New Zealand Employment Relations Authority Decisions

Lesley Susan Carson v Familton Holdings Ltd CA 113/06 (Christchurch) [2006] NZERA 803 (2 August 2006)

Last Updated: 3 December 2021

Determination Number: CA 113/06 File Number: CEA 350/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN Lesley Susan Carson (Applicant)

AND Familton Holdings Ltd (Respondent)

REPRESENTATIVES Rob Davidson, Counsel for Applicant

Greg Familton for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 8 May 2006

27 June 2006

DATE OF DETERMINATION 2 August 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lesley Carson worked part-time as a cook for Familton Holdings Limited from about December 2004 until she resigned on 4 March 2005. Familton Holdings operates a café business in Oamaru called Fahrenheit Café. Ms Carson says that she was constructively dismissed by Familton Holdings and that she has a personal grievance. There is a claim for $15,000.00 compensation for distress and reimbursement of lost wages.

[2] After the statement of problem was lodged and sent to the respondent, the Authority received a letter from Gregory Familton advising that the respondent would participate in mediation and giving an address for service. A statement in reply was also received. Mediation occurred but did not resolve the problem. There was a phone conference on 21 February 2006 and arrangements were agreed for an investigation meeting to be held on Monday 8 May in Oamaru. A notice of directions and notice of investigation meeting were sent to the respondent at the address given by Mr Familton.

No appearance by the respondent

[3] There was no appearance by the respondent at the investigation meeting on 8 May 2006. I rang the phone number used to contact Mr Familton for the phone conference but there was no answer. It is clear from the file that notice of the meeting was delivered to the address given by Mr Familton and there had been some discussion

between a support officer and Mr Familton on 10 March 2006 about preparations for the investigation meeting. At that stage, there being no good cause known for the respondent's non appearance, I decided to proceed with the investigation meeting. Ms Carson gave evidence on oath.

[4] Subsequently, the Authority heard from Mr Familton who apologised for his non-attendance and claimed to have been sick. He supported that with a medical certificate from a doctor saying that Mr Familton reported to him on 10 May 2006 that he had been unwell on 8 May 2006. I gave the respondent the benefit of the doubt and a further meeting was arranged in Christchurch subject to Familton Holdings meeting Ms Carson's travel costs. Mr Familton then attended and gave evidence on oath.

Employment agreement

[5] There is an unsigned written employment agreement but Ms Carson accepts that it applied as she provided it with the statement of problem. It defines a part-time employee as *those employed for flexible hours depending on the requirements of the employer ...A particular number of hours cannot be guaranteed*. There is also a schedule which says *Hours of work: As rostered*. Clause 4.3 of the agreement says *The employer shall, wherever reasonably practicable, give 7 days notice of any change to rostered* hours.

[6] In her statement of evidence, Ms Carson says that her employment agreement provided for her to be rostered between 30-40 hours per week but that statement does not actually appear anywhere in the written agreement.

[7] The employment agreement also specifies the place of work as *1 Wear Street* the location of Fahrenheit Café. The address of another business apparently run by Familton Holdings Limited, *500 Thames Highway*, is crossed out.

The cause of the resignation

[8] Familton Holdings eventually supplied to the Authority copies of 4 payslips. The records show that Ms Carson worked 96.75 hours for a gross of $1,546.88 in the first two fortnights ending 9 January 2005, 56.75 hours ($851.25) in the fortnight ending 23 January 2005, 52 hours ($836.25) in the fortnight ending 6 February 2005 and 35 Hours ($525.00) in the fortnight ending 20 February 2005. It appears that Ms Carson was not paid for time worked on 25 February, 27 February and 28 February 2005. It also appears that Ms Carson was not paid holiday pay at the end of the employment.

[9] On Sunday 6 February, Ms Carson had a disagreement with one of the waiting staff and left a note for the chef saying that she wanted to talk about the incident. Their rosters coincided next on 11 February 2005 but they did not have time to speak about the incident then. Ms Carson worked on 14 February 2005 and found she needed to obtain several ingredients in order to comply with the chef's preparation list. Ms Carson says that while she was out getting the ingredients, she was seen by Mr Familton who stopped her in the street and remonstrated with her about leaving the café. In his evidence, Mr Familton attempted to downplay this exchange but I find that Ms Carson's recollection should be preferred.

[10] 15 February and 16 February were rostered days off for Ms Carson. On 15 February, Mr Familton phoned Ms Carson at home and told her that there was no more work for her at the Fahrenheit Café and that she would be working at the other business, the Galleon Restaurant, when she returned to work on 17 February. Ms Carson said that she did not want to work at the Galleon Restaurant and Mr Familton said that the chef did not want to work with Ms Carson. Ms Carson and Mr Familton agreed to meet the next day to discuss matters.

[11] Next day at the meeting, Ms Carson was told that it was lawful for the company to direct her to work at either restaurant, that there were complaints from the chef and from two waitresses about

her and that the chef had threatened to resign if forced to work with Ms Carson. Ms Carson was not told any details of the complaints. Ms Carson objected to being moved and said that she thought the employment agreement specified her place of work as *1 Wear Street*. The meeting ended without resolution. Ms Carson later checked her employment agreement then tried to contact Mr Familton. When they did speak, arrangements were made for a further meeting on Sunday 20 February. At that meeting, in response to Ms Carson's reference to the employment agreement, Mr Familton said that Ms Carson would only work when the chef was not on if she insisted on remaining at Fahrenheit Café. As a result, Ms Carson worked lunch on Friday 25 February and from 5.30 pm on Sunday 27 February, a total of 7 hours. At work on the Sunday Ms Carson looked for but could not find the roster for the following week.

[12] In the meantime, Ms Carson sought legal advice and her solicitor wrote a letter dated 25 February 2005 to Familton Holdings at its registered office which is also its address for service. The letter set out Ms Carson's account of events and sought her reinstatement to the hours she had been working before the problem arose. Mediation was also suggested.

[13] On Monday 28 February Ms Carson received a phone call from a waitress telling her that she was supposed to be at work. Ms Carson went in and worked the remainder of the shift and saw that she was rostered to work on Wednesday lunch. She left a note for Mr Familton chiding him for not consulting her over the roster and saying that she could not work then as she had another commitment.

[14] Mr Familton phoned Ms Carson on Tuesday 1 March, told her that her attitude was unacceptable and required her to attend a meeting on Friday 4 March. At that meeting, Ms Carson was told that her hours had been reduced because of a downturn in business and not because of complaints from other staff. I accept Ms Carson's evidence that this was the first mention of any downturn. Ms Carson challenged that as different from what had been said earlier and Mrs Familton responded by saying that there were no witnesses at those earlier meetings and that it would be their word against Ms Carson's. Mr Familton told Ms Carson that they would give her some hours for the following week but could not guarantee any work beyond then. However, Ms Carson felt she could no longer trust her employer because of the indication from Mrs Familton that they would lie about what had been said earlier. Mrs Carson resigned.

[15] In evidence, Mr Familton referred to the resignation of a chef from Familton Holding's other business and said that his approach to Ms Carson was to take over from that chef rather than because of complaints from the Fahrenheit Café chef. Mr Familton later provided some payroll detail for this other chef to back up his evidence. This is a third explanation for what was said by Mr Familton to Ms Carson on 15 & 16 February 2005. I prefer Ms Carson's evidence as detailed above. I should also note that Mr Familton told me that there are no notes of any of the meetings or conversations with Ms Carson

[16] In a letter dated 5 April 2005, Ms Carson's solicitor raised her constructive dismissal grievance. There is also later correspondence referring to a denial by Mrs Familton that Familton Holdings Limited ever employed Ms Carson.

Employer's identity

[17] The applicant identified Familton Holdings Limited t/a Armada Motor Inn 27A Coquet Street Oamaru as the respondent. There was no protest about that in the statement in reply. The employment agreement refers to *Familton Holdings* as the employer but has a heading *Armada Motor Inn & Galleon Complex*. I infer that the base agreement was originally prepared for the respondent's Armada Motor Inn business but has been used without amendment for its Fahrenheit

Café business. Despite the informality of the employment agreement, I accept that Ms Carson was employed by the company Familton Holdings Limited.

Constructive dismissal

[18] In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that dismissal includes cases where the employer gives the employee the option of resigning or being dismissed; or embarks on a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and where a breach of duty by an employer leads an employee to resign. The law in respect of the latter category of cases has been developed in *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW Inc* [1994] NZCA 250; [1994] 1 ERNZ 168. There, the Court of Appeal outlined a two step inquiry for determining this type of constructive dismissal. The first question is whether the resignation has been caused by a breach of duty on the part of the employer. The second question is whether the breach was of sufficient seriousness to make it reasonably foreseeable that the employee would resign.

[19] There is a term of trust and confidence implied into every employment relationship. There is also a wider statutory obligation of good faith behaviour that requires parties to be active and constructive in maintaining a

productive employment relationship. Ms Carson considered that Mr Familton and Mrs Familton breached these obligations by attempting to change the explanation for the lack of rostered work and saying that they would deny the earlier conversations indicating a different reason. There was no other reason for Ms Carson's resignation and I find that she resigned because of these breaches by her employer.

[20] I find that it was reasonably foreseeable that Ms Carson might resign. Indeed, Mr Familton foreshadowed the effective end of the employment relationship by saying on 4 March that he could not guarantee any work after the forthcoming week. He knew full well that Ms Carson would have to look elsewhere for regular work because she needed to maintain an income.

[21] It follows that Ms Carson was constructively dismissed and has a personal grievance against Familton Holdings.

Remedies

[22] Ms Carson did not contribute to the circumstances giving rise to the grievance.

[23] I accept Ms Carson's evidence that she found alternative work from 14 April 2005. She also did a day's casual work near the end of March and received about $90.00 gross. Ms Carson is entitled to compensation for lost remuneration between 21 February 2005 and 14 April 2005. However, the evidence does not support Ms Carson's claim to between 30 and 40 hours work per week as explained above. In the fortnight ending 20 February 2005, Ms Carson worked 35 hours. The roster for this work was fixed before any problem arose between Ms Carson and the chef. I fix 35 hours per fortnight as a fair measure of the loss of remuneration suffered by Ms Carson as a result of the grievance. 21 February to 13 April 2005 is 3.7 fortnights at 35 hours and $15.00 per hour totals $1,942.50. The $90.00 must be deducted from that, reducing the loss to approximately

$1,850.00 which Familton Holdings Limited is ordered to pay to Ms Carson.

[24] There is a claim for $15,000.00 distress compensation but the evidence falls well short of proving loss at that level. However, Ms Carson was forced to ask her brother to provide financial assistance and she remained out of work for some weeks. Familton Holdings never gave her the opportunity to answer whatever concerns had been raised about her and indicated their willingness

to be less than frank if challenged. I accept that Ms Carson suffered a measure of distress as a result and order Familton Holdings Limited to pay compensation of $5,000.00.

Summary

[25] Ms Carson has a personal grievance.

[26] Familton Holdings is to pay Ms Carson compensation of $1,850.00 for lost remuneration and

$5,000.00 for distress.

[27] Familton Holdings Limited must also establish whether holiday pay was paid to Ms Carson at the conclusion of the employment and pay the sum owing if it has not done so already. Leave is reserved if there is any difficulty with this.

[28] Costs are reserved.

Philip Cheyne

Member of Employment Relations Authority