

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 123/08
5117205

BETWEEN JODI HARDING
 Applicant

AND WAIKANAЕ LOTTO &
 BOOKS (2007) LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Ross Jamieson for the Applicant
 Graeme Gowland for the Respondent

Investigation Meeting: 5 August 2008 at Wellington

Submissions Received by: 21 August 2008

Determination: 17 September 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant has alleged she was unjustifiably dismissed. She has claimed \$2,376.88 reimbursement of lost wages, and \$12,500 compensation for hurt, humiliation and loss of dignity. She is also seeking costs.

[2] The respondent denied that the applicant was dismissed and contended that it was expected that she would return to work when her health had recovered.

The Facts

[3] The applicant commenced her employment at Waikanae Lotto & Books (2007) Limited (the employer) on 9 August 2007. She was employed as a floor manager, and although she was given an individual employment agreement; it was not signed off by

the parties. She was paid \$13.55 per hour to work 42.5 hours per week on roster including weekends. She reported to Mr Steven Avery, the business's owner.

[4] On Sunday, 17 February 2008, Ms Harding arrived unannounced at Mr Avery's home and informed him that she was going to take time off work from the following Monday so she could return to work "bubbly". This annoyed Mr Avery and he told her that he considered that she was being selfish and inconsiderate to other staff and they would have to cover for her. Ms Harding then drove off.

[5] Mr Avery then sent a text to Ms Harding telling her that "*if you are not at work 2morro I will deduct moneys owed 4 loan frm ths wk's pay ... because I have no way of knowing if u will b back.*" Ms Harding replied: "*I will b bk, if I dn't shw Wednesday my final pay wil b more than enuf.*" Mr Avery then answered the text with the following: "*U r finished ... I have had enough ... consider yr employment terminated due 3 customer complaints in 6 months.*"

[6] Mr Avery says he then got advice from his sister that he could not dismiss Ms Harding like that and he would have to treat the matter sensitively.

[7] On Monday, 18 February 2008, Ms Harding went to work in her uniform because she says she wanted to ensure that she was paid because she needed the money.

[8] She arrived at the car park and met Mr Avery. She says Mr Avery was surprised to see her and swore at her. They have a different opinion over what was said by each other, but it is common ground that they moved to the office. Ms Harding says that Mr Avery was then abusive and confirmed her dismissal and told her that he had received complaints about her and did not provide the detail. He denied that. He says the discussion turned to the amount of time she wanted off work. Mr Avery says that he told her to get a doctor's certificate because he could not get a commitment from her about returning to work. Nevertheless Mr Avery never undid his action of dismissing Ms Harding by email in writing. I find that a genuine and fair and reasonable employer would have done so, especially given that Mr Avery dismissed her by text.

[9] Ms Harding left and says that she first went to her mother's and got some advice in regard to what to do, and then decided to iron her shirts (uniform), and return them to Mr Avery.

[10] Also, on 18 February 2008 Ms Harding went to the doctor and he provided a medical certificate that she was *“too unwell to return to work this week. I am putting her on stress leave and will reassess her next Monday to see if she is fit to return.”*

[11] Mr Avery says that when she returned to work with her uniforms, she made a request for a letter for WINZ and her personal file, and he told her to keep her uniforms. He says there was no problem or any reason to provide her with a letter and personal file. Ms Harding left and did not return to work.

[12] On 20 February, Mr Avery wrote to Ms Harding in the following terms:

20 February 2008

Dear Jodi,

Thank you for faxing me the Doctor’s Certificate confirming you are off work until his re-assessment on Monday 25 February 2008. I trust you are feeling better, wish you a speedy recovery and hope to see you back to work as soon as you are fit and able.

Jodi I would like to apologise for my abrupt manner, and the way I handled the situation when you came to me asking me for a few days off due your personal situation. We all have our problems and pressures.

As you are aware, I am new to retail, and this is the first year for me in Take Note Waikanae, I find the pressure immense. I think we are all pretty tired (including myself) after what has been a hectic few months in which we successfully got through the Christmas and back to school period. Your help in these months was appreciated.

I hope everything goes well for you on Monday and look forward to hearing from you in the near future.

[13] On 26 February 2008, Ms Harding visited the doctor again and he certified that she was *“too unwell to return to work. I am putting her on stress leave for another two weeks and will reassess her then.”*

[14] On 27 February Ms Harding consulted a lawyer who on her behalf raised a personal grievance in a letter dated 27 February 2008. There was no response to this letter because, between the parties’ representatives, agreement was reached for the parties to attend mediation. Following the mediation, Ms Harding did not return to work.

[15] This matter has further escalated because of the credibility dispute between Ms Harding and Mr Avery, and because of a witness statement provided by a supervisor at the Waikanae Lotto & Bookshop who has been critical of Ms Harding’s language at work, matters that Ms Harding raised with her at work and Ms Harding’s

inter-relationships with staff at work. The supervisor says that Ms Harding was not a pleasant person to work with and Ms Harding asked the staff to lie for her. Ms Harding denied that and says that the comment about lying needs to be considered in context that she says involved her not wanting to deal with personal matters at work, when people telephoned to speak to her at work.

[16] Ms Harding told me she had an in-confidence discussion on some personal matters with the supervisor, and that she has been let down by that person breaching their confidence.

[17] These are sensitive matters and as a matter of caution I have suppressed para.7 of the supervisor's brief of evidence. There is no necessity for me to go into the details, except to say there were other matters in Ms Harding's life at the time. In any event I hold that the actual matters do not need to be published, but note that Ms Harding accepted she had an in confidence discussion with the supervisor in late October 2007 on personal matters in her life. They are only relevant if I find in her favour and that there was a causal link to how she felt at the time of what she claims was her dismissal.

[18] Ms Harding was supported by April Garlick and Janet Harman, a family friend and an aunt respectively, to support her and tell the Authority of the impact of the matter on Ms Harding. They say that Ms Harding became withdrawn and was different to her normal self because of her work problems. Ms Harman also said that Ms Harding's break up with her boyfriend had contributed to her emotional upset.

Determination

[19] Mr Avery's action of terminating Ms Harding's employment by text on 17 February was wrong. It was not the action of a fair and reasonable employer.

[20] Was Ms Harding's dismissal of 17 February confirmed by Mr Avery on 18 February? Mr Avery says he believed Ms Harding would return to work because:

- a. He has relied upon the advice he says he received from his sister to treat the matter sensitively, thus to try and recover the situation.
- b. Ms Harding obtained medical certificates to take time off work.
- c. His letter dated 20 February suggested she accepted returning to work.

[21] Ms Harding says she only returned to work to ensure that she got paid, but believed she remained dismissed. Mr Avery had no corroborating evidence of any conversation with his sister to treat the matter sensitively and has not been able to contradict Ms Harding's allegations about their meeting in his office. He did not initiate any action to recover the situation before Ms Harding turned up to work in the car park. Indeed she gave no commitment after receiving the text that she would return to work. Indeed it is likely her return surprised him.

[22] The medical certificates contradict Ms Harding's evidence that Mr Avery confirmed her dismissal because the certificates imply she was working when she was given time off work by her doctor for two weeks. I accept that it is plausible she obtained the medical certificates to get paid because she genuinely thought Mr Avery would not pay her unless she returned to work.

[23] Mr Avery has relied on his letter dated 20 February to confirm his belief that Ms Harding would return to work. That letter could be construed as an attempt to recover the situation of his making, especially since there were no witnesses to the conversation in the office. Indeed he had time after he says he spoke to his sister and before 20 February to unequivocally retract his action, but failed to do so properly, I hold.

[24] Ms Harding's version was put in writing by her representative on 27 February. She referred, in the Authority's investigation meeting for the first time, to some notes she says she wrote up afterwards, but did not produce them to support her version. If she wanted to rely upon her notes to verify what Mr Avery said to her, she had more than a reasonable opportunity to produce the notes. Similarly Mr Avery did not call the employee whom he says might have overheard the conversation in the office. He did not know if that employee heard anything anyway.

[25] What has happened is that Mr Avery and Ms Harding were not able to sort out in a meaningful way what they each wanted following her dismissal on 17 February and during their meeting on 18 February. Since Mr Avery initiated the dismissal by text he has to take responsibility for making Ms Harding's employment less secure.

[26] I conclude that Mr Avery acted unjustifiably by dismissing Ms Harding by text. If he considered she had agreed to return to work, and was to provide him with a medical certificate to take time off and to return to work when she had recovered, he

has not been able to satisfy me that he properly recovered the situation. Ms Harding was adamant that Mr Avery had confirmed her dismissal, but unfortunately there were no witnesses. Where Mr Avery dismissed Ms Harding by text, and knowing it was wrong, a fair and reasonable employer would have retracted it in writing unequivocally. Mr Avery's action disadvantaged Ms Harding in her employment when she left work on 18 February without a clear indication that he wanted her to return to work before he sent his letter dated 20 February, when he attempted to retract the situation, unsatisfactorily, I hold. That letter was not satisfactory to retract and recover the situation for him, I hold, because it clearly did not convey any mutual understanding of the situation. Mr Avery's action of dismissing Ms Harding by text was sufficient for Ms Harding to believe her employment was at an end and was certainly less secure. Thus, Ms Harding has a personal grievance, I hold.

The Remedies

[27] Ms Harding is seeking lost wages. The applicant was sick at least until 11 March 2008. She obtained a new job and commenced on 1 April 2008. It is unclear that her sickness was totally attributable to her employer's actions given she wanted time off for an unrelated reason on 17 February. The applicant looked for alternative work and was successful. But for the respondent's actions I am satisfied the applicant would have been available to work after her sick leave (11 March 2008) given that she was looking for other work and obtained a new job. There was no contributory fault.

[28] I determine that her lost wages amounts to \$1,234.01 for two weeks and one day from the end of her sick leave until she started her new job

[29] Ms Harding has claimed compensation for humiliation loss of dignity and injury to feelings. The claim is affected by at least one matter in her life involving the break up of a personal relationship that has also had some impact on her and at the time of her dismissal. I have not taken into account the matters raised by the supervisor because of the time that had expired between that conversation in October 2007 and the incident on 18 February. The doctor's information is sufficient proof that he was consulted by Ms Harding and not proof that there was any medical impact attributable to her employment given other matters in her life. Given the absence of any witnesses on 18 February I am not satisfied that there was any other action attributed to Mr Avery that has a casual link to the impact of the matter on Ms Harding. The claim warrants \$3,000.

[30] In conclusion Waikanae Lotto & Books (2007) Limited is required to pay Jodi Harding:

- a. \$1,234.01 lost wages
- b. \$3,000 compensation

[31] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority