

Citation of the respondent

[4] The application, as originally filed, cited *The Directors, The Salad Bowl* as the respondent. This was raised with the parties who agree the respondent is The Salad Bowl Limited, a company of which Ms Westphal is a shareholder and director. The citation was changed by agreement.

Background

[5] The Salad Bowl is in the business of preparing and selling salads from retail premises in Nelson to what is predominately a lunchtime clientele. At the time of these events it was looking at opening another outlet which would operate from a mobile cart in Nelson. The Salad Bowl was, at the time, awaiting Council approval to operate the mobile outlet.

[6] Notwithstanding possible delay in the consent process, the Salad Bowl advertised for a new staff member who, it envisaged, would ultimately work from the cart. The advertisement sought someone who would be available to work 15-20 hours per week.

[7] Ms Howe-Thornley applied. She was interviewed by Ms Westphal on 16 August. She is adamant the interview ended with a job offer and there was no mention of a trial period. She says the initial intention was she work between 11am-2pm Monday to Friday but be available for additional work on Saturdays or as client demand required. She says wages were not discussed and there was no draft employment agreement, though she claims Ms Westphal advised she intended printing a form document but could not do so as the printer was not working.

[8] Ms Westphal denies these claims. She is adamant she made it clear Ms Howe-Thornley would be required to undergo a three hour trial to ascertain her suitability for the job. She does, however, agree wages were not discussed and an agreement was not produced. She says that was because she does not produce a copy of the proposed agreement until she makes an offer of employment and that had to await the trials outcome.

[9] Ms Westphal says she then introduced Ms Howe-Thornley to the shop's manager, Ms McArthur. She says she advised Ms McArthur that Ms Howe-Thornley would do a trial period and that evidence is supported by Ms McArthur.

[10] On the evening of Sunday 19 August Ms Westphal telephoned Ms Howe-Thornley and asked if she could come in the following day. She did.

[11] As events transpired the three hour trial was cut short as Ms McArthur fell ill and left early. The Salad Bowl claims Ms Howe-Thornley was only present for an hour and a half while she claims it was two and a half hours. During the time she was there she remained at the back of the shop and had no client contact. She assisted in the preparation of salads and performed some dishwashing and cleaning tasks. That evening Ms Westphal sent Ms Howe-Thornley a text reading:

Hi Amber, Hope today went well for you! Cart launch still up in air, but please come in again tomorrow at 11. thx, randi.

[12] The training was then conducted by Ms Westphal due to Ms McArthur's continued absence. Again there is a disagreement about how long Ms Howe-Thornley was present though the difference is not great. She says two hours; Ms Westphal says one and three quarters.

[13] On this day Ms Howe-Thornley was engaged at the counter serving clients under the supervision of Ms Westphal. She was also taught to operate the till and it is from this subsequent issues arose. There is a further disagreement in that Ms Howe-Thornley claims Ms Westphal was present the entire time she was in the shop. Ms Westphal denies this and says there was a brief absence during which she had to retire to the back area.

[14] At the end of the day Ms Westphal counted the till and says there was a shortfall of \$52.36. She says she was surprised as it had never been that far out before. She then recalled there had been a \$50 note in the till earlier in the day and it was no longer present. She concluded Ms Howe-Thornley had taken it and, at 7.54pm, sent a text reading:

Hi Amber, No need to come into Salad Bowl tomorrow. We'll be in touch. Thx, Randi.

[15] Ms Howe-Thornley thought little of this given she understood she was to be engaged to work on the cart. It was not, as she understood it, due to commence operation until 27 August.

[16] She did not, therefore, make any follow up enquiries until 27 August. That led to an exchange of texts, the content of which is not in dispute. The texts read:

Howe-Thornley to Westphal at 8.35am

Hi randi! What's the go today?

Westphal to Howe-Thornley at 9.56am

Nothing. Please return t-shirt and feel free to get another job.

Howe-Thornley to Westphal at 10am

Sorry i don't understand?

Westphal to Howe-Thornley at 10.05am

There is no job.

Howe-Thornley to Westphal at 10.07am

Ok. Do i get paid for the Monday and Tuesday of last week?

Westphal to Howe-Thornley at 10.08am

Money missing from till is reason you don't have a job!

Howe-Thornley to Westphal at 10.10am

Sorry i have absolutely no idea what you are talking about!!

Westphal to Howe-Thornley at 10.08am

Goodbye.

[17] Communication subsequently followed though Ms Howe-Thornley claims Ms Westphal's responses were tardy and did not provide the information sought. That is one of two rationales for the penalty claim. The other is an alleged refusal by Ms Westphal to attend mediation.

Determination

[18] There are, potentially, two issues to be determined. The first is whether or not Ms Howe-Thornley was an employee of The Salad Bowl? The second depends on the answer to the first. If there was an employment relationship, the question becomes can the Salad Bowl justify its decision to bring it to an end?

[19] The evidence is Ms Howe-Thornley was preparing produce for sale. On the second day she was also serving clients. She was, I conclude, working.

[20] Ms Westphal also asserts she pays prospective employees performing a work trial. Ms Howe-Thornley is the first and only exception though that was not initially intended. Ms Westphal originally intended paying Ms Howe-Thornley for her work on the two days but subsequently changed her mind when she found money missing.

[21] In other words it was intended there be an exchange of labour for remuneration. The fundamental characteristics of an employment agreement are present. For these reasons I conclude Ms Howe-Thornley was employed.

[22] Even if the above conclusion were wrong, I note parliament has now addressed the issue of trial periods. Since 1 April 2011 trial periods must be confirmed in writing prior to commencement. They are also, according to this statutory scheme, paid employment and there is no facility for unpaid experiments. It is arguable the industry practice Ms Westphal evidenced of a short unpaid trial followed by a formal 90 day paid trial is an unlawful device which deprives prospective employees of their statutory rights. Finally, and putting aside, the debate about what was said in the interview, there is an argument Ms Howe-Thornley was a person intending to work and may pursue a personal grievance in any event.

[23] The conclusion Ms Howe-Thornley was employed means the question of whether or not her dismissal can be justified must be addressed. Here I add there can be no doubt there was a dismissal. A dismissal is a sending away and Ms Westphal openly admits that is what she did to Ms Howe-Thornley.

[24] Section 103A of the Employment Relations Act 2000 (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.

[25] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;

- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[26] In essence points 25 (b) to (d) above summarise that which has long been required. An employer is required to put issues in its mind, allow an explanation and consider them.

[27] There was no compliance with these requirements in respect to the decision to conclude this arrangement. Ms Westphal was making a serious accusation yet it was not raised and there was no discussion or attempt to ascertain what happened or why when the decision to dismiss was made. The folly of such a course is exhibited by the fact Ms Westphal originally thought Ms Howe-Thornley had removed two other items in addition to the money. She now accepts that was not the case yet it was in her mind and influenced the decision when it was made.

[28] I have also considered the issue of resources but conclude while The Salad Bowl is a small trader the lack of resources does not excuse the deficiencies here. Not even the most basic requirements of natural justice were considered and, in any event, Ms Westphal could have obtained professional advice but chose not to.

[29] The dismissal must, given the evidence and the failure to comply with the requirements of s.103A, be unjustified.

[30] The conclusion the dismissal is unjustified raises the question of remedies. Ms Howe-Thornley seeks wages lost as a result of the dismissal and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[31] Ms Howe-Thornley seeks \$1,215 in respect to lost wages. That represents payment for fifteen hours per week for the six weeks she took to source a replacement job. 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. Given Ms Howe-Thornley's claim is for the minimum hours identified in the advertisement and a period of less than three months it should be granted in full.

[32] Ms Howe-Thornley seeks \$7,500 as compensation for hurt and humiliation. She supported her claim with evidence of the hurt which emanated from being accused of theft and the inclusion of claims now acknowledged as inaccurate. She also spoke of the traumatising effect her dismissal had and a loss of confidence which continued despite her success in sourcing a new job. Having considered her evidence, I conclude it appropriate to award \$5,000.

[33] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Howe-Thornley contributed to her dismissal in any significant way. While Ms Westphal clearly believes she did, I saw no evidence which supports the accusation of theft. There is nothing upon which I could base a finding of contribution.

[34] There is then the claim The Salad Bowl breached the duty of good faith and its actions warrant a penalty. In particular it is claimed The Salad Bowl refused to provide information in response to Ms Howe-Thornley's claim and refused to attend mediation. I conclude the evidence supports neither the claim nor the imposition of a penalty.

[35] A response was sent on 26 September. It may not have been the answer Ms Howe-Thornley sought but it is substantial and relatively timely. As for the failure to attend mediation I note that while the statutory scheme encourages the use of mediation, it does not make it compulsory. Non-attendance was an option open to The Salad Bowl, especially as there were other factors mitigating against anything which may extend the investigation process.

[36] Finally there is the claim for wages in respect to the hours Ms Howe-Thornley worked at The Salad Bowl. I have already concluded there was an employment relationship so there should be payment.

[37] The parties disagree on how long Ms Howe-Thornley was present. She says five hours; Ms Westphal says three and a quarter. Section 132 of the Employment Relations Act 2000 provides that where there is a failure to keep or produce wage records I should accept the claim as correct unless there is absolute evidence to the contrary. There are no wage records and no absolute evidence contradicting Ms Howe-Thornley's claim (5 hours). I must therefore accept it.

[38] Five hours pay is \$67.50. That amount is owing.

Conclusion and Orders

[39] For the above reasons I conclude Ms Howe-Thornley has a personal grievance as she was unjustifiably dismissed.

[40] As a result the respondent, The Salad Bowl Limited, is ordered to pay the applicant, Ms Amberleigh Howe-Thornley, the following:

- i. \$1,215.00 (one thousand, two hundred and fifteen dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$67.50 (sixty seven dollars and fifty cents) as being recompense of unpaid wages.

[41] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority