IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 468
3092192

	BETWEEN	MICHELLE BRADLEY Applicant
	AND	HOOF CAMP SADDLERY LIMITED Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Gerard Elwell, advocate for the Applicant Kathryn Cook, for the Respondent
Investigation Meeting:	28 October 2020 at Whakatane
Submissions [and further Information] Received:	3 November 2020 from the Applicant 4 November 2020 from the Respondent
Date of Determination:	13 November 2020

DETERMINATION OF THE AUTHORITY

A. The respondent, Hoof Camp Saddlery Limited (Hoof Camp) unjustifiably dismissed the applicant, Ms Michelle Bradley.

B. To remedy her personal grievance for unjustified dismissal Hoof Camp must pay Ms Bradley within 21 days of the date of this determination:

a. the sum of $15,000 as compensation for humiliation, loss of dignity and injury to her feelings under s123 of the Employment Relations Act 2000 (the Act).

C. Costs are reserved.

Employment Relationship Problem

[1] Michelle Bradley worked as a merchandiser and retail sales assistant for Hoof Camp Saddlery Limited (Hoof Camp) from early August 2018 until 1 August 2019. Ms Bradley

worked at Hoof Camp's shop selling horse and horse rider related products and assisting customers. Ms Bradley is an independent horse saddler and conducted her own business on the days she was not working for Hoof Camp.

[2] Hoof Camp's sole director and shareholder, Ms Kathryn Cook, ended Ms Bradley's employment on 1 August 2019 while Ms Bradley and her partner were returning from a trip to England. Ms Cook messaged Ms Bradley that another employee had taken her hours of work and that there was no work available for her when she got back. Ms Bradley says Hoof Camp's actions amounted to an unjustified dismissal. She seeks orders for the payment of lost wages and compensation. She also seeks a penalty against Hoof Camp for not providing her with a copy of her written employment agreement, following requests.

[3] Hoof Camp's response was that Ms Bradley was a casual employee and as such she was able to terminate her employment when there was no further work available for her. Accordingly, Hoof Camp denies unjustifiably dismissing Ms Bradley. In any event, Ms Cook says there were performance issues with Ms Bradley's work about which she had already spoken to Ms Bradley. While Ms Bradley had been away on her trip, Ms Cook says she became aware of further issues with Ms Bradley's performance. These issues and the fact Ms Bradley was a "casual" meant Ms Cook felt justified in not keeping Ms Bradley's job open for her.

The issues

[4] The issues for determination are:

(a) Was the real nature of the relationship between Ms Bradley and Hoof Camp one of permanent part-time or casual employment?

(b) Was Ms Bradley unjustifiably dismissed by Hoof Camp?

(c) If Hoof Camp is found to have acted unjustifiably, what remedies should be awarded to Ms Bradley?, including:

  (i) lost wages; and

  (ii) compensation for hurt and humiliation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

(d) If any remedies are awarded, should they be reduced for blameworthy conduct by Ms Bradley?

(e) Is Hoof Camp liable for any penalties in relation to not providing a copy of a written employment agreement to Ms Bradley?

(f) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[5] Ms Bradley, her partner Mr Rick Vanstone, together with a further four witnesses who are friends or acquaintances of Ms Bradley, each provided written witness statements for the Authority's investigation. Ms Cook, together with five other witnesses, each provided written witness statements on behalf of Hoof Camp. The other witnesses for Hoof Camp included Ms Cook's friends, a Hoof Camp employee at the time of Ms Bradley's employment, and a business colleague.

[6] Three of the total number of 12 witnesses gave evidence by telephone. The other nine witnesses attended the Authority's investigation and gave evidence. Each of the witnesses either affirmed or swore on oath that their evidence was true and correct.

Oral indication of preliminary findings – s 174B(1)(b) of the Act

[7] The parties participated in mediation prior to the investigation meeting. Mediation was not successful in resolving the employment relationship problems. During the course of the Authority's investigation meeting two further opportunities were provided to the parties to resolve their employment relationship problems. Unfortunately, the parties were not able to resolve their differences. After hearing all the evidence at the investigation meeting, I gave the parties an oral indication of my preliminary findings, subject to further submissions.

Written record of determination

[8] On 3 November 2020, written submissions were filed on behalf of Ms Bradley, by her advocate Mr Elwell. On 4 November 2020, the Authority received extensive submissions and further documents from counsel for the respondent, who was not present at the Authority's investigation meeting. Having received the written submissions from the parties and having given them full consideration, this is a written record of my determination which confirms the oral indication of my preliminary findings.

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

Preliminary issues

[10] In relation to the submissions filed on behalf of the respondent, Counsel has raised 3 preliminary issues as follows:

(a) To the extent that the case was aimed at Hoof Camp, the personal grievance was not brought within 90 days;

(b) To the extent that the grievance was brought against Ms Cook personally, it must fail as the wrong entity; and

(c) Concerns with the evidence

Personal grievance out of time

[11] The parties have been aware for a considerable period of time of the requirement to file evidence and witness statements in accordance with the Authority's timetable. It is simply not appropriate, and is contrary to the Authority's processes and natural justice, for counsel for Hoof Camp to attempt to raise these issues following the Authority's investigation meeting. All the above issues could have been raised well in advance and at the investigation meeting, but they were not.

[12] In any event, the issues can be easily addressed. Firstly, the claim was against Hoof Camp and not Ms Cook personally. Having attended mediation and having participated in an investigation meeting, it is too late for Hoof Camp to now claim any personal grievance raised by Ms Bradley was out of time. Its participation so far implies it has consented to the grievance being raised out of time, if indeed it was raised out of time. There was no suggestion in the statement in reply filed by Hoof Camp that Ms Bradley's personal grievance had been raised out of time and no evidence to that effect at the investigation meeting.

Hoof Camp and not Ms Cook is the correct respondent

[13] In an email exchange between the parties and the Authority on 15 and 16 September 2020, the parties accepted that Hoof Camp and not Ms Cook was the correct respondent and proceeded accordingly at the Authority's investigation meeting.

Concerns with the evidence

[14] Counsel for the respondent in his submissions appears to be attempting to deal with evidential matters, after all evidence has been heard and dealt with at the Authority's investigation meeting. I have considered the "concerns" and do not accept they impact on the issues to be determined.

First Issue

Was the real nature of the relationship between Ms Bradley and Hoof Camp one of permanent part-time or casual employment?

[15] The parties dispute the nature of their employment relationship. Ms Cook says Ms Bradley was a casual employee and Ms Bradley considers she was employed on a permanent part time basis or alternatively if her employment was originally casual it became permanent part time employment.

Individual employment agreement

[16] Ms Bradley was provided with a written employment agreement which she signed on 19 August 2018. The following provisions are relevant:

> **3. Nature and term of the agreement**
>
> **3.1 Casual, part-time Individual Employment Agreement (intermittent)**
>
> This employment agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties to this agreement agree that the nature of the relationship is a casual "part-time" employment relationship. The Employer agrees to provide reasonable notice to the employee as to when they are required to work from week to week. The duration of this casual agreement is as follows:
>
> (i) This casual part-Time agreement shall continue in force until such time as it is terminated by either party pursuant to the termination clause in this agreement. Tuesdays & Thursdays each week 9am – 2.30pm or as required by agreement.
>
> **6. Hours of work**
>
> **6.1 Casual Part-Time employment with a minimum number of 10 hours of work guaranteed but no minimum hours for any one period of work.**

> The parties agree that because the employee has been employed on an as Casual/Part-Time, the hours discussed at date of this agreement are as follows, Tuesday and Thursdays 9am – 2.30pm weekly.
>
> **10. Termination of employment**
>
> **10.1 General termination**
> The Employer may terminate this agreement for cause, by providing **two weeks** notice in writing to the employee. Likewise the employee is required to give **two weeks** notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[17] Ms Bradley's job description was as follows:

> Merchandiser/Display Machinist for general and clothing repairs. Customer retail sales which include counter/Eftpos/till and phone management. Unlock and lock up on occasions when necessary.

[18] Whether an employment relationship is "casual", "casual part-time" or "permanent" may affect what obligations parties have to one another, in particular, availability of work, future work or other work and how the relationship may lawfully terminate.

[19] In *Jinkinson v Oceana Gold (NZ) Limited*[1], the Employment Court described the differences in types of employment as follows:

> [40] …it is also important to understand what is meant by the terms "casual" and "ongoing" or "permanent". Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.
>
> [41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

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1 [2009] ERNZ 225 at [40-41]

[20] In my view, the evidence established on the facts in this case, that Ms Bradley was employed on a permanent part-time basis.

[21] The provisions in the employment agreement are confusing. The provisions refer to: (a) both casual and part-time employment, (b) the requirement to work specified days of the week at specified hours, (c) the requirements for both parties to specify periods of notice in the event either party wishes to terminate employment and (d) in the case of the employer the requirement to give a period of notice to terminate "for cause" and (e) the employee's ongoing duties. These are all indicators that the employment was not casual as defined in *Jinkinson v Oceana Gold(NZ) Ltd.*[2]

[22] In this particular case, Ms Bradley began by voluntarily assisting Ms Cook in the shop after Ms Cook's daughter had left. Ms Cook and Ms Bradley were friends. They got to know each other through the horse community in Whakatane and had remained friends for a number of years following.

[23] The employment relationship, if it ever was casual, became permanent part-time in early August 2018. Ms Bradley worked every week, excepting only one or two very short periods of time during the course of her employment when she travelled to Auckland to undertake further training in horse saddlery and went on holiday. The pay records provided by Ms Cook and Hoof Camp's accountants reveal that from the week ending 5 August 2018 until 9 December 2018 of the 19 weeks worked, Ms Bradley worked every Tuesday and Thursday with the exception of the week of 2 September 2018 when she had the week off, and the Tuesday in the week of 9 September 2018 when she had just the Tuesday off. On every other week Ms Bradley worked Tuesday and Thursday and on five of the weeks that she worked during the period from August to December 2018, Ms Bradley worked other days of the week as well. This pattern of working every Tuesday and Thursday continued from 16 December 2018 until 31 March 2019.

[24] Ms Bradley says she consistently worked Tuesdays and Thursdays for Hoof Camp from 1 April 2019. She said Hoof Camp expected her to work and she expected to work on Tuesdays and Thursdays each until she travelled to England for a short period of time in July 2019. She says she expected to return to working Tuesdays and Thursdays and she was expected by Hoof Camp to return to working on those days, upon her return from England. This evidence is

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supported by the pay records provided, by witnesses who visited Ms Bradley in the shop, her flat mate at the time and her partner.

[25] When Ms Bradley travelled to England, this was agreed to by Ms Cook who made arrangements to cover Ms Bradley's work while she was away. In my view, all these factors confirm Ms Bradley was a permanent part-time employee. Both parties had ongoing obligations to each other during this period of permanent part-time employment. Ms Cook arranged for temporary cover in the shop while Ms Bradley travelled to England. This would not have been necessary if Ms Bradley was a casual employee. Ms Bradley expected to return to her job following her trip to England which indicates the ongoing employment obligations between the parties, in my view.

Second Issue

Was Ms Bradley unjustifiably dismissed by Hoof Camp?

[26] In April 2019, Ms Cook requested a meeting with Ms Bradley about some performance issues. The meeting was held on 24 April 2019. There was no indication or suggestion to Ms Bradley that the meeting was a disciplinary meeting, rather, it was a meeting between Ms Cook and Ms Bradley about matters which Ms Cook wished to discuss. There was no warning issued, verbal or in writing, to Ms Bradley following the meeting. A similar meeting was held with another employee who gave evidence before the Authority. That employee described the meeting as a verbal chat with Ms Cook about processes to be followed in the shop and with customers. No warning was issued.

[27] A document headed up "Official written warning discussion 15 April 2019" was provided to the Authority. Ms Cook accepted that she had not given this letter to Ms Bradley following the meeting on 24 April 2019 and accepts that Ms Bradley did not see the document until the parties filed their respective pleadings in the Authority and were directed to mediation. This record of discussion dated 15 April 2019 was reasonably detailed and concluded as follows: "Please take more care with the above issues, I welcome your ideas as to how to prevent the above issues happening again."

[28] There was no suggestion by either party that when Ms Bradley went to England her employment might end as a result of issues raised with her by Ms Cook in April 2019. Further, it was only when Ms Bradley responded to the message from Ms Cook terminating her

employment, that Ms Cook raised the performance issues, apparently as some sort of justification of her decision not to allow Ms Bradley to resume her hours of work.

1 August 2019

[29] Ms Bradley and her partner travelled to England for a number of weeks in July 2019, during which time Ms Bradley attended a course to further her horse saddlery skills. Ms Bradley and her partner were sitting at Singapore Airport on their way home when Ms Bradley received a message from Ms Cook via Messenger as follows:

> Hi Mitch. Looks like you and Rick had an amazing trip. Looks like you will be super busy with your saddle fittings when you return. ☹ I have Ray working in the shop now and Missy took on your days while you were away and would like to keep the extra hours. Things have been fairly quiet and I am now cutting my stock down for a sale that looks like it may go ahead in September. Sorry but I won't have any work available for you when you get back. Pop in and we can have a coffee and to tell me all about your trip. I am back working limited hours on my knee scooter.

[30] Ms Bradley says that she was shocked and upset when she received the message. This reaction was confirmed by her partner. Ms Bradley sent a short message back to Ms Cook as follows. "This is really un professional and a really un pleasant way of ending our holiday."

[31] Ms Cook responded to Ms Bradley's message as follows:

> Hi Mitch, during your absence I had to give Missy extra hours to get through the length of time you were away on your course for your saddle fitting business. She is keen to keep the hours and has stepped up while I have been away in hospital. I have decided to keep her on for the short amount of time I have left running Hoof Camp and therefore no longer have more hours available for you. If you want to chat about this please call in and see me. Regards Kathryn.

[32] On 4 August 2019 at 5:14pm Ms Cook sent an email to Ms Bradley as follows:

> Mitch. Your choice of words UNPROFESSIONAL is what I would use when it comes to what you have done in regard to your contract at Hoof Camp. I have already spoken to you with a verbal warning, after one complaint from a customer but to have 2 more serious ones come in from customers while you were away is just beyond words. One is a blatant disregard for me and my business. I am truly shocked. When I first hired you I had a few concerns from people that have known you a lot longer than I have, but I dismissed their concerns and said Mich is my friend. There reply was, it makes no difference she'll use whoever to get what she wants. I chose to ignore them and continued to hire you. Then we had the whole NSC contract to work and promote their saddles which caused more concerns and calls from wholesalers I deal with also. Saying watch her. You know Mitch I really don't know what I have ever

> done to you?? I supported you thru your breakup, I supported any business venture you tried, Intimo etc, I promote and sell your CML, I even jolly well labelled several tub's of it for you. Helped you pack up your house and move, I've promoted and helped out with your Fossils group, I've even put customers on to you for saddle fittings. What was it I didn't do Mitch??
> Kathryn.

[33] Following this email, Ms Bradley requested a copy of her employment agreement and payslips. She also asked to collect her belongings from the shop on 15 August 2019. The parties have differing views on what happened when Ms Bradley went to drop off the shop key and pick up her belongings from the shop. However, it is clear that the atmosphere was one of tension and the relationship which had once been a friendship had deteriorated significantly.

[34] Ms Cook accepted that if Ms Bradley was a part-time employee that she would owe employment obligations to her, such as consulting with Ms Bradley about the reasons for no longer being able to offer her work, before making the decision to do so. Even if Ms Bradley was a casual employee, which I have found she was not, Ms Cook and Hoof Camp would have owed her obligations during her period of employment on a casual basis.[3] In *Rush Security Services Limited (T/A Darien Rush Security) v Samoa*[4], the Employment Court held that while the employment was casual, the dismissal occurred during the period when mutual obligations of employment existed between the parties. In that case the Court held that ending the assignment, during its course, was a dismissal and the same questions of justification for that action arose whether the employment at the time was casual or ongoing.

[35] I have held that the employment relationship in this case was an ongoing part-time arrangement. Prior to the trip taken by Ms Bradley and her partner, Ms Cook did not discuss whether work would or would not be available to Ms Bradley on her return. Ms Bradley had asked Ms Cook that she would like to take time off to travel to England, a trip which included upskilling in horse saddlery. Ms Cook could have informed Ms Bradley at that time, that as she was a casual employee, there may or may not be work for her when she returned. She did not do that. Rather, she arranged for an existing employee to "cover for" Ms Bradley while Ms Bradley was away. On the day of her return, Ms Cook decided not to allow Ms Bradley to return to her job.

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3 *Surplus Brokers Limited v John Neil Armstrong* [2020] NZEmpC 131

4 *Rush Security Services Limited (T/A Darien Rush Security) v Samoa* [2011] NZEmpC 76, [2011] ERNZ 529 at [32]

[36] The message to Ms Bradley on 1 August telling her that another employee had taken her days of work and would like to keep the extra hours was a clear indication that the Tuesday and Thursday hours of work had been removed by Hoof Camp from Ms Bradley. This indication was made even clearer by the statement that there was no work available to Ms Bradley when she returned from her trip. Those statements amounted, in my view, to a dismissal.

[37] A finding therefore that the dismissal was procedurally unjustified is inevitable in that context. Hoof Camp failed to comply with the requirements of s103A(2) and (3) of the Act. Dismissal was not the action of a fair and reasonable employer, in all the circumstances at the time.

[38] I do not accept the arguments mounted belatedly by counsel for the respondent, that Ms Bradley abandoned her employment, or in the alternative if that argument is not accepted, that she was genuinely made redundant. These claims are not borne out by the evidence.

Third Issue

If Hoof Camp is found to have acted unjustifiably, what remedies should be awarded to Ms Bradley?

[39] Having established a personal grievance for unjustified dismissal, Ms Bradley is entitled to an assessment of remedies. Ms Bradley claimed lost wages as a result of the dismissal.

[40] However, it appears Ms Bradley focused her efforts on her own business rather than seeking other work and income to mitigate her loss. Those activities were not sufficient mitigation endeavours, so no award of lost wages is warranted.

Compensation for humiliation, injury to feelings and loss of dignity

[41] Ms Bradley seeks an award of $15,000 as compensation for the hurt and humiliation she says she suffered as a result of how Hoof Camp treated her. Ms Bradley's evidence was that she became depressed following her dismissal, she suffered significant stress and panic attacks. She also says that she struggled financially to pay her bills as she was expecting to return to her job. Ms Bradley provided the Authority with a statement from a counselling service that she had entered the service for counselling on 27 September 2019. Ms Bradley's partner also gave evidence of the impact the dismissal had on Ms Bradley.

[42] I consider an award of $15,000 compensation in respect of the hurt and humiliation suffered by Ms Bradley to be warranted.

Contribution

[43] Under s 124 of the Act, the Authority must consider whether there any remedies granted should be reduced because of blameworthy actions by Ms Bradley that contributed to the situation giving rise to her grievance. I do not consider that Ms Bradley was responsible for Ms Cook's decision to send her a message when she was returning from her trip back to work, saying that her hours of work had been given to another employee and that there was no further work available to her. I do not consider in the circumstances that Ms Bradley contributed to the situation giving rise to her grievance. I order Hoof Camp to pay Ms Bradley the sum of $15,000 compensation under s123 of the Act, within 21 days of the date of this determination.

Penalties

[44] Ms Bradley did receive a written employment agreement which she signed, albeit a couple of weeks after starting employment with Hoof Camp. Ms Bradley says that during the course of her employment, she asked Ms Cook on a number of occasions for a copy of her employment agreement. This, she says was only provided following the dismissal and Ms Bradley taking a claim against Hoof Camp. I do not consider that Ms Bradley suffered a loss as a result of not receiving a copy of her employment agreement. She had been given a copy to sign and did so. I do not consider a penalty appropriate in the circumstances.

Costs

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Bradley may lodge and serve a memorandum of costs within 21 days of the date of this determination. Within 14 days of receipt of Ms Bradley's memorandum as to costs, Hoof Camp is to lodge any reply memorandum.

Anna Fitzgibbon
Member of the Employment Relations Authority