. Ms Bogun denies this. She says she offered to work on Saturday if someone else wanted the day off.

[13] Ms Osborne said she would work on the upcoming Saturday.

[14] It was agreed that the business would not be opening on the Monday of Anniversary Weekend.

[15] After the staff meeting Mr Davis asked to see Ms Bogun in his "office" – an area that was only partially partitioned off from the retail area of the shop. The parties have markedly different views of what took place at that meeting.

[16] It is Ms Bogun's evidence that Mr Davis called her to his office and asked her "*what makes you think you are too good to work weekends?*" Ms Bogun said she reminded Mr Davis of the earlier discussion between them when Ms Osborne had said she would work weekends. Mr Davis then called Ms Osborne in and an argument developed between the two of them. Ms Bogun's evidence was that Mr Davis lost his temper and swore. She said the situation became very hostile and having undergone non-violent crisis prevention intervention training she realised the best course of action was to remove herself from the office and get away from the argument. She collected her bag.

[17] It was her evidence that Mr Davis became even more agitated. She put it to him (in response to the position he communicated that he worked 7 days) "*So, if I don't work Monday to Friday plus weekends there is no job for me?*" He confirmed to her that there was no job for her if she did not work weekdays and weekends and told her "*to bugger off*". Then as she left Mr Davis walked hard up behind her and physically escorted her to the door. He asked her for the shop keys and then locked the door behind her.

[18] Ms Bogun said that when Mr Davis asked her for the shop keys she said to him "*Bill you're a liar and I would never have expected this of you*". She said this because Mr Davis had communicated to her that she was expected to work seven days per week and this was such a surprise to her. Ms Bogun denied calling Mr Davis a *bloody* liar and she denies slamming a security door as she left. Ms Bogun said the whole episode left her shaky and concerned for her safety.

[19] Mr Davis strongly disputes the applicant's evidence as to what was said and done at the meeting between them on 23 January.

[20] It is his evidence that at the staff meeting on 23<sup>rd</sup> January Ms Bogun said she was not working weekends. He decided to take her aside to ask her why she was not going to work her rostered weekends. She said that Ms Osborne was going to work weekends for her. It was Mr Davis' evidence that he knew this was not possible as Ms Osborne had significant work commitments and would be leaving her employment with Outdoor Sportsworld late in February. He decided to bring Ms Osborne into the discussion to immediately correct Ms Bogun's belief that Ms Osborne would be working weekends for her.

[21] When Ms Osborne joined the conversation she confirmed the earlier discussion that she would work weekends for Ms Bogun. She said she offered to do this because Ms Bogun had been unwell. Ms Osborne clarified that this was not a permanent arrangement and that she would only be doing this until she left her employment in late February. There was then a discussion between the three of them about who was or wasn't going to work weekends. It was Mr Davis' evidence that Ms Bogun asserted she wasn't working weekends. Then she collected her bag and called him a "*bloody liar*". She then left the office and the building slamming one of two security doors behind her before leaving via the back door.

[22] Mr Davis said he put his head in his hands and said "*Oh my God*" because they were coming up to the busiest time of the year. He then realised, as something of an after thought he said, that Ms Bogun had a set of keys to the business. He felt it was vital to retain the keys and he followed Ms Bogun out to her car to request them. She said, "*I didn't think this of you Bill – you're a bloody liar.*" He took the keys and returned to the shop locking the back-door behind him. It was his evidence that it is business practice to keep the back door of the shop locked.

[23] Mr Davis denies absolutely dismissing Ms Bogun or telling her "*to bugger off*". It was his position he asked her why she thought she had the right not to work one Saturday in three. It was also his position there would never have been a job available in his business if she had not agreed to work rostered Saturdays. Mr Davis also denies walking hard up behind Ms Bogun as she left the building.

[24] In her evidence to the Authority, Ms Osborne said she could not recall Ms Bogun saying at the staff meeting that she wasn't working weekends but she said Ms Bogun did say this at the subsequent meeting. At that meeting she confirmed to Mr

Davis that she had agreed to work weekends for Ms Bogun. However, she also confirmed this would not a permanent arrangement and it would only last till she finished up in late February. Mr Davis said he was the one to make these decisions and she confirmed there was a bit of an argument between her and Bill Davis on the point but it was nothing serious. She said she left the meeting at that point and took no further part in it.

[25] She said she did not hear Ms Bogun call Mr Davis a "*bloody liar*". Neither did she observe or hear Mr Davis yelling, screaming or gesticulating. And while she did not actually see Ms Bogun leave she did hear her say "*I'm going home to tell my husband*" and she heard one of the security doors slam. She said that shortly thereafter Mr Davis followed Ms Bogun out. She denied that he followed Ms Bogun "*hard up behind her*".

[26] Ms Courtney Donaldson another retail assistant was present that day and participated in the staff meeting that preceded Mr Davis' meeting with Cheryl Bogun. It is her evidence that Ms Bogun did say at that meeting that she wasn't working weekends. After that Mr Davis asked to meet with Ms Bogun and then he asked Ms Osborne to join them. After Ms Osborne left the meeting she heard Ms Bogun say, "*So, if I don't work Saturdays, I don't have a job here*". Then she heard the security door slam. She turned and saw Bill Davis at his desk with his head in his hands. He said "*Oh my God*" and shortly thereafter he followed Cheryl. He returned later with the shop keys, which he put on his desk. Ms Donaldson was clear that Mr Davis did not follow Ms Bogun to the door "*hard up behind her*".

[27] Ms Kerry Shelford, who was also employed as a shop assistant at Outdoor Sportsworld Ltd at the time in question, gave evidence by telephone. She said that Bill Davis called a meeting on the morning of 23 January 2008. The purpose of the meeting was to decide who was going to work on the upcoming weekend. At that meeting Mr Davis spoke about staff working a fair share of Saturdays and he said he'd speak to Cheryl Bogun after the meeting because she hadn't been working Saturdays. She said that when Cheryl went to talk to Bill she could not hear what was said but she discerned that Bill seemed quite upset although he kept his cool. Cheryl on the other hand was loud and angry. Then Mr Davis called for Ms Osborne to join them and she leaned over the partition between the shop and Mr Davis' office area. They were talking then Ms Osborne returned to join her in the shop. After that Cheryl got really loud and then she collected her bag and left the shop slamming the security

door behind her. (On reflection Ms Shelford said the door might have slammed in the wind). At that time Mr Davis was at his desk with his hands over his face. Then he got up and followed Ms Bogun out and returned with the keys.

[28] There is no dispute that after Ms Bogun left the workplace that day she telephoned because she had left her cell phone at the workplace. Ms Osborne said she would deliver it to her. She also told Ms Bogun that she wanted to talk to her.<sup>1</sup>

[29] Mr and Ms Bogun say that Ms Osborne came to their home and told them that Mr Davis was sorry about the argument the previous day and Bill would now talk to her but because of his pride he wouldn't make the first move.

[30] Ms Osborne says that when she went to the Bogun's home Ms Bogun told her she had been dismissed. She said she had not heard that. She said she did tell Ms Bogun to sort things out with Bill. She said this because that's what she would have done. She did not say that Bill had "*calmed down*". It was her evidence that she would never presume to speak on behalf of Bill or his feelings.

[31] It was the evidence of Mr Bogun that after Ms Osborne left that night they commented that it was odd that she hadn't heard anything when she had been part of the conversation. (This was a reference to Mr Davis telling Ms Bogun "*to bugger off*").

[32] On 25 January at 5.45pm Ms Bogun went to the shop. She took her uniform shirts with her to return them but she also wanted to discuss things calmly with Mr Davis. She said she hoped it would lead to her return to work. Mr Davis was the only person present in the shop. Ms Bogun says she told Mr Davis she didn't like the way things ended between them and she asked if they could have a discussion. She could not remember the exact conversation but she denies there was any mention of working Saturdays. It was her evidence, however that Mr Davis became angry and she realised there was nothing to be gained by continuing in another volatile situation. She does remember Mr Davis saying that she was the first staff member to cause trouble. Ms Bogun accepts she may have referred to taking legal advice in the matter. It was her evidence that as she left Mr Davis said "*You better watch it, girlie*".

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<sup>1</sup> There is some disagreement between Ms Osborne and Mr and Ms Bogun about the timing of this telephone conversation and the date of the subsequent meeting, which took place at the home of the Bogun's. Nothing turns on this point.

[33] Mr Davis accepts that Ms Bogun came to the store late in the afternoon on 25 January. He says there were still customers in the shop but he accepts that other staff had departed for the day. Ms Bogun had her uniform shirts that she handed over. Mr Davis said he was surprised and said, *“I never thought I’d see these again”*. Ms Bogun did say that they had parted in bad circumstances and she asked if they could talk. It was his evidence that he said to her there was no point if she would not work Saturdays. She replied she wouldn’t and that he could talk to her lawyer. Mr Davis was adamant he has never ever used the expression *“girlie”* to his staff. He confirms he did say he’d been in business for 20 years and most of his staff had been with him for 6-8 years; she was the only one to have a problem and that perhaps she should look at herself.

### **Legal Position**

[34] Mr Davis denies absolutely dismissing Ms Bogun or using any combination of language or actions to convey to her she was dismissed. It is his position that Ms Bogun walked out of her employment *“leaving him in a hell of a predicament”*.

[35] The burden rests with Ms Bogun therefore to establish there was a dismissal. If that is established (and this is not an especially onerous burden) then it is for Mr Davis to show the dismissal was justified. The test for justification is that set out in a 2004 amendment to the Employment Relations Act 2000.

*For the purposes of s.103 (1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined on an objective basis, by considering whether the employer’s actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[36] In determining ‘justification’ I must make an objective assessment of the employer’s actions and weigh those actions against those *of a fair and reasonable employer... in all the circumstances.... at the time....*

[37] I note too that the Employment Court stated, when it examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06), that the objects of the Act including the object of good faith must inform any objective assessment of what a fair and reasonable employer would do in all the circumstances.

### **Discussion and Findings**

[38] I find the respondent's witnesses were credible in their evidence and the one thing they were all clear on is that Mr Davis did not follow Ms Bogun out of the business "*hard up behind her*" that morning. It is the evidence of all the respondent's witnesses that after Ms Bogun left, Mr Davis sat at his desk with his head in his hands for a little while and only then did he get up and follow Ms Bogun with the intention of retrieving the shop keys.

[39] This evidence is significant because had I accepted Ms Bogun's evidence that Mr Davis had escorted her to the backdoor and locked the door behind her, then it would have supported her case that Mr Davis had behaved in a manner that was repudiatory of the contract between them.

[40] However, I cannot find this was the case and Ms Bogun's evidence on the point is misleading. Ms Bogun's evidence was also misleading in that she purports that Mr Davis was affirming to her a requirement that she work seven days a week. I find Ms Bogun is well aware the issue between them was the requirement that she work a fair share of Saturdays.

[41] As a result of these credibility findings it calls into question the credibility of Ms Bogun's evidence overall and where there are disputes in the evidence that are relevant to my findings in this matter it must be the evidence of the respondent's witnesses that I prefer.

### **Findings**

[42] I find that Ms Bogun preferred not to work weekends. Nevertheless, I also find she entered into a verbal agreement with Mr Davis that she would work Monday, Tuesday, Thursday, Friday and one Saturday in three. Later, after a commitment that Ms Bogun had on Wednesdays ceased she began working Monday to Friday. She was still contracted to work one Saturday in three.

[43] I find there was a degree of flexibility regarding who would work each weekend. This is confirmed by the fact that while Ms Bogun worked a number of Saturdays they were not in a strict rotation of one in three. It is also confirmed by the fact there was a staff meeting on 23 January to discuss who would work the upcoming Saturday.

[44] I find that in December 2007 Ms Osborne and Ms Bogun agreed between them that Ms Osborne would work weekends for Ms Bogun. It is possible that Ms Bogun misunderstood the arrangement they agreed. However, I find that Ms Osborne was

agreeing to work weekends for Ms Bogun only until she left her employment in late February 2008.

[45] I find that at the staff meeting on 23 January 2008 it is more probable than not that Ms Bogun did offer to work the upcoming Saturday. I also find that Ms Osborne confirmed that she would work instead. I find too, that Ms Bogun made a general statement that she didn't work weekends.

[46] This statement was of concern to Mr Davis as it was a critical term of his employment arrangements with his staff that they work their share of Saturdays. He asked Ms Bogun to meet with him after the staff meeting.

[47] I find that at the meeting between Mr Davis and Ms Bogun, Mr Davis asked Ms Bogun why she thought she had the right not to work weekends. I find Ms Bogun, relying on her agreement with Ms Osborne, said that Ms Osborne had agreed to work Saturdays for her. Mr Davis knew this was impossible, as Ms Osborne would be leaving the business in February so he called her over to have her clarify the situation. There was a brief argument between them over the matter but I find that Ms Osborne did clarify that her agreement to work Saturdays for Cheryl Bogun would not be a permanent arrangement. Following this Ms Osborne left Ms Bogun and Mr Davis to their discussions.

[48] I find that during Ms Bogun's conversation with Mr Davis that day she restated she wasn't working weekends and Mr Davis made it clear she was required to do so. I find that Mr Davis' manner was assertive on the point but that he did not become angry. Nor did he adopt an angry or threatening demeanour towards Ms Bogun or tell her "*to bugger off*". On the contrary, I find it was Ms Bogun who became loud and angry. She called Mr Davis a "*liar*" or "*bloody liar*" and concluded by picking up her handbag and storming out of the business slamming a security door behind her.

[49] I find that Mr Davis remained at his desk for a few moments with his head in his hands. He then followed Ms Bogun from the business to retrieve the shop keys she had with her.

[50] I find, too, that on 25 January at 5.45pm Ms Bogun returned her uniform shirts to the business. Mr Davis was working alone in the shop. Ms Bogun referred to the fact that they had parted on poor terms on the 23<sup>rd</sup>. Mr Davis agreed and advised her he didn't think he deserved that. She asked if they could talk. Mr Davis' response was

that there was no point if she would not work weekends. With that Ms Bogun left the business saying she would be seeing her lawyer.

[51] I find that Mr Davis did not say “*You’d better watch it girlie*”.

### **Conclusion**

[52] Having regard to the weight of the evidence I must find that there was no conduct by Mr Davis either through his words or actions that was repudiatory of the contract between him and Ms Bogun.

[53] That contract included a provision that Ms Bogun would work one Saturday in three. I have found there was some flexibility for staff to work out between themselves who would work any particular weekend but this did not extend to staff unilaterally deciding they wouldn’t work weekends or to making side arrangements with other staff (as Ms Bogun thought she had done with Ms Osborne) to have them work contracted weekend hours. It was this point - that she was contracted to work a fair share of Saturdays - that Mr Davis was at pains to point out to Ms Bogun on 23 January, together with the fact that she could not unilaterally arrive at an agreement with someone else that they would work her share of weekend days.

[54] Ms Bogun took exception to having this pointed out to her and left the business in a state of high dudgeon.

[55] Mr Davis could have been more conciliatory when Ms Bogun asked to talk with him about the matter on 25 January, but when he said there was no point in talking if she was not working weekends he essentially did no more than reaffirm their contractual arrangements. If Ms Bogun wished to resurrect this employment relationship she needed, at that point, to confirm her willingness to work weekends as agreed and she could have done so. Instead she left advising Mr Davis she would be consulting her lawyer.

[56] In essence then I must find that Ms Bogun was not dismissed from her employment. She certainly left in unhappy circumstances when Mr Davis did not accept her wish not to work weekends and the arrangement (albeit it was a mistaken arrangement) she had made with Ms Osborne to cover her for those days.

### **Determination**

[57] Ms Bogun was not dismissed from her employment. Her claim must therefore fail.

## **Penalty**

[58] The applicant seeks a penalty against the respondent for failing to provide her with a written employment contract.

[59] Mr Davis has, I find, an old school approach to employment relationships preferring to rely on agreements reached orally in good faith. Unfortunately the law has long held that individual employment agreements must be in writing (S 65 Employment Relations Act 2000). Further S.63A of the Act requires employers to provide prospective employees with a copy of the intended agreement; advise them they have the right to take independent advice on it; provide a reasonable opportunity for them to take that advice and consider and respond to any issues raised by the employee in relation to the intended employment agreement.

[60] I must say, too, that had the terms of Ms Bogun's employment been reduced to writing the clarity this gave to the matter could have avoided what seems to have become a confused understanding in Ms Bogun's mind.

[61] Ms Bogun was not provided with a written employment agreement<sup>2</sup> and Mr Davis is in breach of the Act. I therefore direct him to pay \$500 to the Crown Account as a penalty for breaching the Act.

## **Costs**

[62] The parties did not have legal representation in this matter so no question of costs arises.

Janet Scott

Member of the Employment Relations Authority

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<sup>2</sup> The evidence suggests that none of his staff are provided with written agreements.