

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 269
3194119

BETWEEN JANINE SMITH
 Applicant

AND GRANT KITCHEN
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Kirsten Westwood, advocate for the Applicant
 No appearance for the Respondent

Investigation Meeting: 16 May 2023 at Palmerston North

Submissions and Other Up to and including 22 May 2023
Information Received:

Date of Determination: 26 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Janine Smith, says she was friends with Grant Kitchen for about ten years and was looking for an opportunity to going back to what she really loved, namely being a restaurant manager. She had received a job offer for a position in Ohakune which paid \$27.50 an hour. Ms Smith says she was looking forward to taking up the offer.

[2] Ms Smith says she was then approached by Mr Kitchen asking that she come and work with him at the Feilding Golf Club. Ms Smith pointed out to Mr Kitchen that she had been offered a full time position in Ohakune which also included a percentage of the profits. Mr Kitchen asked her to take a restaurant manager position with him, saying that he would pay her more than the Ohakune offer, namely \$28 per hour.

[3] Because of the pay offer, and because Mr Kitchen had been a friend, Ms Smith accepted the position and started working for Mr Kitchen. Despite asking on more than one occasion for an employment agreement, Ms Smith was not provided with one.

[4] During the period of employment, Ms Smith found that payment of her wages was sporadic. Following a texted exchange, Ms Smith received a text from Mr Kitchen stating: *“Don’t give me your attitude. Do you want to work or are you just being a dick. Don’t fucking text me when you’ve been drinking.”* Ms Smith was shocked by the response and says she had no idea what had triggered it. She then says she resigned.

[5] Ms Smith says the circumstances under which she resigned constitute a constructive dismissal. She says she was not being paid what she was due, she had not been given an employment agreement and now was being subject to her abuse. In response to her resignation text, Mr Kitchen replied, *“Give my jeep back tomorrow and fuck off.”*

[6] Mr Kitchen has not fully engaged in the investigation but has, however, put in a response to Ms Smith’s claims. In essence, Mr Kitchen says there was no real employment relationship. He was simply paying a *“koha”* and denied any responsibility for or agreement that Ms Smith be paid \$28 per hour.

[7] In terms of remedies, Ms Smith claims:

- (a) A sum of \$25,000 for injuries to feelings, hurt and humiliation;
- (b) Unpaid wages for the 12 weeks she was employed with Mr Kitchen and not paid;
- (c) Unpaid holiday entitlements;
- (d) Lost wages for the three weeks it took her to find alternative employment.
- (e) A sum of \$5785.17 being wages lost as a result of lower income over the thirteen-week period following her dismissal.

The Authority’s investigation

[8] Mr Kitchen did not attend the investigation meeting despite having been served a copy of the Statement of Problem and a Notice of Hearing. Mr Kitchen’s emailed response of 3 April 2023 shows that he was receiving the notices from the Authority and was aware of the proceedings. Because he did not attend the investigation meeting, it raised the question of

whether it should proceed in his absence. After adjourning the investigation meeting for 15 minutes I decided to proceed on the basis that as Mr Kitchen was well aware that the investigation meeting was being held and was aware of the date and time of the investigation meeting, he had decided not to attend for his own reasons. The Authority heard from Ms Smith, Carol Campbell, Ms Smith's close friend, and Mr Roger Campbell, also a friend of Ms Smith's. All witnesses affirmed their evidence.

[9] Mr Kitchen has not provided any records in respect of the matter, including wage and time records. Ms Smith had asked for documentation but not received it. Accordingly, in terms of s 132 of the Employment Relations Act 2000 (the Act) I have accepted the evidence of Ms Smith in respect of unpaid wages. Ms Smith has provided Inland Revenue records and says that she should have been paid \$13,440 gross but received \$4,487.22 over the 12 weeks she worked for Mr Kitchen. She claims therefore a sum of \$8,952.78 on account of unpaid wages.

[10] On top of this, Ms Smith claims holiday pay calculated at eight percent of the \$13,440 which equates to a payment of \$1,075.20.

[11] Following her dismissal, it took Ms Smith three weeks to find work. She therefore seeks a payment of \$3,360 gross being three weeks wages calculated at 40 hours per week. Ms Smith also claims a sum of \$5785.17 as set out on [7] above.

[12] I accept the evidence of Ms Smith and her friends that as a result of her personal grievance she suffered significant hurt and humiliation and injury to feelings. This was not only as a result of her not being paid, and because of the angry exchange of texts, but also because of Mr Kitchen's refusal to engage properly with Ms Smith in all matters over the final days of her employment. Both Mr and Mrs Campbell gave evidence as to the change in Ms Smith's personality after the "dismissal" and how upset she was. They noted that Ms Smith had become unsure of her abilities and somewhat withdrawn. She seemed to have become deeply depressed and was struggling.

[13] Mr Kitchen appears to acknowledge in his email of 31 August 2022 that an employment relationship existed. Amongst other things, he states following the "*resignation*":

Under the collective employment Act your notice is a minimum of two weeks.
You are hereby suspended until a meeting can be held to discuss this matter.
The meeting is to investigate the validity of the allegation and to determine the

outcome. This is considered serious misconduct and may result in the termination of your employment. ... If you cannot make this time we will try to arrange another time. If you do not respond we will deem this abandonment of your employment. ...

Conclusion and orders

[14] Ms Smith was an employee of Mr Kitchen and she was constructively dismissed. That dismissal was unjustified. In *Auckland shop employees IUOW v Woolworths (NZ) Limited* the Court of Appeal held that constructive dismissal includes but is not limited to cases where a breach of duty by the employer causes an employee to resign.¹ This must be a causal link between the employer's conduct and the tendering of the resignation, and the possibility of resignation in response to that conduct should be foreseeable.

[15] It was entirely foreseeable in the circumstances of this case that Ms Smith would leave her employment. She was not being properly paid, she had not been given an employment agreement, and when she queried matters, she received an abusive response from her employer. As said, it was entirely foreseeable that she would not put up with this course of conduct. Accordingly, she is entitled to the remedies claimed.

[16] Ms Smith and her friends gave evidence of the effect the dismissal had on her. She says she was accused of being intoxicated and carried out by two people when that had not occurred. She says the events leading up to her leaving were particularly hurtful, and then she was accused of misconduct after the resignation which included a threat if she did not attend a meeting, she would be deemed to have abandoned her employment. I consider an appropriate award under the circumstances to be \$20,000. Accordingly, within 28 days, Mr Kitchen is to pay Ms Smith the following:

- (a) The sum of \$8,952.78 on account of unpaid wages less PAYE;
- (b) Holiday pay of \$1,075.20 less PAYE;
- (c) Sum of \$3,360 less PAYE which equates to three weeks wages covering the time it took for Ms Smith to find alternative employment.
- (d) A sum of \$5785.17 being wages lost as a result of lower income over the thirteen-week period following her dismissal.

¹ (1985) ERNZ SEL CAS 136; 2 NZLR 372 (CA).

- (e) The sum of \$20,000 for humiliation, loss of dignity and injury to feelings suffered by Ms Smith.

Costs

[17] Costs are reserved. The parties are encouraged to resolve any issues of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Smith may lodge and then should serve a memorandum on costs within 14 days from the date of this determination. From that date of service Mr Kitchen will have 14 days to lodge any reply. Costs will not be considered outside this timetable unless prior leave to do so is sought from and granted by the Authority.

Geoff O'Sullivan
Member of the Employment Relations Authority