

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 49
3108573

BETWEEN MARYNA BOLGARYNA
Applicant
AND AROHA MANAGEMENT
LIMITED
Respondent

Member of Authority: Andrew Gane
Representatives: Applicant in person
No appearance for the Respondent
Investigation Meeting: 12 October 2022
Submissions and other material received: 1 November 2022
Determination: 1 February 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Maryna Bolgaryna raises a personal grievance and claims she was unjustifiably dismissed from her employment with Aroha Management Limited (AM). She seeks reimbursement of lost wages, compensation for hurt and humiliation, and compensation for immigration related costs arising as a result of the grievance, wage arrears and reimbursement of filing costs.

[2] AM did not lodge a statement in reply and failed to participate in these proceedings or attend the investigation meeting.

The Authority's Investigation

[3] During my investigation, I heard evidence from Ms Bolgaryna and her partner, Tony Shephard, remotely by audio visual link. AM was not represented and submitted

no evidence during these proceedings. I am satisfied the company was properly served with the statement of problem on 9 December 2021. I am also satisfied that a copy of the notice of investigation meeting and witness statements were served properly by a process server on the registered office of the company on 14 September 2022.

[4] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, the Authority has carefully considered all the material before it, including all the evidence by the parties and their submissions.

Issues

[5] The issues for resolution are:

- (i) was Ms Bolgaryna unjustifiably dismissed by AM;
- (ii) if AM's actions were not justified what remedies should be awarded, including:
 - a) Reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate this loss);¹and
 - b) compensation for humiliation, loss of dignity, and injury to feelings;² and
 - c) compensation for loss of any benefit, whether of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen;³ and
- (iii) was Ms Bolgaryna owed any wage arrears at the end of her employment; and
- (iv) whether interest should be awarded on wage arrears; and
- (v) should either party contribute to the costs of representation of the other party?

Background

[6] Simon Ong was the director of AM, trading as the Gizzy Aroha Function Restaurant and Bar. AM purchased the restaurant in June 2019. Ms Bolgaryna had been

¹ Employment Relations Act 2000, s 123(1)(b).

² Employment Relations Act 2000, s 123(1)(c)(i).

³ Employment Relations Act, s 123(1)(c)(ii).

working in the restaurant since 2018 under the previous ownership. She signed an individual employment agreement (IEA) with AM and started working for AM on 27 June 2019 as a restaurant manager. Her annual salary was \$45,000 (\$21.65 per hour) and she was required to work a minimum of 40 hours per week. The IEA stipulated a two week notice period of termination of employment.

The Authority's view of the employment relationship problem

[7] Due to the change of restaurant ownership to AM Ms Bolgaryna had to apply for a new immigration visa in July 2019, as her previous visa was tied to the previous restaurant owner. Whilst waiting for her visa Ms Bolgaryna assisted Mr Ong in transferring existing licences of the previous owner to AM. When AM purchased the business, the purchase included all the bookings for events until the end of the 2019 year. Ms Bolgaryna, who was the only person in the restaurant who knew how to manage the booking system, helped Mr Ong administer the bookings.

[8] Mr Ong also tasked Ms Bolgaryna to design new menus, flyers etc. for the restaurant. Ms Bolgaryna was happy to do this as it kept her busy and she thought this would be an opportunity to show Mr Ong how capable she was.

[9] Ms Bolgaryna had previously arranged with Mr Ong to go on maternity leave at the end of September 2019. Ms Bolgaryna's new visa arrived on 30 August 2019. Shortly after Mr Ong asked Ms Bolgaryna to start maternity leave early, as he did not want her to work with "a big belly". Although she was able to work until the end of September 2019, Ms Bolgaryna agreed to start maternity leave from 6 September 2019. While she was on maternity leave Mr Ong asked her to do some jobs for him from home, which she agreed to do. She also advised Mr Ong that she could do only 52 hours all together within the period of her parental paid leave and not for the first 28 days after she gave birth.

[10] On 14th October 2019 Mr Ong's wife asked Ms Bolgaryna whether she could come into the restaurant and make coffees for customers. The other restaurant employees had gone on strike, and no one had showed up at work. Ms Bolgaryna was 1 day overdue to give birth, however, she asked her parents-in-law to drive her to work as she wanted to support the business. While on paid parental leave Ms Bolgaryna was in regular contact with Mr Ong and did at least 40 hours work for AM.

Events leading to Ms Bolgaryna dismissal

[11] On 31 January 2020 Mr Ong contacted Ms Bolgaryna advising her that he had found a new manager.

[12] Ms Bolgaryna's parental leave was due to finish on 6 February 2020. On 1 February 2020 she responded to Mr Ong confirming she wished to retain her role as restaurant manager and asking whether she could extend her maternity leave for another 8 weeks, as she wished to continue breastfeeding her three-month-old child. Later that day Mr Ong called Ms Bolgaryna directing her to attend a meeting at the restaurant on 3 February 2020.

[13] On 3 February 2020 Ms Bolgaryna attended the meeting with her husband. At the meeting, Mr Ong told Ms Bolgaryna that AM was terminating her employment and the company will no longer support her visa applications. Ms Bolgaryna tried to negotiate with Mr Ong by saying she would return to work immediately as she had organised day care by then. Mr Ong refused to accept any of Ms Bolgaryna's proposals. Ms Bolgaryna felt Mr Ong had made up his mind to dismiss her. Ms Bolgaryna and her husband left the meeting saying she needed time to obtain legal advice.

[14] Two hours later Ms Bolgaryna received an e-mail from Donna Biddle, AM's operational manager, advising her that AM would not be extending her parental leave and that Ms Bolgaryna no longer had a role at AM.

[15] On 17 April 2020 Ms Bolgaryna wrote to AM raising a personal grievance. As a result of the dismissal Ms Bolgaryna had to apply for a new work visa.

Unjustified dismissal

[16] I find that Ms Bolgaryna was summarily dismissed when Donna Biddle emailed her on 3 February 2020, advising her that AM would not extend her parental leave and that she no longer had a role at AM. AM did not provide Ms Bolgaryna any information regarding its decision to terminate her employment prior to making that decision. AM failed to give Ms Bolgaryna any contractual notice of her termination of employment. AM's actions were not how a fair and reasonable employer would have behaved towards an employee and undermined the trust and confidence of the employment relationship. Ms Bolgaryna has established her personal grievance for unjustified dismissal.

Remedies

Reimbursement of wages

[17] Where the Authority finds that the employee has a personal grievance; and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration being \$3,750. Here the latter is the lesser amount. AM is ordered to pay Ms Bolgaryna \$3,750 (gross) in reimbursement of lost wages.⁴

Compensation for humiliation, loss of dignity and injury to feelings

[18] Ms Bolgaryna has succeeded in proving her personal grievance claim that she was unjustifiably dismissed from her employment with AM and is entitled to an award of compensation.⁵

[19] Both Ms Bolgaryna and her husband gave compelling evidence of the profound effect the dismissal had on Ms Bolgaryna. As a young mother who was still on maternity leave caring for her 3-month-old child, she was seeking security in both her employment and immigration status from AM. The dismissal, and manner it was carried out in her circumstances was not how a fair and reasonable employer would have behaved and undermined the trust and confidence of the employment relationship. This has had a devastating impact on Ms Bolgaryna, as she was very emotionally distressed by the whole process. The family was instantly reduced to one income at a time when they had the increased cost and responsibility of raising a young child. Ms Bolgaryna also lost her ability to work as her work visa was tied to AM.

[20] Ms Bolgaryna is entitled to compensation of \$15,000 for hurt and humiliation. I do not consider Ms Bolgaryna's behaviour in any way contributed towards the situation that gave rise to her personal grievance.⁶ AM is ordered to pay Ms Bolgaryna compensation of \$15,000.

⁴ Employment Relations Act 2000, s 123(1)(b).

⁵ Employment Relations Act, s 123(1)(c)(i).

⁶ Employment Relations Act, s 124.

Compensation for loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen

[21] Where the Authority finds that the employee has a personal grievance; and that the employee has lost the benefit which the employee might have been expected to obtain as a result of the personal grievance, the Authority may order the payment of the compensation for that loss.⁷

[22] As a result of her unjustified dismissal Ms Bolgaryna lost the benefit of being able to work and obtain an income, as her work visa was tied to her role at AM. I find Ms Bolgaryna is entitled to be compensated for the cost of obtaining a new work visa. Ms Bolgaryna advised that her immigration related costs in obtaining a new work visa totalled \$913. AM is ordered to pay Ms Bolgaryna compensation of \$913 (gross).

Wage arrears

[23] Ms Bolgaryna claims she was owed for 20 hours for work she carried out prior to going on maternity leave and 40 hours she worked while on maternity leave. She also claims for the two-week contractual notice period (80 hours).

[24] I find Ms Bolgaryna is entitled to claim for the above hours she was paid for being a total of 140 hours at \$21.65 being \$3,031 (gross). AM is ordered to pay Ms Bolgaryna wage arrears of \$3,031 (gross).

Interest

[25] Ms Bolgaryna can recover interest on the arrears. AM is liable for payment of that interest calculated from 17 April 2020, the date of the letter raising a personal grievance, until the arrears are paid in full. AM is ordered to pay interest, using the civil debt interest calculator.⁸

Result

[26] Ms Bolgaryna has succeeded with her personal grievance claim. Her dismissal by AM was unjustified, because it had been carried out in a fundamentally unfair way which failed to meet a standard expected of a fair and reasonable employer.

⁷ Employment Relations Act, s 123(1)(c)(ii).

⁸ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

Summary of orders

[27] Ms Bolgaryna was unjustifiably dismissed for which remedies have been awarded. Her claims for wage reimbursement have been upheld. The following orders are made:

- (a) Within 28 days of the date of determination AM is ordered to pay Ms Bolgaryna the following sum:
 - (i) reimbursement of 3 months' salary being \$3,750; and
 - (ii) compensation for hurt humiliation and injury to feelings being \$15,000 for unjustified dismissal; and
 - (iii) compensation for loss of a benefit, being the cost of obtaining a new work visa; equating to \$913; and
 - (iv) wage arrears of \$3,031.
- (b) Within 28 days of the date of determination AM is to calculate and pay Ms Bolgaryna interest on the arrears as awarded in paragraph [25] above.

Costs

[28] Ms Bolgaryna was unrepresented and therefore has no claim for costs. However, AM is ordered to pay Ms Bolgaryna the filing fee of \$71.56.

Andrew Gane
Member of the Employment Relations Authority