

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 40  
5346869

BETWEEN ALLANAH HILL  
Applicant

AND BERNADETTE ENTERPRISE  
LIMITED  
Respondent

Member of Authority: G J Wood  
Representatives: Anthea Connor for the Applicant  
Rita Choy for the Respondent  
Investigation Meeting: 28 February 2012 at Wellington  
Further information: Due by 6 March 2012  
Submissions Received by: 13 March 2012  
Determination: 12 April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Hill, claims that she was dismissed unjustifiably by the respondent (Bernadette), for reasons that were never disclosed to her. She also claims that she was not paid her final pay or notice or holiday pay. Bernadette, which operates the Lyndwood Rest Home in Upper Hutt, claims that Ms Hill was required first to become a casual employee and then was given notice of termination due to concerns about her timeliness, together with a shortage of residents in the rest home. It thus claims that Ms Hill was justifiably dismissed and paid all her entitlements, but that she has not collected her final pay, nor returned her uniform.

## **Factual discussion**

[2] Ms Hill was already working at the Lyndswood Rest Home as a “tea girl” for at least three days a week for two hours a shift, when the business was sold to Bernadette. After Bernadette took over the running of the rest home on 10 September 2010, Ms Hill (who at the time was a school student) signed a new individual employment agreement, which the manager of Bernadette, Ms Rita Choy, stated was one provided by the previous employer. I note that contrary to law the employment agreement does not contain plain language explanations of the services available for resolution of employment relationship problems (see s.65(2)(vi)), nor an employee protection provision as required under s.69OJ. Bernadette would be well served to address these issues, as they expose it to penalties, which fortunately for it were not sought in this case.

[3] Whatever Ms Choy may have thought, the employment agreement does not provide for a trial period whereby an employee may be exempt from personal grievance proceedings in respect of a dismissal during such a trial period. Instead the parties agreed, in a schedule, to a probationary period of 12 weeks. Clause 3 – Probationary Period sets out the requirements of both employer and employee in these circumstances. It states (verbatim):

- 3.1 *If a probationary period is included in Item 4 of Schedule 1, then [Employer] may undertake a review of your employment on or about the end of that period with the intention of enabling [Employer] to assess whether you are likely to be a suitable appointment to [Employer’s] permanent staff.*
- 3.2 *If [Employer] concludes that you are unlikely to be a suitable appointment to [Employer’s] permanent staff, [Employer] will give you the opportunity to respond to such concerns as [Employer] may have.*
- 3.3 *After considering any response that you may wish to make, [Employer] will:*
  - 3.3.1 *confirm your appointment to its permanent staff; or*
  - 3.3.2 *extend the probationary period for such further period, as it considers necessary to enable a further assessment of you to be made. If [Employer] determines to extend the probationary period, [Employer] will inform you of the reasons for that extension and may reassign you to different duties for which you are, or appear to be, better suited; or*

- 3.3.3 *terminate your employment on giving you 2 weeks' written notice. [Employer] may elect to pay salary instead of giving notice;*
- 3.4 *[Employer] will not terminate your employment unless the employer has, at least one month before the review, advised you of:*
- 3.4.1 *any improvement that [Employer] regards as necessary; and*
- 3.4.2 *Warned you of the likely consequences if such improvement is not achieved before the review.*
- 3.5 *[Employer] may take into account such matters as [Employer] sees fit in assessing whether you are likely to be a suitable appointment to [Employer's] permanent staff, regardless of whether or not any such matter amounts to misconduct on your part.*

[4] Clause 17 deals with termination and suspension. It states, amongst other things:

- 17.1 *Subject to clause 3, your employment may be terminated by either you or [Employer] giving 2 weeks' written notice (unless a lesser time is agreed by both parties). [Employer] may elect to pay salary in lieu of notice ...*
- 17.5 *[Employer] shall be entitled to set off against any moneys due to you the value of any property which you fail to return to [Employer] ...*

[5] Although the termination clause is clearly subject to the probationary period clause, Ms Choy, as Bernadette's manager, was not au fait with the provisions of the agreement. It seems clear from notes taken from meetings with her that Ms Choy considered that because Ms Hill had not worked for Bernadette for three months it could change her employment arrangements, including terminating her employment, simply to suit Bernadette.

[6] Ms Choy, on behalf of Bernadette, has also minimised the issues here by reference to Ms Hill's part time status and youth. This is highlighted by her failure to provide more than minimal information, both in the statement in reply and to the investigation meeting, and her failure to attend mediation. Those issues can be addressed in costs.

[7] It appears that Ms Choy may have received some complaints from one of the cooks at the rest home about Ms Hill regularly arriving late. While that cook did not give evidence to the Authority, Bernadette did provide a letter written from her. Ms

Hill was described as a *school student who used to work as a tea girl for two hours a week (Monday to Friday) from 4pm to 6pm. She was late to work most times ...* In fact Ms Hill's hours of work were from 4.30pm to 6.30pm. It was perhaps this that led to the cook's view that Ms Hill was regularly late. Ms Hill denies being regularly late and I accept her evidence, particularly as there is no documentation that supports such an issue ever being raised with Ms Hill before the furnishing of the statement in reply. For example Ms Hill was never deducted any pay for this alleged lateness.

[8] Thus Ms Choy was receiving complaints about Ms Hill's alleged lateness, which I accept were based on a mistake about her starting time at work. Because Ms Choy never took the matter up with Ms Hill until after she was dismissed, Ms Hill was not in a position to rectify this misunderstanding.

[9] It was Ms Choy's evidence that on 17 October she wrote Ms Hill a letter which allegedly stated (verbatim):

*I here give you two weeks notice to work as casual. Due to the reduced number of beds. As from today your contract become casual.*

[10] Ms Hill denies ever receiving this letter.

[11] Ms Choy then claimed that on 1 November she put another letter in Ms Hill's payslip, telling her that she was not required to work any more. Ms Hill claimed she was never given such a letter.

[12] Ms Hill's evidence was the first that she knew about any problems was when she was told on 22 November 2010 that she should not come into work any more, because there were empty beds in the rest home and hence there was not enough work for her. She was told that she could come back to work again in December when the resident numbers were expected to have increased.

[13] Ms Hill got advice from a union official and a meeting was organised for two days later to discuss the issues. At the meeting Ms Choy agreed that there was no work because the resident numbers were down and that this was how these matters were dealt with at Lyndswood. She stated that Ms Hill was a good worker and when the beds filled up again she would be back to work. When the legal issues surrounding this approach were raised by the union official Ms Choy said she would

put Ms Hill on and off work as she liked, and that “*under the 90 day Bill*” she didn’t have to give any reasons.

[14] When this was disputed Ms Choy told the union official to put her concerns in writing. Ms Choy also accepted that Ms Hill was entitled to any extra hour’s pay because she had worked overtime, and that this would be paid in her final pay.

[15] I accept that the union official’s notes of this meeting are an accurate record, as the only document provided close to the time. This evidence is also consistent with notes Ms Hill made, although Ms Hill’s dates are not accurate. I have preferred, on the balance of probabilities (i.e. what is more likely than not), their evidence over Ms Choy’s. Ms Choy was given one week by the Authority to provide documentation to support all her claims, set out above, that she made for the first time at the investigation meeting. She provided no such information. I also note that the letter allegedly given to Ms Hill in October 2010 is dated 17 October 2011, rather than 2010.

[16] On 2 December 2010 Ms Hill went to the Lyndswood Rest Home to collect her pay, but there was no payslip and she had not been paid. She received no response to a subsequent request for assistance.

[17] Although the rest home did later fill up, Ms Choy did not offer Ms Hill any more work. From Ms Choy’s perspective Ms Hill was a worker who was regularly late and who had soured and destroyed her relationship with Bernadette as a result of the concerns she had raised through the union.

[18] Ms Choy claims that Ms Hill was never paid her final pay because she had not returned her uniform. I accept Ms Hill’s evidence, according as it does with common sense, that as Ms Hill generally did not take the uniform home, she did not have it at home when she was told without prior warning she was not required to come to work any more.

[19] On 21 December 2010 the union raised a personal grievance for unjustified dismissal, to which there was no response. In March 2011 Ms Hill’s current solicitors wrote to Bernadette, seeking mediation as an alternative to issuing proceedings, but again did not receive a response. Ms Hill then had to file with the Authority. Despite many attempts mediation was never attended by Bernadette, and the matter had to proceed to an investigation meeting.

**Determination**

[20] The parties' arrangements contained in the employment agreement as set out above must be adhered to, not ignored. There are no grounds for Ms Choy to consider that Bernadette could treat Ms Hill other than in terms of the employment agreement. The employment agreement makes it clear that during the first twelve weeks of Ms Hill's employment s.3 was to be adhered to by both parties.

[21] Instead it appears that Ms Choy mistakenly relied on a statutory 90 day trial period that did not apply. She also believed that Ms Hill was *just the tea girl only working a few hours a week* and that she could change things to suit Bernadette without any consultation with Ms Hill. Instead the law requires Bernadette to act as a fair and reasonable employer. No employee may have their terms and conditions affected to their disadvantage, or be dismissed, except when such action is justifiable. Bernadette's actions towards Ms Hill could never have been justifiable in these circumstances without consultation. In effect, Ms Hill was unilaterally put onto casual staff, and later dismissed with effect on 22 November. Given that there was no genuine reason for dissatisfaction with Ms Hill's performance and there was no consultation with her Ms Hill was unjustifiably disadvantaged and dismissed.

[22] Furthermore, Ms Hill was not even paid for her last week's work, or her notice period or holiday pay. Ms Choy seems to have just ignored Ms Hill's claims in this regard because she believed Ms Hill did not return her uniform. I have already concluded that Ms Hill did not have the uniform to return and therefore Ms Choy was wrong to withhold payment to her, if that was the reason for so doing.

[23] Ms Hill is therefore entitled to compensation. At the end of her employment Ms Hill was owed 18 hours pay, consisting of her last one week's pay and the two weeks' notice she should have received. She is therefore entitled to \$229.50 in unpaid wages.

[24] I am not satisfied that Bernadette's record of payments made to Ms Hill is accurate, given the difference between it and the amounts received by Ms Hill into her bank account. I therefore have to assess holiday pay without having completely accurate records and thus must make an estimate of those earnings for that purpose. Holiday pay must be calculated for the period between 11 September 2010 (her first day of work) and 13 December 2010, at which time her notice period would have

expired, at an average of six hours per week for 13 weeks. That constitutes \$79.56 gross.

[25] Ms Hill seeks interest on all the above payments from 13 December 2010. The claim for interest is appropriate because Ms Hill should have been paid those sums at the time, and has thus not had the benefit of them for 27 months. At an annual interest rate of 5% this equates to a loading of 11.7%, totalling \$36.16.

[26] Ms Hill is also entitled to three months remuneration, as she sought alternative work after she lost her job, but was unsuccessful. The sum is \$994.50 gross.

[27] I also accept Ms Hill's evidence, supported by the union official, about the impact the dismissal and her overall treatment by Bernadette has had on her, not just in financial terms, but also on her self confidence, together with health problems she has faced as a result. Had these health problems been backed by medical evidence they would have supported a higher claim. In all the circumstance I consider that \$3,000 compensation under s.123(1)(c)(i) is appropriate.

[28] There is no issue of contributory actions in this case, as it was Ms Choy who took the unilateral actions that led to Ms Hill's loss of employment, and I am not satisfied that any concerns about Ms Hill's timeliness were accurate.

### **Conclusion**

[29] I conclude that Ms Hill has been unjustifiably disadvantaged and unjustifiably dismissed by Bernadette from her employment at the Lyndswood Rest Home.

[30] I therefore order the respondent, Bernadette Enterprise Limited, to pay to the applicant, Ms Allanah Hill the following sums:

- \$229.50 gross for non-paid wages, including those in lieu of notice;
- \$79.56 gross in unpaid holiday pay;
- \$36.16 gross in interest;
- \$994.50 gross in lost remuneration; and
- \$3,000 in compensation.

**Costs**

[31] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**