

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 59  
3122052

BETWEEN	KYLIE MILLS Applicant
AND	CLOVERBLOOM COMPANY LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Michael Harrison, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	14 October 2021 by Zoom
Submissions received:	14 October and 25 November 2021
Determination:	25 February 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Kylie Mills was employed as a kitchen hand by Rodney Greenwood, on behalf of Cloverbloom Company Limited (Cloverbloom) from 4 November 2019 to 6 January 2020. Rodney Greenwood is the sole director and shareholder of Cloverbloom. Cloverbloom is currently a registered company with the Companies Office.

[2] Ms Mills claims her dismissal was unjustified and that the unilateral reduction to her hours of work was also an unjustified disadvantage. Ms Mills claims lost wages, compensation, penalties and costs.

[3] Mr Greenwood's position was that the individual employment agreement (IEA) was a casual contract of employment, and because of conduct issues and a

misunderstanding about a change in Ms Mills' work hours, Cloverbloom was entitled to dismiss Ms Mills.

### **The Authority's investigation**

[4] An in-person investigation meeting scheduled for 20 August 2021 was cancelled due to Covid-19 Level 4 lockdown. A new date of 14 October 2021 was set down with the Applicant agreeing to a Zoom hearing.

[5] Mr Greenwood had filed a statement in reply but did not attend the case management conference call. The last correspondence from Mr Greenwood to the Authority was on 10 July 2021, when he advised that Cloverbloom was no longer trading, that the business premises had burnt down and that he did not wish to participate in the process. He sought to withdraw from the process on medical grounds. Mr Greenwood was informed an adjournment could be considered if he was to provide medical evidence. The Authority received no further communications from Mr Greenwood.

[6] I am satisfied that the notice of investigation meeting was served to Cloverbloom's address for service as advised to the Authority. Included in that notice that Mr Greenwood received, was advice that if the respondent did not attend the investigation meeting, the Authority may, without hearing the evidence from the respondent, issue a determination in favour of the applicant.

[7] The Authority has the power to proceed<sup>1</sup> if any party without good cause fails to attend and may act as fully in the matter before it as if that party had duly attended or been represented. The investigation meeting proceeded on this basis.

[8] For the Authority's investigation a written witness statement was lodged from Kylie Mills and she answered questions under affirmation from me. Mr Harrison also gave oral closing submissions. Health and counselling records were provided by Ms Mills on 25 November 2021.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

---

<sup>1</sup> Employment Relations Act 2000, schedule 2 clause 12.

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **Background**

[10] Ms Mills was employed by Cloverbloom on 4 November 2019 as a kitchen hand after the business changed hands (having worked for the previous owner). She signed a new IEA with Cloverbloom that provided she would work the “hours per week” on days “as agreed” by the parties.

[11] Cloverbloom had agreed on Ms Mills hours of work and Ms Mills’ roster shows a regular pattern of work. It amounted to 25 hours per week and Ms Mills had adjusted her hours to accommodate a change in the operating hours of the business.

[12] Ms Mills also gave evidence that on 30 December 2019, she sent Mr Greenwood a text message asking why she had not been paid for the statutory holidays (Christmas Day and Boxing Day) because they were days that she would have ordinarily worked.

[13] Mr Greenwood replied saying she was paid eight per-cent holiday pay and that she could not have it both ways. Ms Mills received another text from Mr Greenwood saying he had paid her for the statutory holidays and taken off the holiday pay and said he would let her know about hours next week. Ms Mills replied saying she would be in next week working her usual hours.

[14] On 3 January 2020, she received a text from the rostering person, saying she was working Tuesday morning and night and Wednesday day and night. Ms Mills replied by text saying those were not her normal working hours and asked why her hours had been changed. She set out what her normal work hours were. These regular hours were also necessary for childcare so she could work.

[15] On 4 January 2020, the rostering person responded offering Ms Mills only two shifts on a Monday and Wednesday evening amounting to 6 hours work for the coming week. Ms Mills did an extra shift by agreement to fill in and when she looked at the board at work she discovered her normal shifts had been given to someone else.

[16] Ms Mills sent a text to Mr Greenwood and the rostering person asking why her shifts had been decreased without any notice or consultation. When she did not receive

a reply, she requested a meeting with Mr Greenwood. He agreed to meet but said he was entitled to decrease her hours because she was “casual”. Ms Mills suggested an alternative meeting date that was suitable for the support person she wanted to bring to the meeting.

[17] Ms Mills says Mr Greenwood called her and said he was “extremely abrupt and hot headed” in that he asked her what her problem was and then told her that she was casual and did not have guaranteed hours, so he was entitled to take hours away from her. Ms Mills was not comfortable with how she was being spoken to, so she ended the conversation.

[18] On 6 January 2020, Ms Mills received a text from Mr Greenwood instructing her to read her email. The email stated:

“Employment Termination

06/01/20

Please take note Kylie that we have terminated your employment effective immediately on the following grounds.

You have been late for work or not shown up on numerous occasions when on roster. You have caused an issue at some stage with all your co-workers.

We have no faith in your ability to do your job properly and on quite a few occasions haven’t finished your work but have left the floor mopping off your area to someone else.

You had a bad attitude problem to your employers.

As such we have no confidence in employing you from this day forward and have paid you any money owing for week ending the 5/1/20 and up to the end off the week ending 19/01/20.

You have an outstanding account for bacon which needs to be paid no later than the 10/01/20 or will pursue through a credit agency.

....

[19] On 7 January 2020, Mr Harrison, wrote to Cloverbloom on Ms Mill's behalf, raising a personal grievance based on unjustified dismissal and requested copies of her employment records.

[20] Ms Mills says the copy of the IEA that Mr Greenwood provided was altered in that the words "casual/part time kitchen hand" have been inserted. She says this was not in the contract when she signed the letters of offer of employment and employee acknowledgement.

[21] Ms Mills view is that she was dismissed for requesting to be paid for statutory holidays because there were no issues until she raised that with Mr Greenwood. She feels that what happened was retaliatory conduct by Mr Greenwood. She gave evidence of the impact on her and her family, particularly because of the small community they live in. It was hard to find work, and she found it difficult explaining to her friends and family why she was no longer working.

[22] With reference to the statement in reply, Cloverbloom's position was that the change in hours was only temporary over the Christmas and New Year period, all employees were employed on a part-time casual basis and had received the same contract. He said other staff would be happy to confirm this by way of letter, but nothing further was received from Mr Greenwood. He also indicated he had been unwell.

[23] Mr Greenwood set out that Ms Mills was abusive (towards him) about the hours issue, she "never showed up for work or notified him" (presumably of when she was not attending work) and noted that she was paid 8 per-cent holiday pay as a casual.

[24] He also said other staff did not like working with Ms Mills, that she was "slack at her job" and whatever hours she worked before he bought the business had nothing to do with him. He made reference to a letter to be provided from the previous employer, but no letter was received by the Authority.

[25] Ms Mills denied not attending work and said she had pre-arranged leave. She was shocked to be described as slack and thought she had a good relationship with others at work.

## **Was Ms Mills unjustifiably dismissed?**

[26] The question of whether a dismissal or other action by an employer is justifiable is determined on an objective basis by applying the test at s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.

[27] In applying the test, the Authority must consider four factors in addition to any others it thinks appropriate. The factors are:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

### *Permanent vs casual*

[28] The significant difference between the parties' positions is whether the employment was on a casual or permanent basis.

[29] I prefer the evidence of Ms Mills and the version of the IEA that she provided. She was employed on a permanent basis because that is supported by the fact that both agreements provide for four weeks annual leave on completion of 12 months service and did not stipulate that she be paid eight per-cent of her holiday pay in each wage payment.

[30] The roster also indicates a clear pattern of work which assists in understanding that the employment was of a permanent nature.

[31] I accept that Mr Greenwood was correct in that she was being paid holiday pay in weekly amounts, but it appears that he was mistaken in thinking that he had to do that because the IEA was clearly drafted to accommodate a permanent position.

### *Dismissal*

[32] When an employer wishes to make a finding about an employee's conduct and base any dismissal decision on that finding they must comply with s 103A of the Act and:

- Sufficiently investigate allegations;
- Raise any concerns with the employee;
- Give the employee a reasonable opportunity to respond to those concerns; and
- Genuinely consider any explanation given.

[33] There is no evidence of any consultation about significant changes to Ms Mills' employment or concerns about her conduct at work being raised with Ms Mills as set out in the email dismissing her. The strong wording in the statement of reply suggests there were employment allegations sufficiently serious to be investigated. No allegations were put to her and there was no investigation. In addition, Ms Mills' explanation about agreed hours and payment for statutory holidays does not appear to have been considered fully.

[34] In these circumstances, with no process and not issues raised with Ms Mills, what occurred does not comply with s 103A of the Act and the dismissal is not able to be justified by an employer in these circumstances.

[35] The IEA provided that employment could be ended for reasonable cause. With no process or issues raised, there cannot be reasonable cause. As a result, I find that the dismissal was unjustified both procedurally and substantively. Ms Mills has made out her personal grievance claim that she was unjustifiably dismissed.

## **Remedies**

### *Lost wages*

[36] The Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee because of the grievance.

[37] Reimbursement of lost wages for 13 weeks are sought. Ms Mills was unable to find work for nine months. The community is a small farming town, and she found it difficult to explain why she had lost her job without an adverse inference being taken from that. She spoke about being in her community and having others tell her Mr Greenwood's version of events including at a café where she could have got work. Because of this, she struggled to find work and had to seek assistance from her general practitioner and make other life adjustments because she found herself suffering from anxiety and stress.

[38] I accept that reimbursement is appropriate in circumstances where the manner of dismissal deviated sharply from the statutory obligations on employers, and I consider that reimbursement of a sum equal to three months' ordinary time would be appropriate.

[39] Ms Mills is entitled to reimbursement of the sum of \$5928.00, (based on earnings of \$456.00 per week) under s 123(1)(b) of the Act.

### *Compensation*

[40] Ms Mills seeks compensation in the amount of \$2000 for unjustified disadvantage and for hurt and humiliation in the amount of \$15,000. Ms Mills said when she read the email she was really hurt and gobsmacked because what was said about her was not true. The way in which her employment came to an end made her feel embarrassed and hurt. She said her confidence was very damaged and she needed to take steps to bring her confidence back. She provided the Authority with medical evidence and evidence of the steps she took to regain her equilibrium and confidence.

[41] The impact on her family during the nine months she was without work were significant. Her husband worked very long hours so they could make ends meet. They

were unable to pay for childcare so lost the place they had when they pulled their child out of day care.

[42] The dismissal process followed by Mr Greenwood was unfair and procedurally and substantively flawed. Ms Mills was humiliated and suffered loss of dignity and injury to feelings as a result of how she was dismissed. Subject to any contribution, Ms Mills is entitled to payment of compensation in the sum of \$15,000 under s 123(1)(c)(i) if the Act.

[43] I do not consider that Ms Mills contributed towards the situation that gave rise to the personal grievance. Mr Greenwood has acted with no reference to or understanding of the obligations on him as an employer under the Act to raise concerns and to be responsive and communicative and I have preferred the evidence and the version of the IEA provided by Ms Mills.

### **Penalties**

[44] A penalty is claimed because Mr Greenwood did not comply with the provisions of the IEA in relation to ending employment and investigating serious concerns. The dismissal appeared to be impulsive on Mr Greenwood's part after Ms Mills questioned why her hours were being changed without consultation and sought payment for statutory holidays, as she was entitled to do, in accordance with her IEA and the legislation.

[45] Mr Harrison submitted that the penalties were appropriate in all the circumstances because the failures all rested with the employer who did not appear to understand the nature of the contract between the parties. Dismissal was unjustified and had the appearance of being retaliatory. His actions had significant impact on Ms Mills and were a serious departure from what the Act requires of employers when they have concerns about an employee's conduct, so a significant penalty was sought.

[46] In determining the quantum of penalties to be imposed, if any, I note that the breaches were deliberate evidenced by the steps Mr Greenwood took to end Ms Mills' employment with no corresponding process. Not raising concerns with Ms Mills, whether genuine or not, was unfair to Ms Mills.

[47] The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities<sup>2</sup> and I am satisfied, having taken into account the matters set out in s 133A of the Act, that penalties are warranted in the circumstances of this case.

[48] Acknowledging the inherent inequality of power in employment relationships and then weighing the relevant factors, and taking into account the purpose of penalties to deter the conduct, a penalty of \$3,000 is an appropriate amount to impose for the breaches. That is proportionate to the harm done and within the range of penalties imposed in similar cases.

### **Orders made**

[49] Cloverbloom Company Limited is ordered to pay Kylie Mills the following:

- (a) Reimbursement for lost wages in the amount of \$5928.00 (less tax) under s 123(1)(b) of the Act.
- (b) Compensation in the amount of \$15,000 without deduction under s 123(1)(c)(i) of the Act; and
- (c) Penalties in the amount of \$3,000 of which \$2,000 is to be paid to the Employment Relations Authority by way of the Crown and \$1,000 to Ms Mills within 28 days of this determination.

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

Sarah Kennedy  
Member of the Employment Relations Authority

---

<sup>2</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].