

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 648
3259419

BETWEEN CAROLYN PETERSON
Applicant
AND BLACK LION HOLDINGS
LIMITED
Respondent

Member of Authority: Geoff O’Sullivan
Representatives: Applicant in person
Shewangizaw Worku, representative for the Respondent
Investigation Meeting: 18 June and 15 July 2024 in Wellington
Submissions and Other Information Received: Up to and including 5 August 2024
Determination: 31 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Carolyn Peterson claims that on 11 February 2023 she was dismissed by Black Lion Holdings Limited (Black Lion) with no process or justification. She claims her employer swore at her, yelling at her to get out of the workplace, did not pay her for all hours worked, and deducted the sum equal to two weeks’ notice from her final pay on the basis she did not work it.

[2] Ms Peterson says that the dismissal affected her mental and physical wellbeing and left her in a financially precarious situation.

[3] Black Lion has a different view as to what transpired. It acknowledges there was an incident between the parties in respect of a leaking coffee machine but says following that, Ms Peterson abandoned her employment. Black Lion says this happened after it

gave Ms Peterson a choice, namely she could either follow instructions that she was given or she could leave. Black Lion says that because Ms Peterson did not return to work on the next rostered day, it assumed she had taken the option of leaving.

[4] Black Lion says it was entitled to deduct the notice period provided for in the employment agreement because Ms Peterson did not return to work.

The Authority's investigation

[5] The investigation meeting was set down to be heard in Wellington on 18 June 2024. It was originally scheduled to start at 9.30am, however, despite having some engagement with the Authority, Mr Worku did not appear. Attempts were made to contact him by the Authority Officer, however, these were unsuccessful and the investigation meeting commenced at the slighter later time of 9.50am. The Authority heard from Ms Peterson who gave evidence on oath or affirmation.

[6] Sometime later, Mr Worku contacted the Authority saying he wished to take part in the investigation meeting but had slept in. It is noted that the investigation meeting ultimately commenced at 9.50 on 18 June and this was after attempts had been made to contact Mr Worku. Nonetheless, as the investigation had not concluded a further date, namely 15 July 2024, was scheduled and the investigation meeting continued on that day. Both Mr Worku and Ms Peterson gave evidence on oath or affirmation.

Background

[7] Ms Peterson commenced employment with Black Lion on 3 January 2022. She says that on Saturday 11 February 2023 she commenced her usual work routine at approximately 8.30am. At approximately 12.30pm, she was concerned regarding the state of the coffee machine and went into the kitchen to ask Mr Worku about cleaning the coffee machine. She said to him that she felt he needed to rinse the heads on the machine after using it, to which Mr Worku replied that he did. Ms Peterson did not agree with that and said to Mr Worku that he didn't because there were also grinds in the heads of the machine in the morning. The matter developed into an argument with Mr Worku then saying, "It gets used overnight and you're the one who doesn't clean it," and that he has observed her neglecting to do this.

[8] There is a difference between the parties as to what happened next. Ms Peterson says that Mr Worku proceeded to yell at her, saying that he does what he does and that

he's the boss, and that if she didn't want to do what she was told, she could get the fuck out of here. Ms Peterson says she was taken aback and asked, "Get out?" Mr Worku yelled at her "Yeah get out". Ms Peterson then left the café.

[9] Mr Worku's view as to the conversation differs. He accepts the lead-in to the discussion regarding the coffee machine. He says that Ms Peterson came to him saying that the seal was leaking, to which he responded it was because she did not empty the coffee grinds after making a coffee. He said he would get it serviced but that Ms Peterson needed to empty the coffee once she had finished with the machine. He said Ms Peterson continued to argue with him, so he gave her a choice: "I asked her if she's going to follow the instructions that I give her or is she going to leave, and she chose to leave the job. ..."

[10] Mr Worku accepted that he deducted a sum of \$1,725.00 from Ms Peterson's final pay because she had abandoned her employment. He said during the argument he did not raise his voice and Ms Peterson was signalling she was not listening to his instructions. He confirmed two days after the event he employed someone else to replace Ms Peterson.

[11] In essence both parties agree there was an incident regarding the coffee machine, the difference in their views is Mr Worku states he believed Ms Peterson abandoned her employment after he gave her the option of either following instructions or leaving. The parties agreed on other parts of the narrative, namely Ms Peterson worked for 30 to 35 hours per week and as indicated above, Mr Worku had deducted the notice period from Ms Peterson's final pay because he felt that since she had abandoned her employment the notice period should be forfeited to him as per the employment agreement.

Analysis and conclusion

[12] Ms Peterson gave evidence that she left work because she felt she had no choice. She says she was due to return to work on Sunday February 12 but was still shaken and upset from the events of the previous day. She had also expected to be contacted by Mr Worku and thought she should not ignore what had happened and return to work without contact from her employer.

[13] The parties accept that on February 13 and 14, Ms Peterson was not rostered to work. On February 14, she texted Mr Worku stating, “Do you want me to come to work tomorrow”. She sent the same text to the other person she reported to.

[14] At 1.54pm that day, she received a response from Mr Worku stating:

Hi Kaz my understanding is that I said if you don't want to follow the instructions I give you then you have the choice to stay or leave and my understanding is you made the choice to not follow instructions and leave with no intention of coming back so I've gotten a replacement for the position.

[15] On Wednesday 22 February 2023, Ms Peterson received a payslip showing her final pay and showing a deduction of the notice period.

[16] Section 103(1)(a) of the Employment Relations Act 2000 (the Act) provides that an employee may have a personal grievance against their employer for unjustified dismissal. The test of justification is provided for in s 103A of the Act. The section provides:

103A Test of justification

- (1) For the purposes of section 103(1A) and B, the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) 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 dismissal or action occurred.

[17] In applying that test, s 103A(3) requires consideration of a number of matters. These are as follows:

In applying the test in subsection (2), the Authority or the court must consider—

- (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.

[18] It was not open to Black Lion as a fair and reasonable employer to assume as it did, that Ms Peterson either abandoned her employment or resigned. It took no steps to clarify the position. Further, within two days Mr Worku must have been aware that Ms Peterson considered she was being dismissed because when she asked whether she was to return to work, he told her that she had already been replaced. There was no attempt by Mr Worku to clarify the position.

[19] On his own evidence, it was open to Ms Peterson to conclude that she was being sent away from her employment in circumstances tantamount to dismissal. Perhaps Mr Worku downplays the nature of the exchange between the parties and perhaps Ms Peterson embellishes it. However, it is clear there was a serious disagreement between the two and it was understandable that Ms Peterson took from the conversation that her employment was coming to an end. Mr Worku needed to do more to clarify the situation.

[20] It is telling that he replaced Ms Peterson within two days and then deducted the contractual notice period on the basis she was refusing to work it out. Accordingly, even on Mr Worku's narrative, he would have needed to contact Ms Peterson regarding her intentions during the notice period. No such contact occurred.

[21] Ms Peterson was unjustifiably dismissed from her employment with Black Lion. She did not resign and nor did she abandon her employment. She is accordingly entitled to remedies. Ms Peterson has asked for hurt and humiliation of some \$30,000 and penalties of some \$20,000.

[22] Ms Peterson gave evidence of the emotional impact the dismissal had on her and the anxiety and confusion caused by Black Lion's dismissal. I consider an appropriate award in terms of s 123(1)(c)(i) of the Act to be \$15,000.

[23] Black Lion was not entitled to deduct \$1,725.00 on account of unworked notice as it did. To do so would be in the nature of a penalty and in any event it could be said it was Black Lion's own action which prevented Ms Peterson from working out any notice period. Black Lion is ordered to repay the sum of \$1,725.00.

[24] Ms Peterson's employment agreement provided for two weeks' notice. This has not been paid. Accordingly, as well as reimbursing Ms Peterson for the notice period deducted, Black Lion must also pay the two weeks notice period of \$1,725.00 to Ms Peterson.

[25] Section 124 of the Act requires me to consider the extent to which Ms Peterson's actions may have contributed towards the situation that gave rise to the personal grievance and if required reduce remedies accordingly. Black Lion's defence to Ms Peterson's claims are that she abandoned her employment. I have found that Black Lion could not have reasonably come to that conclusion and accordingly Ms Peterson has not contributed towards the situation that gave rise to her personal grievance. Accordingly no deduction from remedies is made.

[26] In her statement of problem Ms Peterson claimed penalties of some \$20,000. No particular basis as to why these should be paid was made out in the evidence. But in any event, this is not an appropriate case to award penalties. The actions complained of closely mirror the actions relied on for the claim of unjustified dismissal. No award for penalties is made.

Summary of orders

[27] Black Lion Holdings Limited is ordered to make the following payments within 28 days from the date of this determination:

- (a) The sum of \$1,725.00 unlawfully deducted from Carolyn Peterson's final pay;
- (b) The sum of \$1,725.00 being payment for the contractual notice period;
- (c) \$15,000.00 as compensation for humiliation, loss of dignity and injury to Ms Peterson's feelings.

Costs

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

[29] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Peterson may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Black Lion will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[30] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹

Geoff O’Sullivan
Member of the Employment Relations Authority

¹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1