IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 157
3062712

	BETWEEN	GLENICE JONES Applicant
	AND	JOHN EVERISS Respondent

Member of Authority:	Michele Ryan
Representatives:	Matt Belesky, counsel for the Applicant Graeme Ogilvie, advocate for the Respondent
Investigation Meeting:	16 March 2020 at Otaki
Submissions and Further information Received:	16 March 2020 on behalf of the Applicant 3 April 2020 on behalf of the Respondent 17 April 2020 "in reply" on behalf of the Applicant 4 June 2020 on behalf of the Respondent
Date of Determination:	20 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr John Everiss owns a food-cart and a coffee shack. Prior to mid-2018 the coffee shack had operated continuously for five years whereas the food-cart was open only intermittently. Both outlets are relatively proximate to each other, and located within Hyde Park Village shopping complex (Hyde Park) in Te Horo.

[2] Ms Glenice Jones had previous experience working as a baker, and was also a friend of Mr Everiss' son and daughter-in-law. In mid-2018 Ms Jones began working for Mr Everiss at

Hyde Park. Unfortunately, the terms and conditions of their employment relationship were never recorded in writing.

[3] It is common ground that for the second half of 2018 there were difficulties in securing a barista to work at the coffee shack.

[4] Ms Jones says she first began working at the coffee shack in late June 2018 after the incumbent barista had suddenly left. She says shortly thereafter Mr Everiss raised the possibility that she undertake the catering for the food-cart and she accepted his offer. The cart was then scheduled to reopen several weeks later, on 16 July 2018.

[5] In contrast, Mr Everiss says Ms Jones began working at the food-cart when it opened for business in mid-July, but that Ms Jones would "*fill-in*" at the coffee shack when there was no barista.

[6] On Saturday 8 December 2018, a disagreement arose between Ms Jones and a family member of Mr Everiss. It is not necessary to detail the event, but Ms Jones believes that matter provided a catalyst for her dismissal. After her shift the following Sunday she was informed she was not required to attend the coffee shack on Monday. As it transpired she was later told she was not needed on the Tuesday also.

[7] Ms Jones returned to work on Wednesday 12 December 2018 and she was invited to a meeting later in the day. The meeting was attended by Mr Everiss, Ms Jones, her support person Mr David Anton, and a person named Tony who had recently been employed by Mr Everiss. There is no dispute Ms Jones was advised a full time barista had been employed, and that, by inference, she was no longer needed in the coffee shack. The parties otherwise disagree as to what was conveyed over the course of the meeting. The key aspects of each parties' positon is as follows.

[8] Ms Jones says the meeting began with Tony stating he was speaking on behalf of Mr Everiss. He said the food cart "*wasn't making money*" and her hours of work were to be reduced to 25 per week. She was told she could "*take it or leave it*". Tony advised that in any event, he was taking over the food-cart on 1 January 2019 and she would not be required after that point.

[9] Ms Jones says she queried why the current arrangements could not continue, and that she was not able to survive on 25 hours work per week. Tony is said to have reiterated his previous statements but said she could finish work that day and be paid for the rest of the week and a further weeks' notice plus holiday pay. The meeting was adjourned for a brief period. They remained at an impasse. Ms Jones became very upset and left.

[10] Mr Everiss says the purpose of the meeting was to advise Ms Jones that a full time barista had been employed. He says he wanted Ms Jones to return to the original arrangement between them, i.e: that she work a 36 hour week at the food-cart. In his statement in reply Mr Everiss says Ms Jones was unhappy about the reduction in hours and change of duties. He says she simply left the meeting and did not return to work.

[11] Final wages, including up to the end of the week, were paid shortly thereafter. I note there was an additional sum paid, which, on the face of it, appeared to be payment of a further weeks' notice as offered in the meeting, but that sum has subsequently been treated as holiday pay.[1]

Ms Jones' claims

[12] Ms Jones' claim before the Authority is that she was unjustifiably dismissed, either actually or constructively during the meeting. She further claims she was unjustifiably disadvantaged by the process taken to dismiss her.

[13] Ms Jones seeks lost wages, compensation for the personal grievances and a lost benefit, and costs. Holiday entitlements have since been paid.

The Authority's investigation

[14] Ms Jones, her son, and Mr Anton each provided written evidence to the Authority as did Mr Everiss and his daughter-in-law. The Authority interviewed Ms Jones, Mr Anton and Mr Everiss and each answered questions under cross examination. The person called Tony did not attend the investigation meeting.

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[1] See email dated 4 June 2020 from the respondent's representative to the applicant's representative and the Authority.

[15] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act (the Act) where the Chief of the Authority considers exceptional circumstances have caused the delay.[2]

The issues

[16] The Authority must decide:

(a) Whether Ms Jones was actually or constructively dismissed from her employment.

(b) If Ms Jones was dismissed, whether the dismissal was justifiable.

(c) Whether Ms Jones was unjustifiably disadvantaged by the process used to end her employment.

(d) Whether Mr Everiss breached statutory obligations owed towards Ms Jones.

(e) Whether remedies should be awarded.

Was Ms Jones dismissed during the meeting of the 12 December and if so, was the dismissal justified.

[17] Mr Everiss firmly denies Ms Jones was told she was dismissed during the meeting of 12 December 2018 or that he wanted her to leave. However it is established in law that an employee may be dismissed, albeit constructively, despite there being no particular words or phrases used by the employer that can be interpreted as ending the employment. This is because a constructive dismissal may arise where the employer's actions initiate or force an employee's resignation whether the employer intended to have the employee leave or not.

[18] An example of conduct which may result in a constructive dismissal is where the employer breaches a duty which caused the employee to resign.[3] In *Wellington etc Clerical etc IUOW v Greenwich*[4] *the Arbitration Court* held that the essential questions to be addressed in constructive dismissal cases (of this nature) are:

a. What were the terms of the contract?

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2 Employment Relations Act 2000, s 174C(4)

3 See *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

4 *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC)

b. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[19] In a 1994 judgement[5] the Court of Appeal held that a relevant consideration leading to a finding of a constructive dismissal involving a breach is where:

> ... 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.

[20] The Employment Court has recently observed the test is an objective one. The question is whether it was reasonable for someone in the employee's positon to have considered his or her employment had been terminated.[6]

What were the terms of the contract?

[21] The absence of a written employment agreement (or contract) between an employee and an employer does not invalidate the existence of an employment relationship. Terms and conditions of employment may be verbally agreed and/or implied between and employer and an employee.

[22] As already noted, Mr Everiss' evidence is that Ms Jones was employed as a full time employee at 36 hours per week in the food cart. He says Ms Jones' work in the coffee cart was because she was willing to help out when the coffee shack was without a barista. In this way it is said there was a temporary increase in Ms Jones' hours when a barista left and a return to lower hours of work when a new barista was appointed. Submissions furnished on Mr Everiss' behalf suggest Ms Jones' employment was permanent but with variable hours.

[23] I am not persuaded by the position Mr Everiss' takes on this matter for the following reasons. Firstly, I am inclined to find Ms Jones began work in late June at the coffee shack as she asserts, noting that pay records reflect she was in receipt of wages for more than a fortnight before the food cart is said to have opened. But even if I were mistaken on this point, it is clear that whatever initial arrangements were as to Ms Jones' hours of work and location, those matters were varied by agreement in mid-July. Mr Everiss acknowledges that in or around the

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5 *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Offices Industrial Union of Workers (Inc)* [1994] 2 NZLR 415 (CA)

6 *Cornish Truck & Van Limited* [2019 NZEmpC 6 at [45], *Concrete Structures (NZ) Ltd v Sam Ward* [2020] NZEmpC 2019

time in which the food cart opened, he and Ms Jones agreed she would work (and be paid) a minimum of 45 hours per week with her work spread between the food cart and the coffee shack. Mr Everiss says Ms Jones always knew this arrangement was temporary whilst the coffee shack was without a barista, but accepts he could not recall specifically discussing this matter with her.

[24] Mr Everiss conceded however, that the barista, who was appointed in July, had hoped to work full time which would have included the early morning work. He acknowledges the barista's hours of work were tailored to accommodate (by then) an established pattern whereby Ms Jones opened and ran the coffee shack between 6am and 9am. This testimony leads away from the submission that Ms Jones' would revert back to the hours associated solely with the food cart when a barista was available, and I do not accept it.

[25] Notably, Ms Jones' work routine of attending to the coffee shack in the early morning as a feature of almost every day of her employment was not seriously challenged by Mr Everiss. It is further apparent from the wage and time records that Ms Jones' hours of work over the duration of her employment were predominantly between 45 and 57 hours per week. This is clearly in excess of the 36 hours assigned to the food cart each week, noting there is only one week in which Ms Jones hours of work fell below 36 over the material period. Ms Jones appears to have taken unpaid leave at the time.

[26] It follows from the above that I must conclude that Ms Jones' was guaranteed a minimum of 45 hours of work per week as a term of her employment with Mr Everiss.

Was the breach sufficiently serious it was foreseeable Ms Jones would leave?

[27] Where there is a conflict in the evidence as to what was communicated between the parties in the meeting on 12 December 2018, I have preferred the testimony of Ms Jones and her support person, Mr Anton, over that of Mr Everiss.

[28] The above finding should not be taken to suggest Mr Everiss sought to mislead or deceive the Authority. Rather, and perhaps as a consequence of the passage of time, it was apparent Mr Everiss simply did not have a clear memory as to what exactly was said in the meeting. By way of example, Mr Everiss said he could not recall Tony advising Ms Jones' hours would be reduced to 25. However he agreed Ms Jones said during the meeting that she could not financially sustain herself on 25 hours of work per week. Mr Everiss advised he

"*might have said 36 hours*" as the number of hours available for Ms Jones to work going forward. Later in his evidence he intimated he had (during the meeting) been happy for Ms Jones to revert to working 45 hours in total a week including at the coffee shack. Later still, he conceded he did not communicate this positon to Ms Jones at the meeting.

[29] Towards the end of his testimony, Mr Everiss acknowledged he had not been especially communicative with Ms Jones about changes to the operation of the outlets or attentive to the detail of her employment. He said he had largely left it to her to organise what was needed to keep both outlets running including working beyond 45 hours a week if needed. I consider it likely that Mr Everiss took a similar back-seat approach to the meeting of December 2018.

[30] It is submitted on Mr Everiss' behalf that the person called Tony did not speak for him during the meeting. However I have accepted Ms Jones' and Mr Anton's testimony that Tony held himself out as Mr Everiss' representative. Ms Jones was entitled to rely on that assertion particularly where there is nothing to suggest Mr Everiss sought to correct the statement at the time if it was wrong.

[31] I found the evidence given by Ms Jones' support person, Mr Anton, concerning the content of the December meeting to be cogent and impartial. He is very clear that the options put to Ms Jones were limited to accepting a significant reduction in hours of work for the following 3 weeks or leave. I note Mr Anton was known to Mr Everiss prior to the meeting and spoke well of him when giving evidence.

[32] The decision to alter Ms Jones' hours of work to approximately half of that previously undertaken was a fundamental breach of the agreement between the parties, particularly where Ms Jones' was clear she could not sustain employment on those terms. The unyielding approach taken by Mr Everiss or Tony as his representative was, in my view, the result of a naïve understanding of the obligations an employer has towards an employee. But that does not alter the impact of the "take or leave it" offer of 25 hours per week on Ms Jones.

[33] I am satisfied it was reasonable for Ms Jones' to have considered her employment was terminated in the prevailing circumstances, and her departure from her employment was reasonably foreseeable having regard to the seriousness of the breach.

[34] Ms Jones was constructively dismissed.

Was the dismissal justified?

[35] Whether a dismissal is justified is determined by an assessment in accordance with s 103A(2). At its essence the Authority must consider whether the action to dismiss the employed and how it acted in doing so – the procedure – was what a a reasonable employer could have done in the circumstances at the time of the dismissal.[7]

[36] It cannot be the action of a fair and reasonable employer to significantly reduce an employee's hours of work without consent or consultation.

[37] Mr Everiss' testimony was that the food cart was not as successful as he had hoped and that there had been complaints that Ms Jones coffee making wasn't to the standard of a barista. I accept it was raised in the December meeting that the food cart was not sufficiently profitable. There is no evidence that Ms Jones performance in the coffee cart was at issue.

[38] If either of the above concerns provided the basis for reducing her hours of work at the food truck and/or removing Ms Jones from the coffee shack these need to needed to be properly put to Ms Jones prior to the December meeting, alongside any information relevant to the employer's position.

[39] Ms Jones should have been afforded an opportunity to consider those matters and to comment on them. A fair and reasonable employer is obliged to give genuine consideration to those, and to have the employer consider her views before any decisions were made. It is clear these procedural requirements were not met. Ms Jones was disadvantaged by the omission.

[40] Mr Everiss has not been able to justify Ms Jones' dismissal.

Remedies

[41] There is no evidence to support a finding that Ms Jones acted in a blameworthy or causative way which led to her dismissal. It follows that the findings set out below are not subject to reductions based on contribution under s 124 of the Act.

Compensation

[42] Ms Jones lives alone. She says she took the dismissal very badly and was candid as to the impact it had on her. She says the way she was dismissed, particularly with Mr Everiss

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7 Employment Relations Act 2000, s 103A.

present who she had trusted, and having it occur just before Christmas exacerbated the distress she felt. Her evidence is that, having previously felt confident in her work, she experienced intense feelings of hopelessness and failure following her dismissal, and became increasingly withdrawn and isolated. She says she was further humiliated by having to borrow from friends and family to survive which she found humiliating.

[43] Between late February and mid-March 2019 she made two separate and significant attempts to end her life. On each occasion she was then promptly admitted to hospital.

[44] It is clear from the medical information provided that Ms Jones has experienced depression in the past. Mr Everiss was unaware of that fact until he received Ms Jones' brief of evidence. It was suggested in the Authority's investigation that Ms Jones' decline in mental health may not be attributable to the employer.

[45] On balance, I consider it likely that the way Ms Jones was dismissed and the impact that action had, triggered the distress she subsequently experienced. I make this finding where I have no reason to doubt Ms Jones' testimony that in the 10 years prior to the dismissal her mental health had been stable, and medication free during her employment with Mr Everiss. I accept her evidence that there was no other source that prompted the onset of her acute episode of depression.

[46] Considering the evidence as to the effect the dismissal had on Ms Jones, and the current range of compensation awards associated with unjustified dismissal grievances, I consider $20,000 in compensation is appropriate in this matter.

Lost wages

[47] I have found Ms Jones was unjustifiably dismissed. I have also found the omission to properly discuss and consult with Ms Jones on the proposal to alter her hours disadvantaged her. I am unwilling however to treat those matters separately when apportioning remedies, as the facts relevant to the disadvantage claims also form the basis on which her dismissal was unjustified.

[48] Having found Ms Jones was unjustifiably dismissed s 128(2) of the Act requires the Authority to award the lesser of either a sum equal to her actual loss or a sum equal to 3 months' ordinary pay. Subsection (3) provides the Authority with a discretion to order a sum greater than that provided for at subsection (2).

[49] Ms Jones seeks lost wages for the period between the end of her employment with Mr Everiss and the date she began a new job on 4 May 2019 – almost 20 weeks.

[50] Submissions on behalf of Mr Everiss refer to Ms Jones placement on a sickness benefit in early January 2019. It says she was not fit to work and should not be reimbursed lost wages in these circumstances. I am unwilling to conclude Mr Everiss is able to avoid remedies associated with a successful personal grievance claim on the basis she was affected by ill health where the employer's actions led to outcome.

[51] Notably, despite Ms Jones' compromised mental health, she provided evidence of more than 18 applications she made for various positons in January and February 2019 and I am satisfied she sought to mitigate her loss. I note also that Ms Jones was discharged from hospital on 4 April 2019. I have no evidence of applications for alternative employment after that period but I understand she started in new role on 4 May 2019. On this evidence I find an award of lost wages beginning 17 December 2018 until 4 April 2019 is appropriate.

[52] At a rate of $18.00 per hour Ms Jones' average earnings are calculated to have been $844.93 (gross) per week. She is entitled to 15 weeks' and 3 days' lost wages. I calculate that sum to be $13,036.05 (gross) in total.[8]

Penalties

[53] Ms Jones requests the Authority impose the payment of penalties to her for breach of good faith and the failure to provide her with an employment agreement.[9]

[54] The failure by Mr Everiss to be responsive and communicative with Ms Jones, including the provision of information relevant to her employment, during the December meeting was a breach of good faith. There is also no dispute that Mr Everiss, in breach of s 65(4) and s 64(4) of the Act, did not furnish, and retain, a written employment agreement recording material information concerning Ms Jones' hours of work, or employment.

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8 Using the methodology advanced by Ms Jones in her Brief of Evidence at para. 59, the total sum of lost wages is calculated as follows: $844.92(gross) per week x 15 weeks = $12,673.95 + $362.10 (3/5 of $844.92) = $13,036.05.

9 Statement of Problem dated 31 May 2019 at 3.1.7 and 3.1.8. Written submissions were provided in respect of a penalty for the breach of the Holidays Act but no corresponding claim was made on the matter.

[55] Similar to the claims alleging an unjustified disadvantage, Ms Jones' claims for penalty orders rely on the same factual matrix as those relied on successfully to establish the unjustified dismissal personal grievance. The circumstances leading to the breach concerning good faith arose directly from the unilateral decision to alter Ms Jones' hours of work. That decision was made unfairly and initiated the dismissal. Moreover, the failure to record Ms Jones' hours of work in a written employment agreement was a factor leading to the fundamental breach of those terms, which resulted in Ms Jones' constructive dismissal.

[56] In *Salt v Fell*[10] the Court followed the approach taken in *Xu v McIntosh*[11] and observed:

> Where a remedy has been sought and granted in respect of a personal grievance, it will be unusual for a penalty to be imposed in respect of the same conduct on the basis that it is also a breach of an employment agreement. There would need to be …. "special facets of the breach calling for the punishment of the employer on top of compensation for the employee".[12]

[57] In this case, the conduct at issue involves breaches of the Act as opposed to a breach of an employment agreement, but I can find no good reason as to why the rational against a doubling-up of remedies would not equally apply. Mr Everiss had already been ordered to pay Ms Jones lost wages and compensation for the conduct that underpins the claims for penalties. I am not persuaded there are special facets present to warrant punishment. I decline to impose penalties in these circumstances.

Loss of a monetary benefit

[58] Pleaded as loss of a monetary benefit under s 123(1)(c)(ii) this claim concerns the payment of legal fees. I do not accept the payment of legal fees was ever a term of Ms Jones' employment for which Mr Everiss agreed to pay. This claim is dismissed.

Summary of orders

[59] Mr John Everiss is ordered to pay Ms Glenice Jones:

(a) $20,000, without deduction, as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act; and

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10 *Salt v Fell* [2006] ERNZ 499
11 *Xu v McIntoch* [2004] 2 ERNZ 448 at [45]
12 *Salt v Fell*, n 8 at [124]

(b) $13,036.05 minus PAYE for lost wages pursuant to s 128 of the Employment Relations Act 2000.

Costs

[60] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority