

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 216  
3067352

BETWEEN TYELA SINCLAIR  
Applicant  
AND MALIBU DINER LIMITED  
Respondent

**Member of Authority:** Nicola Craig  
**Representatives:** Alex Kersjes, advocate for the applicant  
Marie Bird, agent for the respondent  
**Investigation Meeting:** 11 November 2019 at Hamilton  
**Submissions [and further Information] Received:** At the investigation meeting from both parties  
10 February and 11 May 2020 from the applicant  
10 February, 12 and 15 May 2020 from the respondent  
**Date of Determination:** 2 June 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Tyela Sinclair was unjustifiably dismissed by Malibu Diner Limited.**
- B. Malibu Diner Limited is to pay Ms Sinclair the following sums as remedies for her personal grievance within 28 days of the date of this determination:**
- (i) \$470.03 gross as lost wages; and**
  - (ii) \$7,500.00 as compensation, loss of dignity and injury to feelings.**
- C. Malibu Diner Limited made an unauthorised deduction from Ms Sinclair's wages and is to pay her the sum of \$195.00 without deduction within 28 days of the date of this determination.**

**D. Costs are reserved and a timetable set if the parties are not able to reach agreement.**

**What is the Employment Relationship Problem?**

[1] Tyela Sinclair worked at a café known as the Malibu Diner in Morrinsville from mid-2018. Malibu Diner Limited (Malibu Diner or the company) is owned by Marie Bird, who runs the business with some assistance from her husband, Murray Bird. Ms Sinclair worked as a back of house cook and kitchen hand.

[2] In March 2019 Ms Bird notified Ms Sinclair that she was making her redundant as Malibu Diner needed someone to work longer hours.

[3] Ms Sinclair claims that she was unjustifiably dismissed, questioning whether her dismissal was really for redundancy and claiming that if it was, a fair process was not used. Malibu Diner says that the dismissal was genuinely for redundancy and that it adopted a fair process, having explored the possibility of Ms Sinclair working longer hours. There is also an issue about a deduction from Ms Sinclair's final pay which Malibu Diner says was made because she did not return her uniform on time.

[4] An investigation meeting was held in Hamilton on 11 November 2019. I heard evidence from Ms Sinclair and a friend and former colleague of hers, along with Ms Bird and Mr Bird.

**What did the employment agreement provide?**

[5] Under Ms Sinclair's employment agreement she was to work a minimum of 20 hours each week on Monday, Friday and Saturday between 9am and 2pm. Other hours could be offered when available including (a handwritten addition added) one day of five hours either during the week or on Sunday. The agreement also provided:

The employee can choose when to start and end work each day (within agreed limits), as long as they work the agreed number of hours.

[6] The redundancy clause in the agreement specified:

Redundancy is when an employee's role is no longer needed.

If after following a good faith restructuring process the employee is made redundant, they will be given notice as set out in Ending Employment. They will not receive redundancy compensation or other redundancy entitlements.

[7] The Ending Employment clause provided for either party to give one week's notice in writing of termination.

### **What discussions occurred about work hours?**

[8] The parties give contrasting evidence regarding hours of work discussions. Text, diary entries and letters were also filed.

#### *Ms Sinclair*

[9] Ms Sinclair says that when Ms Bird took over the business in 2018 staff were just told that everyone would do the same hours and days as they are already doing. Ms Sinclair says that a couple of months later she had a conversation with Ms Bird where she was promised extra hours when the catering part of the business took off. Ms Sinclair reports being very interested in and happy to do the extra hours as long as she knew a few days in advance so she could sort out after school care for her children. She offered to put her children into the available care if needed.

[10] Over time Ms Sinclair's work pattern changed so she was sometimes working up to six days a week, often from 9am to 2pm. Occasionally if needed she would work seven days a week. Ms Bird let her know what was required.

[11] Ms Sinclair says she was happy to cover days for other workers when they were sick and she even covered for Ms Bird when the latter went shopping or on holiday. She denies ever saying no to extra work. Even when her children were unwell she still went into work and made arrangements for her children to go to their grandparents' house.

[12] Ms Sinclair emphasises that after the discussion about the prospect of the catering business taking off, there was little or no further discussion about her working more hours.

#### *The Birds and the diary*

[13] Mr Bird says another worker was unable to undertake heavy lifting and straining, such as was required with lifting tables and chairs at the diner's closing time. He says that Ms Sinclair did not always stay and help.

[14] In reply, Ms Sinclair describes a close relationship with the worker in question and says that she was the only person who stayed behind to do the cleaning up and bring the tables in.

[15] Mr Bird says that he and his wife asked Ms Sinclair a number of times to extend her hours but that she always declined for one reason or another, saying it was not possible because of her children's swimming lessons and other commitments. Mr Bird suggested that at the meetings Ms Sinclair said that if they could not get someone else to work on a particular day the Birds would have to shut the diner that day.

[16] Ms Bird says that in February 2019 she and her husband had meetings with Ms Sinclair to ask if she could work more hours but Ms Sinclair basically said she could not do any more. Further, they asked Ms Sinclair if she had any solution to help her work more and she could not come up with anything.

[17] Ms Bird provided diary pages including her handwritten notes. These began with an 18 February 2019 entry noting a talk between herself, her husband and Ms Sinclair, where Ms Sinclair was asked if she could work extra hours as her co-worker had been unwell and the business needed more support. Ms Sinclair is noted as having replied that she said she could not.

[18] Ms Bird had further diary entries:

- (a) 25 February 2019 – "Murray came in so we could talk to Tyela about her hours."
- (b) 26 February 2019 – "Gave Tyela a letter about our meeting yesterday explaining our need for extra hours and help we needed."
- (c) 11 March 2019 – "Gave Tyela a letter asking her to attend a meeting the next morning at 9am."

[19] As well as denying those events occurred, Ms Sinclair says she never saw Ms Bird with a diary. Ms Bird indicated that she kept the diary at home, updating it about once a week.

### *Letters*

[20] Ms Bird maintains that she gave Ms Sinclair letters including the following:

- (a) 19 February 2019:  
"I am writing in relation to our meeting that took place on the 18/02/2019. As per our meeting, we are asking for you to increase your hours on your afternoon shift. This will allow us to open the shop longer and assist with sharing the end

of day clean-up duty. Currently you are leaving between 2-2:30pm. We would appreciate if you are able to stay on for a further hour each day. If you can consider changing your hours and we will meet again in another week to discuss it further. Thank you for considering this request. I look forward to hearing from you.

(b) 26 February 2019:

This is written confirmation about our meeting that took place on the 25/02/2019. During this meeting we advised you that we now need to look at other options in relation to staff as you are unable to change your hours as we had previously asked. ... Additionally if you have any suggestions to help us with staffing hours we would like to hear from you about these.

(c) 11 March 2019 – requesting Ms Sinclair’s attendance at a meeting at 9am on 12 March 2019.

[21] Ms Sinclair denies receiving or seeing any of those letters.

[22] Ms Bird struggled, despite being given several opportunities, to provide clear evidence about the process she went through creating, printing, scanning and then providing the letters. She says that she is unable to provide electronic versions of the letters as her laptop was stolen from her car. She provided a copy of the police report regarding her reporting the incident.

#### *Text messages*

[23] Texts earlier in the employment relationship between Ms Bird and Ms Sinclair mostly show Ms Sinclair willing to work at the times sought by Ms Bird.

[24] One text exchange from July 2018 between the two referred to swimming lessons for Ms Sinclair’s children and the impact it would have on her ability to work. Ms Sinclair noted that she could “just wait until the following term for swimming lessons, no biggie”.

[25] There is some text evidence of Ms Sinclair’s co-operation continuing into 2019. On 5 March Ms Bird texted Ms Sinclair asking her to get in a bit earlier one day so she could take over from another worker who needed to leave. Ms Sinclair replied that she would be there a bit before the other worker’s departure, with Ms Bird responding “Sweet thanks”.

[26] By contrast, text messages between Ms Bird and Ms Sinclair’s colleague from February 2019 indicate some dissatisfaction by both about Ms Sinclair’s willingness to stay on and clean up at the end of the day.

### *The colleague's evidence*

[27] Ms Sinclair's former colleague generally got on well with both Ms Sinclair and Ms Bird. She was not aware of any discussions in February 2019 between the Birds and Ms Sinclair about a need for Ms Sinclair to work longer hours. More broadly she was not aware of meetings between them at all, despite being at the diner most of the time it was open. She was mostly at work during the times Mr Bird described the meetings as occurring. She thought she would have been aware of meeting of the 10 to 15 minute length Ms Bird described.

[28] The colleague was aware of one earlier discussion about extending Ms Sinclair's hours which occurred during a meeting the colleague also attended. She recalled Ms Sinclair saying that she could extend her hours and would have to arrange afterschool care for her children.

[29] The colleague was also not aware of Ms Bird giving any letters to Ms Sinclair despite Ms Bird saying they were handed over in person at the diner.

### *Other issues*

[30] Ms Bird raised an issue about Ms Sinclair's past seemingly to discredit her. This was unrelated to the dismissal. It is fair to say that both parties attempted to disparage the other in the course of this proceeding, in ways I found unhelpful.

### *Conclusion about discussion of extended hours*

[31] The Birds both gave evidence of at least two discussions with Ms Sinclair asking her to extend or increase her work hours. Mr Bird's evidence suggested perhaps more meetings than Ms Bird's evidence did or he may have also covered discussions the year before. Although the two gave relatively similar evidence, I take into account that they are married as well as both being involved in running the diner.

[32] Ms Sinclair categorically denies that there were any discussions in February 2019 about her extending her hours, even in the sense of fairly informal chats, either solely with her or with her and other staff.

[33] I found the colleague's evidence credible. She was the person who had the least motive for providing inaccurate evidence. She got on with both parties. In the context of a small diner and her friendship with Ms Sinclair, I consider it likely that if the Birds had had quarter hour

discussions with Ms Sinclair regarding her hours of work and provided her with letters, the colleague would have been aware of it.

[34] The text evidence generally supported Ms Sinclair's position that she was flexible about her work and increased hours as requested by Ms Bird.

[35] The evidence regarding the process for preparing, printing and providing the letters was confusing. I was unable to establish via computer evidence that the letters had been prepared contemporaneously with their dates, as the computer was not available.

[36] On balance I conclude that Ms Sinclair's version of events was more credible considering the colleague's evidence and texts, and thus there were no meetings in February 2019 discussing hours of work and the prospect of redundancy.

[37] My impression is that Malibu Diner took occasional difficulties there were for example, with Ms Sinclair not being able to make arrangements for someone else to pick up her children on a particular day at short notice, as an indication that Ms Sinclair was not interested in further hours.

### **How was Ms Sinclair informed by Malibu Diner of her redundancy?**

[38] On 12 March 2019, Ms Sinclair phoned the diner to say that she was sick with a stomach bug and would not be coming into work. She checked her emails later and noticed an email from Ms Bird at 12:40pm titled "Redundancy". The email read:

I regretfully am informing you that your position at "Malibu Diner" has become redundant, as you know we have been looking at restructuring the company and changing our opening hours, in which we will now be open until 3pm each day.

Due to the fact that I start at 4-5am each day I need someone who can work on until the cleaning is finished at around 3.30-3.45 each day.

As you know I have had to employ someone who can do these hours and stay on at the end of shifts. I have tried several other options and this is the only solution.

Last week we were put in a position where we could not open because my barista was sick and I had no-one to open to make coffees for the day forcing us to close, it's for that reason I have had to hire someone who can do the longer hours.

I do wish you the best in the future and am sure you will find work suitable to the hours you can work. I am more than willing to supply you with a reference to help you seek other employment. Sorry I did want to talk this over with you

today but with you having a vomiting bug you cannot return to work until 48 hours after the last time you have been sick and I need to action this now.

I will pay you one week's leave to serve as notice. This will be paid on to your nominated bank account with any wages and holiday pay on the next pay run. If you can please return your work uniform at your earliest convenience.

Anything you would like to discuss please feel free to contact me.

[39] Ms Sinclair says that she was very shocked and confused when she received the email as she had no idea that redundancy was even being thought about as it had never been discussed before. She was not aware that Ms Bird had been trying to find another staff member. That evening Ms Sinclair replied:

I have only just [checked] my emails and received my redundant letter.

I would of liked it to be discussed in person first but never mind it's done now.

Could you please write a reference letter for me and email it back. I will give bring in the shirts once I have cleaned them all.

Thank you.

[40] Ms Bird replied that she totally understood and would like to have done that (presumably discussed in person) as well but with Ms Sinclair unwell she could not work for 48 hours after the symptoms occurred. Ms Bird continues:

I needed to do it sooner to be fair to you.

[41] Ms Bird provided a reference shortly afterwards.

[42] Almost a week later, on 20 March 2019, Ms Sinclair messaged Ms Bird saying that she had to soak one of the shirts to get a stain off it and was going to return the uniform the next day. Ms Bird replied that Ms Sinclair was too late as the diner had just ordered the replacement shirts.

[43] Ms Bird emailed that she had deducted money from Ms Sinclair's final pay for the uniform as Ms Sinclair had failed to return them after a week.

**Was Ms Sinclair unjustifiably dismissed by Malibu Diner?**

[44] I must assess whether Malibu Diner acted as a fair and reasonable employer could have done in all the circumstances.<sup>1</sup> This is an objective test. I take into account that Malibu Diner was a small employer.

[45] On behalf of Ms Sinclair it was suggested that this may not have been a genuine redundancy. I do not accept that. I find that Ms Bird wanted to decrease her own hours and ensure that there was adequate support for Ms Sinclair's colleague.

[46] Malibu Diner did want someone who could work later into the afternoon. The diner trialled opening for extended hours for a period after Ms Sinclair's departure, before returning to its original closing time. Ms Sinclair's dismissal was based on a genuine decision that her hours were inadequate.

[47] However, the question remains, did Malibu Diner follow a fair process in reaching the conclusion that Ms Sinclair's employment should be terminated for reason of redundancy? The Employment Court has described the key element as being whether the employer provided the relevant information and actively consulted with affected employees prior to making its final decision.<sup>2</sup>

[48] As stated above, I have found that Malibu Diner did not meet with Ms Sinclair to explore the possibility of her working extended hours or look at other alternatives. Had proper consultation been undertaken with Ms Sinclair, she could well have made arrangements to work the extended hours while the late closing time was tried.

[49] Even if I accepted the evidence given for Malibu Diner, the company would still have had difficulties justifying the dismissal. Ms Bird accepted under cross examination that the sole reason that Ms Sinclair was dismissed was that she could not work from 2.30 to 3.30pm. Although on the Birds' evidence there had been discussion about a possible increase in hours, the company did not get to the point of making it clear that Ms Sinclair's position would be redundant if she did not work the extra hour a day. Both the extent of the increase sought and the consequence of not agreeing should have been made clear by Malibu Diner to Ms Sinclair. The company accepted there may have been some misunderstanding between the parties. In

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<sup>1</sup> Section 103A of the Act.

<sup>2</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmp C 28 at [60].

addition Malibu Diner had already hired Ms Sinclair's replacement at the time it gave her notice.

[50] I also question the immediate need to go ahead in Ms Sinclair's absence, making and conveying by email, the dismissal decision. In addition Malibu Diner did not allow Ms Sinclair to work out her notice period. Ms Bird was concerned that Ms Sinclair could have done damage but there was no basis for this supposition.

[51] I conclude that Malibu Diner failed to act as a fair and reasonable employer could have done in all the circumstances and unjustifiably dismissed Ms Sinclair.

**What, if any, lost wages should Ms Sinclair be awarded?**

[52] Ms Sinclair claims lost wages at the full rate for an initial period before she obtained other work and then at the rate of pay difference between her old and new jobs. There were difficulties with records clearly establishing Ms Sinclair's claim.

[53] I have considered whether, given redundancy was the reason for dismissal, lost wages should be awarded. However, potentially more hours rather than less were available, so I conclude that lost wages should be awarded.

[54] Ms Sinclair is claiming lost wages from 12 March 2019 to 6 April 2019 at a rate of \$517.50 gross per week. However, Malibu Diner says, without challenge, that it paid Ms Sinclair a week's wages in lieu of notice and thus her time without wages began a week later. Also, Mr Bird saw Ms Sinclair working at another establishment on the Friday following her redundancy. He suggests that she thus has not lost wages. Ms Sinclair says she did a successful work trial but was then not needed to start for a couple of weeks until the woman she was replacing had finished. This evidence was consistent with payments in her bank records.

[55] The claim for lost wages is based on Ms Sinclair working for Malibu Diner an average of 30 hours a week, said to be a fair representation of her loss. However her hours, although generally higher later in her employment, were quite variable. I have looked at the time records supplied by the company. Those records were challenged as regards the recording of leave, especially leave without pay. However, I did not understand there to be a suggestion that the hours of work recorded did not reflect the hours actually worked. Also, there was no wage arrears claim other than regarding the deduction from final pay.

[56] I have calculated Ms Sinclair's average hours of work in the three months before her dismissal, excluding the December/January period where the leave recordings are disputed. For that three month period Ms Sinclair worked an average of 24.25 hours per week.

[57] I therefore base the lost wages award on pre-dismissal average weekly hours of 24.25 at \$17.25 per hour, totalling \$418.31 gross.

[58] Examining what records there are, including Ms Sinclair's bank account records, I cannot be satisfied that she was entirely without work and pay for any more than one week. She was paid a week's notice on termination. Ms Sinclair's first pay from her new job was received on 1 April 2019, according to her bank records. Malibu Diner suggests there may have been earlier payments than the 1 April 2019 entry but the search covered the period from 21 January 2019 so would have captured March 2019 payments.

[59] By my calculations, taking into account the notice paid, Ms Sinclair is entitled to one week's lost wages at full pay and the 12 weeks making up the remainder of the three month period at the differential rate between the jobs.<sup>3</sup>

[60] Unfortunately the payslips for most of the relevant period of Ms Sinclair's new employment could not be obtained. However, from the weekly amount claimed, Ms Sinclair specifies an average of \$414.00 gross pay in her new job. She was therefore \$4.31 gross worse off a week on average at her new job.

[61] Ms Sinclair is entitled to lost wages of \$470.03 made up of:

- (i) one week at \$418.31 gross; and
- (ii) 12 weeks at \$4.31 per week, totalling \$51.72.

[62] Malibu Diner Limited is ordered to pay Ms Sinclair lost wages of \$470.03 gross within 28 days of the date of this determination.

### **What about compensation for distress?**

[63] Ms Sinclair claims compensation of \$15,000 under s 123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings caused by her dismissal.

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<sup>3</sup> Under s 128(2) of the Act.

[64] Ms Sinclair was affected by her dismissal. She gave evidence of seeking additional medical assistance. She was already on medication for depression and describes the experience as making her depression and anxiety worse because she was worried that she could not help support her family financially. She felt she was not coping so she went to see her doctor who advised her to keep taking the same medication and practice calming techniques she had been told about previously.

[65] Ms Sinclair describes the redundancy affecting her relationship with her husband as they were both stressed about how they were going to pay for everything on one income. Ms Sinclair was also embarrassed by having to borrow money from her parents to cover the cost of car payments, debts and food for her family.

[66] However, I also take into account the rather unemotional response to the letter notifying her of her redundancy and Ms Sinclair's prompt obtaining of another job, making the suggestion of an extended period of financial suffering less compelling.

[67] I order Malibu Diner Limited to pay Ms Sinclair the sum of \$7,500.00 within 28 days of the date of this determination for compensation under s 123(1)(c)(i) of the Act.

#### **Did Ms Sinclair contribute to the situation?**

[68] I have considered whether Ms Sinclair can be said to have contributed to the situation leading to her dismissal. I have accepted that Ms Sinclair was willing to undertake more work as long as she had sufficient time to make arrangements for her children's care. I do not consider that her actions in that regard can be said to be blameworthy and so make no deduction for contribution.

[69] Any issues regarding Ms Sinclair's performance or conduct which Malibu Diner raised were clearly known by it prior to dismissal and Ms Bird says they were not the basis on which the decision was made. Even if established, they therefore could not be considered to have contributed to the situation and I make no reduction for contribution here either.

#### **Was the deduction for uniform expenses allowed?**

[70] Malibu Diner deducted \$195 from Ms Sinclair's final wage to cover the ordering of new uniform which it says was not returned promptly. There was no prior discussion about a deduction being made.

[71] There is no provision in the employment agreement for deductions except those consented to by Ms Sinclair or required by law. Neither of those situations apply and therefore the deduction was in breach of s 4 of the Wages Protection Act 1983.

[72] I order Malibu Diner Limited to pay Ms Sinclair the sum of \$195.00 without deduction within 28 days of the date of this determination.

### **Costs**

[73] As Ms Sinclair has been successful in her claim, she is entitled to a contribution by Malibu Diner Limited towards her costs of representation. The parties are encouraged to reach an agreement on costs. If they are unable to do so Ms Sinclair shall have 28 days from the date of this determination to file a memorandum seeking costs, which must be accompanied by evidence of costs and disbursements incurred. Malibu Diner Limited will then have 14 days from receipt to file its memorandum in reply.

[74] The Authority operates a notional daily tariff regime, which provides for \$4,500 for the first day of an investigation meeting. In this case the investigation meeting went for a little over half a day and that would likely be reflected in the amount of costs awarded.

**Nicola Craig**  
**Member of the Employment Relations Authority**