

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 110/07
5081818

BETWEEN

MYRIAM SCHOUTEN
Applicant

AND

NEW ZEALAND RUBY
ROCK LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: The applicant in person
The respondent by telephone link

Investigation Meeting: 20 July 2007 at Hokitika

Determination: 12 September 2007

DETERMINATION OF THE AUTHORITY

Identity of the respondent

[1] Ms Schouten lodged her application naming the respondent as Mr and Mrs Commandeur. When the statement in reply was lodged with the Employment Relations Authority it named the respondent as New Zealand Ruby Rock Limited. I am satisfied from the evidence that Ms Schouten's employer was New Zealand Ruby Rock Limited. The respondent is therefore New Zealand Ruby Rock Limited (Ruby Rock).

The employment relationship problem

[2] The applicant, Myriam Schouten, was employed by the respondent from 12 May 2006 until her summary dismissal on 7 November 2006. The reasons for Ms Schouten's dismissal were set out in a letter dated 7 November 2006 which provided:

Today you were dismissed from our New Zealand Ruby Rock gallery the reason is because you have being dishonest in money matters.

We have given you the management of our retail outlet and you have than the (sic) wrong to our Company, we really regret this and we hope it will be of a good lesson for you.

Sincerely.

Gerry Commandeur Director

[3] Ms Schouten says that her dismissal was unjustified and she seeks reimbursement for lost wages and compensation for stress and humiliation. Ms Schouten also sought an apology for the dismissal. An apology is not a remedy which the Authority has jurisdiction under the Employment Relations Act 2000 to award in the event that it determined Ms Schouten had a personal grievance.

[4] Ruby Rock is a duly incorporated company. Gerry Commandeur is the director of Ruby Rock and a master gemcutter. Ruby Rock operates a gallery in Hokitika from where it sells jewellery and related items. Ruby Rock says that Ms Schouten's dismissal was justified for the reasons set out in the letter that was sent to her.

The investigation meeting

[5] A representative from Ruby Rock failed to attend on a telephone conference with the Authority to discuss mediation and setting a date for an investigation meeting in the event that mediation did not resolve the problem. Ms Schouten was prepared to attend mediation but a mediation date could not be arranged.

[6] The Authority is satisfied from documentation provided by Courier Post that Ruby Rock was served on 28 April 2007 with a copy of the notice of direction and investigation meeting notice.

[7] Some time after the date of service, the Authority became aware that Mr Commandeur, was in Australia. The senior support officer managed to obtain an email address for Mr Commandeur and reminded him of the investigation meeting in Hokitika on 20 July 2007. Mr Commandeur indicated that he would not be returning to New Zealand for the meeting. Mr Commandeur then participated in a conference call with the Authority and Ms Schouten to discuss how the matter should proceed. It was agreed that Mr Commandeur and Mrs Commandeur would be permitted to attend the investigation meeting by way of telephone. The Authority was provided with and made sure that the parties each had a copy of written statements from Ms Schouten and Mr Commandeur prior to the investigation meeting.

[8] The Authority duly held an investigation meeting on 20 July 2007 in Hokitika. Mr Commandeur and Mrs Commandeur were connected to the investigation meeting by telephone, so they could be questioned on a number of matters. The Authority also heard from Ms Schouten

and very brief evidence from her mother, Lida Schouten. The Authority made it clear to both parties that a letter provided by the Pastor of the Christian Powerhouse Church would be put to one side as the contents were particularly prejudicial to the respondent and the Pastor did not attend at the investigation meeting.

Issues

[9] The test in s.103A of the Employment Relations Act 2000 requires that the question of whether a dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[10] The Employment Court in *Air New Zealand v. Hudson* (2006) NZER, said with respect to s.103A at para.[132] that:

The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer's actions, the test for justification applies at all stages including the employer's decision that misconduct has occurred and the employer's decision to dismiss.

[11] The issues to be determined in this matter are:

- Was the investigation into the allegation that Ms Schouten was dishonest fair and reasonable;
- Was New Zealand Ruby Rock Limited justified as a result of that investigation in concluding that Ms Schouten had been dishonest in money matters which amounted to serious misconduct and justified summary dismissal on 7 November 2006;
- If the dismissal was unjustified, then what remedies should be awarded and is there any issue of contribution?

The background to the employment relationship

[12] Ms Schouten was not provided with a written employment agreement when she commenced her employment on 12 May 2006. Ms Schouten understood during her employment at Ruby Rock that Mr Commandeur was the one to whom she was required to report, although Mrs Commandeur would come into the shop from time to time. From 12 May 2006 until late June 2006 Ms Schouten only worked 24 hours a week. She was paid \$11.75 per hour for her work.

[13] In or about late June 2006, Mr Commandeur was intending to travel to Australia. Ms Schouten says that at or about this time Mr Commandeur increased her hours to 40 hours per week. There is no dispute about that matter. Mr Commandeur then travelled to Australia

[14] The matter that is in dispute is whether it was agreed that Ms Schouten would also receive a pay increase when her hours increased to 40 hours per week. Ms Schouten said that Mr Commandeur discussed a gross figure of \$520 per week with her. She said that when Mr Commandeur was present she telephoned his son-in-law, Paul, in Blenheim and asked him what the net rate was on that gross sum. Ms Schouten said that Paul, who had helped before in the gallery with the computer and knew about tax rates said that the net sum on the gross figure of \$520.00 was \$415.00 and Ms Schouten said she relayed that to Mr Commandeur.

[15] Mr Commandeur disputes that there was any agreement to change Ms Schouten's rate of pay. He said that as soon as he was out of the country *she put her pay up to \$13.00 an hour instead of \$11.75*. Mr Commandeur says that Ms Schouten's gross pay each week should have been \$470 and not \$520.00

[16] Mr Commandeur deposited by automatic payment into Ms Schouten's bank account every week the sum of \$415.00. Ms Schouten did not have access to the account from which he paid her net wages and no control over that matter. I have had careful regard to the PAYE wages/time records that Ms Schouten was required to keep herself. If Mr Commandeur had intended to pay Ms Schouten on the basis of \$11.75 per hour then he would have deposited a net amount into her bank account of approximately \$376.00 and not \$415.00. I was not able to obtain a clear answer from Mr Commandeur as to the basis of the \$415.00 deposit that he made each week into Ms Schouten's account which seemed more likely to be consistent with Ms Schouten's evidence that it was agreed she would receive that net figure than Mr Commandeur's recollection of events that there was no agreement.

[17] There can be no dispute that the only person who had access to the account from which Ms Schouten's pay was withdrawn and paid to her in the sum of \$415 per week was Mr Commandeur. The figure deposited supports that Ms Schouten's evidence is more likely to be correct that it was agreed Ms Schouten's net pay would be \$415.00 per week.

[18] The only issue therefore can be whether Ms Schouten properly recorded the PAYE on that net figure on her wage/time records. Mr Commandeur accepted that the arrangement was that Ms Schouten would organise PAYE to be paid. It appeared on the face of the pay records for Ms Schouten that on a net payment of \$415.00 per week PAYE would be \$105.00. Mr Commandeur

then placed some reliance on the agreement he had with Ms Schouten that she could take a commission each week. He seemed to rely on this to support that Ms Schouten was already fairly rewarded for her work and to say that she should have paid PAYE from this commission. Ruby Rock was legally required to pay PAYE on Ms Schouten's wages and any other arrangement would not be lawful.

[19] Ms Schouten was given authorisation to one of Mr Commandeur's business accounts, but not the one from which wages were deducted so she could pay the bills and PAYE. There is no suggestion that she paid herself anything out of that account.

Dismissal

[20] On 7 November 2006, which was a Tuesday, Ms Schouten attended at the gallery as usual for work.

[21] Mrs Commandeur was present with another employee at the shop. Ms Schouten was confronted immediately with her pay records. She was asked what her hourly rate was and I accept that she may well have said she did not know. With no further opportunity for explanation Mrs Commandeur told her that she was fired because she had been ripping off the company. Ms Schouten was not allowed to explain her view of the records but she told me that had she been allowed to explain, she would have talked about the agreement she had with Mr Commandeur and the discussions that had taken place between her and Mr Commandeur's son-in-law.

[22] Ms Schouten was required to leave the shop immediately.

[23] Ms Schouten left the shop and went to her mother's home. Ms Schouten's mother described that her daughter was in her words *a mess and was crying and in shock*. Ms Schouten explained that she suffers from a diabetic condition which was aggravated as a result of the dismissal. Ms Schouten said that her condition has always been difficult to manage but she was unable to even look for work after her dismissal and is still in receipt of a sickness benefit. Ms Schouten said she spent the first month after her dismissal in shock and felt *stripped of her identity*. She found it difficult to go out into the community.

[24] Ms Schouten also experienced significant financial difficulties as a result of the dismissal. She received the letter of dismissal which was dated 7 November 2006 about a week after her dismissal. Ms Schouten said that Mr Commandeur always made jokes about her old vehicle which was parked outside the shop. While Ms Schouten was employed by Ruby Rock she purchased a new car shortly before her dismissal. Ms Schouten is now struggling to make payments on that car.

[25] There were other matters put forward in Mr Commandeur's statement in terms of Ms Schouten as an employee. One of these matters was that Ms Schouten entertained people within the shop and the other matter was that she played games on her computer, Solitaire, Free Cell and the like.

[26] I accept Ms Schouten's evidence that when the shop was quiet she would have a game on the computer. I am satisfied that the games were part of Windows and that she had not downloaded these. Ms Schouten explained that sometimes she did not get a proper coffee or lunch break and had to work around the customers. I do not find that that is a matter which could justify Ms Schouten's dismissal .

[27] The other matter raised was that from time to time Ms Schouten's mother or sister would pop in and have a cup of coffee. Ms Schouten said that she was spoken to about this on one occasion and indicated to her family that they should not attend at the shop after that time and they did not. This could not be justification for the dismissal.

Determination

[28] There was no investigation into Ms Schouten's actions in terms of her pay and payment of PAYE. A fair and reasonable employer would have given Ms Schouten a real opportunity to provide an explanation in terms of her pay. An appropriate investigation would have had to have been carried out consistent with the very serious allegation that she had been dishonest and the potential consequence therefore of a dismissal. At the end of that investigation process, a fair and reasonable employer would then have considered all the matters arising from the investigation and have made a fair and reasonable decision.

[29] There was no opportunity for Ms Schouten to provide an explanation about the pay records. There were serious inconsistencies in terms of Mr Commandeur's payment of \$415 into Ms Schouten's bank account each week with Mr Commandeur statement that he intended Ms Schouten receive \$11.75 gross per hour and not \$13 per hour. Had there been a proper investigation then Ms Schouten would not have been found to have been dishonest.

[30] I do not find in this case, on the evidence before me, that it was open to a fair and reasonable employer to have concluded that there was misconduct on the part of Ms Schouten. Ms Schouten was not responsible for the depositing each week of \$415 into her account. Ms Schouten kept a careful record of the amount that was deposited into her account and the calculation of PAYE on that net amount was immediately available to her employer. These were not the actions of somebody who was dishonest.

[31] A fair and reasonable employer must show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. There was no investigation carried out at all in terms of Ms Schouten's pay records and in the absence of such an investigation, and on the face of the records themselves, there is no conduct which a fair and reasonable employer would regard as misconduct, let alone serious misconduct.

[32] I find that Ms Schouten's dismissal was unjustified because it was not what a fair and reasonable employer would have done in all the circumstances that existed at the time.

[33] Ms Schouten has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

Remedies

Contribution

[34] The Authority is required to consider whether Ms Schouten contributed to the circumstances that gave rise to her personal grievance.

[35] I do not find that Ms Schouten contributed to her personal grievance on any basis whatsoever.

Lost wages

[36] Ms Schouten was not in a position following her dismissal to look for work. She already had an existing diabetic condition but I accept it was aggravated as a result of the dismissal. When Ms Schouten commenced employment at Ruby Rock her wages were subsidised for about six months by a job start subsidy. Ms Schouten had a pre-existing condition which limited her ability to look for full time work. In the circumstances I have limited reimbursement of lost wages to three months. I have calculated three months' wages on the gross figure of \$520 per week for 13 weeks and the total sum is \$6760 gross.

[37] I order New Zealand Ruby Rock Limited to pay to Myriam Schouten the sum of \$6760 gross being reimbursement of three months wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[38] Ms Schouten was I accept very humiliated and upset by her dismissal for dishonesty. She saw herself as a honest, hardworking and ethical person. She described that Mr Commandeur made

her feel like *scum* and she could not understand why she had been dismissed. Ms Schouten felt it was difficult to go out in public in the small community in which she worked after her dismissal and was not clear on why she had been dismissed. She suffered serious financial difficulties.

[39] In the circumstances of this case, I find that a significant award is appropriate. The sum of \$10,000 is appropriate.

[40] I order New Zealand Ruby Rock Limited to pay to Myriam Schouten the sum of \$10,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Holiday Pay

[41] Ms Schouten was not paid holiday pay when she was dismissed from her employment. Ms Schouten is entitled to a sum equal to 6% of her gross earnings. Ms Schouten's gross earnings at Ruby Rock were \$11052 and 6% of that is \$663.12.

[42] I order New Zealand Ruby Rock Limited to pay to Myriam Schouten the sum of \$663.12 being holiday pay.

Costs

[43] Ms Schouten was not represented but did incur the filing fee of \$70. I order New Zealand Ruby Rock Limited to pay to Ms Schouten the sum of \$70 being her filing fee.

Summary of findings and orders made

- I have found Ms Schouten was unjustifiably dismissed from her employment with New Zealand Ruby Rock Limited.
- I have not found that Ms Schouten contributed to her dismissal.
- I have ordered New Zealand Ruby Rock Limited to pay to Myriam Schouten the sum of \$6760 gross being lost wages under s.123 (1) (b) of the Employment Relations Act 2000.
- I have ordered New Zealand Ruby Rock Limited to pay to Myriam Schouten the sum of \$10,000.00 being compensation for humiliation and loss of dignity under s123(1)(c) (i) of the Employment Relations Act 2000.

- I have ordered New Zealand Ruby Rock Limited to pay to Myriam Schouten the sum of \$663.12 being holiday pay.
- I have ordered New Zealand Ruby Rock Limited to pay to Myriam Schouten the sum of \$70 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority