

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 473/10
5302246

BETWEEN

DEBBIE SMITH
Applicant

AND

MATTHEW BARNES T/A
LONG JOHN SILVER
WHANGAPARAOA
Respondent

Member of Authority: Robin Arthur

Representatives: Mark Nutsford for Applicant
No appearance for Respondent

Investigation Meeting: 8 November 2010

Determination: 8 November 2010

DETERMINATION OF THE AUTHORITY

- A. Debbie Smith was unjustifiably dismissed by Matthew Barnes on 26 December 2009.**
- B. In remedy of Ms Smith's personal grievance, Mr Barnes is to pay her the following sums within 28 days of the date of this determination:**
- (i) \$2400 in lost wages and \$4000 compensation for injury to feelings; and**
 - (ii) \$228 in holiday pay; and**
 - (iii) \$500 as a contribution to her costs**

Employment Relationship Problem

[1] Debbie Smith worked at the Long John Silver store in Whangaparaoa's Plaza Mall from 12 August to 26 December 2009. It was her first job in 11 years. She had

time out of the paid workforce when her daughter was born. She got the job with the assistance of Work and Income New Zealand (WINZ).

[2] She says she was dismissed over the telephone by Mr Barnes because she did not agree to work an extra shift on 26 December. She was asked during her rostered shift to stay on and cover for a worker who had called in sick.

[3] Through her representative Ms Smith raised a personal grievance on 20 January 2010. Mr Barnes did not respond to correspondence or messages and Ms Smith lodged her application in the Authority on 13 April 2010.

[4] Mr Barnes did not provide a reply in the statutory form but by email on 25 April 2010 denied Ms Smith was dismissed on 26 December 2009. Rather he stated Ms Smith had not previously checked her working hours on a roster posted seven days earlier. He stated Ms Smith was “irate” when she spoke to him by telephone, had left the store and not been heard from since.

No attendance at mediation or investigation

[5] The matter was referred to mediation but, despite repeated attempts during August and September 2010, the Mediation Service was unable to get Mr Barnes to agree on any of a number of mediation dates offered. The file was referred back to the Authority. Mr Barnes did not respond to messages about attending a case management conference by telephone to discuss arrangements for the investigation. The Authority set the matter down for an investigation. On 20 October 2010 a notice of this meeting was sent to the parties, which in Mr Barnes’ case was by way of an email and PDF attachment sent to the email address through which Mr Barnes had previously communicated with the Authority. A message regarding the notice was also left on Mr Barnes’ mobile telephone.

[6] When Mr Barnes did not attend the meeting at the appointed time, he was contacted by telephone by an Authority support officer. Mr Barnes confirmed he had received the notice but said he was unable to take time off work.

[7] The Notice of Investigation Meeting includes a note indicating that if a

respondent does not attend, the Authority may issue a determination in favour of the applicant without hearing evidence from the respondent. Mr Barnes had adequate opportunity to seek another investigation meeting date if he were truly unable to attend on the notified date. I have exercised the power under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) to proceed to investigate and determine this matter.

The end of the employment

[8] In light of Mr Barnes' failure to attend mediation and participate in the Authority's investigation I accept the sworn evidence of Ms Smith on how her employment came to an end.

[9] On 26 December Ms Smith attended work from 11am to 2pm, the hours stated on the roster posted in the store. On a previous shift at work she had double-checked the roster for 26 December because she was making plans for the visit of a friend from Hamilton that day, and had then arranged for that visit to occur after 3pm. Mr Barnes' wife was also working at the store and asked Ms Smith to work on after 2pm. Ms Smith explained that she could only work until 3pm. Mrs Barnes then telephoned Mr Barnes who asked to speak to Ms Smith. After Ms Smith apologised for not being available for extra hours that day, and explained she had other commitments, Mr Barnes told her: "*You'd better finish your shift and go and look for another job*".

Determination

[10] I accept Ms Smith was dismissed by Mr Barnes on 26 December 2010. I find the dismissal was unjustified because a fair and reasonable employer, without some binding arrangement that she would be available at such short notice, would not have dismissed Ms Smith for not being available for extra work that day. Ms Smith has a personal grievance which requires remedy.

Identity of the employer

[11] Ms Smith's application to the Authority, lodged by her representative, identified the employer as Mr Barnes in his personal capacity and trading as Long

John Silver Whangaparaoa.

[12] Her evidence confirmed that she understood Mr Barnes was her employer. Mrs Barnes also worked at the store but referred problems or questions to Mr Barnes to deal with or answer.

[13] In another matter recently before the Authority involving a different former worker at the Long John Silver Whangaparaoa store, the employer was identified as Minato Limited, a company which remains registered with Mr Barnes as a director and shareholder.¹

[14] The name Minato Limited was also listed as the payer for wages directly deposited into Ms Smith's bank account. However, in breach of s63A(2) of the Act, Ms Smith was provided with no intended employment agreement before she started work and, contrary to the requirements of s65 of the Act, had no written employment agreement. Such an agreement would have clearly identified the employer.

[15] I accept Ms Smith's evidence that Minato Limited was never identified to her as her employer and that she understood Mr Barnes was her employer. In those circumstances, even if Mr Barnes were acting on behalf of Minato Limited in employing Ms Smith, she is entitled under the doctrine of 'undisclosed principal' to proceed against Mr Barnes personally and he is liable personally for remedies awarded to her.²

Remedies

[16] Ms Smith sought remedies of lost wages, payment of outstanding holiday pay, compensation for distress, and costs.

Lost wages

[17] Ms Smith worked 12 or more hours a week. Her pay rate was \$12.50 an hour.

¹ *Susan Quinn, Labour Inspector v Minato Limited* AA 366/10, 18 August 2010, Member Dumbleton.

² *Cowan v Baggstrom* (unreported, EC WC 39/99, 13 July 1999, Shaw J) and *Cuttance t/a Olympus Fitness Centres v Purkis* [1994] 2 ERNZ 321.

[18] Since her dismissal she has applied for jobs in fast food stores, retail stores and a government department. While she has had a number of interviews, she has not yet gained another job. I am satisfied Ms Smith has made reasonable efforts to mitigate her loss.

[19] Ms Smith had intended remaining in the Long John Silver job for the foreseeable future as it was walking distance from her home and she liked the work. However Mr Barnes' business at that site was clearly in financial difficulty by April 2010 and I find a strong likelihood that Ms Smith's employment would not have continued after that period. Accordingly under s123(1)(b) and s128 of the Act I assess Ms Smith's loss of wages as being limited to a period of 16 weeks. Based on her minimum working hours of 12 hours a week at \$12.50 an hour, the loss totals \$2400. Mr Barnes is ordered to pay Ms Smith that amount.

Holiday pay

[20] Ms Smith is also entitled to holiday pay, calculated at 8 per cent of her gross wages, for the 19 weeks of her employment by Mr Barnes.

[21] He did not respond to the request of Ms Smith's representatives for time and wage records. In the absence of those records, I assess the gross pay on the same hours and rate as above to total \$2850. Holiday pay of \$228 is due on that amount.

Compensation for distress

[22] This job was the first for Ms Smith after a long period of absence from the paid workforce. She was pleased to have money which enabled her to pay bills and shopping so that the money she and her unemployed husband received from WINZ benefits went further. She was humiliated to lose the job and it damaged her confidence in seeking other work. As she said in her evidence to the Authority: "*It squashed me*".

[23] Having regard to the particular circumstances and the general range of awards in similar cases, \$4000 is an appropriate level of compensation for the humiliation,

loss of dignity and injury to Ms Smith's feelings caused by Mr Barnes' unjustified dismissal of her. Mr Barnes is ordered to pay her that amount under s123(1)(c)(i) of the Act.

Penalties

[24] If penalties had been sought, Mr Barnes would probably have been ordered to pay penalties for failing to provide Ms Smith with an intended employment agreement in writing and failing to provide wage and time records when requested.

Costs

[25] Ms Smith seeks a reasonable contribution towards the costs of bringing her successful application and accepts these should be assessed on the basis of a pro-rata of usual daily rate in the Authority. The investigation meeting took around one hour. Mr Barnes is to pay \$500 to Ms Smith as a contribution to her costs.

Robin Arthur
Member of the Employment Relations Authority