

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 22
5350450

BETWEEN

KATRINA DEW
Applicant

AND

OLLIVERS CAFÉ LIMITED
Respondent

Member of Authority: M Loftus

Representatives: Martin Round, Advocate for the Applicant
Hans van Schreven, Counsel for the Respondent

Investigation Meeting: 17 January 2012 at Christchurch

Submissions Received: At the investigation

Determination: 9 February 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Katrina Dew, claims that she was unjustifiably dismissed by the respondent, Ollivers Café Limited (Ollivers), on or about 17 April 2011.

[2] Ollivers accepts that it dismissed Ms Dew, but claims that her cessation was a justified redundancy brought about by an inability to continue her employment as a result of the earthquake that struck Christchurch on 22 February 2011.

Background

[3] Ollivers is owned by its two directors, Ms Karen Whalley and Mr Jason Olliver. It operates (or more correctly, used to operate) two Christchurch cafes under the Robert Harris brand. One is located in the South City Mall while the other, known as The Crossing, was in the central business district and, even today, remains within

the inaccessible red zone. Prior to 22 February 2011 the company employed 16 staff; 7 at each of the two establishments and 2 who moved between the two.

[4] Whilst Ollivers was registered as a company in September 2005, the current operation is relatively new and only commenced trading in December 2010. Ms Dew was one of its original employees. She was initially engaged as a Café Assistant and Barrista but within a very short time (a couple of weeks) was offered, and accepted, the position of Branch Manager at South City with an increased wage.

[5] The employment progressed without, it would appear, any untoward events. Here I note that events the employer viewed negatively were discussed during the investigation meeting, but I suspect the negativity has only arisen since the claim was filed. Indeed, Ms Whalley essentially admitted as much when giving oral evidence and accepted that Ms Dew worked well, though she did qualify this with the statement *when she was on her game*.

[6] The earthquake of 22 February 2011 severely affected both of Ollivers's establishments. As said earlier, The Crossing is still within the red zone and is yet to have a major structural assessment. Its condition remains largely unknown and Ollivers is unaware whether or not it will ever function again. There was significant damage to South City and it was to remain closed until early June.

[7] For Ms Whalley and Mr Olliver this signalled the commencement of a difficult period with a number of challenges from access restrictions, insurance issues, and repair work. There were also severe financial difficulties resulting from the fact that the business no longer had income or cashflow.

[8] Notwithstanding the financial situation, the company initially chose to try and retain those of its staff who had remained in Christchurch. In this respect it would appear that seven of the 16 either left Christchurch or, for other reasons, opted to discontinue their relationship with Ollivers. To retain those who remained, Ollivers became reliant upon the Government Earthquake Wage Subsidy. This, as I understand the evidence, saw the Government assist struggling employers by paying a subsidy at the rate of \$500 per week for full time employees and \$300 per week for part time employees. Given its financial dilemma, Ollivers ceased paying normal wages and simply passed the subsidy amount to eligible employees.

[9] As a condition of receiving the subsidy Ollivers was required, prior to paying an eligible employee, to confirm that the employee remained in Christchurch, was available for work and not receiving income from any other source. As time progressed, there was a further requirement that there be an intention to employ a recipient in any subsequent reincarnation of the business.

[10] There then commenced a series of text communications between Ollivers and remaining staff. Ms Whalley states that this was the easiest way to communicate as her staff tended to be younger and use text and, in any event, it was easier in that she could send one message to multiple recipients. In essence the texts fulfilled two purposes. The first was to ascertain an employee's continued eligibility for the subsidy and the second was an attempt to keep staff informed about what was happening with the business though Ms Whalley concedes that the message essentially remained *we don't know*.

[11] The texts were reasonably frequent and Ms Dew received 18 between the earthquake and a telephone conversation that occurred on 13 April 2011. She does not take issue with the method of communication, but does express disappointment at the lack of concrete information which stymied what she initially claimed was a requirement to answer queries from other staff. Under questioning she did, however, concede that Ms Whalley was hamstrung by a lack of information herself and made every attempt to pass on as much information as she could. Ms Dew also conceded that while she was communicating with some, but not all, of her staff she was not required to do so by her employer, nor was she fulfilling a formal function.

[12] On either Monday 11 April or Tuesday the 12th, Ms Whalley and Mr Olliver met with their accountant. In essence, the message was simple. It was – *you can't go on like this. If you don't do something about your costs and overheads you'll have nothing left*.

[13] When considering this, they concluded that The Crossing was, at least in the foreseeable future, defunct and the company's future relied on re-establishing its business at South City. That conclusion led to two crucial decisions. The first was that they would take a far more active role in the business than they had previously. This would reduce costs by meaning the business required less staff and negate the need for a manager. The second was that South City, once re-established, would only require five additional staff. At the time nine remained.

[14] Two of the nine had been employed for less than 90 days and were covered by trial period clauses drafted in accordance with s.67A of the Employment Relations Act 2000. These were used to affect the dismissal of those two employees. A third employee indicated that she no longer wished to return as she had obtained alternative employment. Of the remaining six, three were deemed indispensable by virtue of their kitchen skills. That left three, including the two managers whose positions were to be disestablished by virtue of the decision that Ms Whalley and Mr Olliver would play a greater part in the business, competing for two positions.

[15] A decision was made that Ms Whalley would contact Ms Dew and discuss the situation while Mr Olliver would contact the other manager. I do not know who was talking to the third employee though the evidence would suggest that some form of undertaking had already been made in respect to that persons continued employment. The decision as to who would contact who was a result of previous working arrangements and the fact Ms Whalley had tended to work with Ms Dew while Mr Olliver had, when he had worked, tended to be at The Crossing and was therefore familiar with the other manager.

[16] The conversation between Ms Whalley and Ms Dew occurred on 13 April. It took 23 minutes. About the conversation Ms Whalley states –

I explained to the Applicant in no uncertain terms that we had no money and that we could not guarantee that we would be able to continue paying her for much longer as the wage subsidy was due to expire or that we could guarantee her employment. In particular I explained that we were having a lot of trouble getting acceptance of our four insurance claims for the cafes. Obtaining payment under our Business Interruption Insurance was proving to be a complete nightmare as we were continually being rebuffed due to “depopulation” and “prevention of access” arguments. I reiterated that the future of the cafes was very, very uncertain and that we would understand if she chose to move on to other employment and that we would help her find alternative employment. I suggested firstly work at the Monteiths Merrin Street Bar which was walking distance from her home, and then temporary work at Robert Harris Nelson in which all her expenses including accommodation would have been met. She chose to ignore these options.

[17] Ms Dew’s recollection, as recited in her written evidence, is that

Karen Whalley rang me and explained that their insurance had still not been processed and suggested that I hand in my notice so my holiday pay could tide me over until they re-opened. I told her I would get back to her the following day.

[18] When giving oral evidence, Ms Dew said that Ms Whalley had called; had said she did not want to renew the Government subsidy as she had to pay it back and then suggested that she (Dew) resign so that she could have her holiday pay to tide her over and that there would be an opportunity for re-employment once the café was reopened. Ms Dew is adamant in her denial that the possibility of alternate jobs was ever discussed and states that she felt she was under pressure and therefore opted out of the conversation by saying that she would call back tomorrow. In the interim, and before the second call which ultimately occurred two days later (on Friday the 15th) Ms Dew sought legal advice.

[19] Ms Whalley states that Ms Dew became abusive and resorted to swearing. Ms Dew's response is that swearing is a natural part of her conversation habits but denies swearing at Ms Whalley and claims she was doing no more than commenting on the situation. She adds that she felt extremely frustrated as, in her view, the situation now being conveyed to her was *a bolt out of the blue* and accepts that her frustration may have resulted in a degree of terseness.

[20] The other point of disagreement about this conversation is whether or not Ms Whalley indicated that termination was likely and/or imminent. Ms Whalley says she did. Ms Dew denies that, but accepts that enough was said that she thought her job would *not go any further*.

[21] A second conversation between the two, which was relatively short, occurred on Friday 15 April. About it, Ms Whalley says Ms Dew was abusive, resorted to profanity and made threats about the possibility of legal action. Ms Whalley claims that Ms Dew's conduct was such that after about two minutes she (Ms Whalley) simply hung up.

[22] Ms Dew's evidence about the conversation is confusing. Answers she gave under oral questioning first from me and subsequently Mr van Schreven, were quite contradictory. Suffice to say she denied being abusive and claims that she advised Ms Whalley that she loved her job and wished to remain.

[23] Ms Whalley states that she saw the conversations, and in particular Ms Dew's abusiveness, as evidence of a complete breakdown of the relationship. She decided

that, as a consequence of her conduct, Ms Dew would go and the other ex-manager would remain.

[24] That decision was relayed by letter dated 17 April 2011. It was received by Ms Dew on either the 18th or 19th. It explains the situation in which the company has found itself and, in particular, the difficulties regarding insurance, before going on to say

Due to this lack of clarification to ourselves as to when we will be reopening, and our own personal financial pressures due to having no income, we have had to make the decision at this time to review our staffing requirements. We have made the decision that once South City is reopened we will manage the café ourselves, so will no longer have a need for a Café Manager. We therefore regret to advise that we can no longer continue your employment.

[25] Further correspondence followed, both by text and letter, over the dismissal and the fact that Ms Dew is yet to receive both outstanding holiday pay and payment for her notice period.

Determination

[26] Before proceeding it should be noted that the question of frustration was discussed but both representatives disregard the doctrine and treat the dismissal as a redundancy in accordance with normal employment law. I consider that appropriate particularly as the business continued to operate, albeit in a reconfigured way. In other words this is a redundancy as opposed to a closure brought about by factors beyond the control of the parties.

[27] As said in opening, Ollivers accepts it dismissed Ms Dew. The law therefore requires that it justify its decision. Ollivers justification is that it could no longer retain Ms Dew. Its business was in tatters – it had been deprived of income, cashflow and even premises to operate from as a result of Christchurch's 22 February earthquake and if it were to have any chance of survival it had to reduce overheads, the most significant of which was the cost of its staff.

[28] Section 103A of the Employment Relations Act 2000 (the Act), states that the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.

[29] In a redundancy setting it is well established that:

When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.

In Coutts Cars Ltd v Baguley [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA), the Court of Appeal in reviewing the approach of the Employment Court decision (Baguley v Coutts Cars Ltd [2000] 2 ERNZ 409) emphasised the need to consider the two factors (genuineness and process) separately ...

Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[30] Ms Dew's assertion that the redundancy was not genuine has two parts. The first is an assertion that Ms Whalley is not acting as the manager and that others perform the role. The second is that the two establishments were separate entities and that Ms Dew understood they were operated by separate companies. Ms Dew essentially contends her position remained given the choice effectively came down to one of the two previous managers remaining. She believes she should have been the chosen manager given one was still required at South City and that was her position.

[31] That approach is, in my view, flawed. Ms Dew's assertion that Ms Whalley was not acting as manager and that others were performing the work was based on second and third hand hearsay. I must prefer Ms Whalley's contrary evidence which was not disturbed by cross examination.

[32] The second element underpinning Ms Dew's position, namely that the Crossing and South City were operated by two disparate companies is simply incorrect. The assertion came from the bar and Ms Dew tendered no evidence on the matter but, in any event, the records clearly show there was only one company which previously operated from both sites.

[33] Notwithstanding the conclusion that the arguments proffered by Ms Dew as to why her dismissal was unjustified are flawed, Ollivers are still required to justify the dismissal.

[34] I have no qualms in concluding that the circumstances entitled the business to review its staffing needs. It was, at least temporarily, inoperable and at least half the business would likely remain that way for a considerable period of time. It is patently apparent that the business therefore had a surplus of staff.

[35] Similarly, I conclude the owners were entitled to have a view about an optimal staffing level.

[36] They were not, however, entitled to confirm their view as operative and apply it before consulting with affected staff. This is due to the content of section 4(1A)(c) of the Employment Relations Act 2000. That section requires that an employer who is proposing to make a decision that may have an adverse effect on the continuation of an employee's employment is required to provide the affected employee(s) with access to relevant information and give the employee(s) an opportunity to comment before the decision is finally made.

[37] Whilst giving oral evidence Ms Whalley openly accepted that the decisions were made on the advice of the company's accountant and without consulting affected staff.

[38] I must conclude that a fair and reasonable employer would comply with its statutory obligations. The failure to do so must, in my view, render the dismissal unjustified if only from a procedural perspective.

[39] However there is also the issue of selection and this goes to the substantive justification. I say that given that traditionally a redundancy arises as a result of two occurrences and that is confirmed by the definition contained in Ms Dew's employment agreement. First, the position occupied by the affected employee(s) becomes surplus to the requirements of the employer and, second, the employment then ceases as a result.

[40] Putting aside my qualms about the number of surplus positions as a result of the lack of consultation and assuming the number of residual positions decided by the employer could otherwise have been justified, there is an issue over how the decision to select Ms Dew for cessation was reached.

[41] This is not a situation of total closure with no options. It was one where the number of staff had to reduce but some would remain. In such a situation all involved must be given a fair opportunity for retention but that did not occur here. Instead Ms Dew was chosen as a reaction to her alleged behaviour over the phone. There are three flaws with that:

- a. There was no consultation over the selection process as is required by s.4(1A)(c);
- b. The decision was a reactionary one made in the heat of the moment. It is well established that such decisions are fraught and that a cooling down and consideration period is desirable – see for example *Kostic v Dodd EMC Christchurch CC*, 11 July 2007; and
- c. The choice was made for what was, in effect, a disciplinary reason without any of the investigatory process normally required before a disciplinary outcome is affected.

[42] In other words, I must conclude that Ms Dew's selection was deficient and had the process been more comprehensive she may have had a chance of remaining either along with the other manager or in the place thereof.

[43] For the above reasons, I must conclude this dismissal was unjustified and that raises the issue of remedies. Ms Dew seeks lost wages and compensation pursuant to s.123(1)(c)(i) of the Act.

[44] The conclusion that the selection criteria was flawed undermines the decisions substantive justification. Whilst I have no doubt that positions were surplus, the employer has failed to convince me that Ms Dew would necessarily have lost her employment as a result had this been treated as a redundancy. A redundancy implies no fault, yet Ms Whalley is clear in her admission that Ms Dew was chosen due to her behaviour. That implies fault (which is being alleged here as confirmed by the argument discussed latter that Ms Dew contributed to her demise (see 49 below)) and is incompatible with the present redundancy justification. The fact Ms Dew may have remained had the process been more appropriate means the decision can not be substantively justified and that means an award of wages must be considered.

[45] Ms Dew remained unemployed for 7 weeks but two of those were covered by her notice period (see 52 below). The residual period is five weeks which means a total loss of \$2,500 at the weekly rate of \$500 which was applicable at the time. I conclude that amount should be awarded in full given the evidence shows an attempt to mitigate the loss by actively seeking alternative employment.

[46] Ms Dew also claims compensation for humiliation but only offered limited evidence in support. She referred to a need to register for the unemployment benefit and a reliance on food parcels – both of which she considered humiliating, along with the respondents refusal to attend mediation. The later is, notwithstanding the legislative scheme and its promotion of mediation, a right the employer had and not something that merits an award of compensation.

[47] It is a given that an unjustified dismissal will cause some humiliation but a paucity of evidence supporting an unquantified claim will inevitably lead to a low award. In the circumstances, I consider an award of \$1,000 appropriate.

[48] Finally, the conclusion Ms Dew has a personal grievance and that remedies are appropriate means I must consider whether or not she contributed to the situation in which she found herself (s.124 of the Act).

[49] Mr van Shreven submits that should I find in Ms Dew's favour I should also conclude that she contributed to the situation in which she found herself by reacting to the directors approaches in an improper and threatening way. A significant reduction in remedies is urged.

[50] I have no doubt given the admissions recorded in paragraph 19 above that Ms Dew did react badly. I also have no doubt that she should have known better given her evidence that she knew Ms Whalley was conflict averse and did not react well to such behaviour. Therefore, and given Ms Whalley's admission that the decision to dismiss was a reaction to that behaviour, I must conclude that Ms Dew's behaviour was a contributing factor. The level of contribution is, however, small when weighed against the deficiencies of the employer in this matter. I consider a contribution a reduction of 10% appropriate and shall apply it to both sums awarded above.

Penalty

[51] In the initial pleadings Ms Dew sought, as a remedy, the imposition of a penalty upon Ollivers for having failed to provide the time and wage records as sought in a letter dated 6 May. The evidence suggests the records were provided, albeit after a delay of some eleven weeks and the matter was not pursued in submission. In the circumstances I shall not therefore consider this claim further.

Arrears claim

[52] Ms Dew also claimed that her contractual notice period of two weeks had not been paid. This claim was accepted by Ollivers who agreed to make the payment forthwith. I simply note that if this payment has not yet been made, it must.

Orders

[53] For the reasons given the following orders are made:

- (i) The respondent, Ollivers Café Limited, is to pay to the applicant, Ms Katrina Dew, the sum of \$2,250.00 (two thousand, two hundred and fifty dollars) as reimbursement of wages lost as a result of Ms Dew's unjustified dismissal; and
- (ii) The respondent is to pay the applicant a further \$900.00 (nine hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and\
- (iii) Should payment not yet have been made for the two week notice period, it must.

Costs

[54] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Ms Dew wishes to seek costs, she is required to file her application within 28 days of this determination. A copy shall be served on Ollivers who is to file any response within 14 days of the application.

M Loftus
Member of the Employment Relations Authority