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Pretorius v Fit Pit Limited (Auckland) [2017] NZERA 287; [2017] NZERA Auckland 287 (14 September 2017)

Last Updated: 2 October 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 287
3000087

BETWEEN MARISKA PRETORIUS Applicant

A N D FIT PIT LIMITED Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person

L Looi, Respondent Director

Investigation Meeting: 12 September 2017 at Auckland Submissions Received: 12 September 2017 from both parties Date of Determination: 14 September 2017

ORAL DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Mariska Pretorius was unjustifiably dismissed by Fit Pit Limited.

B. Fit Pit Limited is ordered to pay Mariska Pretorius lost remuneration of \$1,224 pursuant to [s.123\(b\)](#) of the [Employment Relations Act 2000](#).

C. Fit Pit Limited is ordered to pay Ms Pretorius \$2,000 compensation for hurt and humiliation pursuant to [s.123\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).

D. There is no order for costs. Employment relationship problem

[1] Mariska Pretorius alleges she was unjustifiably dismissed by Louis Looi, Director of Fit Pit Limited, in October 2016. Mr Looi accepts the employment was terminated but alleges she had been claiming for hours she never worked and there was threatening behaviour.

Issues

[2] There is a single issue for determination by the Authority. That was whether

Mariska Pretorius was unjustifiably dismissed by Fit Pit Limited.

Relevant Facts

[3] Mariska Pretorius was employed by Fit Pit Limited on 22 June 2016 as a fitness instructor and sales consultant. It is accepted she worked well.

[4] On 4 October 2016 matters changed. Ms Pretorius alleges Mr Looi asked her to leave the premises following an altercation about her attendance at a weekend function. Mr Looi denies that occurred. This matter does not require resolution as it does

not greatly impact upon the events of the following day.

[5] However the primary dispute is around the events that occurred on 5 October

2016. Ms Pretorius turned up to work at around 4:51am. Mr Looi was also in his office and she saw him at 6am. It was following a short conversation with him that she decided to record their future conversations.

[6] Ms Pretorius has produced a copy of the transcript from those recordings. Mr Looi has not taken issue with the recording or transcripts. The transcript shows that there was a dispute between the parties regarding deductions from Ms Pretorius's wages for an over-payment, and a request by her that she be paid for the extra hours worked in cash.

[7] Under examination Mr Looi accepted he stated to Ms Pretorius at some stage

“Now if I can ask you to leave ... I will instantly now dismiss you. That's all.”

[8] The recording also notes Mr Looi referring to giving Ms Pretorius warnings. It appears from the recording he also later retracts those warnings.

[9] At some stage Mr Looi accepted he states to Ms Pretorius “Mariska, you are putting the business at risk”. Ms Pretorius asks several times about she is putting the business at risk and Mr Looi replies “I'm going to say one more time. Pack up your stuff and go, and I'm happy to pay you the rest of the week. Thank you.”

[10] However Ms Pretorius does not leave. She again asks how she's putting the

business at risk. In reply Mr Looi states “One! I'm going to say one more time,

Mariska.” When she asks again about how she is putting the business at risk Mr Looi says “Two! Mariska, I'm going to call the cops, yeah.” Ms Pretorius replies “Call the cops because I want to know where I'm putting the business at risk.” Mr Looi says “I will tell you what, this is going to look really ugly for you if I call the cops, hey.”

[11] Ms Pretorius calls Mr Looi's partner. Mr Looi's partner advises her to leave and tells her that she will sort out matters with Mr Looi and call her later. Ms Pretorius leaves the building then calls her own partner. Ms Pretorius' partner comes to her workplace and seeks to speak with Mr Looi. It appears at that moment Mr Looi decides to call the police. The police arrive and take statements from each person present. No further action is taken. Ms Pretorius then leaves.

[12] Sometime later Ms Pretorius is asked to return her uniform and keys. She has no further contact with Mr Looi or his partner about her employment.

[13] Mediation was arranged but is unsuccessful. Ms Pretorius files a Statement of Problem in the Authority around November 2016. The matter now requires a determination.

The law

[14] If an employee's dismissal is accepted or proven as having occurred, the employer has the onus of justifying the dismissal. It must prove the dismissal was what a fair and reasonable employer could have done in all the circumstances.

[15] [Section 103A](#) of the [Employment Relations Act 2000](#) requires employers to raise concerns, investigate, give opportunities for employees to reply to the concerns and consider their responses before taking dismissal action.

Casual employee?

[16] An issue that has been raised on this particular file has been whether Ms Pretorius was a casual employee or not. Even if she was a casual employee, Fit Pit Limited must still comply with the requirements of [s.103A](#). If they seek to dismiss any employee during the term of their engagement they must still meet those statutory requirements.

[17] There is no signed employment agreement between the parties. Both produced an unsigned agreement that refers to casual employment on an “as required”

basis. However, Ms Pretorius states that was not the employment that she was offered or agreed to. When she was interviewed by Mr Looi for the job she was told there was a trial period, and then she was employed permanently from Monday to Wednesday for 18 hours per week at \$17 per hour.

[18] Both parties referred me to rosters that Ms Pretorius' work operated under. These work rosters show that she had a regular pattern of employment from Monday to Wednesday, 5am to 11am.

[19] Mr Looi complained about Ms Pretorius working elsewhere. If she was a casual employee she was entitled to do so at the end of her engagement. This indicated he expected her to be present as per the rosters. I accept Ms Pretorius' evidence the other jobs were short duration at the beginning of her employment and after hours. It does not matter whether they were

undertaken with or without Mr Looi's knowledge and consent.

[20] Other than the unsigned employment agreement there is no evidence to show her employment operated on a casual basis. I determine Mariska Pretorius was a permanent part-time employee.

Was Ms Pretorius unjustifiably dismissed?

[21] Because Mr Looi accepted in his evidence that Mariska Pretorius was dismissed on 5 October 2017, Fit Pit Limited is now required to justify that dismissal. There is no evidence to show that the concerns Mr Looi referred to today, or in his Statement in Reply, were raised in advance of any dismissal.

[22] The reasons for dismissal are set out in Fit Pit Limited's Statement in Reply. It states:

Mariska was terminated due to claiming extra hours without my permission. Her timesheets do not reflect on the actual hours rostered and I gave her several verbal warnings.

[23] This concern would not have justified immediate dismissal in and of itself. This is especially given the defects in the process set out below.

[24] There is no evidence that concern was raised with Ms Pretorius prior to 5

October 2017. Mr Looi referred to generic emails to staff about timesheets which he

did not produce in evidence. Even if he had, this is not raising the above concerns with Ms Pretorius or alerting her to the possibility she may be dismissed.

[25] There was also no investigation of that concern. Ms Pretorius disputed this at hearing. She also disputed the concerns at the time as shown by the 5 October transcript. A reasonable employer would have taken some time to investigate such a concern prior to dismissal.

[26] There was given no opportunity to respond or seek legal advice about the concern. Fit Pit Limited could not have genuinely considered any response from her as a consequence.

[27] There was no corroborative evidence of Fit Pit Limited taking disciplinary action such as verbal warnings prior to 5 October 2017. I do not accept Mr Looi's evidence she was verbally warned in a casual conversation he could not recall the date of nor had any corroborating evidence about. The transcript from 5 October does appear to refer to warnings being given after dismissal and when Ms Pretorius asks about how she is putting the business at risk. In these circumstances, a reasonable employer cannot justify dismissal by giving verbal warnings the same day without following any lawful process.

[28] It is difficult from the recording and transcript to ascertain the parties' behaviour at the time. At best it is unclear who to believe about the issues of aggression. In any event Ms Pretorius was dismissed before any alleged aggression got to the point of police involvement. Both parties and Ms Pretorius' partner were compliant and no further Police involvement has occurred.

[29] I am not particularly convinced about the allegations about Ms Pretorius's partner's behaviour. There is no evidence produced from the police as to that being a concern. There are no copies of the police statements made at the time.

[30] In my view these defects were not minor and they did cause Ms Pretorius unfairness. Mariska Pretorius was unjustifiably dismissed by Fit Pit Limited.

[31] I do not accept Ms Pretorius was reinstated to her job by Fit Pit Ltd's receiver and therefore has not claim. She was asked to do one class for cash which she did. That is not reinstatement.

[32] Because Ms Pretorius has proven she has a personal grievance she is entitled to receive remedies. Those remedies include lost remuneration and compensation.

Lost remuneration

[33] The lost remuneration claimed is capped at three months. Ms Pretorius earned

\$306 gross per week. She has given evidence of some mitigation of loss. However there were difficulties in her obtaining work because of her residency status. She also took time out from looking for work to re-train. In the circumstances I am prepared to award one month's lost remuneration, totalling \$1,224.

[34] Fit Pit Limited is ordered to pay Mariska Pretorius lost remuneration of \$1,224 pursuant to [s123\(b\)](#) of the [Employment Relations Act 2000](#).

Hurt and humiliation

[35] I accept that Ms Pretorius was upset and embarrassed about what colleagues had been told regarding the police involvement. I accept she was stressed that the police were involved at all. However, I can also understand Mr Looi wishing to call the police if Ms Pretorius was refusing to leave. Her hurt and humiliation from Police involvement has to some extent been caused by her own actions.

[36] Ms Pretorius refers to reputational damage. It is difficult to prove reputational damage. This is limited to embarrassment around colleagues and the possibility she has lost clients because of the police involvement. This employment was of short duration from 22 June to 5 October 2016. Some of her reputation may be restored through this decision. I am prepared to award a lower band of compensation in the circumstances, of \$2,000.

[37] Fit Pit Limited is ordered to pay Ms Pretorius \$2,000 compensation for hurt and humiliation pursuant to [s.123\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).

[38] There is no issue of contributory conduct reducing remedies.



T G Tetitaha

Member of the Employment Relations Authority

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