IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 78
5377174

BETWEEN	MONIQUE HYDE Applicant
A N D	WINTON HOTEL (2002) LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Mary-Jane Thomas, Counsel for Applicant Alyn Higgins, Counsel for Respondent
Investigation meeting:	27 February 2013 at Invercargill
Submissions Received:	12 March 2013 from Applicant 21 March 2013 from Respondent
Date of Determination:	2 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Monique Hyde, claims she was dismissed (albeit constructively) from her employment with the respondent, Winton Hotel (2002) Limited (the hotel or *the employer*) on 18 February 2012.

[2] The hotel denies the claim and contends Ms Hyde left of her own volition.

[3] There is also a claim for two days pay when Ms Hyde was sick. The hotel accepts payment as not made but denies receiving the medical certificate which Ms Hyde sys she delivered in support of her claim.

Background

[4] Ms Hyde commenced behind the bar in February 2011 having approached to ask if any work was available. She claims to have understood she could expect between 60 and 70 hours a fortnight and would ultimately work as a duty manager.

[5] About Ms Hyde's chances of being a duty manager Winton's managing director, Ms Karen Drake, says:

> *I offered to pay for Monique to complete the necessary training required to be a manager of licensed premises but Monique never presented a completed General Manager's certificate for sale of liquor purposes. So while Monique may have at times been acting manager on premises (as she was able to be) she never worked as a duty manager while employed by the Winton because she did not have the necessary qualifications.*

[6] Ms Hyde's contention is the outcome was due to the hotel's failure to pay for the certificate. The hotel denies knowledge of any account.

[7] The hotel also has different views about the required hours. It says work was arranged under a fortnightly roster which saw employees work Monday, Wednesday and Friday in week 1; Tuesday, Thursday, Saturday in week 2. There was a set commencement time of 6pm and work would continue until patrons departed. The normal expectation was approximately 25 hours a week and an employee could advise non-availability if s/he so wished.

[8] There was no signed employment agreement, though a document stipulating terms and conditions was appended to a noticeboard and available for staff to consult.

[9] In September 2011, Ms Hyde and her partner moved into the hotel. They were required to provide their own food and groceries and contribute $100 towards the power account. There was no rent but Ms Hyde was expected to do various tasks when Ms Drake's daughter was not present and be available *on call* to assist outside her rostered shifts without further payment. There is some disagreement as to whether she ever answered an *on call* request but if she did it is agreed requests were rare.

[10] The employment proceeded with a few incidents which were canvassed during the investigation meeting. The first, according to Ms Hyde, arose as a result of her

partner having served an under-age person in the bar. She says Police subsequently investigated and *I recall the employer accusing me of being a liar and claiming that I had lied to the Police*.

[11] Ms Drake denies the claim. She says the Police investigation had nothing to do with the serving of an under-age patron but involved an incident where Ms Hyde's partner was alleged to have chased someone through the bar with a knife. Ms Drake accepts she advised Ms Hyde be truthful with the Police but denies suggesting she was a liar.

[12] The second event occurred on 5 November 2011. That was the final day of the Cycling Tour of Southland. It is both busy and a day Ms Drake traditionally takes off work. Ms Hyde was not rostered to work but Ms Drake approached that morning and asked whether she would be available if things got busy. Ms Hyde says she replied she had made plans for her day off and may not be available to assist.

[13] Ms Hyde goes on to say:

> *I returned to work on my next rostered day on and the employer told me that she would dock my wages to reflect the three hours when I had not been at work on Saturday 5 November when she had needed me.*

[14] Ms Drake says she originally asked whether or not Ms Hyde would be available the previous Thursday and was told *yes*. She says she again raised the issue that morning but did not understand there were any issues or concerns. She denies deducting the pay.

[15] Ms Hyde claims her hours were unilaterally reduced without explanation after the *under age incident* with a further reduction occurring after the Tour of Southland incident. She says she was only be given 12-20 hours a fortnight come January 2012

[16] Ms Drake denies the claim of a reduction in hours. She says the work was there if Ms Hyde wanted it but she chose to be unavailable for various reasons including performing another job. Ms Hyde denies she had the other job.

[17] Ms Hyde goes on to say:

> *By 18 February 2012 my hours had reduced to the point where it was untenable for me to remain working solely for the employer. I was also aware that by this time the employer had hired someone else to*

> *work in the bar. I thought this was odd, as I was not being rostered on as much as I could, yet someone else was going to start having hours at the hotel.*
>
> *I came to work on 18 February 2012, as I was rostered to work Saturday and Sunday day shift. By this time my solicitor had been in contact with the employer and had requested a copy of my employment file. The employer asked me what I was intending to do, by speaking with a lawyer.*
>
> *I told the employer that I did not want to discuss it with her at that time, as we were working in the bar at the time, in front of patrons and other staff.*
>
> *The employer then asked me whether I wanted the job (with the diminished hours) or not. I responded saying that it was a job and I needed the money.*
>
> *The employer then told me, that because of that response, she was going to give me a written warning although no written warning was ever given.*

[18] The conversation then degenerated with Ms Hyde claiming various hurtful and inappropriate comments were made. She left and chose not to return.

[19] Ms Drake's evidence is:

> *On 18 February 2012, Monique arrived at work late and I asked Monique whether there was anything that she wanted to discuss.*
>
> *Monique told me that she didn't want to discuss it with me. I had by this time received a letter from Preston Russell Law asking for Monique's employment information.*
>
> *I said to Monique that as the employer that I was entitled to know if there were any issues with my staff and to have her work on time and when needed.*
>
> *Also at this time I had started training someone else for bar work knowing that Monique had her farm job and because Monique had said that she was looking for another job.*

[20] While Ms Drake denies making the comments specifically alleged by Ms Hyde she accepts she told Ms Hyde to *grow up as she could go a long way in this business*. She adds she also commented it may be *an idea to get rid of her drop-kick of a partner*.

[21] The grievance was raised soon thereafter with a letter advising its existence being sent on 9 March.

Determination

[22] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

> *It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[23] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

a. An employer gives an employee a choice between resigning or being dismissed;

b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

c. A breach of duty by the employer causes an employee to resign.

[24] There must also be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[25] The claims regarding various comments I take no further. Ms Hyde never voiced her concerns at the time and when answering questions accepted she could not remember details. She also conceded she did not consider the one she had specific recollection about (10 and 11 above) to be serious. This suggests her other concerns related to trivial issues which would not support a claim of constructive dismissal.

[26] Miss Hyde's key allegation, and the prime reason she says continued employment was untenable, is she did not get the hours expected and then those she had were taken from her.

[27] I do not accept the first of these arguments given the evidence. When answering questions Ms Hyde talked about her expectations. She did not actually say there was a guarantee of the hours she alleges. There is also the fact the wage records suggest she only once worked over 60 hours a fortnight and the fortnightly average was just over 40 hours. Despite this Ms Hyde remained for around a year. Her conduct suggests she accepted the situation.

[28] There is, however, the alleged reduction in hours. There are three pay periods in which Ms Hyde worker considerably less hours than her norm. These include the last two fortnights.

[29] Ms Drake says the rosters remained unchanged but Ms Hyde was no longer available as she had a second job and Ms Drake has to use a new employee. There was no evidence supporting Ms Drake's allegation Ms Hyde had another job and Ms Hyde denies the claim. I then consider Ms Hyde's claim she asked for additional hours during this period and the reply was *do you deserve them.* While Ms Drake denied Ms Hyde sought increased hours in her brief she did not repeat the denial when answering questions and did not respond to her alleged reply. When I add this to the fact Ms Hyde considered the situation serious enough to obtain legal assistance, I conclude the evidence supports the claim of a reduction.

[30] To reduce someone's hours and therefore affect their earnings without justification is a breach that can justify the response of resignation. That said there is the fact the hours did change so a question arises as to whether this was really a reduction. I conclude the answer is yes given the pay received those two fortnights was approximately half that normally earned and Ms Drake accepts engaging another employee to work hours previously performed by Ms Hyde.

[31] The third period of similarly low pay occurred in November. Ms Drake says Ms Hyde took leave. Ms Hyde can not remember and does not dispute Ms Drake's claim so I take that event no further.

[32] When I add Ms Drake's admission in respect to various comments made during the final discussion I can see why Ms Hyde left given the already tenuous situation caused by reduced hours and income. Having considered the evidence I conclude Ms Hyde was constructively dismissed.

[33] That the dismissal was unjustified goes without saying. There as no attempt to justify a dismissal the employer denies occurred.

[34] The conclusion Ms Hyde was unjustifiably dismissed raises the question of remedies. Ms Hyde 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.

[35] Here some difficulties arise. Ms Hyde obtained replacement employment in June some 14 or so weeks after her departure. Given her average earnings over the period of employment her earnings for that period could have been in the order of $4,228. However she also performed causal work during that period. The earnings reduce the actual loss and should be deducted from the award but I have no idea what the amount is.

[36] I therefore order the payment of $4,228 minus any earnings from casual employment during the period 18 February 2012 to 1 June 2012. I leave it to the parties to resolve the issue but leave is granted for them to return to the Authority should they be unable to do so.

[37] The amount of compensation sought was not quantified and there was virtually no evidence tendered in support of the claim. In these circumstances, but accepting some hurt must emanate from an unjustified dismissal, Ms Hyde can expect nothing other than a token award. I consider $1,500 appropriate.

[38] Finally there is the issue of the two days sick leave that was not paid. The medical certificate was produced and Ms Drake does not dispute Ms Hyde may have been off sick. Given she had worked over six months and is therefore entitled to sick leave given s.63 of the Holidays Act 2003 I conclude she should have been paid for the hours she was rostered to work on the days in question (11 and 12 February 2012).

[39] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Hyde contributed to her dismissal in any significant way. There is no evidence to support such a finding and I conclude the answer is no.

Conclusion and Orders

[40] For the above reasons I conclude Ms Hyde has a personal grievance as she was unjustifiably dismissed.

[41] As a result the respondent, Winton Hotel (2002) Limited, is ordered to pay the applicant, Ms Monique Hyde, the following:

i. $4,228.00 (four thousand, two hundred and twenty eight dollars) gross, minus the amount of earnings from casual engagements between 18

February 2012 and 1 June 2012 any 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; and

iii. Payment for 11 and 12 February 2012.

[42] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority