

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 463
3153123

BETWEEN SOPHIE GRACE FORSYTH
Applicant

AND JOHN QUINN
Respondent

Member of Authority: Helen Doyle
Representatives: Sophie Forsyth in person
No appearance by the Respondent
Investigation Meeting: 23 August 2022 at Christchurch
Submissions Received: On the day
Date of Determination: 15 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sophie Forsyth was employed by John Quinn. She undertook work between late May 2021 and 29 July 2021.

[2] John Quinn operates The Lyttleton Arms Hotel (Lyttleton Arms) in the seaport town of Lyttleton.

[3] Ms Forsyth says that she was unjustifiably dismissed from her employment when she received a text message from Mr Quinn that stated as follows:

Hi Sophie the 90 day
trial is nearby up, so

we have decided to try someone else. Anne will pay you what you're owed.
Thanks john

[4] Ms Forsyth also alleged bullying, although in her evidence said that aspects of bullying were absorbed in the claim for unjustified dismissal because of the nature of the communications.

[5] Ms Forsyth seeks recovery of lost wages and an apology. The Authority explained that an apology was not a remedy it had jurisdiction to award. Ms Forsyth then asked at the investigation meeting for compensation. I will address that aspect if I get to the point of remedies.

[6] Mr Quinn lodged a statement in reply. He referred to several matters. I will set them out in some detail because there was no appearance by him at the Authority investigation meeting.

[7] Mr Quinn stated that Ms Forsyth had applied for five days of leave, but she took ten days. Further, that it was never Ms Forsyth's intention to stay at Lyttleton Arms and that was why leave had been granted and she had been paid for the first two shifts of that leave. He did not accept that there was bullying and referred to discussions with other staff about that. There was reference to Ms Forsyth refusing to resume her regular shifts when she returned from her leave and that any loss of wages was as a direct result of that refusal. He then referred to some issues with performance.

[8] In the statement in reply Mr Quinn stated he was "keen" for mediation and available for this. He agreed that his communication with Ms Forsyth should have been better and that she should have had an employment agreement. He was happy to apologise for these aspects but not about the bullying claims.

[9] Ms Forsyth said that Mr Quinn was not able to be contacted for mediation attendance and the matter returned to the Authority without mediation having taken place.

The investigative process

[10] Although Mr Quinn had lodged a statement in reply, he did not attend case management conferences or the investigation meeting on 23 August 2022. I am satisfied that he was

properly served at his address for service with all relevant documents including directions and notices of the investigation meeting.

[11] Mr Quinn did not advise of any reason why he did not attend. The Authority delayed the commencement of the investigation meeting for a short period of time. It then proceeded to hear evidence from Ms Forsyth in accordance with clause 12 of the Second Schedule of the Employment Relations Act 2000 (the Act).

The Issues

[12] The Authority needs to determine the following issues in this matter:

- (a) Was Ms Forsyth dismissed from her employment?
- (b) If Ms Forsyth was dismissed from her employment, then was the dismissal unjustified?
- (c) If the dismissal was unjustified then what remedies are available and are there issues of mitigation and contribution?

Was Ms Forsyth dismissed?

[13] Ms Forsyth wanted to undertake a course with the International Maritime Institute of New Zealand through the Nelson Marlborough Institute of Technology (NMIT) whilst working at Lyttleton Arms.

[14] The courses in basic training and seafarer security awareness would enable her in the future to work undertaking chef type duties at sea.

[15] I asked Ms Forsyth to provide me with the exact dates of the course. Ms Forsyth duly provided a copy of certificates that confirmed that the course was held from 29 July 2021 to 11 August 2021 and that she had successfully completed the training course during that period.

[16] Ms Forsyth raised the issue of leave for this period with Mr Quinn. He confirms in his statement in reply that he authorised leave, however, for a shorter period than the length of the course.

[17] I am satisfied that Ms Forsyth obtained authorisation from Mr Quinn before 29 July 2021 for leave so she could undertake the course. It is not necessary to determine what amount of leave Mr Quinn authorised for Ms Forsyth. That is because the text message that was sent by Mr Quinn that Ms Forsyth regards as dismissing her was sent on the first day of the course, which was 29 July 2021. As Ms Forsyth observed during her evidence, if Mr Quinn considered he had only authorised five days leave then communication after the end of the fifth leave day could have been expected.

[18] The statement in reply suggests that it was Ms Forsyth's refusal to work shifts that caused the relationship to end. Whilst there were some text exchanges after 29 July 2021 between Ms Forsyth and Mr Quinn about what had happened, the relationship never resumed. It is clear from the text messages that Ms Forsyth regarded the text message sent on 29 July 2021 as a dismissal. None of the text messages from Mr Quinn support a commitment to reinstate Ms Forsyth's employment.

[19] It has been observed by the Court of Appeal that dismissal is a word with a wide meaning and includes a "sending apart" and a "sending away".¹

[20] I find that the content of the text message sent on 29 July 2021 by Mr Quinn was clear. It was that the 90-day trial period was almost up. Mr Quinn wanted to try someone new in the role and Ms Forsyth would be paid what she was owed. It was a sending apart.

[21] The employment relationship between Ms Forsyth and Mr Quinn ended by way of dismissal on 29 July 2021.

If Ms Forsyth was dismissed from her employment, then was the dismissal unjustified?

[22] The provision in s 67A of the Act that sets out conditions under which an employment agreement may provide for a trial period of 90 days or less, this does not apply to Ms Forsyth's employment. A trial period is defined in s 67A(2) of the Act as a written provision in an employment agreement. There was no written employment agreement. The basis on which Ms Forsyth's employment was ended because her 90-day trial was coming to an end was fundamentally flawed.

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 973.

[23] When the Authority is asked to consider the justification of dismissal, it is required to apply the test of justification in s 103A of the Act. In doing so it objectively assesses whether the employer's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. Procedural fairness factors are set out in s 103A (3) (a) – (d) of the Act. These require that the Authority must consider whether any allegations against the employee were sufficiently investigated, whether concerns were raised, whether the employee had a reasonable opportunity to respond to the concerns and whether the response was genuinely considered.

[24] The Authority must not determine a dismissal or an action to be unjustified if the defects in the process were minor and did not result in the employee being treated unfairly.

[25] I do not find when objectively assessed that the substantive basis for the dismissal other than the trial period was clear. The dismissal was without any procedural fairness. The defects were significant and resulted in unfairness.

[26] The dismissal was unjustified. It was not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. Ms Forsyth has made out her grievance that her dismissal was unjustified and is entitled to an assessment of remedies.

Remedies

Should a late amendment to remedies be granted?

[27] I have considered Ms Forsyth's application for a late amendment to remedies to include a claim for compensation. In the statement in reply Mr Quinn commented about the remedies claimed in the statement of problem. I consider it would be prejudicial to Mr Quinn for an amendment to be permitted at this late stage. He would have no right of reply and it would be a different claim to that which he replied to.

[28] I do not allow a late amendment to include a claim for compensation. That leaves the remedy of reimbursement of lost wages to consider.

Lost wages

[29] Ms Forsyth was dismissed on 29 July 2021. She would not have been available to return to work at the Lyttleton Arms until after 11 August 2021, a Wednesday. The period of

leave was to be unpaid. Mr Quinn said that he paid for two shifts over that leave even though Ms Forsyth did not work.

[30] Section 128 of the Act applies to reimbursement when the Authority determines that an employee has a personal grievance and has lost remuneration as a result.

[31] Section 128(2) provides that the Authority must whether it provides for any of the other remedies in s 123 order the employer to pay the lesser of a sum equal to lost remuneration or 3 months ordinary time remuneration.

[32] Ms Forsyth provided all her payslips except for the one for the week 28 June to 4 July 2021. I have the summary of income from the Inland Revenue Department (IRD) for 1 April 2021 to 31 March 2022. From that I have been able to assess Ms Forsyth's gross earnings and hours for the week for which there is no payslip. I have done this by adding the gross pay from the payslips I have. I then subtracted the holiday pay amount from the IRD gross earnings. The difference in the gross pay at that stage from the payslips is what Ms Forsyth would have received for the week for which there is no payslip. I have calculated for the period of her employment excluding the first week Ms Forsyth averaged 27.30 hours per week over eight weeks of employment. Ms Forsyth was paid \$24 per hour. 27.30 hours multiplied by \$24 per hour is \$655.20 gross per week.

[33] A loss of 13 weeks income is \$8,517.60 gross.

[34] I have then considered whether Ms Forsyth's actual loss was less than that amount. The IRD summary reflects attempts to mitigate, and some income received. Earnings from 1 September 2021 to 30 November are shown as \$1,882.04 from one employer and from another from 1 November 2021 to 31 January 2022 as \$1,898.37. Over December 2021 earnings were received of \$3,394.00 from one employer and \$160 from another. There were no significant earnings in January beyond that referred to above for the period worked for an employer from November 2021. In February 2022 Ms Forsyth obtained her current job and there is no discernible loss thereafter. I have not as is the practice in the Authority and Employment Court taken benefits received into account. That is a matter between Ms Forsyth and the Ministry of Social Development.

[35] Total earnings over the six-month period from 29 July 2021 to 1 February 2022 for Ms Forsyth were \$7574.41. I have included in that payment for ten hours that Mr Quinn said was

made for shifts not worked whilst Ms Forsyth was on leave. Had Ms Forsyth not been unjustifiably dismissed she would have received \$17,035.22 adjusted by two weeks for unpaid leave for the course by \$1,310.40. The final figure taking that amount off is \$15,724.82 gross. From that I have taken earnings of \$7,574.41. That leaves a total of \$8150.40.

[36] Actual loss is less than three months ordinary time remuneration. I do not conclude that the employment relationship with Lyttleton Arms would not have continued for some months after the unpaid leave. The amount, subject to any issues as to contribution that Ms Forsyth is entitled to for reimbursement of lost wages is the sum of \$8,150.40 gross.

Contribution

[37] The Authority must if it determines an employee has a personal grievance, consider if the employee contributed towards the situation that gave rise to the personal grievance.

[38] I do not find that there was any causal link established between any conduct of Ms Forsyth and the situation that gave rise to the personal grievance.

[39] There is to be no reduction of the lost wages award for reason of contribution.

Costs

[40] Ms Forsyth was not represented so there is no issue of costs. She is entitled to reimbursement of her filing fee of \$71.56.

Orders made

[41] I order John Quinn to pay to Sophie Forsyth the sum of \$8,150.40 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[42] I order John Quinn to pay to Sophie Forsyth the sum of \$71.56 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority