

[3] Ms Neame says Mr Geister's actions constituted a dismissal and claims the dismissal was unjustified. Fine Fettle Limited denies Ms Neame was dismissed and says she abandoned her employment.

[4] Ms Neame also claims she was not paid at least the minimum wage during her employment and holiday pay remains outstanding.

[5] The key issues for this determination are:

- Was Ms Neame dismissed or did she abandon her employment?
- If Ms Neame was dismissed what, if any, remedies should be awarded;
- Was Ms Neame paid at least the minimum wage?
- Was Ms Neame paid holiday pay at the end of her employment?

Dismissal or abandonment?

[6] It was common ground that Mr and Mrs Geister, the directors and shareholders of Fine Fettle Limited, had reason to raise issues about Ms Neame's performance with her throughout her employment. The issues related to her lack of concentration. Mrs Geister also says Ms Neame was frequently late for work, arriving 5-10 minutes after her required start time of 8.00am. Ms Neame was never subject to any formal warnings relating to her performance. Ms Neame accepted that during the four months of her employment, she was spoken to at least five times about performance issues.

[7] Ms Neame also told me Mr Geister had an issue with her not writing things down such as recipes and the steps taken to prepare food etc. Ms Neame told me Mr Geister talked to her about this at least five times. She says Mr Geister wanted her to write these things down because he thought she would remember them better. Ms Neame said that as she was a slow writer she did not follow Mr Geister's instructions as she thought she could be doing more important things.

[8] On Sunday, 4 January 2009, Mr Geister invited Ms Neame into the restaurant to talk after all other staff had completed their work and left for the day. Mr Geister was unwell and unable to attend the investigation meeting to give evidence, however, Mrs Geister, says she was present in the restaurant and within earshot of Ms Neame and Mr Geister and overheard the conversation between them. Ms Neame denies Ms Geister was in the room and says if she was there she never made her presence known.

[9] Ms Neame says Mr Geister told her during this brief meeting that she was not working out and that she should find another job. Ms Neame says she was then told she could collect her wages which had been made up. Ms Neame says she asked Mr Geister if she should return to work the next day and he shook his head indicating he did not require her to attend work. Ms Neame collected her pay and left the restaurant in tears.

[10] Mrs Geister agrees Mr Geister told Ms Neame she was not suited to her job and that she should consider finding another job, but says Ms Neame was expected to return to work the following day and Mr Geister told Ms Neame he would see her in the morning. Ms Neame denies this.

[11] When Ms Neame failed to turn up for work on 5 January Mrs Geister made one attempt to make telephone contact with her to find out where she was but there was no response. Mrs Geister then set about immediately altering the roster for the following two week period, removing Ms Neame from the roster completely. Mrs Geister says that by not turning up for work Ms Neame had abandoned her employment.

[12] Two days later, on 7 January 2009 Ms Neame wrote to Mr Geister raising a personal grievance and requesting the reasons for her dismissal. Mrs Geister responded on 18 January denying a dismissal had taken place and claiming Ms Neame had abandoned her employment.

[13] The key issue is whether Ms Neame was in fact dismissed. Ms Neame says the dismissal occurred at the point where Mr Geister indicated by the shake of his head that he did not require Ms Neame to return to work the next day. Ms Neame relies on the fact that her pay was made up ready for her to collect to support her contention that she was not required to return to work.

[14] Mrs Geister says Ms Neame was told she was expected to work the following day. In the Statement in Reply, Mrs Geister says Ms Neame was crying after being told her performance was unsatisfactory and that Mr Geister told Ms Neame that he would discuss the issues the following day once she had calmed down.

[15] A dismissal requires a sending away by the employer. Ms Neame has not satisfied me on the balance of probabilities that she was sent away. The evidence available to the Authority shows that Ms Neame was not performing to the required standard and that issues relating to her performance were being raised with her on a

regular basis. The evidence also shows that it was not uncommon for Ms Neame to become upset during meetings where her performance was being discussed. With regards to her pay being made up on the Sunday, during the investigation meeting Ms Neame acknowledged that Sunday was her normal pay day.

[16] Standing back and considering the evidence objectively, I find Ms Neame was not dismissed on 4 January and I am unable to be of any further assistance to her.

Claim for minimum wages

[17] Ms Neame claims she was not paid the minimum wage during her employment. At the time of her employment the minimum wage was \$12.00 gross per hour. It was common ground that each employee had their own wages note book and that this is where wages were put each pay day. The note book containing the details of Ms Neame's wages can not be located by Mrs Geister.

[18] Ms Neame has made this claim because she says she rang the Inland Revenue Department ("IRD") to find out how much tax had been paid on her wages. Ms Neame says she was advised that no PAYE tax had been paid by Fine Fettle Limited on her behalf.

[19] Mrs Geister told me that she had been deducting PAYE tax from Ms Neame's wages but that the amounts had not been remitted to the IRD as she did not have Ms Neame's IRD number. Ms Neame accepted at the investigation meeting that she did not provide her IRD number to Ms Geister until the week before she was dismissed.

[20] Mrs Geister told me that the payments of PAYE have now been remitted to the IRD. From the wages documents provided to the Authority by Mrs Geister it is apparent that PAYE was not deducted from the wages paid to Ms Neame for the first six weeks of her employment. It is the responsibility of the Respondent to ensure PAYE tax is deducted at source and is then remitted correctly to the IRD.

[21] Having said that, the wages documents show that Ms Neame was paid at the minimum rate of pay for each hour she worked while employed by Fine Fettle Limited.

Outstanding holiday pay

[22] At the investigation meeting Mrs Geister acknowledged that Ms Neame has not received her holiday pay. Using the information provided by Mrs Geister as to the wages paid to Ms Neame for the period of her employment I have calculated that an amount of \$320.88 gross remains outstanding for holiday pay.

Fine Fettle Limited is ordered to pay to Ms Neame \$320.88 gross for outstanding holiday pay within 28 days of the date of this determination.

Costs

[23] Neither the Respondent nor the Applicant was represented at the Authority's investigation meeting. Both parties have been successful to a degree and I have therefore concluded that costs shall lie where they fall.

Vicki Campbell
Member of Employment Relations Authority