



New Zealand Employment Relations Authority Decisions

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Howes v Bon Ton Limited (Wellington) [2011] NZERA 977; [2011] NZERA Wellington 199 (6 December 2011)

Last Updated: 25 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 199
5305246

BETWEEN SARAH HOWES Applicant

AND BON TON LIMITED Respondent

Member of Authority: G J Wood

Representatives: Briany Howes for the Applicant

Jennifer Souness for the Respondent

Investigation Meeting: 23 August 2011 at Wellington

Further Information received:

By 9 September 2011

Determination: 6 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant's (Ms Sarah Howes) employment relationship problems with the respondent (Bon Ton) arose out of her employment as the Manager of its Wellington brothel. Ms Howes had a number of problems with alleged underpayments by Bon Ton, and what she considered to be unfair treatment afforded to her by the principal of Bon Ton, Ms Jennifer Souness. As a result Ms Howes considers that she was unjustifiably constructively dismissed and underpaid in various ways by Bon Ton. Bon Ton denies all of Ms Howes' claims.

[2] The issues for determination are –

(a) Was Ms Howes an employee of Bon Ton between August and September 2008, and thus entitled to be reimbursed for Kiwi Saver and student loan deductions that were not forwarded to IRD?

(b) Was Ms Howes' pay unlawfully reduced with effect from 1 April

2009?

(c) Should Ms Howes be reimbursed a petrol allowance for her job as manager?

(d) Is Ms Howes entitled to any pay for public holidays when she left Bon

Ton, and/or any holiday pay?

(e) Was Ms Howes unjustifiably constructively dismissed, and if so, what remedies, if any, should be awarded to her?

Factual discussion

[3] There can be no certainty about matters that happened several years ago. During this time all witnesses' recollections of events will certainly have deteriorated. Ms Howes has made some serious allegations about Ms Souness' threatening and bullying behaviour. In making my determination on the balance of probabilities (ie what is more likely than not) I have taken into account that the more serious the allegation is, such as threatening behaviour, the more convincing the evidence in support of it must be. A lot of evidence from witnesses other than Ms Howes and Ms Souness was effectively hearsay, and I have had little regard to it. Therefore in making my determinations on disputed matters of fact I have relied principally on what little documentation exists in this matter, together with the evidence of Bon Ton's accountant at the time.

[4] I have also had no reason to alter any of my findings in my previous determination (WA183/10, 15 November 2010), over whether Ms Howes' grievances were raised were out of time, which was not challenged. The only grievance now being pursued is for unjustified constructive dismissal.

[5] I have made an order prohibiting the publication of the names of the clients of Bon Ton on the grounds of commercial confidentiality, given that Ms Howes and Bon Ton now appear to be in competition.

[6] The fact that my earlier determination was not challenged, together with the further evidence of Bon Ton's accountant and the handwritten documentation on the accountant's letterhead, which deals with Kiwi Saver (at least) over the months of August and September, I conclude as follows. After Ms Howes had been associated with Bon Ton for a while she was employed as its Manager, commencing towards the end of July or the beginning of August 2008. Ms Souness chose Ms Howes to take over as Manager, when she left to set up an Auckland branch of Bon Ton, because of their good working relationship over a long period of time.

[7] I accept that the job involved a lot of cleaning and maintenance work, on top of organising appointments and the normal administrative tasks of a manager. Around this time there were a number of discussions about the terms of Ms Howes' employment agreement, and a draft was discussed between the parties. I therefore reject Bon Ton's claim that Ms Howes was not employed by it during the period between August and October of 2008 as an employee, but rather as a contractor. It is also clear from the documentation that Ms Howes wished to be part of the Kiwi Saver scheme, which she should have been automatically enrolled in as a new employee. No doubt this was an oversight on Bon Ton's part. It was later remedied.

[8] Given that Ms Howes was not enrolled in Kiwi Saver until October 2008, despite her commencing some ten weeks earlier, I find that the agreement made in respect of remuneration was that Ms Howes was to be paid a set rate, to take into account the variable hours she would ordinarily be required to work, based on approximately \$20.00 per hour after income tax, being \$25.47 gross per hour, for a 40 hour week. This would be a net amount, after student loan and Kiwi Saver deductions, of \$676.16, which was the amount paid to Ms Howes throughout the course of her employment, as it was the agreed formula between them.

[9] The nature of the brothel business meant that Ms Howes' hours of work, however, were not consistent. She was not required to be at work at all times and often was available to take calls while at home, as the brothel was only open to clients with a booking. An analysis of the 2009 bookings diary showed that business fluctuated greatly. I also note that a number of sex workers had keys to the property for night work, so that Ms Howes' presence was often not required if those sex workers were the only ones engaged at the time.

[10] On that basis I do not accept Ms Howes' claims that she constantly worked over 70 hours per week. Rather, her hours varied, but were significantly less than that, and were consistent with the *unders and overs* arrangement that she had agreed with Ms Souness. The only exception to this was that Ms Howes had expected that

part-time assistance at night would have been provided for earlier in her employment than it was. However, I still conclude that did not result in her working excessive hours compared to what she had agreed to with Ms Souness. This was certainly not the case in her last three months of employment.

[11] Ms Howes complained about the amount of driving she had to do between Bon Ton's Wellington premises and her own home in the Hutt Valley. There is no basis for complaint here. She had obligations to look after her child, and she met those by travelling between Wellington and the Hutt Valley, often on two or three occasions during one day. That was never agreed to by Bon Ton as part of its responsibilities as an employer, and nor could Ms Howes have expected it to, even if she had asked.

[12] Ms Howes also claims that she should have been reimbursed for petrol for the use of her car in delivering clients, which she estimates cost her \$35 per week. There was never any agreement with Bon Ton to pay her \$35 per week. When she did take sex workers to offsite appointments, she was paid when she made a claim for mileage. The rate she was paid was consistent with private sector practice. It therefore follows that she can have no claim over this issue.

[13] In April 2010 personal income tax rates changed. Bon Ton therefore determined, in the light of the parties' agreement

(that Ms Howes' pay would be set at a net rate), that her gross rate through the PAYE system should reduce, in order that there was no increase in Ms Howes' net rate of pay. This was consistent with the parties' agreement and therefore Ms Howes can have no complaint. Indeed she made no such complaint until after her employment ended.

[14] Ms Howes claimed that she worked nine public holidays without extra recompense during the course of her employment. I accept that the Brothel was open on public holidays. In the absence of the part-time relief worker, who worked three nights a week in the last three months or so of Ms Howes' employment, I accept that she was required to work all the public holidays during her employment, at least in the sense of being on call to answer the phone, plus come in to work if necessary. I therefore accept that she was entitled to be paid time and a half and be given a day off in lieu for these nine days.

[15] The good relationship between Ms Souness and Ms Howes continued until Ms Howes became upset by what she saw as a change of Ms Souness' attitude towards her when the Auckland branch was not proving successful. The reasons for this failure included that state of the economy and Ms Souness suffering a serious injury, which precluded her from working for a long period.

[16] In August 2009 Ms Souness was so concerned about Bon Ton's financial situation that she took advice from its accountants, who recommended she cut staff costs. Ms Souness approached Ms Howes asking how much she was paid, and then suggesting that her pay would have to be reduced, particularly as the Auckland brothel had had to close to look for new premises. Ms Howes refused to take a salary cut and the next week Ms Souness rang apologising for the suggestion, which she said had been made by the accountants.

[17] I accept that the failure of the Auckland brothel did mean that Ms Souness' approach to the Wellington brothel and Ms Howes changed significantly, and that it changed for the worse. This was because Ms Souness was requiring the profit from the Wellington brothel to subsidise the failing Auckland brothel. I therefore accept that Ms Souness became more demanding of Ms Howes, such as requiring her to assist with some matters related to the Auckland branch, particularly when Ms Souness was off work injured.

[18] In addition, while I accept that Ms Souness, under financial pressure, started placing more pressure on Ms Howes over the Wellington operation, I also note that Ms Howes stopped returning Ms Souness' calls and also did not answer calls from her, which did not help their relationship.

[19] I accept that there were disagreements over matters such as purchasing of wine and other personal matters, but these were not so serious as to constitute major breaches of the parties' employment agreement. For example, in around September, Ms Souness visited the Wellington brothel and made a comment (which she said was not a criticism), that the place was a bit unclean and that a cleaner should be re-hired. This moved Ms Howes to tears, which she accepted was not over the tidiness issue per se, but over the stress and tiredness she had felt all year. In this regard Ms Howes accepts that she had had major disruptions to her personal life during this period.

[20] Over time I accept that the increased expectations from Ms Souness began to place pressure on Ms Howes, which upset her. However, I do not accept that any of Ms Souness' behaviours, with pretty much all of the interactions taking place over the telephone, were as bad as they were painted by Ms Howes. Thus while Ms Souness had become demanding and even inconsiderate at times, I do not accept that the demands placed on Ms Howes were so unreasonable that she should not be expected to put up with them.

[21] Around November Ms Souness decided to come back to work in Wellington in the interim, until new premises could be found for the Auckland brothel. Ms Howes did not want to work at Wellington if Ms Souness was there, and she made that quite clear to others, before Ms Souness arrived back in November. The major reason for this was because she would see her responsibilities and even potentially her hours of work reduced. Ms Howes made this decision without notifying Ms Souness of her view.

[22] Ms Howes therefore decided to take two weeks' leave when Ms Souness came down, so as to avoid her. Ms Howes claims that she was regularly contacted by Ms Souness during her holiday, which I accept, and which is not good management practice. Ms Howes also claims that Ms Souness informed her that she would not be returning to Auckland for the next few months. However, that is inconsistent with her own letter of resignation. In that letter, dated 20 November, and sent in while Ms Howes was still on leave, she states that she felt she should inform Ms Souness of her decision to resign, *before you commit to a new site in Auckland*.

[23] I therefore do not accept that Ms Howes resigned because she was told that Ms Souness was staying on in Wellington for several months and that she could, accordingly, be out of a job. Ms Howes did not have another job to go to, at least immediately, when she resigned, and it is therefore unlikely that she would have resigned because she believed her job was going to be disestablished some weeks or months down the track. If that were true she could have continued looking for new employment and receiving work and income from Bon Ton during that period.

[24] I conclude that Ms Howes simply did not want to deal with Ms Souness any more, and certainly not in what she saw as

her office, even although Ms Souness was the principal of Bon Ton. Ms Howes therefore wrote the letter on 20 November 2009 stating that she would not be working for Bon Ton after 6 December because she was

resigning. A number of issues of concern to her were raised, including under payments, the working of excessive hours, being given additional responsibilities, and her personally investing in Bon Ton with her own initiatives.

[25] Finally, in the letter Ms Howes stated:

I have also struggled with this decision to leave because I know it won't be easy to find a job that I love this much, nor will it be easy to find a replacement. But I want to be fair to myself, and to you, and I thought I should let you know of my decision before you commit to a new site in Auckland.

[26] I accept that Ms Howes' resignation came out of the blue to Ms Souness and that Ms Howes had not formally attempted to resolve any of the issues she had with Ms Souness.

[27] In December, after Ms Howes had left, she was paid \$1,000, which was described by Bon Ton in bank records, for whatever reason, as a bonus. It now claims that the payment was made to cover issues such as holiday pay and other financial issues addressed in Ms Howes' letter of resignation. I accept Ms Souness' evidence that the payment was mis-categorised as a bonus. Rather, as Ms Howes had raised a number of concerns about non-payment over certain matters, I conclude that this payment was made to deal with those issues. It is simply not credible that, having raised the concerns that she did in her resignation letter (such as pay for public holidays); Bon Ton would have paid the money as a bonus out of the goodness of Ms Souness' heart. Instead I conclude that it was in response to Ms Howes' concerns, which included holiday pay issues. I therefore consider it appropriate that the payment be categorised as payment for any residual moneys owing to Ms Howes and for it to be taken into account by the Authority in assessing how much money is owed to her.

[28] I accept that 8% of eighteen weeks pay is owing to Ms Howes for unpaid holiday pay, after taking into account her full term of employment between August

2008 and December 2009, and holidays that Ms Howes did take during its course. That entitlement constitutes \$973.67 net.

The law

[29] The law on constructive dismissal is clear. In this case the claim can only be that Bon Ton had breached its duties to Ms Howes and that these breaches were the reason for her resignation.

[30] In *Auckland Electric Power Board v. Auckland Local Authorities IUOW*

[\[1994\] 1 ERNZ 169](#) it was held at 172:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[31] In *Wellington Clerical Workers IUOW v. Greenwich* [\[1983\] ACJ 986](#) at 975 the Court of Arbitration held:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Determination

[32] Because Ms Howes was paid \$676.16 throughout her employment, but no deductions for her Kiwi Saver contributions and student loans were made for ten weeks, despite that being part of the bargain, Ms Howes is entitled to the \$1,077.80 she claims. I reject all her claims for interest, because they were not made until final submissions. Bon Ton is entitled to be informed of such a claim well in advance of final submissions.

[33] Given that Ms Howes was not paid for any public holiday pay due at the end of her employment, except for the \$1,000 bonus discussed above, I conclude that she is entitled to 13.5 days pay for underpaid public holidays, to cover for time and a half,

plus a day in lieu. This totals \$1,825.63 net. Again no interest payment is appropriate.

[34] I find that Bon Ton was under no obligation to pay Ms Howes vehicle reimbursement claims of \$35.00 per week.

[35] Ms Howes was not paid the holiday pay owing to her of \$973.67 net when she left her employment.

[36] Clearly, Ms Howes was upset about her work situation; otherwise she would not have resigned. However, it is clear from my factual findings above that Ms Howes has no grounds for a claim for constructive dismissal. On the basis of the facts as found above, there were no serious breaches of duty to Ms Howes that caused her to leave her employment. She did not identify the underpayment of her wages for the first ten weeks, which had occurred more than a year earlier, as the reason for her resignation. She was not aware that she would not be paid for her holiday pay, as required by law, because she could not know that in advance of leaving, when it was due. She had simply raised the public holiday issue as one item in her letter, without ever having raised it with Bon Ton before.

[37] Ms Howes claims that a major reason she left was the long hours she had to work. I have accepted that one of her reasons may have been that she was fed up with the variable hours required to work, but that does not constitute a breach of the parties' employment agreement, given the original terms and my findings about the length of her working week in terms of hours. Furthermore, for the last three months of her employment Ms Howes had hired a person to help cover for her three nights a week. This would have greatly reduced any pressure on Ms Howes.

[38] Another major reason for the resignation was that Ms Howes did not want to work with Ms Souness, even for a limited period, while the Auckland brothel was closed. There can have been no breach of duty by Bon Ton over such a decision by Ms Howes, not Bon Ton, particularly in the circumstances set out above.

[39] Given that there was no serious breach of duty by Bon Ton towards Ms Howes, in any event one that caused her to resign, there can be no constructive dismissal. I therefore dismiss Ms Howes' personal grievance for unjustified constructive dismissal.

[40] I accept that Ms Howes is owed the following sums (net of tax) by Bon Ton:

- \$1,825.63 net over public holidays worked

- \$973.67 net for unpaid holiday pay

- \$1,077.80 reimbursement for Kiwi Saver and student loan payments not deducted.

[41] Against this must be deducted the \$1,000 paid by Bon Ton to meet some or all of these payments. It therefore follows that Ms Howes has been underpaid by

\$2,877.10.

[42] I therefore order the respondent, Bon Ton Limited, to pay to the applicant, Ms

Sarah Howes, the sum of \$2,877.10 net.

Costs

[43] Costs are reserved.

G J Wood

Member of the Employment Relations Authority