

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 64
5396265

BETWEEN KATHRYN SARAH DUFFY
 Applicant

A N D KINDERCARE LEARNING
 CENTRES LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Kathryn Duffy, On her own behalf, and Paul Duffy
 Leanne Tong, Representative of the Respondent

Investigation meeting: 26 March 2013 at Christchurch

Submissions Received: At the investigation

Date of Determination: 5 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Kathryn Duffy, claims she was unjustifiably disadvantaged in her employment as her employer, Kindercare Learning Centres Limited, failed to provide rest and meal breaks.

[2] Kindercare refutes the claim on the grounds Ms Duffy was, or at least should have been, aware of her right to take breaks but chose not to.

Background

[3] Ms Duffy was engaged as a cook at Kindercare's premises in Sawyers Arms Road upon its opening in the middle of 2009.

[4] She says she was unaware of the statutory right to rest and meal breaks given she was a recent immigrant to New Zealand. She did not think about the issue as such rights are not mandated in her country of origin.

[5] The right to which she refers is granted by Part 6D of the Employment Relations Act 2000. Assuming a minimum number of hours are worked each day, the Act requires an employer *provide* employees with rest and meal breaks. Ms Duffy was entitled to two paid ten minute rest breaks and a 30 minute meal break.

[6] Just before her commencement, Ms Duffy signed an employment agreement. It makes no mention of rest and meal breaks though the accompanying letter advises *Your normal hours of work will be 8.00 am to 3.30 pm with a ½ hour unpaid lunch break, Monday to Friday.*

[7] The employment agreement, which is a form document, was subsequently revised for new starts. It now includes a provision that reads *You agree that rest and unpaid meal breaks shall be taken at times directed by the Centre Director* but the parties agree Ms Duffy was not aware of the amended version till after her cessation.

[8] On 29 June 2012 Ms Duffy tendered her resignation. That was followed by a lengthy meeting between Ms Duffy and Ms Tong, Kindercare's Area Manager. There is some disagreement about what was discussed and why, but that need not be investigated in order to determine this claim.

[9] Around the time of the meeting Ms Duffy became aware of Part 6D of the Act through her husband, Paul, who discovered it when perusing a Department of Labour website.

[10] A letter followed in which Ms Duffy advised Ms Tong of a *wish to raise a grievance regarding the following issues*. The first is no longer being pursued and, in relation to the second, Ms Duffy states:

My second issue that has only recently been brought to my attention is regarding paid breaks these being 10 minute morning and afternoon breaks, as at no point was i instructed by management that I was entitled to any of these, therefore I have only been taking one 30 minute break each day during my employment. This prompted me to check Kindercares legal obligation on The Department of Labour website and feel that Kindercare are in breach of the Health and Safety/Welfare Regulations.

[11] Ms Tong's response was dated 13 July 2012. Unfortunately it was sent to the wrong address and Ms Duffy did not receive it until after she sent a prompt in mid-September. In replying to question of breaks, Ms Tong says:

You are absolutely correct with respect to 10 minute breaks being a legal right of every employee. All of our teaching staff at Sawyers Arms Road have their 10 minute breaks each day and it is my understanding that no member of the team has been told that they cannot have a break. Some of our staff chose not to have a break but we do support staff who do wish to take their breaks. I don't think Kindercare has ever required staff to take breaks so this will be why you were not "instructed" to take breaks but you were free to have breaks if you chose to do so. I understand that from time to time you added extra time to your lunch breaks to take account of the 10 minute breaks that you had not used.

[12] Ms Duffy says she was aware teaching staff took breaks but was unaware the entitlement extended to the two non-teaching staff as the other non-teaching employee also failed to take breaks. As a result Ms Duffy neither questioned the possible anomaly nor pushed the issue.

[13] This last point raises the issue of a written statement from the other non-teaching employee appended to the statement in reply. It advises she was aware of her entitlement to a break but chose not to avail herself of it. It goes on to say:

In my opinion no one who works in this centre could have been in any doubt that they were entitled to and able to take these breaks if they so choose. We were definitely never encouraged to take these breaks, but neither were we actively discouraged from taking these breaks.

[14] A subsequent statement from the same employee dated 8 February 2013 advises she wished to resile from her earlier statement. She now claims she was discouraged from taking breaks and coerced into signing the earlier document which she alleges was written by another person. I take the allegation no further as the claim is denied by Ms Tong, the employee did not appear at the investigation to substantiate her claim and the issue need not be resolved in order to determine Ms Duffy's claim.

Determination

[15] Ms Tong does not deny Ms Duffy was entitled to the claimed breaks, nor does she deny they were not taken. The disagreement concerns Ms Duffy's knowledge of her entitlement and whether or not the failure to take breaks was voluntary.

[16] Ms Duffy claims she was unaware of the entitlement. Ms Tong is of the view that can not be correct. She says Ms Duffy would have seen those around her taking breaks but chose to ignore the fact and continued working. Ms Tong accepts Kindercare (or a representative thereof) would never have raised the issue and tried to persuade or instruct Ms Duffy to take breaks.

[17] The law is clear. An employer *must provide* breaks. The word *must* implies compulsion. To *provide* is to supply or furnish something. Here the duty to provide falls upon the employer.

[18] In my view, the employer must be proactive and ensure that which it is required to do is done. I do not accept the argument Ms Duffy should have known. I accept her evidence she didn't think about it given her background but, in any event, it is not enough for Kindercare to sit back and do nothing given the statutory obligation and this must be especially true when it has (albeit for employees other than Ms Duffy) taken for itself the right of specifying when the breaks are taken.

[19] Simply put, Kindercare has not ensured the provision of breaks. It is in breach of a duty imposed by the Act and as a result Ms Duffy has been deprived of a benefit. She must therefore have been disadvantaged. There is no real attempt to justify Kindercare's approach so I must conclude Ms Duffy has suffered an unjustified action resulting in disadvantage and therefore has a personal grievance as claimed.

[20] That conclusion leads to the question of remedies. The remedy sought is compensation in an unspecified amount, though mention was made of payment for the time that would otherwise have been spent on paid rest breaks as being an indicator of how much should be awarded.

[21] The normal way of addressing an anomaly such as this would have been through compliance or penalty actions but neither have been sought or addressed. As said earlier, the contended breach was addressed as a personal grievance claim and compensation sought therefore.

[22] Compensation in respect of a personal grievance is for hurt and humiliation. It is not recompense for the wages that may have been payable for rest breaks but, in any event, I conclude these would not have been payable. The time in question has already been paid. The issue is whether or not the activities undertaken during that time were appropriate.

[23] In respect of the hurt felt, Ms Duffy's evidence was sparse and suggests the bulk of her angst was caused by other factors and, in particular, her belief Kindercare ridiculed her claim by asserting she must have known about the entitlement. That said some hurt must emanate from having been the subject of an unjustified action and, having considered the evidence, I conclude a low award is warranted.

[24] I therefore order the respondent, Kindercare Learning Centres Limited, to pay the applicant, Ms Kathryn Duffy, the sum of \$750.00 pursuant to section 123 (1)(c)(i) of the Employment Relations Act.

Costs

[25] It is normal costs follow the event but Ms Duffy was unrepresented at the investigation and resides locally. That means recoverable costs are most likely limited to the Authority's filing fee.

[26] In order to avoid additional effort or expense, and given a costs award can be reviewed, I order Kindercare pay Ms Duffy a further \$71.56 as a contribution towards costs.

M B Loftus
Member of the Employment Relations Authority