

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2020] NZERA 412
3079272

BETWEEN	CHLOE NEL Applicant
AND	CA31 LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Paul Mathews, representative for the Applicant No appearance for the Respondent
Investigation Meeting:	8 October 2020
Submissions received:	8 October 2020 from Applicant No submissions received from the Respondent
Determination:	13 October 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Chloe Nel was employed as a barista by CA31 Limited (CA31) at its café located in east Auckland from July 2018 until her dismissal on 16 August 2019. Ms Nel seeks orders to compensate for the hurt caused consequent to what she says was an unjustified dismissal by way of redundancy and award her entitlements due when her employment ended including notice and holiday pay. Ms Nel has not sought any penalties.

[2] CA31 has not filed a statement in reply or relevant documents as directed. The Authority understands its position to be that the financial circumstances of the business caused its closure and the consequent end to Ms Nel's employment and that there is no

outstanding holiday pay. Information provided by CA31 has been considered in determining this employment relationship problem.

The Authority's investigation

[3] Ms Nel filed her statement of problem in the Authority on 23 October 2019. The Authority is satisfied the statement of problem was served on CA31's address for service on 29 October 2019. By minute dated 9 December 2019 the Authority issued directions to progress this matter which included CA31 file relevant wage, time, holiday and leave records. The parties were duly directed to attend mediation by 28 February 2020.

[4] On 25 February 2020 the sole director and shareholder of CA31 wrote to the Authority, through a lawyer, who advised he was not instructed to act on behalf of either CA31 or its director, that the director was unable to attend or otherwise participate in a mediation or investigation meeting and was unable to make arrangements for CA31 to be otherwise represented. The letter included information about the circumstances which led to the ending of Ms Nel's employment, the financial circumstances of CA31 and the director's personal circumstances which prevented her participation in the Authority investigation. CA31 has not complied with the directions to file relevant information or attend mediation.

[5] The scheduling of the investigation meeting has been delayed due to COVID-19 lockdown restrictions and Ms Nel's ability to access the necessary technology to attend remotely; she has been overseas since December 2019. The investigation meeting was held by Zoom and proceeded in the absence of CA31.¹ The Authority received evidence from Ms Nel and her father Gavin Nel. No representative of CA31 attended at the scheduled start time. Notwithstanding CA31's failure to file a statement in reply and advice that it would not participate, Authority minutes and notices have been sent to its address for service, emailed to the director and copied to the writer of the 25 February 2020 correspondence. CA31 has provided no further information or otherwise participated after 25 February 2019.

¹ Clause 12 Schedule 2 Employment Relations Act 2000.

[6] 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 necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information and evidence of the parties and the submissions.

The issues

[7] The issues identified for investigation and determination are:

- (i) Was Ms Nel unjustifiably dismissed or unjustifiably disadvantaged in relation to her work for CA31 finishing?
- (ii) If so, what remedies, if any, should be awarded?
- (iii) Does CA31 owe Ms Nel any wages and holiday pay, if so, how much?
- (iv) Should either party contribute to the costs of representation of the other party?

Background

[8] In July 2018 Ms Nel started working for CA31 as a casual barista. She was 18 years old and had secured the role after door knocking in the area handing out her CV. It was her first 'proper' job after finishing a barista training course. Ms Nel's starting rate was the then applicable minimum wage rate of \$16.50 and she worked about six hours per day three days per week. She recalled her manager giving her a piece of paper to sign in her first week of employment which contained her bank account and IRD number. The Authority is satisfied CA31 did not provide Ms Nel with a written employment agreement when her employment commenced as it was required to do by statute.²

[9] In November, presumably after successfully completing a trial period, CA31 provided Ms Nel a written employment agreement, which she duly signed and returned. She was told her hourly rate of pay would increase, was provided with full time hours

² Section 63A Employment Relations Act 2000.

and promoted to front of house manager. CA31 did not give Ms Nel a copy of the employment agreement again, in breach of its statutory obligations.

[10] Ms Nel's evidence that she was a hardworking and loyal employee is entirely accepted.

[11] Information provided to the Authority by Ms Nel and CA31 indicates the business was facing increasing difficulties during the period Ms Nel was employed. Ms Nel said though she was usually paid weekly often her pays were late or in arrears which she would have to follow up. She observed her manager was increasingly and inexplicably less involved in the day to day operation of the cafe and significant tasks fell to her to complete, such as food ordering, which otherwise would not be done.

[12] The information from CA31 indicates from at least June 2018 it was dealing with claims for rent arrears from the landlord of the property in which the café was located including that on 31 July 2019 CA31 was on notice possession of the premises would be exercised which occurred on 16 August 2019.³ Action has subsequently been taken against CA31 to recover the rent arrears and costs associated with the repossession. The financial information provided to the Authority indicates that at February 2020 CA31 had limited assets and significant debts. CA31 has not provided updated information.

[13] Friday 16 August 2019 was also a significant day for Ms Nel who, that afternoon, received the following group text message from the director:

FINAL NOTICE TO ALL STAFF

Unfortunately due to financial reasons we have been evicted as of today. The café has been closed permanently.

As the company is no longer financial, no further wages or payouts will be available. Our sincere apologies for the inconvenience this is going to cause you.

Thank you for your hard work and the laughs. We wish you the best in the future.

[14] She understood this to be notice her employment had ended. In a further text message exchange with the director she requested her final pay and a copy of her employment agreement which was promised along with an offer of a reference. The

³ District Court proceedings dated 20 December 2019 seeking to recover rent arrears and costs against CA31 and the director have been filed in the Authority.

employment agreement was not provided. The text messages also included an exchange which Ms Nel felt was unfair and unnecessary in the circumstances and has caused her upset. In evidence Ms Nel accepted the business closed because of financial difficulties and that those difficulties have caused her employment to end.

Discussion

Was Ms Nel unjustifiably dismissed or unjustifiably disadvantaged in relation to her work for CA31 Limited finishing?

[15] Mr Mathews submission that the defects in the process followed by the employer were not minor and resulted in Ms Nel being treated unfairly is accepted. He usefully referred the Authority to a recent judgment of the Employment Court which sets out guidance for analysis of redundancy dismissals in situations of inevitable job superfluity.⁴

[16] It is accepted the text message advising the business was closed and her employment ended came as a shock to Ms Nel. The information before the Authority establishes the pressure on CA31 from its landlord to pay rent arrears was not new and was mounting and further, that CA31 had received at least two weeks' notice of repossession action before it occurred on 16 August. In such circumstances a fair and reasonable employer would have given Ms Nel at least contractual notice of the closure of the business and outlined the reasons why the business was closing and her job was to end. Such notice and information would have given her time to consider the reasons she was about to lose her job, the potential impact of that loss, ask and receive answers to any questions of CA31 and seek independent advice. During the notice period a fair and reasonable employer would have provided Ms Nel access to her employment agreement which, by law, would have set out a plain language explanation for dispute resolution. A fair and reasonable employer would have provided termination pay and access to a calculation of such based on duly maintained wage, time, holiday and leave records. None of this occurred in circumstances where it reasonably could have.

[17] Ms Nel was dismissed from her employment by way of redundancy and her dismissal was unjustified.⁵ Though it is accepted the reason for the closure of the

⁴ *Innovative Landscapes (2015) Limited v Popkin* [2020] NZEmpC 40.

⁵ Section 103A of the Employment Relations Act 2000 sets out the test of whether a dismissal or action is justified.

business was genuine the complete lack of process and the unfairness occasioned to Ms Nel by that lack of process gives rise to a finding of unjustified dismissal.

What remedies should be awarded?

[18] It is accepted that the notice of dismissal came as a shock and that Ms Nel found the text message exchange with the director upsetting and unpleasant. It was unnecessary and unfair for the director to comment on the tone of Ms Nel's communication and disparage and belittle her in circumstances where she (the director) had just dismissed her staff by way of text message and advised them they would not receive contractual entitlements.

[19] Gavin Nel, Ms Nel's father gave evidence that after the dismissal he was concerned about its impact on his daughter, that she was down and not her usual self and his concern grew to such a level that he recommended she return to South Africa to receive the support of her mother which she did in December 2019. Unfortunately, the entirely unforeseen consequences of that decision are that Ms Nel is now unable to return to New Zealand given the COVID-19 pandemic.

[20] As discussed above CA31 failed to provide a copy of the employment agreement to Ms Nel. This has disadvantaged Ms Nel to the extent she would have been unable to point to specific provisions concerning termination processes and notice with which she could reasonably have expected her employer to comply. CA31's failure to comply with this statutory requirement adds to the hurt Ms Nel suffered, who as a young person in her first proper job, was particularly dependant on her employer to do the right thing.

[21] I am satisfied Ms Nel experienced harm under each of the heads in section 123(1)(c)(i). She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to her dismissal of \$12,000.00.

Wages and holiday pay?

[22] Ms Nel accepted she was paid for every hour worked. She does however, seek payment for reasonable notice of termination of employment. The claim that notice should have been paid is accepted. The question then is, in the absence of the written

employment agreement recording the parties' agreement as to notice or Ms Nel's recollection of what the notice period was, what is reasonable notice? The Authority is satisfied reasonable notice is one week's ordinary pay - Ms Nel was paid weekly through her employment with CA31. Consideration has been given to the submission that two-weeks would be reasonable notice given the industry norm but without supporting evidence the submission is not accepted.

[23] Ms Nel is entitled to notice of one week's ordinary pay being \$708.00 gross.⁶

[24] As an employee Ms Nel was entitled to holiday pay upon the termination of her employment calculated at eight per cent of her gross earnings.⁷ Ms Nel's unchallenged evidence that she took no paid holidays during her employment with CA31 is accepted. She has provided IRD and bank records which the Authority accepts support her holiday pay calculation of \$1796.00.

[25] CA31 Limited is ordered to pay Ms Nel \$1796.00 in holiday pay entitlements due on termination within 14 days of the date of this determination.

Interest

[26] Ms Nel is entitled to an award of interest on the notice period and the holiday pay component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. It is appropriate where a person has been deprived of the use of money to make an award for interest.

[27] CA31 Limited is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:⁸

- (i) Interest on the sum of \$2504.00 from 16 August 2019 until the date payment is made in full.

[28] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

⁶ 40 hours multiplied by applicable adult minimum wage of \$17.70.

⁷ s 27 Holidays Act 2003

⁸ www.justice.govt.nz/fines/civil-debt-interest-calculator

Summary of orders

[29] The Authority orders as follows:

- a) Within 14 days of the date of determination CA31 Limited is ordered to pay Ms Nel the following sums:
 - (i) wage arrears of \$708.00;
 - (ii) compensation under s 123(1)(c)(i) of \$12,000.00;
 - (iii) holiday pay of \$1796.00; and
 - (iv) filing fee of \$71.56.

- b) Within 14 days of the date of determination CA31 Limited is to calculate and pay Ms Nel interest on arrears of one week's paid notice and holiday pay as awarded in paragraph [28] above.

Costs

[30] Ms Nel has been successful in her claim and she is entitled to consideration of a contribution to costs incurred in representation. Mr Mathews submitted an award of costs at half the applicable daily tariff of \$4,500 would be appropriate.

[31] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.

- Frequently costs are judged against a notional daily tariff.⁹

[32] The investigation meeting took less than half a day and was held by zoom. Given the short hearing time and that attendance in person was not required the starting point for costs is \$1500. There is no basis for uplift from that the figure. While CA31 did not participate in the investigation meeting or file documents as directed, the Authority is not satisfied Ms Nel incurred unnecessary costs associated that lack of participation or compliance; the information advanced in support of her claim was what would normally be expected of an applicant.

[33] The filing fee of \$71.56 is an amount Ms Nel can reasonably recover from CA31 Limited. CA31 Limited is to pay the sum of \$71.56 to Ms Nel within 14 days of the date of this determination.

[34] CA31 Limited is ordered to pay Chloe Nel \$1571.56 as a contribution to her costs and to reimburse her the filing fee within 21 days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority

⁹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.