



New Zealand Employment Relations Authority Decisions

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Fitzpatrick v Mahaki Properties Limited (Wellington) [2011] NZERA 390; [2011] NZERA Wellington 108 (27 May 2011)

Last Updated: 24 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 108

5320912

BETWEEN

BARBARA FITZPATRICK Applicant

AND

MAHAKI PROPERTIES

LIMITED

Respondent

Member of Authority:

P R Stapp

Representatives:

Graeme Ogilvie for Applicant Anton and Natalya Price for Respondent

Investigation Meeting: 3 February 2011 at Wellington and 26 May 2011 at

Paraparaumu

Determination:

27 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application for unpaid wages and holiday pay. The pay claim relates to 6 days pay including 2 days' sick leave. Mahaki Properties Limited deny the claim. It does accept that a sum of holiday pay is owed after having its advisors check out Mrs Fitzpatrick's entitlement.

[2] Ms Fitzpatrick is seeking (as revised by 26 May 2011):

- a. \$720 for 6 days' pay including 2 days sick leave; and
- b. \$542.40 holiday pay

[3] The respondent denied any wages are owed because Ms Fitzpatrick did not attend work and walked out after giving notice, and claimed sick leave for the period of the notice. It also claimed that Mrs Fitzpatrick had an obligation to remain working when Natalya Price, one of the owners, had to go overseas, but there has been no counter claim by the respondent regarding these allegations.

Issues

[4] Was a week's notice from Ms Fitzpatrick reasonable notice and for her to base a claim for wages on?

[5] What date did Ms Fitzpatrick give Mr Price her written notice of resigning: 23 or 24 August 2010?

[6] Did Ms Fitzpatrick work on 23, 24, 25 and 26 August 2010 and was she entitled to sick leave on Friday 27 and Monday 30 August 2010? Alternatively, did she walk out beforehand?

[7] How much is the applicant owed?

[8] Which party is entitled to costs and how much?

The facts

[9] Ms Fitzpatrick commenced working for Mahaki Properties Limited trading as the Palms Cafe located at Paraparaumu, from 24 April 2009. There was no signed employment agreement. She was employed as the kitchen manager/cook. She was paid \$600 gross per week. She was not required to complete weekly timesheets like other employees because of her position and role. During her employment she took 4 weeks' annual leave in May 2010 for her first year of service, and 1 day's annual leave after that. Following her anniversary date she worked a further 17 weeks.

[10] Ms Fitzpatrick decided to look for another job. She says she telephoned the Department of Labour and was told that she would need to give a week's notice. In her first statement to the Authority she said that she gave this to Anton Price, director, on 23 August 2010. She subsequently changed this to 24 August 2010. She says Mr Price became angry and hostile and made her distressed and unwell. He denied that claim. She went to the doctor on Thursday 26 August, and was put off work for the rest of the week. She believed that her sick leave would cover the time off.

[11] Mrs Price left for overseas on Saturday 20 August until November 2010. It is common ground that Ms Fitzpatrick worked on Saturday 20 August.

[12] Mr Price says that Ms Fitzpatrick's last day at work was on Monday 23 August when she turned up and then left and did not fulfil a commitment and assurance she made to Mrs Price to look after and take care of the business during her absence overseas. He says she returned her uniform; keys and credit card and left a doctor's note to say she would not be fit for work for a week on Tuesday 24 August. He says that the remaining employees had to run the business on their own to cover for her and he had to find a replacement (that took 4 weeks), and the cafe had to close on several days. The business has since been sold. Mr and Mrs Price say that the cafe was a mess that week due to Ms Fitzpatrick resigning.

[13] Ms Fitzpatrick's claim is that she was not paid for 4 days that she worked on 23 (Monday), 24 (Tuesday) 25 (Wednesday) and Thursday 26 August and 2 days sick leave (Friday and Monday). Her daughter returned the credit card, uniform and keys, along with providing a medical certificate on Friday 27 August. She was not paid any holiday pay when she left, but discovered that she was paid \$211.20 without any details after she had left (October 2010).

Discussion

[14] Both parties have used the Department of Labour as an authority on their entitlements and rights. I am not at all persuaded by the reliability of what they are saying. Ms Fitzpatrick says the department told her that she needed to give a week's notice and Mr Price says he was told that Ms Fitzpatrick and her representative had no legal authority to demand anything! I do not rely on this as an authority because there is nothing in writing and I have absolutely no knowledge of what information either party put to the department to consider or indeed, what the department in fact advised. In any event there has been no counter claim from the respondent for this to be relevant to the current claim..

[15] Mr and Mrs Price have complained about Ms Fitzpatrick leaving because they relied on Ms Fitzpatrick to cover Mrs Price's overseas trip. There were 4 junior employees and 3 part timers who on their own were not expected to run the business while Mrs Price was away, and Mr Price had no idea of running a cafe.

[16] Reasonable notice must apply having regard to various considerations, in the absence of any agreed terms between the parties. These considerations include: the position held, the pay arrangements, the nature and the length of the employment, the industry and any other circumstances. Ms Fitzpatrick says there was no commitment made for her to cover for Mrs Price and indeed she did not find out about Mrs Price going overseas until late. At least one week's notice was the bare minimum that would have been reasonable because:

- a. There was no employment agreement.
- b. There was no certainty on any commitment regarding Mrs Price going overseas.

[17] The respondent now accepts after getting the holiday payments checked with its advisor that \$484.60 is owed to Ms Fitzpatrick. Because of the applicant's claim the issue on holiday pay is about the quantum.

[18] It is common ground that Ms Fitzpatrick gave notice in writing, which she intended to be a week. The fact that it was

expressed to end on 31 August but the claim has only been up to 30 August does not of its own mean that Ms Fitzpatrick is unreliable, except that she has taken some time to sort out the detail of her claim with some assistance from her advocate.

Determination

[19] I hold that Ms Fitzpatrick handed in her resignation on Tuesday 24 August. This is because:

- a. Her daughter verified typing the resignation.
- b. The resignation was typed on the daughter's computer at approximately 8 pm on 23 August.
- c. The daughter confirmed her mother taking in the resignation the next day, 24 August because her mother visited her later, upset about what happened after handing in the resignation.
- d. The daughter confirmed that she went into the cafe to check how Ms Fitzpatrick was on 25 August. This followed a visit from Ms Fitzpatrick to see her daughter the night before. Ms Fitzpatrick was upset.
- e. There was a meeting at the workplace between Mr Price and two workers over what would happen with Ms Fitzpatrick leaving. There was no witness to Mr Price being given the resignation letter on 23 August and no witness to him being given the credit card, uniform and keys on 24 August. This contrasts with the evidence of the baker/cook (summonsed by the respondent) who stated that he received a bag of "stuff (credit card, uniform and keys) from Ms Fitzpatrick's daughter on Friday morning 27 August when Ms Fitzpatrick was ill. This was consistent with Ms Fitzpatrick's and her daughter's evidence. The baker cook was trying his best to remember and be helpful without the advantage of any notes and any written statement of evidence.
- f. The baker/cook confirmed hearing that Ms Fitzpatrick had resigned after being asked to go in to work for the meeting on 24 August, but having regard to his evidence this does not prove that Ms Fitzpatrick was not at work as Mr Price claims.
- g. The dates of the medical records and medical certificate confirm Ms Fitzpatrick's appointment with the doctor on 26 August. This contradicts Mr Price's evidence.

[20] Ms Fitzpatrick worked at least on Monday 23 August 2010. It is more than likely she also worked on 24, 25 and 26 August 2010. This is because:

- a. There is inconsistent evidence from the two summonsed witnesses (baker/cook and customer) and one cafe employee who voluntarily appeared. First the voluntary witness (cafe employee) was not at work on Monday (timesheet) to know whether or not Ms Fitzpatrick was there. That person accepted she personally was not at work on the Monday. Second the baker/cook was not at work on Monday and Tuesday. He stated that if he was absent then Ms Fitzpatrick would bake and cook. He presumed she would have been there to do that. No one had any knowledge of anyone else that could cook. His evidence was persuasive.
- b. The cafe employee said that Ms Fitzpatrick was not at work at all during the week. She could not verify at least the Monday, I hold, especially since she was not at work that day herself. Her statement could not possibly be an accurate account of what she saw. Also her statement was prepared by Mr Price on the basis of what he knew and could determine from time sheets for her to repeat, although the witness genuinely believed the statement was accurate at the time. I cannot rely on it, I hold.
- c. The second employee (the baker/cook) proved to be a most reliable witness. He was certain that Ms Fitzpatrick was at work on 23, 24, 25 and 26 August, but he says that she left early on Wednesday 25 August at around 12 noon for what he thought was a doctor's appointment. Ms Fitzpatrick denied that, and says she worked all day. The medical documents support a later doctor's appointment. Thus the witness might have been wrong about this since he was trying to remember what happened some time ago.
- d. I hold that the baker/cook was reliable because he acknowledged difficulty in remembering precisely what happened and did not want to make anything up in answering questions to explain why he was saying that he could not recall the precise details. He had no written statement and his evidence needed to be led. His inability to be precise and recall the detail means that Ms Fitzpatrick likely did attend work during the afternoon because she was emphatic about being there. Also, she says she telephoned the doctor late Wednesday, and could only get an appointment on Thursday. The baker/cook's explanation to support his evidence that Ms Fitzpatrick was at work on 23 and 24 August was that if he was not at work then Ms Fitzpatrick would be required to bake. This is most probably consistent because no one else was known to be able to bake in both their absence. His evidence was entirely plausible. The late suggestion from Mr and Mrs Price that another employee could bake scones has been raised too late and without any sufficient corroboration for me to give it any weight.
- e. A customer summonsed (by the respondent) could not recall whether Ms Fitzpatrick was at work or not, despite being categorical that he did not see her at work during the week in a written statement. His evidence must be treated with caution because he conceded that he did not always go into the cafe on a Wednesday and only went in late afternoon. He also accepted that he had difficulties with his memory, and I am not satisfied that Mr Price was able to satisfactorily challenge that. The witness could not have possibly known if Ms Fitzpatrick was at work or not for all of the time during

- the week, which weakens his statement.
- f. Mr Price was not a regular attendee at the cafe. He relied on what he had been told by other witnesses (his written statements and statement in reply) that she was not at work. He never saw anything himself. However the evidence from the witnesses Mr Price referred to has proved to be not as decisive and entirely reliable to establish that Ms Fitzpatrick was not at work.
 - g. Mrs Price is saying what she has apparently been told by others without corroborating evidence. The summonsed witnesses have not helped to support her, I hold. Mrs Price was not present from 20 August to be able to refer to directly say what happened. I understand that Mrs Price felt let down and disappointed by Ms Fitzpatrick's decision to resign, but I have to set that to one side because what Mrs Price feels is not relevant, I hold.
 - h. Ms Fitzpatrick's evidence was backed up by the baker/cook who confirmed that she was at work at least on the Wednesday morning and Thursday.
 - i. Ms Fitzpatrick was not required to keep timesheets for proof of attendance.
 - j. Mr Price summonsed another employee who did not appear at the Authority's investigation meeting. There was no adequate proof of service by him, despite having somebody carry out the service of the summons and no fee for travel was paid.

[21] I am not satisfied that the respondent's evidence that Ms Fitzpatrick did not spend money on the business eftpos card for supplies at all during the week is sufficient on its own to make it probable that Ms Fitzpatrick was not at work that week. I hold that the buying of supplies was uncertain. Ms Fitzpatrick accepted she did not buy supplies that week, or use the eftpos card. The baker/cook informed me that if he needed supplies he would buy them with petty cash. They gave evidence of sufficient supplies being obtained by Mrs Price before she left, and that there were some deliveries of other supplies. Therefore, I am not satisfied that Mrs Fitzpatrick would not have been at work on the basis of her not using her eftpos card. Also, I am not satisfied about the daily supplies of shaved ham and fresh salads that the parties raised. Mrs Price was adamant that Ms Fitzpatrick would have needed to buy fresh supplies. This has not been entirely helpful in the absence of any certain evidence.

[22] Furthermore, I am not satisfied that Ms Fitzpatrick's changes in her evidence to quantify her claim on the days she says she was at work and her effective date for resigning mean that she has made things up, is unreliable and has set up the situation for her own gain, as claimed by the respondent.

[23] Ms Fitzpatrick's claim has been sufficiently consistent to be believable, I hold. During the same time the respondent has obtained information on quantifying the holiday pay and has accepted a sum is owed, albeit close to the applicant's claim.

[24] Therefore, I hold that Ms Fitzpatrick is entitled to be paid for 23, 24, 25 and 26 August.

[25] In the absence of any record keeping on sick leave I accept that Ms Fitzpatrick is entitled to 2 days sick leave on 27 August and 30 August 2010. I am satisfied that Ms Fitzpatrick went to the doctor. She provided proof of her visit, and this included obtaining a medical certificate provided at the time by the doctor. She went to the doctor in her own time in the evening. That was consistent with being put off work from Friday 27 August.

[26] Therefore, Ms Fitzpatrick is owed \$720 wages for six days. [27] Ms Fitzpatrick's holiday pay is \$542.40.

[28] This is a matter for costs. Costs follow the event because the applicant was successful. The applicant was represented and is entitled to a contribution to her costs for preparation and attendances. I am satisfied that she has incurred some costs for representation by using a professional advocate. The usual tariff applies because there is nothing exceptional or unusual about the Authority's investigation to justify full costs. A portion of the daily tariff arrangement is ample to contribute to Ms Fitzpatrick's costs. I award her \$1,000 costs for the two short investigation meetings required.

Orders of the Authority

[29] Mahaki Properties Limited is to pay Ms Fitzpatrick the sums of:

- a. \$720 wages.
- b. \$542.60 holiday pay.
- c. \$1,000 costs.

P R Stapp
Member of the Employment Relations Authority