

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 285
5457810

BETWEEN

RENE MULDER
Applicant

A N D

JOANNE HAUNUI TRADING
AS THIRTY30
Respondent

Member of Authority: Rachel Larmer

Representatives: Dave Vinnicombe, Advocate for Applicant
No appearance by Respondent

Investigation Meeting: 04 July 2014 at Whangarei

Date of Determination: 04 July 2014

DETERMINATION OF THE AUTHORITY

- A. Joanne Haunui unjustifiably dismissed Rene Mulder. Ms Haunui is ordered within 28 days of the date of this determination to pay Mr Mulder:**
- a. \$4,791.50 lost remuneration;**
 - b. \$3,500 distress compensation;**
 - c. \$1,000 towards his costs;**
 - d. \$71.56 to reimburse his filing fee.**

No appearance by Respondent

[1] Ms Haunui did not file a Statement in Reply and she did not seek leave to file a Statement in Reply out of time. Ms Haunui did not attend the Authority's investigation meeting today. I am satisfied the Statement of Problem and Notice of Hearing were served on Ms Haunui.

Employment relationship problem

[2] Mr Mulder and Ms Haunui worked together in Australia. Ms Haunui returned to New Zealand and brought the café/restaurant Thirty30 in Pihia. She asked Mr Mulder to come and work for her as a chef and she paid for his flights back to New Zealand.

[3] Mr Mulder started work as a permanent fulltime employee on 03 October 2013. He was paid \$23 per hour for 40 hours per week.

[4] On 30 March 2014 Mr Mulder attended work as usual. He was given a new roster which showed he had been rostered to work only three days. When he asked why that had occurred he was told that he would be finishing work on 02 April 2014 because he had a six month contract.

[5] Mr Mulder says he did not receive a written employment agreement before or during his employment. He also says he never would have agreed to leave Australia for a fixed term contract. He believed he had ongoing employment and had made commitments to his partner and landlord on that basis. Mr Mulder says he was shocked to be told of his dismissal.

[6] On 31 March Mr Mulder received a text message confirming his employment had been terminated and saying he could go in to work to collect a copy of his termination letter and employment agreement. The text also alleges that the restaurant manager Ms Karen Smith (Ms Haunui's domestic partner) felt physically threatened by Mr Mulder. He denies threatening anyone or behaving in a manner that could be construed as threatening.

[7] Mr Mulder attended work on 01 April to collect his employment agreement which he says was the first time he saw it. The agreement he was given had not been signed by him.

[8] Mr Mulder claims he was unjustifiably dismissed.

Issues

[9] The following issues are to be determined:

- a. Was Mr Mulder dismissed?
- b. If so, was dismissal justified?
- c. If not, what if any remedies should be awarded?
- d. What if any costs should be awarded?

Was Mr Mulder dismissed?

[10] The expiry of a genuine fixed term engagement is not a dismissal. However in order to end an employee's fixed term employment without that amounting to a dismissal the requirements of s.66 of the Employment Relations Act 2000 (the Act) must be complied with. Failure to do so means an employer is unable to rely on the expiry of a fixed term to end an employee's employment without that amounting to a dismissal.

[11] I find it more likely than not that Mr Mulder was not given a written employment agreement until after he had been dismissed. The purported fixed term is therefore not effective. Even if he had been given the purported employment agreement before he accepted the offer of employment it still did not comply with the requirements of s.66 of the Act. Ms Haunui is therefore unable to rely on it as ending Mr Mulder's employment without that amounting to a dismissal.

[12] I find that Mr Mulder was dismissed because he was sent away at Ms Haunui's sole initiative. He was rostered off then told and subsequently texted that his employment had ended. That is clearly a dismissal.

Was dismissal justified?

[13] Justification is to be objectively determined in accordance with the justification test in s.103A of the Act.

[14] A fair and reasonable employer is expected to comply with its statutory obligations and I find that Ms Haunui did not. She breached her s.4(1A) good faith obligations to Mr Mulder because he was not provided with all relevant information before being dismissed. She also failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act.

[15] Ms Haunui is unable to justify Mr Mulder's dismissal.

What if any remedies should be awarded?

[16] I find that Mr Mulder took appropriate steps to mitigate his loss. He was out of work for two weeks then he obtained temporary work for three weeks fruit picking. He then obtained work as a chef for 30 hours a week at \$18 per hour.

[17] I accept Mr Mulder's evidence that he lost \$4,971.16 actual remuneration as a result of his unjustified dismissal. It is appropriate for him to be compensated for that. Ms Haunui is ordered to pay Mr Mulder \$4,971.16 lost remuneration under s.128 of the Act.

[18] Mr Mulder gave evidence of the stress humiliation and distress his unjustified dismissal has caused him. He almost lost his rental accommodation due to inability to pay his rent. He was placed under financial pressure and had to borrow money from his parents which he has not yet been able to repay. His relationship with his partner was adversely affected due to the financial stress and pressure.

[19] I order Ms Haunui to pay Mr Mulder \$3,500 under s.123 (1)(c)(i) of the Act to compensate him for the hurt humiliation and injury to feeling he has suffered as a result of his unjustified dismissal.

[20] Having determined that Mr Mulder has a grievance s.124 of the Act requires the Authority to consider whether he contributed to the situation that gave rise to his dismissal grievance and if so to reduce remedies accordingly.

[21] This requires blameworthy conduct which is established on the balance of probabilities. There is no such evidence so Mr Mulder's remedies are not to be reduced on the grounds of contribution.

What if any costs should be awarded?

[22] Mr Mulder as the successful party is entitled to a contribution towards his actual costs. I am satisfied he has incurred actual costs in excess of the Authority's current notional daily tariff of \$3,500.

[23] I adopt the Authority's usual notional daily tariff based approach to costs. This matter involved less than one hour for the Authority's investigation meeting so the pro rata starting point for assessing costs is \$500.

[24] I accept Mr Vinnicombe's submission that Ms Haunui's complete failure to engage in any way whatsoever with the mediation and Authority processes has put Mr Mulder to the time and cost of an Authority investigation. I consider the notional starting tariff should be increased to reflect that.

[25] Ms Haunui is ordered to pay Ms Mulder \$1,000 towards his actual costs.

Outcome

[26] Ms Haunui's dismissal of Mr Mulder was unjustified. Ms Haunui is ordered within 28 days of the date of this determination to pay Mr Mulder:

- a. \$4,791.16 lost remuneration;
- b. \$3,500 distress compensation;
- c. \$1,000 towards his actual costs;
- d. \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority