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Fox v Fritzams Limited (Wellington) [2016] NZERA 586; [2016] NZERA Wellington 146 (1 December 2016)

Last Updated: 13 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2016] NZERA Wellington 146
5637949

BETWEEN CHASE KURDT FOX Applicant

AND FRITZAMS LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person

No appearance by Respondent

Investigation Meeting: 1 December 2016

Determination: 1 December 2016

ORAL DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Chase Fox claims to have been unjustifiably dismissed by the respondent, FritzAMS Limited (FritzAMS). Mr Fox was employed by FritzAMS in September

2015 and was originally based in Auckland. In February 2016 he relocated to

Wellington and signed a new employment agreement with FritzAMS.

[2] Mr Fox, whose role was shop assistant, claims the sole director of FritzAMS, Fritz Edmond Petersen, informed him on 20 June 2016 that the store in which he worked was to close and that he was “*out of a job*”. Mr Fox claims he received no wages for his last week of work. He says the termination of his employment was unjustifiable both procedurally and substantively.

[3] He seeks payment of unpaid wages for his last week of work. Additionally he seeks payment in lieu of notice in accordance with his employment agreement, compensation for the hurt, humiliation, loss of dignity and injury to feelings he suffered, and three months lost wages in accordance with s.128 of the Employment

Relations Act 2000 (the Act).

[4] FritzAMS is an adult shop operator according to information voluntarily provided on the New Zealand Companies Office register. It has not lodged a statement in reply in the Authority. Nor has Mr Petersen responded to correspondence sent to him at the company’s registered address. FritzAMS’ view of Mr Fox’s claims is therefore unknown.

The Authority's investigation

[5] The respondent did not attend the Authority's investigation meeting. I am satisfied documents relating to this matter were correctly served on the respondent. An Authority Officer contacted Mr Peterson by telephone shortly after 9.30 a.m. on the day of the investigation meeting to inquire whether he intended to attend and he confirmed he did not intend to do so. I commenced the investigation meeting without the respondent in accordance with clause 12 of Schedule 2 to the [Employment Relations Act 2000](#) (the Act).

The employment agreement and Mr Fox's evidence

[6] Mr Fox provided an unsigned copy of the later of the two individual employment agreements (IEA) he entered into with FritzAMS. This recorded his commencement date as 22 February 2016. It stated his position as shop assistant at "*D.VICE.....Wellington and at other locations as per clause 4 hereof*". Clause 4 provided that his usual place of work would be a shop at a specified location but that he may be required from time to time to work at Trade Fairs or other D.VICE retail outlets or other locations as required by the employer.

[7] Another term of the IEA was that Mr Fox would be paid at the rate of \$15 per hour. Shortly after the IEA was agreed, the minimum wage increased to \$15.25 per hour from 1 April 2016. Although the IEA was not varied in writing, Mr Fox said his pay was increased accordingly from that date.

[8] The IEA recorded that Mr Fox was employed to perform duties on a part-time basis, being 33.5 hours per week. The hours of work clause provided for some flexibility. It is Mr Fox's evidence that he was employed in a full-time capacity

working at least 33.5 hours a week and often more due to covering shifts at another store owned by FritzAMS.

[9] The termination provision of the employment agreement provided for four weeks' notice by either party¹. At the employer's discretion, wages could be paid in lieu of some or all of the notice period. The redundancy provision of the employment agreement stated the employer would follow a fair procedure including consultation and exploration of alternative options before terminating the employee's employment.

[10] While there was no compensation provided for redundancy, the redundancy clause stated that the employer would give not less than the (four weeks') notice specified in the termination clause. Again it provided the employer could, at its discretion, pay wages in lieu of some or all of the notice period.

[11] On 20 June 2016 Mr Fox said he received a phone call, while working at the store, from the manager of an Auckland D.VICE store. She told Mr Fox the previous owners of the business had presented legal documents and were going to arrive and repossess stock with D.VICE branding. She told Mr Fox to cooperate with this process.

[12] It was Mr Fox's evidence he did as he had been instructed to do by a senior staff member whom he described "*as close to a manager as the store had beyond me*". An hour later Mr Fox said Mr Petersen arrived, told him the store was going to close, took Mr Fox's keys and told he was "*out of a job*". Mr Fox left the store. He said he assumed he had been made redundant.

[13] Three days later, on 23 June, Mr Fox realised he had not received any pay. He not received either his normal pay for the last week he had worked, or the four weeks' wages that were due to him under his employment agreement. He said, when he noticed the store was open later that day, he called in to see if he could glean any information. A staff member whom he knew, told him the store was to remain open and that she, and all other staff of the Wellington store except for Mr Fox, had been paid their wages.

[14] Mr Fox said he then emailed Mr Petersen informing him he had not been paid and noting there were no legal grounds for withholding his pay. Mr Fox put Mr

¹ A shorter period of notice was required during the initial probationary period, but this is not relevant to Mr Fox's employment.

Petersen on notice that he would be taking legal action if he did not see his wages by the end of that week. He also put Mr Petersen on notice that he was likely to pursue legal action regarding his unfair dismissal.

[15] On 30 June 2016 Mr Fox raised a personal grievance for unjustified dismissal with FritzAMS by way of an emailed letter to Mr Petersen. He subsequently contacted FritzAMS' accountant setting out the wages he was owed and the periods for which they were due. He also claimed his contractual entitlement to four weeks' pay in lieu of notice and to outstanding holiday pay owing to him. Mr Fox says he has received no response to any correspondence sent to either Mr Petersen or his accountant.

[16] Mr Fox gave evidence, which I accept, of his distress at the loss of his employment and the means by which it had been effected. He spoke also about the financial embarrassment he had faced with the abrupt cessation of his remuneration and the stress this had caused him. He also gave evidence of his efforts to find alternative employment which he eventually did

from 7 September 2016. I accept he attempted to mitigate his loss by seeking work within days of losing his employment with FritzAMS.

Legal principles

[17] The test for whether a dismissal is justifiable is to be applied on an objective basis. The test, which is specified in the Act, is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.²

Determination

[18] As FritzAMS decided not to participate in the Authority's process I have no evidence of how it views its actions in relation to Mr Fox's termination of employment. I accept Mr Fox's version of events and find there to have been a complete failure to apply even the rudiments of a fair process. There was no advance warning his dismissal was likely to occur, and Mr Fox was given no information by

his employer about the situation it was facing.

2 Section 103A

[19] The limited information he received came from a manager in the Auckland store and was accompanied by an instruction to cooperate with the former owners who were reclaiming their branded stock. When Mr Petersen arrived at the store in which Mr Fox was employed, the information he imparted to Mr Fox was brief and brutal. The employer made no attempt to engage with Mr Fox over the termination of his employment or the payment of his outstanding wages and contractual entitlements.

[20] With regard to the substantive reason for Mr Fox's dismissal, the only evidence before me, apart from the very limited second-hand information given to Mr Fox, has come from another former employee of FritzAMS. This was in relation to her own claims for arrears of wages and may be relevant to the reason for effecting the termination of Mr Fox's employment, although it provides no explanation for the manner in which it was carried out.

[21] The other employee, Tania Gibbons, whose claims I heard on the same day as Mr Fox's claims, presented a signed letter from Mr Petersen headed "*Termination of your employment by reason of redundancy*". The letter referred to conflict between the former and current owners of the business, and the seizing of property, which resulted in that employee's position being no longer needed.

[22] Mr Fox was, until the day of the investigation meeting, unaware his former colleague had received this letter and it did not form part of the evidence he presented. I cannot ignore its existence, having had it drawn to my attention and have accordingly considered the contents of the letter.

[23] I have also taken into account, however, the evidence Mr Fox gave, which I accept, regarding other colleagues from the Wellington store retaining their positions with FritzAMS at least in the period immediately following his own dismissal. That evidence was corroborated by Ms Gibbons who said Mr Fox was the only person whose employment was terminated on 20 June 2016. This leads me to conclude there are differences between Ms Gibbons' position and Mr Fox's. It does not necessarily follow that, because Ms Gibbons was informed her position of Party Manager was made redundant, Mr Fox's position of shop assistant was similarly redundant.

[24] That view is supported by oral evidence from Ms Gibbons and Mr Fox that FritzAMS continued to operate the shop under recent weeks, albeit under a different name. On that basis I have insufficient information to conclude that Mr Fox's position was redundant at the time his dismissal was effected and I do not do so. I find he was dismissed unjustifiably, both procedurally and substantively.

Remedies

[25] Mr Fox seeks compensation of \$7,000 for the hurt and humiliation he suffered, pursuant to s. 123(1)(c)(i) of the Act. I am satisfied from his oral evidence he was significantly affected by the abrupt loss of his employment, both financially and emotionally. I find \$7,000 to be appropriate compensation in the circumstances.

[26] I am also satisfied Mr Fox attempted to mitigate his loss by seeking alternative employment although he was not successful until 7 September 2016. I award him lost wages from the date of his dismissal to the date he commenced his current employment in accordance with s.128 of the Act.

[27] I am obliged to consider whether Mr Fox contributed to the situation that led to his personal grievance and I find he did not contribute to the situation in any way.

[28] I find he is owed wages for the last week of his employment and holiday pay owing to him at that time.

Orders

[29] FritzAMS Ltd is ordered to pay the following sums to Mr Fox:

(a) wage arrears of \$640.50 for the week to 17 June 2016 plus four hours on 20 June 2016;

(b) unpaid holiday pay owing at termination of employment of

\$751.67;

(c) pay in lieu of notice of \$2,028.25, in accordance with his contractual entitlement;

(d) lost earnings of \$6,591.81; and

(e) compensation of \$7,000 (without deduction) under s.

123(1)(c)(i) of the Act.

[30] The sums awarded in (a)(to (d) above are subject to the deduction of tax.

Costs

[31] Mr Fox represented himself and accordingly there is no issue as to legal costs. However he is entitled to the payment of the Authority's filing fee. FritzAMS Limited is ordered to reimburse Mr Fox \$71.56.

Trish MacKinnon

Member of the Employment Relations Authority

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