

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Paula Hardy (Applicant)
AND Scoopy's Ice Cream Parlour (Whangarei) Limited (Respondent)
REPRESENTATIVES Timothy Oldfield, Advocate for Applicant
Alan Heward, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 30 January 2007
DATE OF DETERMINATION 15 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination addresses the merits of Ms Hardy's personal grievances on the ground of unjustified constructive dismissal, and disadvantage in employment by various unjustified actions of her employer.

[2] The disadvantage grievances concern:
(a) A unilateral reduction in Ms Hardy's hours of work on or about 2 May 2004;
(b) An unjustified suspension without pay on 26 May 2004; and
(c) An unjustified warning on 26 May 2004.

[3] The claim of constructive dismissal relies on the cumulative effect of these, as well as an alleged breach of implied term of fair treatment.

Preliminary matter

[4] The grievances have already been referred to in a determination addressing the identity of the employer, in **Hardy v Scoopy's Ice Cream Parlour (Whangarei) Limited & Anor** 12 October 2006, AA 319/06. There I recorded that an investigation into the merits of the grievances had been abandoned while confusion over SICPWL's representation was resolved, and that subsequently an issue had been raised over the identity of the employer. A second investigation meeting was convened to address that point, since no consensus had been reached on whether that matter could be determined on the papers. Mr Heward said he was instructed by Noel and Jill Aitken, who at various times had interests in both companies referred to. They remain registered as directors and shareholders of SICPWL.

[5] I had not addressed the evidence bearing on the merits of the grievances, and convened a third meeting for that purpose.

[6] Neither Mr Heward nor his clients attended on the notified date or otherwise contacted the Authority regarding their intentions. A support officer from the Authority's registry attempted to contact Mr Heward regarding his and the Aitkens' intentions. The officer was advised that Mr Heward was in court in Dunedin. Clearly he was unavailable to attend or otherwise participate in the investigation. I ascertained directly from Mr Aitken that he did not wish to participate further in the investigation. I have therefore proceeded without hearing further from SICPWL, under clause 12 Schedule 2 of the Employment Relations Act 2000.

The employment relationship

[7] SICPWL operates an ice cream parlour on premises at the Warehouse in Whangarei. Ms Hardy began her employment as an assistant on 13 December 2003. She was to be paid \$10.50 per hour.

[8] Ms Hardy says the agreed hours of work were at least 20, although in the early part of her employment she was rostered for an average of 25 hours per week, on Saturday, Sunday, Monday, Tuesday and Wednesday. The start time was 11 am, but the finish time would vary. SICPWL said in its statement in reply that Ms Hardy was employed to work weekends, with the prospect of additional hours becoming available during the high season. However there was nothing else to substantiate this, and the available information tends to support Ms Hardy's account.

[9] In or about February 2004 Ms Hardy became pregnant. She began to suffer severe morning sickness, but continued to come to work. Because of her condition Mrs Aitken allowed her to start a little later in the mornings. Ms Hardy also asked for a written employment agreement. None was ever provided.

[10] By arrangement Ms Hardy had a week off work from 10 – 16 April 2004. She was paid holiday pay as if she had worked a 25 hour week. From 20 – 26 April she was off work sick.

1. Reduction in hours of work

[11] Later in April the Aitkens' son, Mark Aitken, was working in the parlour in place of his mother. According to Ms Hardy, on or about 28 April Mark Aitken was working on the next staff roster when he announced that he was going to change the roster to suit all staff. Ms Hardy indicated an interest in having Saturdays off as well as in a later, further reduction in her hours. She said Mark Aitken agreed to change the roster so that she did not work on Saturdays, but Noel Aitken refused to confirm the change.

[12] In correspondence to Ms Hardy's union, setting out their position, the Aitkens said Ms Hardy asked to have the weekends off because she was finding the work too difficult. They said they agreed, and that two other staff members agreed to change their hours of work in order to accommodate Ms Hardy's changes. However a note from Mark Aitken, dated 29 June 2004, records only that Ms Hardy asked for Saturdays off, with the possibility of picking up Thursday work instead. The same note recorded that no Thursday work was available.

[13] From the equivocal nature of her own statement, and the additional material, I consider it likely Ms Hardy was not only willing but preferred not to work on Saturdays. However I am not persuaded she also wished to relinquish her Sundays.

[14] Ms Hardy received the confirmed roster on 2 May 2004. Her start time was to be midday, and there were no Saturday or Sunday hours. As a result her hours of work were reduced to 12 per week, being Mondays, Tuesdays and Wednesdays only. These were the changes which the Aitkens

said were agreed. Ms Hardy said she complained about the change to Mark Aitken, and also approached her union. She said further that, on or about 20 May, she complained to Noel Aitken. Among other things Noel Aitken told her he would look into the possibility of making more hours available to her.

[15] According to a statement it made to the union, SICPWL took the view Ms Hardy worked her reduced hours without complaint. I do not accept that.

[16] Moreover, by letter dated 21 May 2004, Ms Hardy's union wrote saying it wanted Ms Hardy reinstated to 'her regular 20 hours'. Ms Hardy's evidence suggests that the letter's account of the facts is inaccurate, but for present purposes the existence of the letter confirms there was a challenge to the reduction in Ms Hardy's hours of work.

2. Suspension without pay and unjustified warning

[17] While at work on 26 May 2004, Jill Aitken handed a letter to Ms Hardy. The letter, also dated 26 May 2004, was signed by Mark Aitken. It referred to 'a discrepancy in the stock levels' in that Ms Hardy had been seen taking two cans of coke without recording her action in the staff stock book. The letter also said Ms Hardy's performance was 'less than satisfactory' in that at times she had remained seated while other staff members were serving customers, she had recorded incorrect start and finish times on her timesheets, and had taken numerous smoko breaks before her allotted break. The letter advised Ms Hardy:

" ... this is to be considered your second warning, first written warning. As of today you are to be suspended from work sans pay at the direction of upper management until this matter has been resolved."

[18] Because of the course the employment relationship took, those allegations were not answered at the time. However according to Ms Hardy's evidence:

(a) The cans of coke. Ms Hardy said that, at the start of the employment relationship, she was told staff were permitted to take food and drink from the parlour and were not obliged to record or pay for them. Ms Hardy also said that, later, she was told she could take a maximum of one can of drink without paying. Then, commencing about a week before she received the 26 May letter, staff were required to write their purchases in the staff stock book. Finally, Ms Hardy said she paid for the two cans she was seen taking, and that is why the items were not recorded in the staff stock book.

(b) Less than satisfactory performance. Ms Hardy did not dispute that there were times when she remained seated, but said this was because of the pregnancy-related symptoms she was experiencing.

(c) Incorrect start and finish times on timesheets. It is not clear what SICPWL meant by this, but Ms Hardy believed the reference was to her reporting for work in May at her original start time of 11 am, rather than the new rostered time of midday, which she did on the advice of her union.

(d) Smoko breaks. Ms Hardy accepted that she was smoking during her pregnancy. She did not deny doing so at times other than scheduled smoko breaks.

[19] On 4 June 2004 Mr Aitken asked Ms Hardy to meet with him, and advised she could bring a representative. Ms Hardy told Mr Aitken she would get back to him when she had spoken to the union.

3. The termination of employment

[20] It appears there was telephone contact between Mr Aitken and the union regarding the possibility of a settlement, and there were unsuccessful attempts to arrange a meeting. By letter dated 14 June 2004 SICPWL asked Ms Hardy to return to work on 21 June, and to attend a meeting to answer the allegations referred to in the 26 May letter.

[21] On or about 20 June 2004 Noel Aitken attempted to contact Ms Hardy directly in order to arrange the meeting he had been seeking. As Ms Hardy was out, he spoke to Ms Hardy's husband, David Hardy. According to Mr Hardy, he advised that if the call was about work Mr Aitken should contact the union. Mr Aitken said he wanted to speak to Ms Hardy herself and not the union. He also asked Mr Hardy to tell Ms Hardy that she was required to report for work on Monday (21 June). Mr Hardy repeated that Mr Aitken should speak to union, saying too that Ms Hardy was stressed and upset and would not be reporting for work until Mr Aitken met with the union.

[22] Ms Hardy did not report for work on 21 June. By a letter of that date the union raised personal grievances in relation to Ms Hardy's hours of work and the suspension, and an alleged failure to comply with the duty to treat Ms Hardy fairly and reasonably. It said:

"It is quite clear that Paula has been disadvantaged by your actions as her employer, a situation that is tantamount to a constructive dismissal."

[23] In a written but undated reply, Mrs Aitken set out SICPWL's view of the facts. The letter ended by saying:

"I have now taken advise (sic) and have sent a second Written Warning on a breach of Good Faith to Paula, and as she does not want to return to work or come to a meeting, which you arranged with Noel on June 11th 2004, by phone at 11.45 am for today the 1st July 2004 at 10.30 am. Paula has now put her job in jeopardy."

[24] By letter dated 17 July 2004 Mrs Aitken purported to issue a 'Second and Final Written Warning' regarding the taking of personal and private information without authority. It is not clear what information was being referred to, but I infer the concern was with material Ms Hardy sent to the union. The letter then summarised the attempts to meet, although it said nothing about any attempts in July, and ended by saying:

"As this is your Second and Final Written Warning and you have no desire to a meeting I therefore require that you return your uniform shirts and your hat ..."

[25] Ms Hardy did not report for work again.

Determination – Disadvantage grievances

1. Reduction in hours of work

[26] I am not persuaded Ms Hardy agreed to the removal of both Saturday and Sunday work, but I am persuaded she was happy to relinquish Saturday work. Her health meant that continuing with that work, at least in the near future, was too difficult for her.

[27] My conclusion, therefore, is that there was a unilateral reduction in Ms Hardy's hours of work to the extent that she was no longer rostered for work on Sundays. Aside from the indication that SICPWL believes the reduction was agreed, there was no material on which I could find the reduction justified. Accordingly Ms Hardy has a personal grievance in that her employment was affected to her disadvantage by an unjustified action of her employer's.

2. Suspension without pay

[28] There was no evidence of a term of employment permitting suspension without pay in a disciplinary context. Nor do I accept there was anything in the concerns expressed in the 26 May letter of so pressing a nature as to justify such action in the absence of any agreement allowing it.

[29] The suspension was unjustified. Ms Hardy has a personal grievance in that respect also.

3. Unjustified warning

[30] The warning was issued before SICPWL had properly put its concerns to Ms Hardy and obtained her response. That was entirely the wrong approach. In addition - except to the extent that in evidence Ms Hardy made limited admissions regarding her conduct - there was not otherwise any evidence substantiating the reasons given for the warning. Overall it, too, was unjustified and Ms Hardy has a personal grievance in respect of it.

Determination – Constructive dismissal

[31] The basis for the constructive dismissal was that there was said to be a breach of duty by the employer, of such a nature that it was reasonably foreseeable by the employer that the employee would not be prepared to continue the employment. Here, the specious disciplinary allegations, the unjustified warning and the unjustified and indefinite suspension without pay were said to constitute the necessary repudiatory conduct.

[32] I regard the suspension and the warning as part of the same profoundly flawed procedure. I am not prepared to say that SICPWL had no reasonable grounds for seeking to initiate a disciplinary procedure, although it is very unfortunate that as the relationship subsequently deteriorated further SICPWL resorted to making additional allegations of the kind found in the statement in reply. Nor, although the suspension without pay was unjustified, was it fully reflective of the facts to say it was indefinite in duration. There was never any need for it to become extended, and it appears that one of the reasons why matters could not be resolved quickly and efficiently was an inability on the part of Mr Aitken and Ms Hardy's union representative to reach consensus on a time for an early meeting. Another appears to be that the parties embarked on discussions about an exit package.

[33] Matters were complicated further when Mr Aitken sought to discuss a return to work directly with Ms Hardy, without involving the union. Ms Hardy adopted the stance that she would refuse to return to work until a meeting had been held. Mr Aitken should not have attempted to bypass the union as he did, consistently. If, as now seems to be the case, Ms Hardy considered her employment was already over she could have indicated that, and should have referred Mr Aitken to the settlement discussions.

[34] The reality of the termination of this employment relationship is that no exit package was concluded, and Ms Hardy simply did not report for work again. Despite the Aitkens' correspondence in July, the relationship had ended on or before 21 June

[35] As for breaches of duty on the part of SICPWL, I have already found that SICPWL imposed an unjustified and unilateral reduction in Ms Hardy's hours of work, imposed a suspension without pay which was unjustified, and imposed a disciplinary warning which was also unjustified. These breaches are so numerous and so significant that they amounted to a failure to accord to Ms Hardy the fair and reasonable treatment to which she was entitled, and her failure to return to work was a foreseeable result.

[36] Ms Hardy was constructively dismissed and the dismissal was unjustified. She has a personal grievance on that ground, too.

Remedies

1. The disadvantage grievances

[37] Ms Hardy is entitled to the reimbursement of remuneration lost as a result of the grievances, and compensation for injury to her feelings.

[38] Regarding the reduction to her hours of work, reimbursement was sought for the period 2 – 26 May 2004 at 8 hours per week. Because I believe Ms Hardy accepted the loss of Saturday work, I calculate the reimbursement of lost earnings at 4 hours per week for that period. Accordingly SICPWL is ordered to pay Ms Hardy the sum of $4 \times \$10.50 \times 3 \text{ (weeks)} = \126 .

[39] Ms Hardy is entitled to an additional 6% on that amount as holiday pay. Accordingly SICPWL is to pay an additional $6\% \times \$126 = \7.56 .

[40] Ms Hardy is also entitled to be reimbursed for the period during which she was unjustifiably suspended without pay. The period commenced on 26 May and ended on the termination of her employment on 21 June. Accordingly SICPWL is ordered to pay to Ms Hardy the sum of $20 \times \$10.50 \times 3 \text{ (weeks)} = \630 .

[41] Ms Hardy is entitled to an additional 6% on that amount as holiday pay. Accordingly SICPWL is to pay an additional $6\% \times \$630 = \37.80 .

[42] No additional remuneration was lost as a result of the unjustified warning.

[43] Because the subject matter of these grievances was also the basis for my finding there was a constructive dismissal, I will address compensation for injury to feelings as a global figure when assessing remedies for the constructive dismissal.

2. The constructive dismissal

[44] Ms Hardy also lost remuneration after the date of the dismissal, which I have identified as no later than 21 June. Since on her own evidence she was having a difficult pregnancy, and SICPWL was undercapitalised and was for sale, Ms Hardy's prospects for long term employment at 20 or more hours per week were slim. For that reason it is appropriate to reimburse Ms Hardy for remuneration lost in respect of the three months following the termination of employment. SICPWL is ordered to pay her the sum of $20 \times \$10.50 \times 13 \text{ (weeks)} = \$2,730$. Holiday pay at 6% of that figure is \$163.80, and payment is ordered accordingly.

[45] There was evidence of injury to Ms Hardy's feelings. I apply a slight reduction in association with the unjustified warning because of the admission regarding smoking, and because purporting to defy the roster while the matter was under discussion was ill-advised. Moreover during the employment relationship there was a degree of variation in Ms Hardy's start and finish times which for the most part was convenient to her, and I am not persuaded that a start time of 11 am was necessarily a condition of employment or that the rostered later start in May was unfair or unjustified. Accordingly SICPWL is ordered to pay Ms Hardy the sum of \$5,000, being a global sum taking into account all of the grievances.

[46] A further claim for underpaid holiday pay was set out in Ms Hardy's evidence. The claim was not related to the personal grievances and should not have been raised in that way. To the extent that the claim otherwise had any merit, any possible underpayment was likely to be minimal and I do not take the matter any further.

Summary of awards

[47] In summary, SICPWL is ordered to pay to Ms Hardy:

- (a) \$133.56 as reimbursement of remuneration lost as a result of the reduction in her hours of work;
- (b) \$667.80 as reimbursement of remuneration lost as a result of the unjustified suspension;
- (c) \$2,730 as remuneration lost as a result of the unjustified dismissal;
- (d) Holiday pay on these amounts in the total sum of \$209.16; and
- (e) \$5,000 as compensation for the injury to her feelings.

Costs

[48] Costs are reserved. If an order is sought, a memorandum to that effect is to be filed in the Authority within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority