

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 148
5369361

BETWEEN LINA NGAMETUA
 Applicant

AND B&H HAWKES BAY LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: David Oliver, Counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 19 September 2013 at Napier

Submissions Received: Oral submissions on the day of the investigation meeting

Determination: 22 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lina Ngametua worked as Bar Manager for B&H Hawkes Bay Limited, at its HB Sportz Bar, from August 2011 until November 2011. On 25 November 2011 she was given a letter, dated the previous day, removing her from the position of Bar Manager and offering her a part time, on-call bar staff position.

[2] Mrs Ngametua says she was given no warning about the impending loss of her position and had no idea her employer was planning to take this action. The letter she was given informed her that a new person would take over the position of Bar Manager from that day.

[3] She claims to have been unjustifiably dismissed on 25 November 2011. Additionally, she claims to have been underpaid throughout her employment with B&H Hawkes Bay Limited. This occurred because her employer agreed at the

outset of her employment to pay her 10% of bar takings in addition to her weekly wage, but failed to make good on that agreement.

[4] In the alternative, Mrs Ngametua claims that she worked between 6 and 7 days a week, for between 10 and 14 hours a day. Her weekly remuneration of \$609 gross represented less than the minimum wage of \$13 per hour that was in place at the time, for the hours she worked.

[5] Mrs Ngametua, who raised her personal grievance for unjustifiable dismissal by letter dated 20 December 2011, seeks compensation and reimbursement of 3 months' lost wages. She also seeks wage arrears, holiday pay, interest and costs.

[6] B&H Hawkes Bay Limited (B&H), through its director, Brent Foster, provided a letter to the Authority dated 28 March 2013, in response to Mrs Ngametua's statement of problem. Mr Foster claimed B&H had no choice but to remove Mrs Ngametua from the position of Bar Manager. The weekend before her removal she had threatened to close the business down and call the police to remove patrons if a partner of the business was not removed from the building. She subsequently refused to work with that partner.

[7] Mr Foster rejected Mrs Ngametua's claims over the hours she had worked during her employment, calling them "*exaggerated*". He said the bar had incurred financial losses and a decision had been taken to close it down at the end of the financial year. It had no money to pay any claims against it. He denied the verbal agreement to pay her 10% of bar takings and said the agreement was for the payment of 10% of profit, not turnover.

The Authority's investigation

[8] B&H attended mediation with Mrs Ngametua and provided some documentation to her and to the Authority. It provided no witness statements, however. It notified the Authority and Mrs Ngametua on 26 July 2013, through its representative, Doug Abraham, that it had closed its doors and ceased trading earlier that month. The company claimed to be insolvent with liabilities outweighing assets. It indicated it would not attend the investigation meeting.

[9] As the company remained on the Companies Office register, the Authority confirmed its intention of proceeding with the investigation meeting. It kept

Mr Abraham informed as to the location and timing of the meeting. Telephone confirmation was received from B&H on 18 September 2013 that it would not be attending the investigation meeting the following day.

[10] B&H did not attend the investigation meeting. I proceeded with my investigation, in accordance with clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act), as if B&H had duly attended or been represented.

[11] Mrs Ngametua gave evidence on her own behalf. There were no other witnesses.

Mrs Ngametua's evidence

[12] Mrs Ngametua had been approached by Mr Foster and his business partner, Henry Heather, about taking on the position of Bar Manager at the bar they were considering purchasing. Once they had purchased it, Mrs Ngametua accepted the position.

[13] When she asked for a written employment agreement, Mr Foster was reluctant to provide one, saying that they had a "*gentleman's agreement*" and did not need a written document to record that. Mrs Ngametua drafted an employment agreement for her employer's consideration, which Mr Foster said he would consider. He did not discuss the draft further with Mrs Ngametua and the document was not agreed between them.

[14] Mrs Ngametua referred to tensions that had developed between her and Mr Heather. Approximately one month into her employment, she says Mr Heather was removed from any involvement in the bar by the Department of Internal Affairs, due to his undischarged bankruptcy status. He continued to frequent the bar and to give her advice. Mr Foster told her not to take any notice of him.

[15] On or around 19 November 2011 Mr Heather was abusive and aggressive to her in the bar. Mrs Ngametua did not think she could manage the bar in those circumstances. As it could not operate without a licenced duty manager, and as she was the only such person present, she proposed closing the bar. The situation was resolved when Mr Foster told Mr Heather to leave the premises.

[16] Mr Foster subsequently raised with Mrs Ngametua the possibility of her purchasing the bar. On 23 November 2011 she informed him that she was not interested as the price he was seeking was too high. They discussed the difficulty of Mrs Ngametua being unwilling to work with Mr Heather, and Mrs Ngametua made it clear that she was very happy to work with Mr Foster, whom she considered as her employer. She was unsure what Mr Heather's role was, but says that she did not refuse to work with him.

[17] On 25 November 2011 Mr Foster called her to his home and gave her a letter terminating her employment as Bar Manager. The reason given was her failure in promoting the bar. She had not increased sales by bringing in new customers and promoting repeat business. Mrs Ngametua had received no warnings over her performance and there had been no consultation over the termination of her role. The offer of part-time on-call bar staff employment came to nothing.

[18] By her account Mrs Ngametua worked more than 60 hours a week cleaning the premises, running the bar and undertaking administrative duties. She questions the veracity of the incomplete time records provided by B&H, and provided the Authority with her own records, many of which had been reconstructed from memory.

Issues

[19] The issues for determination are whether:

- a. Whether Mrs Ngametua was unjustifiably dismissed;
- b. Whether she was entitled to 10% of the bar takings;
- c. Whether she was paid less than the rate prescribed by the Minimum Wage Act 1983 and the Minimum Wage Order 2011.

Was Mrs Ngametua unjustifiably dismissed?

[20] Whether or not an action is justifiable is determined on an objective basis by applying the test in 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 have done in all the circumstances at the time the action occurred.

[21] In applying the test there are a number of factors I am required to consider. In this instance they include whether, before removing Mrs Ngametua from her position as Bar Manager, B&H:

- i. investigated the allegations against her sufficiently, taking into account the resources available to it; and
- ii. raised its concerns with her; and
- iii. gave her a reasonable opportunity to respond to its concerns; and
- iv. genuinely considered her explanation in relation to the allegations against her.

[22] It is clear from Mrs Ngametua's evidence, and from Mr Foster's letter of 28 March 2013 in response to her statement of problem, that no investigation took place. There was a meeting to discuss the difficulties Mrs Ngametua faced in working with Mr Heather, and the possibility of her purchasing the business. At the meeting there was no discussion about her failure to promote the bar, which was the reason given in the letter of 24 November 2011 for removing her from her position of Bar Manager.

[23] Mrs Ngametua had no opportunity to provide an explanation in relation to her alleged failure to promote the HB Sportz Bar because no such allegation was ever put to her. B&H failed completely to accord Mrs Ngametua the benefit of a fair procedure before terminating her employment as Bar Manager. It brooked no discussion of the matter, having already appointed someone else to her position before giving her the letter of termination.

[24] The offer of employment as part-time on-call bar staff was risible. It provided her no certainty of employment and, in any event, did not form a reasonable alternative to her full-time Bar Manager's position. On the advice of the local Community Law office, and because she needed work, Ms Ngametua indicated to Mr Foster she would be prepared to accept such work. Accordingly, she asked him to provide her with an employment agreement. Neither an employment agreement, nor an offer of any work, was forthcoming. I do not consider that B&H's offer, or Mrs Ngametua's expression of interest in that offer borne out of her need for work, compromises her claim to have been unjustifiably dismissed.

[25] In the absence of evidence of any semblance of a fair procedure followed by her employer, I am satisfied that Mrs Ngametua was unjustifiably dismissed.

Is Mrs Ngametua entitled to 10% of the bar takings?

[26] Mrs Ngametua claims she had a verbal agreement with her employer that she would be paid this sum, in addition to the agreed weekly wage. Mr Foster, in his letter of 28 March 2013, which I have already referred to, asserted that the verbal agreement was for payment of "*10% of profit, not turnover*".

[27] As Mr Foster did not attend the investigation meeting, there was no opportunity to question him over the matter. However, after questioning Mrs Ngametua about the words actually used by Mr Foster, I find it likely that the parties had a different understanding of the agreement from the outset. Mrs Ngametua assumed they were talking about money taken over the bar on a weekly basis, whereas Mr Foster was referring to the profit made by the bar weekly. I am not prepared to find that the agreement was for 10% of bar takings as claimed by Mrs Ngametua.

[28] Mr Foster's letter of 28 March 2013 had documents attached to it, one of which was the Statement of Financial Performance of B&H for the first year's operation of the HB Sportz Bar, ending 31 March 2012. This showed a nett after tax loss for the year. While this was unsworn evidence, I have no evidence of profits made by the bar that would enable me to find any monies owing to Mrs Ngametua arising from her verbal agreement with B&H.

Was Mrs Ngametua paid less than the minimum wage?

[29] Mrs Ngametua claims to have worked on average 65.1 hours a week throughout her employment. She was paid a weekly wage of \$609 gross, or \$500 nett. B&H supplied wage records that verified this. It also provided some time records, which it said were compiled from timesheets completed by Mrs Ngametua. The timesheets were incomplete, with no hours of work recorded for ten of the sixteen weeks of her employment.

[30] I am mindful that B&H did not provide proper time records, as requested by Mrs Ngametua and as required by s. 130 of the Act. It may be that B&H believed it was not necessary to do so as it was paying Mrs Ngametua an agreed weekly wage. However, it should have been aware of the implications of the minimum wage legislation on that agreed wage, in light of the long hours that Mrs Ngametua recorded in her time sheets.

[31] Mr Foster claimed in his letter to the Authority that Mrs Ngametua exaggerated the hours she worked. There is no evidence that he challenged her on those hours at the time she submitted the timesheets. As B&H's time records were compiled from her timesheets, he must have been aware of the hours she claimed to work for at least four of the sixteen weeks of her employment with B&H.

[32] Faced with a lack of time records from her employer, Mrs Ngametua had to reconstruct most of her time sheets more than a year after her employment ended. I accept that she made a conscientious attempt to be as accurate as possible, linking particular social events at the bar with the hours she recalled working on those days.

[33] Section 132 of the Act gives me the discretion, in this situation, to accept Mrs Ngametua's claims in relation to the hours, days, and times she worked unless those claims are disproved by B&H. B&H did not attend the investigation meeting, and has not disproved her claims. I intend to apply s. 132 and find that Mrs Ngametua's hours of work were those she claimed in her reconstructed timesheets.

[34] Mrs Ngametua has calculated the amounts by which B&H paid her less than the minimum wage which, at the relevant time, was \$520 per week and \$13 per hour for each hour worked over 40. The amounts vary between \$54 and \$392 per week, in fifteen of the sixteen weeks of her employment, totalling a claimed underpayment of \$3559.50. I have checked Mrs Ngametua's calculations and am satisfied of their accuracy except in relation to week 12, when she took annual leave by agreement with her employer. The calculation of her pay that week should be in accordance with section 22(2)(b)(ii)(B) of the Holidays Act 2003. I have adjusted Mrs Ngametua's calculation upwards by \$32.50 to correct the shortfall she claims.

[35] I set out below the shortfall in Mrs Ngametua's wages for each of the fifteen weeks in which her wages fell short of her entitlement under the Minimum Wage Order 2011. The calculation has been made by multiplying her hours of work each week by \$13, then subtracting the pay she received for that week. The number in brackets is the number of hours she worked each week. In each case her weekly payment was \$609 gross. Holiday pay calculated at 8% should be added to the total shortfall in wages.

Week 1:	\$392.00	(77)
Week 2:	\$236.00	(65)

Week 3:	\$327.00	(72)
Week 4:	\$314.00	(71)
Week 5:	\$268.50	(67.5)
Week 6:	\$164.50	(59.5)
Week 7:	\$236.00	(65)
Week 8:	\$249.00	(66)
Week 9:	\$216.50	(63.5)
Week 10:	\$145.00	(58)
Week 11:	\$262.00	(67)
Week 12:	\$255.50	(66.5 (average))
Week 13:	\$216.50	(63.5)
Week 14:	\$255.50	(66.5)
Week 15:	\$ 54.00	(51)

Determination

[36] Mrs Ngametua was unjustifiably dismissed from her employment as Bar Manager for B&H. Her personal grievance succeeds.

[37] She was paid at less than the statutory minimum rate for fifteen of the sixteen weeks of her employment.

Contribution

[38] I find there was no contribution by Mrs Ngametua to the situation that gave rise to her personal grievance.

Remedies

[39] Mrs Ngametua seeks compensation of \$8,000 for the humiliation, loss of dignity and injury to feelings she sustained because of her unjustifiable dismissal. She also seeks the reimbursement of a sum equivalent to 3 months' lost wages.

[40] I am satisfied that Mrs Ngametua was affected by her dismissal and I accept her evidence of being "*upset*", "*downhearted and emotional*" and of taking "*a few weeks to a month to bounce back*". That affected her ability to seek other work

immediately. She provided evidence of having sought employment but, at the date of the investigation meeting, had still been unsuccessful in obtaining ongoing employment.

[41] I find an award of \$6,000 under s. 123(1)(c)(i) of the Act to be appropriate in the circumstances.

[42] Additionally, Mrs Ngametua should receive the equivalent of 13 weeks' pay based on a weekly wage of \$609 under s. 123(1)(b) of the Act. The sum of \$548.10 is to be deducted from that, in acknowledgement of the full week's payment she received for her final week of work, when she worked only part of one day.

Orders

[43] B&H Hawkes Bay Limited is ordered to pay Mrs Ngametua the following as remedies for her personal grievance:

- a. \$6,000 under s. 123(1)(c)(i) of the Act; and
- b. \$7,368.90 under s. 123(1)(b) of the Act;

[44] Pursuant to s. 11 of the Minimum Wage Act 1983, B&H Hawkes Bay Limited is ordered to pay Mrs Ngametua:

- a. \$3,592.00 in wages underpaid during her employment; and
- b. \$287.36, being the holiday pay due on the underpaid wages; and
- c. Interest on the sums at (a) and (b) at the rate of 5% from 28 November 2011 to the date of payment.

Costs

[45] The investigation meeting took approximately half a day. Using the Authority's current daily tariff as a guideline this would result in an award of costs of \$1,750. This is an appropriate instance for increasing the tariff, however, as a written offer to settle was made to B&H on 13 June 2013, more than 3 months before the investigation meeting. The offer was made on a *without prejudice except as to costs* basis. It was for an amount that is considerably less than that I have ordered B&H to

pay Mrs Ngametua. Mrs Ngametua's counsel, Mr Oliver, says he received no response to this offer from B&H or its representative, Mr Abraham.

[46] Mrs Ngametua was legally aided but will be expected to repay the amount of the grant of legal aid she received, which totalled \$2,797.65. I order B&H to pay costs in that sum.

Trish MacKinnon

Member of the Employment Relations Authority