

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 135  
5423615

BETWEEN MICHELLE RABE  
Applicant  
AND DIVA LIMITED  
Respondent

Member of Authority: P R Stapp  
Representatives: Sarah Fouhy for Applicant  
Pham Van Hiep for the Respondent  
Investigation Meeting: 24 October 2013 at Wellington  
Determination: 25 October 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Rabe claims that she was unjustifiably dismissed. She has claimed that her work environment was not safe because of an atmosphere of bullying, intimidation and stress. She claims that there was no training, and when training was requested, it was refused. Ms Rabe says she requested details of her final entitlement of wages, annual leave and notice, and her request was ignored by the respondent. No statement in reply has been provided by Diva Limited and it has not complied with a request for wages time and holiday records.

[2] Ms Rabe is seeking her correct final pay and notice, compensation and costs.

[3] In considering the correspondence and documents supplied by Ms Rabe I am satisfied that she raised a personal grievance with her employer (email dated 25 June 2013 and statement of problem filed on 9 July 2013). The documents properly raised a personal grievance with the nature of the claim and putting the employer on notice of the remedies being claimed to resolve the employment relationship problem. Ms

Rabe can be excused for not following a more precise procedure of corresponding with her employer first and before filing in the Authority, as she has dealt with the matter on her own and with the help of her partner, a support person, and her partner is not a professional employment representative. Any defects should not prevent Ms Rabe's claims proceeding because the respondent has been on notice of them in the timeframes as required. The claims were sufficiently clear for the employer to be on notice of a personal grievance and the remedies being claimed.

### **Issues**

[4] Does Ms Rabe have a personal grievance and on what grounds?

[5] The employment agreement contains a "probation" provision. There is an issue about how this applies.

[6] Is Ms Rabe entitled to any further wages, notice and annual leave?

[7] What notice (under the termination and/or probation clauses in the employment agreement) applies?

### **The facts**

[8] Diva Limited operates Lava Café located at the Grand Arcade in Wellington. The sole director of the company is Pham Van Hiep. Ms Rabe was employed by Diva Limited (Diva) as a prep chef/cook and started work on or about 22 April 2013. Lava Cafe is a retail licensed café, and Diva employs about 5 full time employees. It has an accountant to assist calculate and pay the wages. Ms Rabe was paid \$15 per hour for hours worked as required according to the employment agreement and pay slips. The only proof of hours worked and the average hours worked in regular weeks has been obtained from the payslips produced. Ms Rabe's payslips show that 6 regular weeks (more than 30 hours per week) involve an average of 39.20 hours per week. The employment agreement was signed before Ms Rabe started work in or about April 2013. There was a probation clause included in the employment agreement that requires at least 2 weeks' advanced warning (a first warning) before applying any termination of employment in 3 months relating to performance. Ms Rabe was paid

weekly in arrears. Notice of one month and/or one week can apply according to the termination and probation clauses respectively.

[9] Ms Rabe was issued a performance warning on 22 May 2013 in writing for improvements she was required to attain in two weeks. It is common ground that Ms Rabe was given the warning and it had been effective for more than 2 weeks. On 25 June 2013 Ms Rabe was dismissed by Pham Van Hiep (letter 25 June 2013). She was dismissed for allegedly failing to improve performance; her work ethic and attitude after the first warning (letter of dismissal). She was not regarded by Pham Van Hiep as a team player (letter of dismissal).

[10] Her last day of work was Tuesday 25 June 2013 when she was handed the letter about lunch time and left the premises and contacted her partner Sarah Fouhy for help. Ms Fouhy arranged a meeting with Mr Van Hiep immediately and this lasted about 10-15 minutes without any result. Later the same day Ms Rabe informed Mr Van Hiep by email that she would not return to work because of discrimination, her employer's attitude towards her and her stress. Ms Rabe requested details of her annual leave for payment, and on 1 July 2013 Diva replied by email confirming the end of Ms Rabe's employment and that she would be paid outstanding money (including "*a full week plus holiday pay, which covers the two months you were with us from 22 April to the 2<sup>nd</sup> July*"). She was paid \$180 for 12 hours worked in the last week. Her final holiday pay was \$423.60 gross. There was no payment made for any notice. The same email confirmed that the business could not keep her on.

[11] I have assessed Ms Rabe's total gross earnings from the pay slips as approximately \$4,554.01 gross in total for the time she worked. Eight per cent of the total gross amounts to \$364.32. She is not owed any more holiday pay. The difference between this sum and the amount paid may be accounted for by the gross pay for the missing week where there was no pay slip and no wage details and Ms Rabe has only been able to provide the net of tax amount. No other explanation has been provided because Mr Van Hiep does not know and there are no other details available. One month's notice was required under the terms of the employment agreement for termination, however, the employment agreement in the probation clause provides for one week's notice. When no details were provided Ms Rabe filed her application in the Authority.

**The respondent's participation in the Authority's investigation**

[12] The respondent Diva Limited attended the investigation meeting late after the start was delayed. Diva was put on notice of the employment relationship problem and was served with a minute and notice of the Authority's investigation meeting. A request was made by the Authority for wage time and holiday records and any payslips. Diva Limited's registered address is used by someone else. There has been no explanation for this. The support officer had to serve the notice and documents on the business address, which accepted service by courier (track and trace). Pham Van Hiep has confirmed that he had received all the documents.

[13] I considered mediation as I must under s 159 of the Employment Relations Act 2000. I decided mediation would not be constructive because Diva did not get involved to attend mediation with MBIE. S 159A of the Act does not apply. Further Diva failed to provide a reply to the claims and did not make contact with the Authority with any reasons for its failure to reply in the required time.

[14] Mr Van Hiep claimed that his records and computer had been taken from his home. He informed the Authority that he had made no attempt to ask his accountants for assistance before the investigation meeting.

[15] On the day of the investigation meeting Mr Van Hiep turned up only after being contacted by the support officer and he did not bring any documents with him, except to hand up an unsworn statement from a kitchen hand.

[16] Diva was requested on 15 October 2013 to provide its wage time and holiday records and pay slips for Ms Rabe, and the contact details of its accountant, but nothing has been produced to satisfy the request. Diva has failed to assist the Authority in its investigation of the claims.

[17] Diva was given the right to be heard at the investigation meeting because Mr Van Hiep did turn up to the investigation meeting. In summary Mr Van Hiep says that he decided not to do anything about the claims because he had done everything right, in his opinion; and he says that the one month's notice did not apply under the probation clause, and Ms Rabe did not return to work.

**Determination**

[18] The details of the reasons for Ms Rabe's dismissal have not been fully provided by Diva, except for the information contained in the dismissal letter produced by Ms Rabe. Ms Rabe did not have the benefit of any investigation into her performance and the reasons advanced by Diva in the letter of dismissal at the end of the employment. I accept that Diva is a small employer with 5 full time employees, one sole director and is trading in only one outlet. It has an accountant.

[19] The probation clause in the employment agreement is not a valid "Trial Clause" under the Employment Relations Act because it did not provide in writing that the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal under s 67A (2) (c) of the Act. It is not clear whether or not the employer is relying on using the clause as a "Trial Clause". However, I accept that the probation clause in the agreement would apply instead of a "Trial Clause" as the probation clause was in writing as required under the Act to apply.

[20] The employer is still required to follow the correct procedure for termination of employment under s 103A (3) (a)-(d) of the Act and under the probation clause of the employment agreement. None of the procedural requirements under the Act were complied with by Diva. The concerns that were put to Ms Rabe in the dismissal letter were not put to her before the decision was made to dismiss her and she was handed the letter first, I hold. It was a requirement of the probation clause to give the employee an opportunity to respond to any concerns, and it has clearly been breached. Ms Rabe had no reasonable opportunity to respond to the concerns, I hold, because she was handed the letter of 25 June without any prior discussion and/or meeting as to the concerns and possibility of dismissal. It follows that the employer did not genuinely consider an explanation before the decision was made. It follows that Ms Rabe's dismissal was not justified. A fair and reasonable could not have dismissed without following the proper procedure I hold. The failure is not minor and technical.

[21] In addition after her dismissal Ms Rabe has raised the alleged issues of the atmosphere in the workplace, i.e an unsafe workplace and the respondent's refusal to provide training when requested. However, at no stage did Ms Rabe put the employer

on notice of the details of her claims. Indeed the emails, the statement of problem and the employer's letter of termination of the employment do not provide any specificity on the matters. I am satisfied that the employment ended at the initiative of the employer when Diva ended the employment with its letter of termination on 25 June and confirmed it had ended on 1 July for performance. The reason for the dismissal could only have been for the alleged performance matters. I would have reasonably expected more detail as to the reasons relied upon for the dismissal, the standards of work required, the matters that needed particular attention and the options including training to achieve the requirements, all of which have not been provided. The dismissal has not been justified solely based on one warning especially given the failure of the respondent to provide any evidence as to the details of its concerns prior to the dismissal. As I have said the decision failed to meet the procedural requirements of the Act and the probation clause in the employment agreement.

[22] As Ms Rabe has a personal grievance the remedies that apply are lost wages and compensation as claimed. There was no contribution and blameworthy conduct on her part as her evidence was the only evidence I have heard in the matter and I have no reason to reject it (applying s 124 of the Act). Ms Rabe is entitled to three months' lost wages (13 weeks for a quarter of the year). She has mitigated her loss by going to Work and Income for help, cold calling to look for work, applying for jobs on line and using her c v and says she had to keep a record of her on line applications for Work and Income. She attended a Job Seekers seminar on the Friday following her dismissal. She obtained a new job and started work on 23 September 2013.

[23] Ms Rabe's lost wages for 13 weeks including the 27 unpaid hours of her last week of work from 25 June to 20 September amounts to a total of \$7,515 gross (\$15.00 per hour at an average of 39.20 hours per week and the 27 hours not paid).

[24] She is entitled to compensation for the impact of the dismissal on her feelings, and hurt and humiliation caused by the dismissal, and the lack of any process followed by the employer including a failure by the employer to properly listen to her and to hear any explanation. I accept she left the premises crying and sat outside until help arrived. The employer has left a stigma of unfair dismissal without proper reasons provided. Ms Rabe is entitled to \$2,000 compensation.

[25] Ms Rabe's claim for a balance of pay for her last week has been established because the wages were lost due to the dismissal. The employment agreement is clear that only one week's notice is required where the termination relates to the probation clause. No notice in lieu was paid and as it was promised Diva has to comply with that decision it made at the time to pay the full week.

[26] Ms Rabe has incurred the cost of the filing fee (\$71.56).

### **Orders of the Authority**

[27] Diva Limited is to pay Michelle Rabe:

- i. \$7,515 gross lost wages due to the unjustified dismissal.
- ii. \$2,000 compensation under s 123 (1) (c) (i) of the Employment Relations Act.
- iii. \$71.56 filing fee.

P R Stapp  
Member of the Employment Relations Authority