

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

**[2013] NZERA Auckland 92
5398797**

BETWEEN REBECCA JANE FINLAY
Applicant

A N D BLACKWOODS BAKERIES
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Keshila Fayen, Advocate for Applicant
Paul Whiteford, Advocate for Respondent

Investigation Meeting: 5 March 2013 at Auckland

Date of Determination: 19 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Finlay) alleges that she was unjustifiably dismissed. That contention is resisted by the respondent (Blackwoods Bakeries).

[2] Ms Finlay was employed by Blackwoods Bakeries as a salesperson from February 2010 until her dismissal on 12 July 2012. There was no written employment agreement, nor it seems were pay slips provided. Ms Finlay worked exclusively on Sundays at the farmers' market, Hamilton.

[3] Her evidence is that she was collected at approximately 5.30am each Sunday morning and she worked through until noon. The business had previously been owned by Ms Finlay's sister but in October of 2011, Paul Whiteford assumed full ownership.

[4] Ms Finlay says that the employment continued after Mr Whiteford took over the business and that from October 2011 when he assumed control down to April 2012, "*there was no change to my shift pattern or hours of work*".

[5] On 20 April 2012, Ms Finlay received a text message indicating that she was not required to work her usual shift on 22 April 2012. Ms Finlay acknowledged to the Authority that she had from time to time taken the odd Sunday off for personal reasons but could not recall a previous occasion when the employer had asked her not to attend at work.

[6] There was then a return to the normal arrangement for a short period and then on 3 May 2012, Mr Whiteford again texted Ms Finlay and asked her not to work. The 3 May 2012 text message says in part *“I have a new person we are training up, need to send to Hamilton this week, you can have a rest day”*.

[7] There then followed an exchange between Ms Finlay and Mr Whiteford in which she protested the change, pointing out she needed to work as she relied on her wages. His response was to indicate that he was in the process of training up new people and he needed to have the flexibility to do that.

[8] On 11 May 2012, Ms Finlay received another text message from Mr Whiteford in which he indicated that he was *“not going to have any work for you, for the next few weeks, once the new training is completed, we’ll be able to look at who we position at the different markets”*. Ms Finlay’s response a day later included the following observations:

I don’t think this has been handled very well. Have I done something wrong. Two and a half years I have done this job, and this is how I’m treated ... If you are giving me the boot, at least have the decency to call not text.

[9] Then, after being without work for a number of successive Sundays, Ms Finlay sent an email to Mr Whiteford on 26 May 2012. That email is in the following terms:

Paul [Mr Whiteford] I am sending you this email as you only want to text me, but not call. I would like to know where I stand, as your communication has stopped. As at this Sunday, it will be four weeks since I have worked. This is now six weeks in total that I have been stood down this year. I would like to know, since I have worked for the organisation for 2½ years, and have trained several staff members. Not once, have I been questioned or asked about my loyalty to the previous owners and/or to you, as the new owner. My question is, have I been let go, as this is what has been told to me, by several stall holders at the markets. Can you please clarify this for me? And if this is the case I would like to know, the reason why. I await your response. Signed Rebecca Finlay

[10] There was no immediate response to that email. A meeting was convened by Ms Finlay's advocate on 11 July 2012. Mr Whiteford attended. He had some documentation with him relating to alleged financial discrepancies in the sales figures for the Hamilton market. Ms Finlay's evidence is that she was not able, in the time available, to offer any explanation for the apparent discrepancies. Ms Finlay proposed that Mr Whiteford leave copies of the material with her and she would provide a detailed response. He declined to do that.

[11] By letter dated the following day, Blackwoods Bakeries dismissed Ms Finlay. That letter is in the following terms:

Dear Rebecca,

Further to our meeting on Wednesday 11 July 2012 in regard to our investigation into the sales figures at the Hamilton market not matching the amount of product sold.

As there has been no resolution to this matter we hereby have no alternative but to give you one week's notice of termination of your employment with our company from today's date.

We will also pay you your normal pay for this week in lieu of working on the next pay run.

[12] A personal grievance claim was promptly raised thereafter. In responding to the statement of problem, Blackwoods Bakeries indicated that the "*documentation with details of the missing money*" were in the hands of the Police "*who are currently investigating the matter*".

Issues

[13] The Authority needs to consider the following questions:

- (a) What type of employment was this;
- (b) Was Ms Finlay unjustifiably dismissed?

What type of employment was this?

[14] The Authority is satisfied on the evidence it heard that Ms Finlay was a permanent part time employee and not a casual employee as was maintained by Blackwoods Bakeries. The Authority takes this view because the evidence discloses that Ms Finlay worked regular shifts over a two year period and until the actions

initiated by Blackwoods Bakeries in April 2012, the evidence is that there were no Sundays not worked at the behest of the employer. Indeed, it seems that Ms Finlay worked every Sunday, over the same hours, until April 2012 unless she herself requested a day off for personal reasons.

[15] Given that casual employment is, by its very nature, a discrete engagement which is complete in itself, if Ms Finlay were employed on a casual basis, the Authority would have expected there to be either an irregular pattern of hours and days worked on an as and when required basis at the behest of the employer, or at the very least, evidence of the employer summoning Ms Finlay to work prior to each work period.

[16] There is no evidence that that sort of pattern existed and accordingly the Authority is satisfied that this was a permanent part time role. The importance of that conclusion, of course, is that it impacts on the extent of the employer's obligations on dismissal.

Was Ms Finlay unjustifiably dismissed?

[17] Notwithstanding Mr Whiteford's adamant assertion that he followed the process recommended to him by the Labour Department, the Authority has no hesitation in concluding that this disciplinary process did not conform with the requirements of New Zealand law.

[18] Mr Whiteford was very persuasive that he had been advised to take the steps he took, and that that advice came from an Information Officer of the Department of Labour. But the Authority observes that Information Officers are not allowed to "advise" clients; their role is exclusively to provide information. This is for the essentially practical reason that the Information Officer is presented with one side only of the dispute and then only the material that the client chooses to share.

[19] For this reason alone, the Authority is not persuaded that Mr Whiteford received advice from an Information Officer; the protocol is clear they are not permitted to give advice, just information.

[20] In the relevant Practice Note, the role of the Information Officer is to "...provide information to customers regarding the legislation administered by the Department (of Labour), any common law relating to the legislation, and any policy

lines as developed by the Department in relation to how the Department administer, interpret and enforce the legislation”.

[21] Further, the provision of information is defined as “...telling a customer, for example, what a particular Act provides, or the outcome of a leading case”. Information Officers should “..not make recommendations as to what customers should do...” and should never “...tell a customer to take a particular course of action”. Again, the Information Officers role “...does not extending to providing legal advice” and should focus on providing the customer “...with options rather than solutions”.

[22] In failing to take the suggestion that Mr Whiteford’s material be made available to Ms Finlay for her to study and respond to formally, Mr Whiteford fatally damaged his ability to defend his process. It would be self-evident that a person confronted for the first time with sales information showing a serious discrepancy would be shocked by the implied allegation of wrongdoing and would need some little time to consider and digest whatever material was available.

[23] In that regard, the Authority is absolutely satisfied with the evidence provided both by Ms Finlay and by her husband (who attended the 11 July 2012 meeting as well), that there was no reasonable opportunity at the meeting for Ms Finlay to consider the material which Mr Whiteford had, and respond to it appropriately.

[24] As it is, the dismissal is simply unfair because Ms Finlay has been given no opportunity to respond to the implication of serious criminal wrongdoing. The law is clear that the more serious the allegation an employer puts to an employee, the more careful must the employer’s process be in ensuring that the employee is given a proper opportunity to be heard: see for example the careful discussion on this point in *Allen v. Transpacific Industries Group Ltd* (Employment Court, Auckland, AC20/09, 4 May 2009, per Chief Judge Colgan).

[25] Of course, Blackwoods Bakeries says that the information available to it linked the discrepancy in its trading to the periods when Ms Finlay was working and that the reason it went through the process of removing her from various work periods was to, as it were, satisfy the hypothesis that she was the person responsible.

[26] But even on the basis of what may appear to be a prima facie case, the law still requires the employer to seek an explanation and there has been no genuine

opportunity for Ms Finlay to do that. There may very well be an explanation, but she, by the defective process adopted by the employer, has been deprived of the opportunity of advancing any such alternative explanation. If, as Chief Judge Goddard remarked in *Smith v. McCulloch & Partners*, (unreported) CC17/03, dishonesty is “*the most serious of all serious misconduct*”, it is apparent that employers have an enhanced duty to be scrupulously fair in investigating those sorts of allegations: *Allen*.

[27] As the Chief Judge remarked in *Allen* (paragraph 47): “*It was fundamental that the company could not allow its investigations only to fit the initial hypothesis of fraudulent employee conduct. It is important in such cases that the obligations on the employer to investigate and conclude fairly and dispassionately by reference to evidence, is not overborne by the apparent enormity and outrageousness of the suspicion. Although some employees act dishonestly and shamelessly towards their employers including by making fraudulent claims, the majority of employees do not do so. Employees are entitled in employment law to a presumption of innocence of such allegations unless and until there is probative evidence of a strength commensurate with the gravity of the allegation. The importance of open mindedness and preparedness to modify suspicions and even preliminary views cannot be over emphasised*”.

[28] Not only is the employer’s process defective in the fundamental way just described, but it is also defective in failing to comply with the obligations of good faith set out in s.4 of the Employment Relations Act 2000 (the Act). Although not pleaded, the Authority has no hesitation in concluding that Blackwoods Bakeries has failed to “*be active and constructive in establishing and maintaining a productive employment relationship ...*” by “*... among other things, [being] responsive and communicative*”: s.4(1A)(b) of the Act.

[29] While the need for some degree of secrecy is understandable in an investigation of financial irregularity, there is no excuse for the employer’s failure in this case to respond affirmatively to Ms Finlay’s request for information on 11 July 2012. Indeed, Ms Finlay has had to drag what little information is available from the employer without any attempt by the employer to fulfil the most basic of its obligations. There was a lengthy gap from the email of 26 May 2012 sent by Ms Finlay to the 11 July 2012 meeting during which period there was no engagement

at all from the employer. And the meeting on 11 July 2012 was a meeting convened by Ms Finlay and not by the employer. So again, she was forced to try to get to the bottom of what was going on without any proper collaboration from the employer.

Determination

[30] The Authority is satisfied that Ms Finlay has demonstrated satisfactorily that she has a personal grievance by reason of having been unjustifiably dismissed from her employment. She was obliquely accused of dishonesty while in the employment and was not given a proper opportunity to provide an explanation after considering the material which the employer had collected. After meeting with the employer on 11 July 2012 (a meeting convened by Ms Finlay) to try to get to the bottom of why she was getting no work, she was dismissed the very next day, apparently in reliance on her inability the previous day to provide an explanation for the allegedly missing money, without being given any proper opportunity to consider and evaluate the information that the employer had collected. Although not pleaded, the Authority thinks the employer is also guilty of a breach of good faith.

[31] The Authority is required to consider whether the successful employee has in any way contributed to the circumstances giving rise to her dismissal and has concluded that nothing Ms Finlay did contributed in any material particular to the circumstances of the dismissal. Indeed, as the Authority has already remarked, Ms Finlay took all proper steps to try to bring the matter to a head and obtain information from Blackwoods Bakeries which it seemed frankly unwilling to part with.

[32] To remedy Ms Finlay's grievance, the Authority determines that Blackwoods Bakeries is to pay her the sum of \$2,500 as compensation under s.123(1)(c)(i) of the Act. The Authority is satisfied on the evidence it heard of the humiliation, loss of dignity and injury to feelings that this dismissal has caused Ms Finlay.

[33] Ms Finlay also seeks reimbursement of the wages lost in the period from 20 April 2012 down to 13 July 2012 in the amount of \$1,538.70. The Authority is not minded to make an award in that regard; in the Authority's opinion, the reason that Ms Finlay was not working for those missed Sundays was because of the employer's legitimate inquiry into the financial discrepancies. The only way the employer could

investigate the matter was by changing the roster and accordingly the Authority is not satisfied that it would be just or equitable to make that award.

[34] Ms Finlay has found alternative work. She sensibly obtained that new employment during the lengthy period when she was not working for Blackwoods Bakeries and had heard nothing from them in respect to her future employment there. The fact that she obtained this employment before she was dismissed by Blackwoods Bakeries, means that her entitlement to lost wages could be commensurately reduced: s. 128 (2) of the Act. However, the Authority does have a discretion in sub section (3) to order payment of a sum greater than the strict application of sub section (2) might require.

[35] The work Ms Finlay performed for Blackwoods Bakeries was paid at the hourly rate of \$22 net whereas her new employment, admittedly over longer hours, is paid for at the rate of \$20 per hour gross. That latter figure nets down to \$17 per hour. On that basis then, the difference in effective hourly rate is \$5 per hour. Assuming the employment continued for the three months following the dismissal, Ms Finlay would have earned \$2077.24 net. In fact she earned more than that because of the extra hours worked. But she is entitled to be compensated for the loss in the hourly rate as if she worked the same hours as previously, but at the higher rate of pay. On this basis, Ms Finlay is entitled to be paid the difference in the hourly rates but over the hours she would have worked had she not been dismissed. That difference is \$470.74 net because, had she worked the same span of hours as required by Blackwoods Bakeries, but at the hourly rate paid by her new employer, she would have earned \$1606. 50 net. Blackwoods Bakeries are to pay to Ms Finlay the sum of \$550 gross as a contribution to wages lost as a consequence of the dismissal, in addition to the compensation figure already determined.

Costs

[36] Costs are reserved.

James Crichton
Member of the Employment Relations Authority