

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 9
3121814

BETWEEN	VIVIENNE LEWIS Applicant
AND	BROWN SHAVER LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Applicant in person James Hobcraft, counsel for the Respondent
Investigation Meeting:	22 September 2021 at Dunedin
Submissions and other material received:	Up to, and including, 19 October 2021
Determination:	19 January 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Vivienne Lewis was employed by Brown Shaver Limited (Brown Shaver) at the Waihemo Lodge Hotel (Waihemo) in Palmerston, East Otago in several capacities over two periods of employment. Brown Shaver owns and operates several hotels in the Canterbury and Otago regions.

[2] Ms Lewis said she was unjustifiably dismissed through redundancy and claimed statutory remedies including for lost wages and compensation of hurt, humiliation and injury to feelings. She also sought a penalty for breach of good faith. Brown Shaver denied Ms Lewis' claims and resisted grant by the Authority of any and all of her proposed remedies.

The Authority's Investigation

[3] During the investigation meeting held in Dunedin, I heard evidence from Ms Lewis and for Brown Shaver, directors Larry Paul and John Lindsay. Ms Lewis' son also provided a witness statement. However, as he did not attend the investigation meeting to swear or affirm his evidence and be questioned about it, this was set aside.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination will not record all the evidence and submissions received during the Authority's investigation but it does state findings of fact and law, and expresses conclusions on issues necessary to dispose of the matter.

Issues

[5] The following are the issues for investigation and determination:

- (i) Was Ms Lewis dismissed by Brown Shaver?;
- (ii) If so, was the decision made what a fair and reasonable employer could have done in all the circumstances at the time?;
- (iii) If Brown Shaver's actions were not justified what remedies should be awarded, considering:
 - (a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;
 - (b) compensation for lost wages under s 123(1)(b) of the Act?
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Lewis that contributed to the situation giving rise to the grievance;
- (v) Did Brown Shaver breach its good faith obligations to Ms Lewis?;
- (vi) If so, should a penalty be imposed, in what amount and should this be made payable to the Applicant?;
- (vii) Should either party contribute to the cost of representation of the other?

What caused Ms Lewis' employment relationship problem?

[6] Ms Lewis' first period of employment at Waihemo came to an end due to several reasons including, seemingly, an ongoing disagreement with a co-worker (Person A).

[7] In early 2019, Ms Lewis was approached by Waihemo's manager enquiring as to whether she wanted to return to work at the hotel as a bar person. Evidently, Ms Lewis agreed provided that Person A was not involved in her employment. Having received assurances about this, Ms Lewis and Brown Shaver entered into an employment agreement. There was some dispute in the evidence between the parties about whether Ms Lewis was a fulltime or part-time employee but ultimately I prefer Ms Lewis' evidence about this: she was a fulltime employee. In any event, the second period of employment commenced on or around 14 February 2019.

[8] On 20 November 2019, Ms Lewis broke her leg and she commenced an extended period of ACC. Indeed, she was still receiving support from ACC at the time of the Authority's investigation meeting.

[9] At or about this time, Person A became the manager of Waihemo, or at least more responsible for its operations than previously. Person A evidently then engaged with Ms Lewis about when she might be fit to return to work. Ms Lewis said it was made clear to her that her hours and days would change and that Person A would be more involved in her employment.

[10] With the onset of the COVID-19 pandemic, Ms Lewis contacted Person A to enquire whether Brown Shaver was applying to the government's wage subsidy scheme to cover her position. Person A told Ms Lewis to speak to Mr Paul. Ms Lewis said she sent Mr Paul a text message on 24 April 2020 but received no reply. Mr Paul and Mr Lindsay would say in their written evidence that no wage subsidy was applied for because Ms Lewis was on ACC.

[11] Ms Lewis said she became aware that Person A was advertising the reopening of Waihemo due to a move to “COVID-19 Alert Level 2” via a “social media” post on 14 May 2020. Again Ms Lewis asked Person A if Brown Shaver was applying for the wage subsidy for her and she was told to contact Mr Lindsay. Ms Lewis said this was strange because she always dealt with Mr Paul. Ms Lewis contacted Mr Paul instead but received no response.

[12] On 15 May 2020, Mr Lindsay returned Ms Lewis’ call. In his evidence Mr Lindsay said Brown Shaver’s operations were in “total disarray” due to the pandemic and it was a very challenging time for the company. Mr Lindsay also said that Mr Paul had asked him to return Ms Lewis’ call because Mr Paul was “focused on other problems at the time”.

[13] During the conversation, Ms Lewis said Mr Lindsay told her she was being made redundant and that her job was “gone”. Mr Lindsay completely rejected the notion he told Ms Lewis she was redundant during the phone call. In his written and oral evidence, he carefully set out what he spoke to Ms Lewis about, including:

- (i) Waihemo was closed due to the COVID-19 restrictions;
- (ii) Brown Shaver had no idea what the future looked like;
- (iii) she would not provide ACC medical clearance to return to work;
- (iv) that it was likely Ms Lewis’ hours would need to be reduced and such hours may be in the kitchen preparing “meals on wheels” as the bar was closed¹; and
- (v) no wage subsidy application had been made because she was on ACC.

[14] Mr Lindsay said he became aware that Ms Lewis considered that he had made her redundant. In response, he said he sent Ms Lewis a text message reiterating that her job was still open provided she provided the necessary medical clearance to return to work.

¹ The employment agreement extant appeared to allow for this to occur.

[15] Unpersuaded by Mr Lindsay's representations, on 7 June 2020 Ms Lewis raised a personal grievance with Brown Shaver for unjustified dismissal. A number of other issues were raised also including defamation, which is outside of the Authority's jurisdiction. These matters were not pressed before the Authority.

[16] The parties did not attend mediation and there was a dispute on the facts about the reason or reasons for this. In the end, the matter proceeded to an investigation meeting to ensure the orderly resolution of the employment relationship problem.

The Authority's view of the employment relationship problem

[17] In my view, based on the evidence before the Authority, Ms Lewis claim falters at the first hurdle. I find that Ms Lewis was not dismissed by reason of redundancy, or any other reason, by Brown Shaver. There was no "sending away". I accept the submission advanced by Brown Shaver that the text message sent by Mr Lindsay on 25 May 2020 reinforces his earlier position in relation to the telephone conversation of 15 May 2020 rather than detracts from it.

[18] I find it was open to Ms Lewis to return to work at Waihemo upon presentation of a medical clearance but this did not occur. Having found as a fact there was no dismissal, it is not necessary to make any findings as to how the employment did actually end but there is force in Brown Shaver's submission that it ended either through abandonment of employment or resignation through conduct by Ms Lewis.

[19] Having found Brown Shaver did not dismiss Ms Lewis, it is not necessary to consider remedies including the imposition of a penalty for breach of good faith; a breach of which has not, in any event, been established. Ultimately, any consequences that flow from the end of the employment relationship between Brown Shaver and Ms Lewis are for her to bear.

Costs

[20] Costs are reserved. Given Ms Lewis' personal and financial circumstances this is possibly a matter where costs between the parties can lie where they fall. If a determination of the Authority is required on costs, Brown Shaver may lodge a memorandum within 28 days of the date of this determination and Ms Lewis would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Dallas
Chief of the Employment Relations Authority