

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 168  
5446521

BETWEEN

SHANI HAYES  
First Applicant

LOIS HAYES  
Second Applicant

DANICA HAYES  
Third Applicant

A N D

HUNGRY HOUND LIMITED  
Respondent

Member of Authority: M B Loftus  
Representatives: Shani Hayes for the Applicants  
Brian Oliver for the Respondent  
Investigation Meeting: 14 October 2014 at Gore  
Submissions Received: At the investigation meeting  
Date of Determination: 29 October 2014

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

- [1] Shani Hayes and Danica Hayes both claim they were dismissed by Hungry Hound Limited on or about 16 June 2013.
- [2] Lois Hayes claims she was constructively dismissed the same day.
- [3] All three applicants also claim they were unjustifiably disadvantaged in their employment.
- [4] Hungry Hound Limited (Hungry Hound) denies the claims have validity.



**Background**

[5] Hungry Hound is a company jointly owned and directed by Brian and Diana Oliver. It was originally established as a computer business under another name. In April 2013 the name changed to reflect the owners' decision to operate a food outlet trading as The Hungry Hound.

[6] Hungry Hound had its genesis in discussions between Diana and Lois who, for some five years, worked together at a local dairy. Diana is of the view the original intention was the two form a partnership but Lois is adamant there was never a chance of her participating in the business' ownership. Ultimately Diana decided to establish the venture with the assistance of her husband.

[7] While it is irrelevant whether or not Diana and Lois intended forming a partnership, it is clear there were numerous discussions between the two about the business and how it would run. From time to time the conversations included input from Lois' grandchildren, Shani and Danica. They were local schoolchildren who also worked part-time at the dairy. It is also clear those conversations canvassed the possibility of Shani and Danica working at the Hungry Hound.

[8] The issue of Shani and Danica working at the Hungry Hound was resolved at a meeting at Lois' home. Diana, Shani and Danica were also present and there is some debate as to whether or not Lois' daughter, Seleena Hayes, was also present. Seleena, the mother of Shani and Danica, says she was. That view is also held by her daughters but Lois and Diana have no recollection of her presence.

[9] Both Shani and Danica claim they and Diana reached an agreement about the rate of pay and hours of work. They claim they were offered \$14 per hour and Diana told them they had first call on any available hours outside school time. They say that led to an agreement which would see them share 3.30pm to 8.00pm, Monday to Friday. Danica would work Monday and Tuesday, Shani Wednesday and Thursday and they would work alternate Fridays. There were some additional hours available over the weekend and each expected to work between 14.5 and 18 hours a week.

[10] Seleena says she questioned whether the hours were set as she would not allow her children to trade their incomes at the dairy for possible uncertainty. She says Diana confirmed the arrangement her daughters cite.

[11] Diana says she initially intended opening between 8am and 8pm, seven days a week. Opening and the bulk of the day work would be performed by herself and Lois, with whom she had earlier entered into an employment arrangement. Lois would receive \$15 an hour and was guaranteed a minimum of 30 hours work a week. With respect to Shani and Danica, she says she prefaced the offer of \$14 an hour with the word *about* and claims she said they would have to be flexible about the hours.

[12] Approximately a week after commencement, Brian Oliver presented written employment agreements to Shani, Danica and Lois for their perusal and signature. Those offered to Shani and Danica identified them as casual employees and specified a pay rate of \$13.75 an hour. They took issue on the grounds that did not reflect the agreement they had entered into. As a result they never signed the employment agreements. They did, however, commence on the hours initially agreed.

[13] As events transpired, the business did not attract the level of custom initially envisaged and Brian was soon looking for ways to reduce costs. That quickly led to a reduction in the hours offered to Shani and Danica. They say their protestations went unanswered, as does Lois who challenged a decision to close between 2pm and 4pm.

[14] Events came to a head on Sunday 16 June 2013 when Lois and Danica arrived to work an evening shift. Lois says Brian approached and advised the girls were being *put off* due to a lack of work. Danica, on hearing that, left in tears. Lois then asked that Diana be called to the shop so the two could discuss the situation. When Diana arrived approximately 15 minutes later she and Lois went outside to talk but Lois claims Diana refused to answer her queries or even speak.

[15] Lois goes on to say,

*It was then that I realised that the relationship with my employers had been irreversibly damaged. I felt I could no longer continue working there under the distressing and stressful conditions. I informed Mrs Oliver that due to the strained conditions, I could not keep working.*

[16] Lois then left and on arriving home contacted Shani who came to Lois' home. It was there Lois told Shani of Brian's comments and advised she was no longer employed.

[17] Brian has a different recollection of the conversation. He says he could not honour the promise to give Lois 30 hours a week and keep the girls but did not say so

on the Sunday evening. He claims he advised he had to change the girls' hours but did not say they were no longer employed. He claims there was a prospect of work come summer when, hopefully, trade would increase.

[18] With respect to Lois' departure, Diana accepts she did not say much. She says she did not want to inflame the situation and felt intimidated by Lois' anger over the way her grandchildren were being treated. Diana says she tried to explain the changes were being forced by the business situation but Lois was not listening. Diana says Seleena arrived and Lois then said *if they don't work then I don't work*. She says Seleena then commented *promises made promises broken* before she and Lois then left.

[19] Both Lois and Seleena deny making the alleged comments.

[20] The following day Brian, Shani and Danica met. He says he explained the reasons he had to alter the hours of work. He felt the meeting ended on good terms and the girls understood there would be no work in the immediate future. Shani and Danica dispute the *good terms* and say they were told there would be no further work.

[21] Shani, Danica and Lois sought advice from the Southland Community Law Centre who entered into correspondence with Hungry Hound. It failed to resolve the dispute, hence this investigation.

#### **Name of the respondent**

[22] The application, as initially filed, names the respondent as *Hungry Hound Limited, Hector Brian and Diana Shirley Oliver*.

[23] When I asked the parties whether the employer was the company or the Oliver's personally, I received various answers. Shani, speaking on behalf of the three applicants, indicated she had not really thought about the issue. She added she thought she was employed by Olivers due to the earlier friendship and the fact her discussions regarding work had been with Diana.

[24] Brian's response was the employer was always going to be the company and it would be nonsense to think an individual would assume personal liability when they had the protection of a limited liability company.

[25] I accept Brian's comments. They reflect normal business practice. More importantly, I note Shani's admission she never thought about it and the fact that while the applicants took issue with the employment agreements and, in particular, the rate of pay and hours of work they never contested the fact Hungry Hound Limited was identified as the employer.

[26] Having discussed the issue with the parties, I conclude the employer was Hungry Hound Limited and have altered the citation accordingly.

### **Determination**

[27] As said in opening, all three applicants raised claims they were unjustifiably disadvantaged in their employment. When asked what the disadvantage was, all three accepted it was the injury caused by their dismissals.

[28] That does not, in my view, constitute a separate cause of action given s.122 of the Employment Relations Act 2000 (the Act). As I advised the parties at the investigation meeting I will take the unjustified action claims no further. These are dismissal claims.

### ***Shani and Danica***

[29] Shani and Danica's situations are virtually identical, with each claiming to have been unjustifiably dismissed.

[30] Hungry Hound contends there was no dismissal given the possibility of future work. In the alternative, and should it be found the applicants were dismissed, it is argued the decision were justified by virtue of their status as casual employees.

[31] Potentially there are, therefore, three questions to be answered:

- a. How were Shani and Danica employed – as casuals or part-timers?
- b. Were they dismissed? and
- c. If so, can their dismissals be justified?

[32] I conclude, when addressing the nature of the relationship, that Shani and Danica were part-time employees and not casual. I do so as while Diana claims to have mentioned a need for flexibility in respect of the hours she offered no evidence

as to what she meant (ie: flexibility regarding the number of hours or flexibility about when they would be worked) and she does not suggest she made any attempt to explain her needs to either Shani or Danica. To the contrary, and more importantly, she accepted, when questioned, the arrangement outlined by Shani and Danica was that to which she agreed at the meeting and as a result there were set hours each week. Such an arrangement is not causal in nature – it is indicative of part-time employment.

[33] In reaching the above conclusions I do not have to decide whether or not Seleena was present and have disregarded her evidence. I can comfortably base my conclusion on Diana's concessions.

[34] That raises the question of whether or not there was a dismissal. The answer is yes. While Brian does not agree he said there was no more work on the Sunday, he accepts that was the outcome of the Monday meeting. He says that by the end of the meeting *the girls knew there would be no work available in the immediate future*, and no guarantees in the longer term.

[35] To remove all hours from a part-time employee is, effectively, a dismissal.

[36] That conclusion raises the question of whether or not Hungry Hound can justify its decision. In essence the argument is Shani and Danica were causal employees which meant they need not be offered work and their cessation was in accordance with the agreement between the parties. My conclusion they were not causal nullifies the argument.

[37] Section 103A of the Act states the question of whether a dismissal is justifiable:

*... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.*

[38] Traditionally the objective review has been performed by considering the employers actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no such thing as a firm delineation, separation still provides a useful means of analysis.

[39] Notwithstanding Hungry Hound's reliance on the applicant's casual status, this is essentially a redundancy argument. Hungry Hound is asserting a lack of trade

meant it was incapable of retaining either Shani or Danica. Its problem is there was no evidence tendered in support of these assertions. No financial records – nothing. There is no evidence upon which I could conclude the *inability to employ* argument has merit.

[40] Turning to process. In essence the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. This means the employer should raise its concerns, allow a response and genuinely consider the response.

[41] Similar requirements exist in a potential redundancy setting and are met through a consultation process. Indeed such a process is mandatory (s.4(1A)(c) of the Act) and this was confirmed by the Court in *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102.

[42] Here there is no evidence any of these requirements were met. That, though, is not surprising given the employers incorrect reliance on the fact Shani and Danica were casual employees and a resulting belief these requirements need not be met.

[43] Finally I note size and a lack of resources do not excuse the deficiencies in this instance given the Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152. At paragraphs 94 and 95 the Court noted such all-encompassing failures were neither excusable nor minor (s.103A(5)).

[44] For the above reasons I conclude Shani and Danica both have a personal grievance in that they were unjustifiably dismissed.

### ***Lois***

[45] Lois Hayes claims she was constructively dismissed. She says her resignation was attributable to Brian's inappropriate language and behaviour in the shop.

[46] Hungry Hound disagrees. It is of the view Lois' decision to depart was a reaction to the advice Shani and Danica hours were to change. It does, however, concede Brian did occasionally swear but that was inevitably the result of equipment failure and aimed an inanimate objects and not people, especially Lois.

[47] While a simplistic summary of significantly more complex law, the concept of constructive dismissal is that actions or words of the employer induced a subsequently proffered resignation.

[48] The employer's conduct must be more than inconsiderate or cause unhappiness. It must be dismissive or repudiatory (*Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965) and the possibility a resignation might result must be foreseeable.

[49] Lois is under a duty to establish the fact of dismissal or, in this instance, that Brian's conduct was dismissive or repudiatory.

[50] She has failed to do so. Putting aside the argument of what prompted her decision to leave, she failed to offer any real evidence in support of her claim. She said no more than is quoted in paragraph 15 (above) with the rationale of Brian's swearing only be offered under prompting from myself. In other words there is no evidence Brian's conduct was anything more than inconsiderate and definitely none that indicates it was repudiatory.

[51] To that I add the fact Lois concedes she never raised the issue other than in a passing way and neither Brian or Diana could not possibly have foreseen the alleged conduct would have resulted in her resignation.

[52] For the above reasons I conclude Lois Hayes has failed to establish she was constructively dismissed and the claim therefore fails.

### ***Remedies***

[53] The conclusion both Shani and Danica have a personal grievance in that they were unjustifiably dismissed raises the question of remedies. Both seek lost wages and compensation for hurt and humiliation under s.123(1)(c)(i) of the Act.

[54] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. The Authority may recompense a greater loss but that requires evidence of attempts to mitigate.

[55] Shani quickly obtained alternate employment and started approximately four weeks after her cessation with Hungry Hound. The arrangement she had with Hungry Hound would indicate an average working week of 16.25 hours. At the initially agreed rate of \$14 per hour her loss (four weeks) is in the order of \$910 gross. That is payable.

[56] Here I note the argument about \$14 per hour versus the \$13.75 mentioned in the written employment agreements and which appears to have actually been paid. I take this no further as (a) the evidence does not confirm what was actually paid for the work performed and (b) there is no formal arrears claim.

[57] Unlike her sister, Danica was not successful with her attempts to obtain further work and is yet to find an alternate. While I accept she made various applications she accepts her attempts were limited by her schooling and the size of the community in which she lives. In the circumstances, and given the evidence, I consider it appropriate I apply the statutory provision and award three months lost wages. The amount payable to Danica is \$2,957.50.

[58] As already said both also seek compensation pursuant to s.123(1)(c)(i) of the Act. The amount is unspecified. Accepting hurt must emanate from an unjustified dismissal and some compensation is payable, I conclude that here the amount must be minimal given a lack of evidence in support of the claim.

[59] Having considered the evidence I have I consider it appropriate to award \$1,500.00 to each of the successful applicants.

[60] The conclusion remedies accrue means I must, in accordance with s.124 of the Act, address whether or not Shani or Danica contributed to their dismissals in any material way. Given the nub of Hungry Hound's argument is it was unable to offer work the answer must be no.

### **Conclusion and Orders**

[61] For the above reasons I conclude Shani Hayes and Danica Hayes each has a personal grievance in that they were unjustifiably dismissed.

[62] Hungry Hound Limited is therefore ordered to pay the first applicant, Shani Hayes:

- i. \$910.00 (nine hundred and ten dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$1,500.00 (one thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[63] Hungry Hound Limited is also ordered to pay the third applicant, Danica Hayes:

- i. \$2,957.50 (two thousand, nine hundred and fifty seven dollars and fifty cents) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$1,500.00 (one thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[64] The second applicant's claim she was constructively dismissed is unsuccessful.

[65] Costs are reserved.

  
M B Loftus  
Member of the Employment Relations Authority

