

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 179
5320613

BETWEEN GAYNOR JOY HILLARY
 Applicant

A N D NZ SHOPPING.COM
 COMPANY LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Justine Baird, Counsel for Applicant
 Leroy Dickson, Counsel for Respondent

Investigation meeting: 7 July 2011 at Queenstown

Submissions Received 24 August 2011 from Applicant
 29 August 2011 from Respondent

Date of Determination: 23 August 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Gaynor Hillary, claims she was unjustifiably dismissed from her employ with the respondent, NZ Shopping.Com Company Limited (NZ Shopping), on 16 February 2010.

[2] Ms Hillary also claims NZ Shopping owe unpaid holiday pay along with other monies improperly deducted from her pay. Finally there was an issue concerning money deducted for forwarding to the Ministry of Justice but retained by NZ Shopping.

[3] In its statement in reply NZ Shopping denied dismissing Ms Hillary, let alone unjustifiably. It also denied the claims of unauthorised deductions, unpaid holidays and failing to forward monies to the Ministry of Justice, though its position has subsequently altered.

Background

[4] Ms Hillary had two periods of engagement with NZ Shopping. The first ran from October 2008 to October 2009. There was no employment agreement.

[5] Toward the end of the engagement NZ Shopping received an attachment notice from the Ministry of Justice. These are issued pursuant to the Summary Proceedings Act 1957 and require an employer to deduct money from wages and forward it to the Ministry to pay fines. It was the first of four notices. Ms Hillary says she arranged for NZ Shopping to deduct the money. One of the owners, Mrs Roseanne Jones, agrees. Her husband Mr Ewan Jones, a minority shareholder who manages the accounts, says *no* – he required authorisation from Ms Hillary and did not get it.

[6] Ms Hillary left to pursue a better paying opportunity but that did not work out and she soon returned (November 2009). The initial expectation was that she cover staff absences for two weeks but that changed and the arrangement became permanent.

[7] During the first week of December 2009 Ms Hillary took a holiday in Australia with a colleague, Donna. Donna, who is also Mr Jones' ex-wife, was a friend and the two had previously flatted together. Whilst in Australia they had a disagreement which Ms Hillary says resulted in a substantial deterioration in their relationship.

[8] Ms Hillary goes on to say that after their return Donna became the acting manager in the Jones' absence and, as a result, there was degradation in the working environment. Ms Hillary claims that when the Jones's returned the situation deteriorated further with Mr Jones humiliating her in front of customers and abusing his wife. Those claims are denied.

[9] Ms Hillary says she raised her concerns with Mrs Jones and advised the situation was such she had considered leaving. She says that was immediately followed by a further degradation in her conditions and various privileges such as the ability to check private emails were removed.

[10] On or about 3 February 2010 Ms Hillary was, for the first time, given a written employment agreement to consider. Mrs Jones explains that was because Ms Hillary

has become permanent and she was getting concerned about *where things were going with Gaynor*. She therefore decided it was time to *protect the business* as she also claims to have recently become aware that Ms Hillary had abandoned some previous positions. She *wanted to have a formal notice period in place to leave no doubt as to Gaynor's terms of employment as much for her protection as ours*.

[11] There is a disagreement as to whether Ms Hillary asked for time to consider the agreement as she claims or not as Mrs Jones claims, but it is clear the agreement was never signed.

[12] Shortly thereafter the issue of unpaid fines arose again. On 8 February Ms Hillary received advice from the Ministry of Justice that no payments had been made. That saw the additional of penalties to the outstanding amount.

[13] On 10 and 11 February Ms Hillary took sick leave. On her return (Monday 15 February) she was handed a pay slip which showed she had not been paid for those two days. She says she questioned this as she had received prior approval for the leave from Mrs Jones. Mrs Jones agrees but advice of the approval had not passed to Mr Jones who prepares the pay. The situation was aggravated as Ms Hillary believes Mr Jones accused her of faking the sickness and a dispute arose between the two about that, her pay records and the unpaid fines. Ms Hillary then departed to get documents to support her claim for sick pay but as she left she told Mr Jones he was a liar and a thief.

[14] Ms Hillary soon returned with documents supporting her claim for sick leave at which point Mr Jones suggested she take the rest of the day off. She says she was upset, thought that a good idea and did. Mr Jones denies that, claiming she stormed out having advised her resignation amidst a stream of obscenities. He also denies asking for evidence of the sickness and did not mention Ms Hillary leaving to get the supporting documentation.

[15] It should be noted that despite Mrs Jones having approved the leave which was for a medical appointment out of town payment was still delayed. Indeed, the matter was not resolved and full payment made till well after the initiation of these proceedings.

[16] Ms Hillary goes on to say:

I arrived at work the following morning at about 8.30am (Tuesday 16 February 2010) to start work. I walked into the staff room area and went to put my bag down. Ewan walked in and asked me what I was doing there. Ewan then said if I did not leave the premises he would call the Police and trespass me.

I was shocked by Ewan's actions and I sat on the couch and said I was not leaving until I had received my pay records.

[17] Ms Hillary claims Mr Jones responded that she was not going to get her pay records and was going to a lawyer. Ms Hillary says Mr Jones then telephoned Donna and gave the phone to her. She says *the conversation was civil but Ewan disconnected the phone and started escorting me from the premises.*

[18] Mr Jones denies that claim. He says Ms Hillary arrived, asked for a pay slip which was provided and left, swearing as she went. When questioned about the trespass comments Mr Jones adds he told Ms Hillary he did not like her behaviour.

[19] Having left, Ms Hillary subsequently telephoned Donna and is alleged to have left a message stating *I hope you are happy now, I've quit.* Ms Hillary denies that claim and there is now no evidence of the message other than the assertion it was left.

[20] Following cessation Ms Hillary received a summary of wages showing the sum of \$1,347.00 had been deducted for forwarding to the Ministry of Justice and a further \$370.00 deducted for a payment to Donna.

[21] She says:

I had not authorised the deduction for payment of my fines on this occasion. During my discussions with Ewan on 15 and 16 February 2010 I made it clear I wanted to be paid in full and I would take responsibility for my own debts. Ewan had refused saying it was all organised with the Ministry of Justice.

I did not authorise the deduction for Donna.

[22] Ms Hillary adds that notwithstanding advice monies had been deducted in respect to her fines she received a further letter from the Ministry of Justice dated 10 June stating the sums remained outstanding. As events transpired NZ Shopping eventually forwarded the monies to the Ministry of Justice in October 2010.

Issues for determination

[23] There are, potentially, three issues to be determined. They are:

- i. Was Ms Hillary dismissed or did she resign;
- ii. If there was a dismissal, can NZ Shopping justify it; and
- iii. Does NZ Shopping owe Ms Hillary for unpaid wages and holiday pay?

Determination

The termination

[24] The first question is whether or not there was a dismissal. Ms Hillary claims she was dismissed on 16 February. She claims to have been told to leave the premises before being escorted there-from. NZ Shopping say she resigned on 15 February amidst a tirade of obscenities when she and Mr Jones were discussing both the requirement to make deductions on behalf of the Ministry of Justice and her eligibility for sick pay.

[25] I prefer Ms Hillary's evidence. I find, as a matter of credibility, it preferable to that offered on behalf of NZ Shopping. For example NZ Shopping have levelled various accusations against Ms Hillary which are belied by the Ministry of Justice's case notes. NZ Shopping's credibility is further undermined by denying the claims in respect of unauthorised deductions and failure to forward money to the Ministry of Justice in the statement in reply. When the statement was prepared both denials were patently false and it was only later the issues were addressed with various payments being made. There were also explanations that were simply not credible. For example when Mr Jones was first asked to explain why the payments had not been made to the Ministry of Justice he said they misunderstood the process, yet undermined that by giving significant evidence about conversations he had with the Ministry. In any event it is clear he understood his obligations no later than 15 February when he advised the Ministry he would forward the money yet he failed to do so for another eight months. Finally I must say I found Mr Jones an unsatisfactory witness. His answers were frequently evasive and he often said *its covered in my brief* when the sections to which he referred went nowhere near answering the question.

[26] Ms Hillary's evidence does not face similar criticism.

[27] Before leaving the issue comment should be made about a point emphasised in both the evidence and submission of NZ Shopping. Contained in the Ministry of Justice case notes are three entries dated 15 February 2010. The first records the caller (Mr Jones) advised that the defendant (Ms Hillary) *has now left employment*. Ms Hillary also called and spoke about her *previous employer*. It is submitted this confirms the relationship came to an end that day which must imply a resignation. I do not accept that. Mr Jones made a second call that day but this time said he *thinks* Ms Hillary had left. That is not nearly as definitive and brings the earlier assertion into doubt. Furthermore, and given what occurred the next day, it is quite possible the argument was such Mr Jones doubted she would return but knew that if she did he would remove any doubt. As to Ms Hillary's comment – all I can say is it is clear her state was such she could have said anything and given previous thoughts of resigning it may well have been her intention at the time.

[28] Even if I am wrong in reaching my conclusion on the basis of credibility, I would have reached the same conclusion for another reason. Both parties agree the discussion of 15 February was heated. It is fraught to accept a resignation tendered in heat and the veracity there-of should often be revisited after a cooling period. Failure to do so may well render the cessation unjustified (see for example *Kostic v Dodd* EMC Christchurch CC14/07, 11 July 2007 Judge Couch). There is no evidence the alleged resignation was questioned after a cooling period in this instance.

[29] For these reasons I conclude there was a dismissal as claimed by Ms Hillary. That conclusion gives rise to the question of whether or not NZ Shopping can justify the dismissal.

[30] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that 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 would have done in all the circumstances at the time the dismissal ... occurred

[31] The above test is used as the cause of action arose prior to the present s.103A coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide

otherwise. Given there is no suggestion in the Act the new s.103A has retrospective effect, the earlier test must apply.

[32] Having just said the test of justification applicable as of 1 April 2011 is not to be applied here, I believe it appropriate it be referred to. I do so as its content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The test now requires that:

(3) In applying the test in subsection (2), the Authority or the court must consider—

...

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[33] NZ Shopping does not come close to complying with the above requirements. There is absolutely no evidence of any investigation or inquiry which involved the putting of concerns, the acquisition of explanations and the consideration there-of. That, however, is not surprising. NZ Shopping do not claim to have engaged in such a process given their reliance on the purported resignation. The dismissal is unjustified.

[34] The conclusion Ms Hillary's dismissal was unjustified means the question of remedies must be considered. She seeks lost wages for a period of three months and compensation of \$10,000 for hurt and humiliation.

[35] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. The amount sought is \$5,107.12. That represents three months earnings at NZ Shopping minus earnings from casual engagements Ms Hillary undertook during that time. Given the content of s.128 I see no reason as to why the amount sought should not be awarded in full.

[36] Ms Hillary also seeks \$10,000 as compensation. Her claim was accompanied by strong evidential support. As a result of NZ Shopping's actions she also faced

pressures from external bodies such as the Ministry of Justice which resulted in additional stress and hurt. Having considered the evidence I conclude an award of \$8,000 to be appropriate.

[37] In accordance with the provisions of s.124 of the Act, I must finally ask whether or not Ms Taylor contributed to the situation in which she found herself and reduce the remedies accordingly. The answer must be no given NZ Shopping's defence that there was a resignation and they never saw a need for a disciplinary process.

Unpaid wages and holiday pay

[38] Ms Hillary claims \$1,637.36 in respect of unpaid wages, which she characterises as unauthorised deductions. She claims a further \$1,476.94 for unpaid holidays which is now conceded (refer paragraph 31 of the NZ Shopping's submissions).

[39] Ms Hillary calculates her wage claim by comparing payments allegedly made by NZ Shopping to those actually received. That is the reason for the use of the terms unauthorised deduction – the money was allegedly paid but not, according to Ms Hillary, received.

[40] The source document is one prepared by Mr Jones but NZ Shopping now attempts to distance itself from the record it prepared. It claims the document was prepared hurriedly and should only be considered indicative and not definitive as is evidenced by various inaccuracies contained therein. For example the amount owing to the Ministry of Justice is incorrectly recorded and the amount payable as holiday pay is also incorrectly calculated.

[41] That explanation is inadequate. The document in question is the employers. I take it as read especially as the evidence shows NZ Shopping ignored various requests for accurate time and wage records over a considerable period of time. It knew this was an issue and had more than sufficient time to get it right. If it chose not to and found itself in a position whereby it was forced to make quick and inaccurate estimates it must, given s.132 of the Act, accept the consequences.

[42] It is also suggested the difference can be explained by Ms Hillary having received cash payments though this is denied by Ms Hillary. The computation in

respect to the amount is also one of the errors referred to above which detracts from the assertion

[43] Section 132 of the Employment Relations Act 2000 provides that where there is a failure to keep or produce wage records I can accept the claim as correct unless there is absolute evidence to the contrary. There is no absolute evidence contradicting Ms Hillary's claim so I accept it, though I note the concession in the submissions and the resulting possibility the holiday pay issue has already been rectified.

Conclusion and Orders

[44] For the forgoing reasons it is concluded Ms Hillary has a personal grievance for unjustified dismissal. She is also owed for unpaid wages and holiday pay and the following orders are made;

- i. The respondent, NZ Shopping.Com Company Limited, is to pay the applicant, Ms Gaynor Hillary, \$5,107.12 (five thousand, one hundred and seven dollars and twelve cents) as recompense for wages lost as a result of the dismissal; and
- ii. NZ Shopping.Com Company Limited is to pay Ms Hillary a further \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.
- iii. NZ Shopping.Com Company Limited owes Ms Hillary a further \$3,114.30 (three thousand, one hundred and fourteen dollars and thirty cents) as restitution if unpaid holiday pay and wages either improperly deducted or simply not paid. If this has not already been paid, it must. PAYE should be deducted and forwarded to Inland Revenue with the residue paid to Ms Hillary.

[45] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority