

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN LJS Employment Ltd (Applicant)

AND Janine Matthews (Respondent)

REPRESENTATIVES Phillip Officer, for Applicant
No appearance for Respondent

MEMBER OF AUTHORITY Vicki Campbell

INVESTIGATION MEETING 28 February 2006

DATE OF DETERMINATION 11 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Jannine Matthews, the respondent in this matter was employed by LJS Employment Limited ("LJS") as a Trainee Manager on 12 July 2005 and worked her last shift on 10 August 2005.

[2] LJS seek to recover \$2,665.81 from Ms Matthews comprising one months notice, and a training bond. LJS has retained from Ms Matthews \$167.22 being holiday pay due and \$90.00 uniform bond leaving a total for recovery of \$2,498.59.

[3] In her statement in reply Ms Matthews says she gave one month's notice and worked two weeks of her notice period. She says she was told she wasn't required to work the remainder of her notice period.

[4] This matter was filed on 18 August 2005. Ms Matthews has responded to only one telephone conference call with the Authority during the period August 2005 to February 2006. At a conference call on 17 November 2005, Ms Matthews undertook to be available at a certain address and telephone number during specific times of the day in order for service of documents to be

executed. Ms Matthews has failed to adhere to her promises. She has been evasive with process servers and has been complete unresponsive to telephone messages.

[5] The parties were directed to mediation in December 2005. The applicants attended as previously been arranged, however, Ms Matthews telephone the mediation service at 9.10am on the day of the planned mediation and advised that she was sick and could not attend.

[6] I determined, given Ms Matthews lack of response to any and all communications from the Authority that further mediation would be unlikely to contribute constructively to a resolution of this employment relationship problem. The matter was duly set down. After several failed attempts by process servers to serve the notice of meeting documents on Ms Matthews the applicant eventually succeeded to serve the notice of the investigation meeting on Ms Matthews on 18 February 2006.

[7] On the day of the investigation meeting Ms Matthews did not attend at the appointed time. At 10.15am the Authority Support Officer left messages for Ms Matthews to contact the Authority urgently. At 10.40am Ms Matthews made contact and advised that she had forgotten about the investigation meeting and offered to attend a conference call the following morning. I spoke directly with Ms Matthews and explained to her that it would be in her best interests to attend the investigation meeting and give her side of the story. I offered to adjourn the investigation meeting until 1.00pm that day in order to allow her time to make suitable arrangements to attend.

[8] The investigation meeting was adjourned and commenced at 1.00pm. Ms Matthews was not in attendance. I am satisfied that Ms Matthews has been served with notification of the investigation meeting. I have therefore heard and determined the matter in the respondent's absence pursuant to Schedule 2 of the Employment Relations Act 2000.

The Employment Agreement

[9] For the purposes of this matter the material clause in the employment agreement is clause 12 which states:

Terms of Employment

- (a) One weeks notice of termination of employment shall be given by either party, unless another period of notice is agreed on in writing by both parties, but this shall not affect the Employer's right to dismiss the Employee for serious misconduct, when the Employee is subject to instant dismissal and entitled to payment up to the day of dismissal only.

- (b) If the Employee leaves the Employer's service without notice or without good cause, the Employee shall forfeit one week's ordinary pay in lieu of notice. The employer reserves the right to deduct accordingly from the final pay, and any other monetary bond posted, of the Employee, one week's ordinary pay as allowed in this clause.
- (c) Where the Employee absents himself or herself from work on any day for more than one consecutive day without the consent or notification of the Employer, this shall be considered as serious misconduct and the Employee shall be deemed to have terminated their employment unless a reason satisfactory to the Employer can be given, and shall forfeit an ordinary week's pay.
- (d) At the termination of employment providing the proper notice is given the Employer, subject to the return of all uniforms and any other equipment or documents supplied, the Employer shall pay the final net amount due to the Employee less any deductions allow for in this contract, no later than the next pay period, unless otherwise agreed to in writing by both parties.
- (e) If the Employee leaves the Employer's service within two months of the Employee's commencement of employment for any reason, the Employee shall forfeit one week's ordinary pay in reimbursement towards the Employers training costs of the Employee. The Employer reserves the right to deduct accordingly from the final pay, and any other monetary Bond posted, of the Employee, one week's ordinary pay as allowed under this clause.
- (f) If the Employee is placed on Suspension for an alleged breach of the Company Work Rules pending a disciplinary meeting hearing to investigate the alleged breach then the Employee shall be Suspended without pay, provided that the disciplinary meeting hearing is conducted with [sic] 14 days of the date of Suspension.

[10] In addition to the Employment Agreement a letter of offer dated 5 July 2005 outlines further terms and conditions of employment. Relevant to this matter is the reference to Termination of Employment. The letter of offer varies the employment agreement and requires notice of one month rather than the 1 week provided for in the agreement.

[11] On 30 July 2005, Ms Matthews contacted Mr Winstone Mathe and advised that her mother was sick and she couldn't get to work. Ms Matthews was asked to stop by the shop that day and see Mr Mathe. Later that same afternoon, Mr Mathe rang Ms Matthews to find out what was happening. Ms Matthews advised him that she would not be in for the whole day.

[12] On Monday, 1 August 2005 Ms Matthews was absent from work. Mr Mathes contacted Ms Matthews to enquire as to her whereabouts. Ms Matthews advised Mr Mathes that she did not believe she was needed and so she would not be in. Mr Mathes contacted Mr Malcolm Smith, who then contacted Ms Matthews and arranged to meet with Ms Matthews in the office. Soon afterwards Ms Matthews rang Mr Smith and advised that she had locked herself out and could not come into the meeting.

[13] Mr Smith and Mr Mathe then proceeded to Ms Matthews home address to discuss the situation with her directly. That discussion resulted in Ms Matthews resigning her position with one months notice. The discussion included the possibility of Ms Matthews only working two weeks notice subject to a replacement being found.

[14] Ms Matthews then attended work on 2 August and worked as required until 10 August 2004.

[15] Ms Matthews contacted Mr Mathe on 11 August and advised him that as she had a job interview she would not be at work that day. Mr Mathe says that he told Ms Matthews that she was needed at work because he was short staffed. Mr Mathe asked Ms Matthews if the interview time could be changed. Ms Matthews must have enquired about that possibility because Mr Mathes evidence at the investigation meeting was that Ms Matthews then rang him back and advised him she couldn't change the interview time. Mr Mathe told Ms Matthews that she was needed at work and that if she failed to show up to work he would consider that she had abandoned her employment.

[16] Ms Matthews did not turn up for work on 12 August and the company made no arrangements to contact her.

[17] I consider that on 1 August 2005 there was a mutual agreement to end the employment relationship on 2 September 2005. Ms Matthews worked one and a half weeks of her notice period and did not return to work. I do not know why she did not return.

[18] LJS seeks to recover one months wages in lieu of notice less holiday pay which have been withheld. The employment agreement does not provide an express agreement (required pursuant to section 4 and 5 of the Wages Protection Act) to withhold the payment of holiday pay at termination of employment.

LJS Employment Ltd is in breach of the Wages Protection Act and is ordered to pay to Ms Matthews all outstanding holiday pay forthwith.

[19] I now turn to the question whether payment or forfeiture of one month's wages in the absence of one months notice is an agreed genuine pre-estimate of damage or a penalty. I find the requirement to forfeit or to pay one months wages to be an agreed genuine pre-estimate of loss in the absence of proper notice being given by either party. The parties are entitled to have their agreement upheld as it relates to improper notice. In this matter Ms Matthews did provide one month's notice, but did not complete it.

[20] The employment agreement is silent on what happens in this situation. What the employment agreement is clear about is that notice is required and it is only in the absence of such

notice that the penalty applies. Ms Matthews did provide one months notice. I consider that she has met her obligations under the employment agreement and the penalty will not apply.

The application for payment of one months notice is not granted.

The training bond

[21] Mr Mathe told me at the investigation meeting that the training bond was to cover the costs associated with training Ms Matthews in cooking the Fish and Chips in the way required by the company including fish cutting techniques and food preparation; teaching Ms Mathews how to open the shop; Cashing up and cleaning and serving.

[22] Mr Mathes accepted that the training provided to Ms Matthews was standard training and was part and parcel of employing new staff.

[23] The Wages Protection Act prohibits an employer receiving the payment of a premium for the employment of a worker. The normal understanding of a premium imports some consideration paid or demanded as a price of a contract (*Sears v A-G (in respect of the Controller and Auditor-General, Audit Dept)* [1994] 2 ERNZ 39). The history of section 12A of the Act was set out in *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451:

Section 12A of the WPA was inserted into the WPA by s62(2) of the Health and Safety in Employment Act (HASE) 1992 as that statute repealed the Factories and Commercial Premises Act 1981 which had previously had a similar provision to that of s12A. Historically the prohibition of charging premiums was enacted to protect vulnerable trades at the time in particular hairdressing trainees where premiums were charged tuition by employers. The historical background was also linked to the introduction of the minimum wage for shop assistants under the Shops and Offices Act 1904. The prohibition on premiums was to overcome the common practice at the time of an assistant being paid wages at the end of one week but giving these back at the end of the next week in the form of a premium.

[24] The demand by LJS for a training bond for training which consisted of normal on-the-job training is a premium within the meaning of section 12A of the Act and is therefore not able to be extracted from Ms Matthews.

Vicki Campbell
Member of Employment Relations Authority