

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 34
5470840

BETWEEN RUTH HAWKINS
Applicant

A N D FARM GATE DELI LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Warwick Reid, Advocate for the Applicant
Graham Rogers, Advocate for the Respondent

Investigation Meeting: 9 December 2014 at Tauranga

Submissions Received: 9 December 2014 from the Applicant
19 December 2014 from the Respondent

Date of Determination: 04 February 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Hawkins was employed by Farm Gate Deli Limited (Farm Gate) under an individual employment agreement which she signed on 18 April 2013. When Ms Hawkins started work on 22 April 2013 Farm Gate was a brand new food retail business based in Waihi.

[2] Ms Hawkins initially worked a minimum of 35 hours per week and during the busy periods often longer than that. Ms Hawkins resigned without notice on 24 April 2014 after an altercation at work with Ms Edmonds.

[3] Ms Hawkins claims she was constructively dismissed after Farm Gate unilaterally reduced her hours of work from 35 per week to around 20 or so hours per week. Farm Gate denies that Ms Hawkins was dismissed. Farm Gate says it consulted with Ms Hawkins over the reduction in her minimum hours of work. Farm Gate says

it had to reduce staffing hours because the business was not as busy as expected. Farm Gate says that Ms Hawkins voluntarily resigned.

[4] Ms Hawkin's hours of work clause stated that her ordinary hours of work were as per those stated in Appendix A which states that Ms Hawkins' hours of work were to be "*as per staff rota*".

[5] The hours of work clause also provides that Ms Hawkins' starting and finishing times would be set by the employer after consultation with her and that the "*hours of work may be changed following consultation*" with her.

[6] Ms Janet Edmond, one of the two directors and shareholders of Farm Gate, emailed Ms Hawkins the relevant employment documentation on 15 April 2013. Sent at the same time as the proposed employment agreement was a job description which recorded the hours of work as "*rostered duties during opening hours minimum 35 hours per week March-November maximum 60 hours per week December-February*". Ms Edmond's email also included an information sheet about Farm Gate together with proposed staff rosters.

[7] Ms Hawkins acknowledges that she always understood that her hours of work would be flexible because they would be set by a roster. However Ms Hawkins told the Authority that she only accepted the offer of employment on the basis she would be offered a minimum of 35 hours per week. Ms Hawkins said this minimum number of hours work per week was very important to her because she and her husband relied on her income to meet financial commitments they had.

[8] Ms Edmond agrees that was discussed and agreed before Ms Hawkins accepted the offer of employment. I also find that the parties acted consistently with a minimum of 35 hours per week being an agreed term of Ms Hawkins employment. For example on 19 October 2013 Ms Hawkins noticed that her rostered weekly hours were below the agreed minimum so she raised this with Ms Edmond who altered the rosters to ensure Ms Hawkins worked at least 35 hours per week.

[9] On 11 February 2014 Ms Edmond emailed all staff informing them of changes to the business opening hours and associated changes to staffing hours. New proposed rosters were provided with this email. Ms Hawkins said this new roster showed she would work 21.5 hours in the first week and 18.75 hours in the second week. These hours were not actual work hours because within these times Ms Hawkins was also

expected to take non paid breaks, which meant her paid hours were less than the roster suggested.

[10] Ms Edmond invited staff comments on the proposed new rosters by Sunday, 16 February 2014. However despite that Ms Edmond admits that she actually formalised and implemented the new rosters on Friday, 13 February 2014 two days before the supposed consultation period ended.

[11] Ms Hawkins says she was effectively deprived of an opportunity to discuss the proposed roster changes because she did not work on Wednesday 11th, Thursday 12th and Friday 13th February 2014. Ms Edmond was not at work (she was on holiday) and so was not actually available to discuss her email with the roster changes on any of the days that Ms Hawkins was at work.

[12] The new rosters took effect on 16 February. On 19 February Ms Hawkins emailed Ms Edmond and the second director and shareholder Ms Joanne Curd objecting to the implementation of the rosters which reduced her hours to less than the minimum hours that had been mutually agreed at the outset of her employment. Ms Hawkins also expressed dissatisfaction about the lack of adequate consultation over the roster changes.

[13] Ms Hawkins also expressed concern over her hours being reduced by almost half while the other two employees retained their minimum contracted hours. Ms Hawkins expressed her view that if hours had to be reduced then the part time staff should be the first to have their hours cut, not the full time staff (such as her).

[14] Ms Hawkins also noted that one employee (J) who had been brought in as a temporary reliever had been given more rostered hours than she (Ms Hawkins) had. Ms Hawkins says the changes actually meant her permanent full time role had been made redundant because the hours she had been given in accordance with the new roster amounted to only a part time position. Ms Hawkins expressed her view that the unilateral reduction in her minimum hours was a breach of contract.

[15] Ms Hawkins also expressed concern that both women had seen her while at work and had greeted her as if nothing had happened which Ms Hawkins said she found very uncomfortable. Ms Hawkins' email said:

I can only assume this is a method by which you are hoping that I will resign? In fact, you have given me no choice but to look for alternative employment, I simply cannot afford to work for you under this proposal and my first priority now will be to actively find alternative employment.

[16] Ms Edmond's response to these concerns was to arrange a meeting with Ms Hawkins after she (Ms Edmond) return from leave.

[17] On 6 March Ms Hawkins, Ms Curd and Ms Edmond met to discuss Ms Hawkins' concerns. Ms Hawkins says there was a general discussion about the rosters and about why her hours had been reduced but there was no willingness to address her specific concerns or about the fact she had been unilaterally changed from a full time to a part time position.

[18] Ms Edmond and Ms Curd say that they believed agreement was reached with Ms Hawkins during this meeting regarding the roster changes. They claim that Ms Hawkins' concerns were addressed by their agreement to "fix" the rosters (i.e. give Ms Hawkins specified regular days and times of work) so she could seek additional employment around her Farm Gate work because her family needed more income than her reduced hours at Farm Gate provided.

[19] The evidence I heard satisfied me that Ms Edmond and Ms Curd did not address Ms Hawkins' specific concerns. The meeting was unstructured (it took place outside in the carpark) and no notes were taken. There was no agenda and the specific concerns Ms Hawkins had identified in her emails were not adequately dealt with. I accept Ms Hawkins' evidence that the meeting basically just involved Ms Edmonds and Ms Curd explaining their position.

[20] Ms Edmond emailed the staff again on 17 March about the rosters and staff hours. She advised that the new roster changes were an amendment to the staff contracts and that the hours of work would be further amended as the business went into the 2014/15 summer period.

[21] On 24 April an issue flared up between Ms Hawkins and Ms Edmond regarding the trimming of silver beet during which Ms Hawkins left the premises and said she was not coming back. Ms Edmonds wrote to Ms Hawkins that day saying she had to give 4 weeks' notice of resignation and that there were a number of concerns which she (Ms Edmonds) wanted to raise with her (Ms Hawkins).

[22] Ms Hawkins replied to the points Ms Edmonds had raised, again referred to her (Ms Hawkins') previous concerns and confirmed that she considered she had been left with no choice but to resign. Ms Hawkins also raised a personal grievance claim for constructive dismissal.

[23] Ms Hawkins acknowledges that the dispute over the silverbeet was minor but says she regarded the employment relationship was effectively at an end when her hours were unilaterally reduced. Ms Hawkins said she persevered for a number of weeks for economic reasons because the family needed her income and she did not have alternative employment, but says that by 24 April 2014 she "*could not stand it any longer*" because she had formed the view that Ms Edmonds and Ms Curd did not want her around.

[24] Ms Hawkins was out of work until September 2014 when she secured a part time retail job.

Issues

[25] The following issues are to be determined:

- (a) Was Ms Hawkins dismissed?
- (b) If so, was dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) What if any costs should be awarded?

Was Ms Hawkins dismissed?

[26] Ms Hawkins bears the onus of establishing on the balance of probabilities that she was dismissed and did not freely or voluntarily resign. In terms of her constructive dismissal claim Ms Hawkins relies on a fundamental breach of contract (the unilateral reduction of hours of work and associated drop in wages) which she says made it reasonably foreseeable that she would not continue working under those circumstances.

Was Ms Hawkins entitled to a minimum of 35 hours of work per week?

[27] There is no dispute that the parties discussed the fact that Ms Hawkins required a minimum of 35 hours of work per week because she needed and wanted full time employment and that anything less than that would not be financially viable for her.

[28] Ms Edmond accepted when giving her evidence that there was an agreement to provide Ms Hawkins with a minimum of 35 hours of work per week. This agreement was reflected in the job description provided to Ms Hawkins before she accepted the offer of employment. The parties also acted in accordance with that agreement. For example Ms Edmond immediately adjusted the roster after Ms Hawkins identified she has been provided with less than 35 hours of work in that particular roster.

[29] I am therefore satisfied on the balance of probabilities that there was a mutual agreement that Ms Hawkins would be offered no less than 35 hours of work per week with her actual days and hours of work to be advised to her as per the staff roster which was to be scheduled by the employer, in consultation with her. Accordingly I find that the provision of a minimum of 35 hours per weeks work to Ms Hawkins was a mutually agreed contractual term of the employment relationship.

Was Ms Hawkins' employment agreement fundamentally breached?

[30] I consider that Farm Gate fundamentally breached Ms Hawkins' employment agreement by unilaterally varying her minimum hours of work per week from 35 hours per week to approximately 20 hours per week. This had a detrimental impact on Ms Hawkins' wages which significantly decreased to less than what she was able to financially support her household with.

[31] I do not accept Farm Gate's suggestion that it adequately consulted with Ms Hawkins about the decrease in her minimum hours of work. I consider that the changes were presented to Ms Hawkins as effectively a done deal. There was no real time for consultation and the sort of information that an employer is expected to provide to an employee to enable there to be meaningful consultation was not given to Ms Hawkins before the decrease to her hours was implemented.

[32] I therefore find that Ms Hawkins' hours of work were unilaterally varied to her detriment contrary to the agreement that the parties had reached regarding her minimum hours of work. This was a fundamental breach of her terms and conditions of employment.

Did Ms Hawkins agree at the 6 March meeting to the reduction in her work hours?

[33] I am not satisfied on the balance of probabilities that Ms Hawkins agreed to the changes to her minimum hours as a result of the meeting that occurred on 6 March 2014. It was clear that Ms Hawkins was still very unhappy and upset about the change to her hours. She also clearly communicated she was unable to support the household and meet her financial outgoings on the reduced hours.

[34] I prefer Ms Hawkins' evidence that the reduction in her hours was presented to her at the 6 March meeting as a done deal. I find that Ms Edmond and Ms Curd did not (in accordance with their evidence to the Authority) adequately address the various issues that Ms Hawkins had been raising. This showed a closed mind approach to the issues Ms Hawkins had raised. It also meant that the meeting did not resolve the specific concerns Ms Hawkins had identified about the way her hours had been unilaterally decreased.

[35] For example, Ms Hawkins' concerns about a part time employee having their hours reduced less than Ms Hawkins was not adequately responded to. Nor was her concern about her hours being reduced when a new casual staff member or a chef had been engaged to work in the kitchen. These were matters that were not adequately addressed until the Authority's investigation meeting.

[36] I accept Ms Hawkins' evidence that the roster changes were presented at the meeting as a done deal. This is supported by the evidence given by Ms Curd and Ms Edmond which focused on the rationale for the roster changes and the effects of the changes rather than addressing Ms Hawkins's specific concerns. In any event, by then, the roster changes had already been implemented.

[37] The rosters were not adjusted after this meeting to increase Ms Hawkins' minimum hours or to ensure that she worked at least 35 hours per week.

[38] Ms Edmond's and Ms Curd's both acknowledged that Ms Hawkins' attitude appeared to deteriorate after the roster changes and she presented at work as being

unhappy. Ms Hawkins also accepted she was extremely unhappy as a result of the roster changes and the reduction in her hours and that did affect her attitude towards her work. This evidence supports my finding that there was no mutual agreement to vary Ms Hawkins' minimum number of hours of work per week.

Was it reasonably foreseeable that Ms Hawkins would resign as a result of the unilateral reduction in her hours of work?

[39] Ms Hawkins had made it clear before accepting employment that it was critical for her to obtain a minimum number of hours of work for financial reasons so that she could support her household. She also acted consistently with this during the relationship drawing to Farm Gate's attention on an occasion in October 2013 when her hours dropped below the agreed minimum number of hours per week. Farm Gate then made the necessary adjustments.

[40] It is a fundamental term and condition of Ms Hawkins' employment that she was entitled to be rostered on for no less than 35 hours per week so that she knew she would be earning a specific amount as a minimum wage each week.

[41] I consider it is reasonably foreseeable that an employee who has had their hours of work unilaterally decreased with the associated adverse impact on their wages would not be prepared to continue working under such circumstances.

[42] Ms Hawkins made it clear in her emails and verbal communications with Ms Curd and Ms Edmond that she was simply unable to continue working at the reduced hours due to financial reasons. This clearly put them on notice that resignation was likely as did her indication that she would be forced to seek additional employment to supplement her income. I find it was reasonably foreseeable that Ms Hawkins would be likely to resign as a result of the fundamental breach of her employment agreement.

Did Ms Hawkins acquiesce to the roster changes?

[43] I do not consider that Ms Hawkins acquiesced to the roster changes. She made it clear as soon as the changes were advised to her that she disputed them and considered them to be a breach of contract. She also made it clear that she was unhappy with the changes which would force her to seek employment elsewhere. She also indicated in an email to Farm Gate that she considered its actions indicated that it wanted her to resign.

[44] Although there was a delay between the implementation of the reduction in Ms Hawkins' hours and her leaving work, I accept her evidence that this was due to the financial pressure that the household was under. They needed her income to live on and she did not have any alternate income available to her. She therefore tried to stay at Farm Gate as long as she could.

[45] I also accept Ms Hawkins' evidence that she left on 24 April because she could not stand it anymore. She had formed the view that Ms Curd and Ms Edmond did not want her in the business any longer and she felt she could not continue working under those circumstances. The silver beet incident was the last straw.

[46] I find that Ms Hawkins did not acquiesce to the changes. She did not accept them and made her dissatisfaction and unhappiness very clear.

Outcome

[47] I am satisfied on the balance of probabilities that Ms Hawkins was constructively dismissed because Farm Gate unilaterally breached a fundamental term of her employment which made it reasonably foreseeable that she would not continue working in the circumstances.

[48] I find that this was not a free or voluntary resignation by Ms Hawkins. It was effectively a sending away at the employer's initiative which in law amounts to a dismissal.

Was dismissal justified?

[49] Ms Hawkins has established that her employment ended as the result of a dismissal so the onus now passes to Farm Gate to establish on the balance of probabilities that her dismissal was justified.

[50] Justification is to be assessed in light of the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Farm Gate's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time that Ms Hawkins was dismissed.

[51] A fair and reasonable employer is expected to comply with its statutory obligations, including the s.4(1A) good faith requirements and the four procedural

fairness tests in s.103A(3) of the Act. Failure to do so will undermine an employer's ability to justify its actions and how it acted.¹

[52] I find that Farm Gate's dismissal of Ms Hawkins was not justified. It did not comply with any of the four procedural fairness tests in s.103A (3) of the Act.

[53] Farm Gate effectively presented the changes to the roster as a fait accompli. It did not keep an open mind or provide Ms Hawkins with adequate feedback to the specific concerns she had raised. I accept Ms Hawkins' evidence that Farm Gate appeared to be "*going through the motions*" and had already made up its mind by the time of the 6 March meeting.

[54] Farm Gate also implemented the changes before the stated consultation period had occurred. It also set a consultation period during which Ms Hawkins had no real opportunity to meet with Ms Edmonds or Ms Curd to discuss her concerns about the proposed changes. These are not the actions of a fair and reasonable employer.

[55] I do accept Farm Gate's evidence that it had genuine financial and commercial reasons for wanting to restructure the business by changing its opening hours and staff resourcing. However it could and should have (but did not) followed a fair and proper restructuring process before implementing the changes it did. As Ms Hawkins pointed out in her email to Farm Gate the changes had effectively changed her from a full time employee into a part time employee.

[56] The failure to adequately consult with Ms Hawkins prior to implementing the changes fundamentally undermines Farm Gate's ability to substantively justify Ms Hawkins' dismissal. Who knows what would have come up during a fair and proper the consultation process.

[57] Ms Hawkins did make some valid comments regarding an expectation that casual and part time employees would have their hours cut before full time employees did. The fact that there was no adequate consultation means that I am unable to speculate on what the outcome of a fair and proper restructuring process would have been had Farm Gate complied with its statutory obligations to Ms Hawkins.

¹ S.103A(2) of the Act.

[58] I therefore find that Farm Gate is unable to substantively or procedurally justify Ms Hawkins' dismissal. Accordingly, I find Ms Hawkins' dismissal was unjustified.

What if any remedies should be awarded?

[59] Ms Hawkins obtained part time retail work in September 2014. She claims lost remuneration from the date of dismissal until the date of the Authority's investigation meeting.

Mitigation of loss

[60] I am satisfied that Ms Hawkins appropriately mitigated her loss and that employment opportunities in the Waihi area were limited because of the size of the population.

Lost remuneration

[61] I am satisfied that Ms Hawkins lost remuneration as a result of her unjustified dismissal and that she should be compensated for that. Farm Gate is ordered to pay Ms Hawkins lost remuneration from 25 April 2014 until 14 September 2014 based on 35 hours per week. The parties are to calculate this amount and attempt to agree on it. If agreement is not possible then either party has 14 days from the date of this determination to apply to the Authority to set the amount of lost remuneration.

Future lost remuneration

[62] I decline Ms Hawkins' claim for future lost remuneration. She obtained a job in mid-September 2014 and I consider that breaks the change of causation between her unjustified dismissal and the lost remuneration she incurred.

Hurt and humiliation

[63] Ms Hawkins clearly suffered upset, embarrassment and distress. Ms Hawkins says she felt betrayed by Ms Edmond. Ms Hawkins' household's financial situation also became critical. The family had to obtain a bank loan in order to pay their bills and Ms Hawkins described to the Authority her humiliation in dealing with friends and former customers who knew that she had worked at Farm Gate.

[64] I consider that an award of \$3,500 under s.123(1)(c)(i) of the Act is appropriate to compensate Ms Hawkins for the humiliation, distress and injury to feelings that she suffered.

Costs

[65] The parties are encouraged to resolve costs by agreement. If that is not possible then Ms Hawkins has 14 days from the date of this determination to apply for costs. Farm Gate has seven days within which to respond with Ms Hawkins having a further three working days within which to apply.

[66] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are therefore invited to identify any factors which they say should result in the Authority's notional daily tariff (currently \$3,500) being adjusted.

Rachel Larmer
Member of the Employment Relations Authority