

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 41
5329615

BETWEEN MICHELLE FAIRBAIRN
Applicant
A N D MILLIES LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Georgina Burness, Advocate for Applicant
Gregory Martin, Counsel for Respondent
Investigation Meeting: 7 February 2011 at Ashburton
Date of Determination: 22 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Fairbairn) was employed as a staff member in a bar facility in Ashburton called Millies operated by the respondent employer. On 4 September 2010, Millies premises sustained damage as a consequence of the first Christchurch earthquake. Work continued immediately after 4 September but on 15 September 2010 there was a staff meeting which Ms Fairbairn attended (along with her partner who was also a staff member). Millies indicated to staff that the bar would close until further notice.

[2] There is dispute between the parties as to exactly what Millies said to staff about their future as a business, but it is clear that Millies promised to continue paying staff in the immediate future. In making those payments to staff, Millies was relying on business interruption insurance to fund those wages payments.

[3] In fact, Ms Fairbairn was paid for eight weeks but was not required to work during that period.

[4] Then on 28 October 2010, Ms Fairbairn was told by Millies that the business could no longer afford to keep paying her and that she would cease employment with effect from 11 November 2010.

[5] Sometime later, the bar was able to reopen in the same premises after the landlord made temporary repairs to the damage sustained by the earthquake. Ms Fairbairn was not re-employed and it is common ground that she was the only former member of the full time staff who was not re-employed when the business reopened.

[6] Ms Fairbairn claims that she has a personal grievance by reason of either an unjustified dismissal or a disadvantage to her occasioned by unjustifiable actions of Millies. Millies resists those claims, contending that Ms Fairbairn was maintained in the employment for as long as Millies could afford it, but that once its funding ran out, it was unable to continue to pay her. It says that the temporary closure of the business for some three months caused a significant downturn which meant a reduction in staff after the business reopened.

Issues

[7] The Authority will need to determine what was communicated at the staff meeting on 15 September 2010 and then whether Millies behaved appropriately, both in declaring Ms Fairbairn redundant and in failing to re-employ her after the business was able to reopen.

What happened at the 15 September 2010 meeting?

[8] Mr Millichamp, the director of Millies, told me that he clearly expressed to staff at the 15 September meeting that he would *be doing his best to retain all staff in employment*. Another witness, Kirsty McGlynn, told me that it was she who asked the question about whether staff should be looking for other work and she told me that *the answer I heard was that we should start having a look around but there was insurance in place to cover our wages in the meantime*.

[9] Ms McGlynn's recollection of what Mr Millichamp said is consistent with his evidence too. While he agrees that he did refer to the existence of insurance cover, he says he told the staff they should look around for other jobs as that would be *in your best interests* but that they should keep him advised about their intentions.

Mr Millichamp was clear that at the time of the 15 September meeting, he was optimistic that he would be able to continue to pay all staff and that the business would reopen eventually, either in its current building (suitably repaired) or in new premises.

[10] Another witness, Ms Cunningham, remembers much the same exchange, indicated that Mr Millichamp told staff that it was in their best interests to look for work but that he was hopeful of keeping everybody in the employment.

[11] Conversely, Ms Fairbairn and her partner, Mr Bishop, both stoutly maintained that Mr Millichamp had said nothing of the sort and that he had in fact told them **not** to look for other work and that he indicated that he would let them know if the situation changed. Because Ms Fairbairn was never told by Mr Millichamp that *the situation had changed*, she was most surprised when, on 28 October 2010, Mr Millichamp gave her two weeks' notice of the cessation of her employment for redundancy.

[12] I have concluded that it is more rather than less likely that Millies told the staff to seek alternative employment if they could, but to keep Millies advised of their circumstances. I think it also more likely than not that Mr Millichamp did make it clear that he wanted to retain all staff, if at all possible, and that he had some funding in place to achieve that.

[13] However, even if Ms Fairbairn is right in her recollection that Mr Millichamp made no suggestion that she should look for alternative employment, that still does not make the subsequent redundancy unfair. I am absolutely satisfied on the evidence before the Authority that this was a genuine redundancy situation caused simply by Millies literally running out of money. In effect, it had paid Ms Fairbairn 10 weeks' wages for no work whatever in an effort to fulfil its obligations and in the hope that it would be able to restart its business. Mr Millichamp gave me evidence that he and his partner had used \$30,000 of savings to make continuing payments to staff which they hoped would be reimbursable under their business interruption insurance and that by the time the decision was taken to declare staff redundant at the end of October 2010, they had run through that money and were \$5,000 into overdraft. I accept that evidence at face value and record the Authority's observation that it would be difficult to find a more straightforward example of the obvious business imperative of declaring staff redundant, than this example.

[14] The Authority's conclusion then is that this was a genuine redundancy situation occasioned by the extinguishing of the employer's funds in circumstances where the employer's business had ceased trading, albeit temporarily.

Ought Millies to have re-employed Ms Fairbairn later?

[15] Some little time after Ms Fairbairn ceased her employment with Millies, Millies' landlord announced that the building premises in which Millies traded had been sufficiently repaired to enable Millies to commence operations again. There was little warning of this change in situation and Mr Millichamp told me in his evidence that he found out that the business could reopen the day before a story appeared in the *Ashburton Guardian* newspaper indicating that Millies was to reopen and in the same premises.

[16] Mr Millichamp freely admitted that Ms Fairbairn was the only member of the full time staff who was not re-employed. He told me some of her hours had disappeared and others were picked up by other staff, in particular himself and his partner. Mr Millichamp told me (and I accept) that as a consequence of the business being closed for fully three months because of the earthquake damage to its building, a significant chunk of revenue was lost because, in Mr Millichamp's own words, the time that Millies was closed was *just too long* and patrons had got out of the habit of going there or developed the habit of going to other similar premises.

[17] I am satisfied on the evidence that the decline in Millies' business was real, was occasioned by the lengthy closure, and that in consequence, it was not unreasonable for Millies to have to trim staff to meet the reduced demand for working hours. That the business chose not re-employ Ms Fairbairn is regrettable for her, but as a matter of law, is precisely the sort of decision that is within the preserve of the employer to make and that there is nothing unfair or unreasonable about Millies making that decision in this case.

[18] However, Ms Fairbairn raises another issue and contends that the real reason she was not re-employed was because there were allegations of theft as a servant made against her by Millies. Millies acknowledges that for about three weeks prior to the first Christchurch earthquake on 4 September 2010, it had been concerned about some anecdotal evidence that Ms Fairbairn was stealing from the business. Mr Millichamp told me that he watched the in-house cameras *quite regularly* but that

he did not find a lot of evidence. It is plain that he took no steps in respect of the theft allegation; he never raised it with Ms Fairbairn while she was in the employment and he readily conceded that he found no evidence that she was stealing from the business. However, there remained a suspicion in his mind.

[19] That suspicion seems to have crystallised in a text exchange with Mr Craig Bishop, Ms Fairbairn's partner, over the two days commencing 23 November 2010. Mr Bishop's evidence is that on those two days, a text exchange between him and Mr Millichamp (with whom up till then Mr Bishop had enjoyed good relationships), culminated in Mr Millichamp claiming that Ms Fairbairn was stealing from the business. Mr Bishop was naturally concerned by this allegation and obviously passed it on to his partner, Ms Fairbairn, who was equally concerned at the allegation, particularly as it had never been put to her during the employment and indeed, until the information was communicated to her by Mr Bishop, she had never even heard of the suggestion.

[20] Mr Millichamp says that he was *rattled* by the receipt of the personal grievance letter dated 22 November 2010 and that his revelation about the alleged theft in the text message to Mr Bishop was really a consequence of him *losing the plot*.

[21] I am inclined to accept that contention from Mr Millichamp as truthful, but it does not alter the fact that he, by letting his guard down, allowed himself to make a damaging allegation against Ms Fairbairn, for which, by his own admission, there is not a shred of evidence, and worse than that, again on his own evidence, he told his remaining staff about his concerns in that regard and he acknowledges that they may have talked to other people in the community.

[22] Certainly, Ms Fairbairn's evidence was that she remains unemployed and she feels certain that one of the reasons for that is the suggestion that she is a dishonest person which she hotly denies. She gave me very clear evidence which I accept that she did not take money, either directly or in kind, from the business and that she was a loyal and devoted employee.

Determination

[23] I am satisfied that Ms Fairbairn does not have a personal grievance for unjustified dismissal. I think the evidence is plain that this was a genuine redundancy

caused by the exigency of the business simply running out of money when, through no fault of its own, it was unable to trade.

[24] However, it seems to me equally apparent that Ms Fairbairn has suffered a disadvantage as a consequence of an unjustified action of her employer, Millies, in that Millies has allowed entirely unsubstantiated allegations about Ms Fairbairn to circulate in its small community. I am satisfied on the evidence before the Authority that Ms Fairbairn has suffered damage because of the circulation of rumours about her honesty and that the source of those rumours is her former employer, Millies.

[25] Having made those findings, I accept without reservation that Millies did not act in that way maliciously, but was caught off balance by the personal grievance allegation and reacted completely inappropriately. The irony of that situation is that, as the Authority's findings in the present make clear, Millies had no cause for concern about the claimed personal grievance as it was articulated in the letter of 22 November 2010. It is only its subsequent behaviour that has created any liability.

[26] Because I have found that a personal grievance has been proved by the applicant, I must, of necessity, turn to consider whether Ms Fairbairn has contributed in any way to the circumstances giving rise to the personal grievance. I am satisfied, on the evidence, that she has done nothing to contribute to those circumstances wherein she was unjustly accused (after the event) of being a dishonest employee. Ms Fairbairn never even had the opportunity to respond to such an allegation and found that it was being put about in the community after her dismissal for redundancy. In those circumstances, she cannot be held to have contributed in any way to the facts giving rise to the personal grievance.

[27] I take the unusual step in the present case of not making orders in this determination. I leave it to the parties' representatives to arrange between themselves a basis on which Millies can put right the injustice that I hold it has done to Ms Fairbairn. I am satisfied this is an appropriate way to deal with Ms Fairbairn's grievance and I leave it to the representatives to craft whatever arrangement they feel appropriately deals with their respective clients' needs, consistent with this finding of the Authority.

[28] In the event the parties are unable to reach an agreement in conformity with the immediately preceding paragraph of this determination, leave is reserved for either

party to revert to the Authority for orders. The attention of the parties is drawn to the fact that by force of statute, the orders that the Authority may make to remedy a personal grievance are more limited in scope than the agreements parties may reach between themselves.

[29] The Authority's expectation is that, if the parties are able to reach an accommodation with each other to resolve matters between them concerning remedy, the terms of that agreement will be confidential to the parties but both parties' representatives are to cooperate in advising the Authority that an agreement has been reached and I will then prepare and issue a short consent determination confirming that the agreement between the parties, the terms of which are private and confidential, represents the order of the Authority in relation to remedies.

Costs

[30] In the particular circumstances of this case, it seems to me appropriate to comment that both parties have been partially successful. It follows that either party could potentially make an application to the Authority for costs to be fixed in their favour.

[31] That being the position, the parties are encouraged to discuss the question of costs in their contact concerning remedies and to try to deal with both matters together. If that approach is not successful, then leave is reserved for either party to apply to the Authority for costs to be fixed. I note that as Ms Fairbairn is legally aided, the effect of the *exceptional circumstances* rule would need to be considered in any application for costs by Millies.

James Crichton
Member of the Employment Relations Authority