

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 201  
3077272

BETWEEN            KELLY ANNE SULLIVAN  
                                 Applicant  
  
AND                    ERMAN PRIVATE LIMITED  
                                 Respondent

Member of Authority:     David G Beck  
  
Representatives:         Jonathon Amtmann, counsel for the Applicant  
                                 Respondent in person  
  
Investigation Meeting:    17 April 2020 via phone  
  
Submissions Received:    24 April and 15 May 2020 from the Applicant  
                                 7 May 2020 from the Respondent  
  
Date of Determination:    18 May 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        Kelly Anne Sullivan was employed by Erman Private Limited (“Erman”) at a convenience/takeaway store as a shop assistant from 27 February 2018 until she was summarily dismissed on 2 November 2018.

[2]        Ms Sullivan raised a personal grievance through counsel in a letter of 28 January 2019, alleging that she had been unjustifiably disadvantaged and unjustifiably dismissed. The matter was filed in the Authority on 7 October 2019 and Ms Sullivan seeks lost wages and compensation.

## **The Authority's investigation**

[3] Erman filed no statement in reply, did not participate in a case management conference and filed no brief of evidence prior to the hearing. The hearing was initially scheduled for 9 April in Invercargill but cancelled due to the coronavirus lockdown. The investigation meeting proceeded by way of a teleconference on 17 April 2020.

[4] Gurpreet (aka Garry) Singh, Erman's sole director took part in the investigation meeting, initially claiming that he had received no previous correspondence from the Authority. Mr Singh said that he had blocked all emails from the applicant's counsel as he felt harassed by the applicant raising a personal grievance. When pressed, Mr Singh accepted that he had viewed the initial personal grievance letter, had then been apprised of the Authority process by his accountant, had viewed Ms Sullivan's statement of problem and he had her brief of evidence with attachments in front of him during the investigation meeting.

[5] Mr Singh was advised that his ability to be heard was at the Authority's discretion and after consultation with Ms Sullivan and her counsel, it was decided he could participate fully in the hearing to the extent of being allowed to question Ms Sullivan, make an oral statement outlining his view of Ms Sullivan's evidence and make a final submission. As Mr Singh was unrepresented, the Authority timetabled written submissions to ensure that Mr Singh had an opportunity to seek legal advice and further explain his actions.

[6] After the hearing, Ms Sullivan's counsel provided a written submission addressing legal issues. Mr Singh also provided a written submission claiming that Erman trading as Edendale Discounter Store no longer operated due to ongoing financial losses and had been wound up as of 30 June 2019. Mr Singh provided a March 2020 IRD return for the year ending 2019 that indicated a substantial loss but did not provide any financial accounts, claiming his accountant was currently working on such. As of the date of this determination, the respondent company was still registered. The applicant during the investigation meeting acknowledged that the Edendale store had been closed since mid-2019 and remains so.

[7] Mr Singh's written submission, best described as a combination of a brief of evidence and a submission, is dealt with below. In accepting Mr Singh's belated brief and assessing such, the point has to be made that the Authority (and the applicant's counsel) had no ability to test any of such in cross examination and none of Mr Singh's assertions were put to the

applicant. Mr Singh's submission maintained his central claim made during the investigation meeting, that Ms Sullivan was casual and had no status to raise a personal grievance.

[8] Mr Singh belatedly raised a 90 day issue in his submission claiming Ms Sullivan personal grievance was out of time having been filed in the Authority on 3 October 2019.

[9] Mr Singh ended his submission making a "reparation claim" against Ms Sullivan in the amount of \$50,000 for his stress resulting from the grievance being raised by Ms Sullivan. Even if the Authority was minded to consider this claim, its late nature and complete lack of justification prevents it proceeding.

[10] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the submissions received from both parties and refer to them where appropriate and relevant. I do make the observation that determining crucial factual matters was greatly assisted by the fact that key exchanges were recorded in uncontested text and email messages between the parties.

## **Issues**

The issues to be decided are:

- (a) Was Ms Sullivan's personal grievance raised out of time?
- (b) Was Ms Sullivan a casual employee with no expectation of ongoing regular employment and did the employment end as a result of this categorisation.
- (c) If not a casual employee was Ms Sullivan unjustifiably dismissed?
- (d) If an unjustified dismissal is found what remedies should be awarded.
- (e) If remedies are appropriate the issue of any contributory conduct is to be assessed.
- (f) An assessment of the level of costs to be awarded to the successful party.

### **What caused Ms Sullivan's Employment Relationship Problem?**

[11] Erman first engaged Ms Sullivan on an individual employment agreement signed by both parties on 27 February 2018 that described the employment as an "On Call Casual Shop Assistant". The employment took place in a convenience store located just off State Highway One at Edendale, a small town located between Gore and Invercargill. Ms Sullivan's job included working on the till serving customers, helping in the kitchen with takeaway food and cleaning. Initially Ms Sullivan worked alongside Mr Singh and another full time employee, Ms B.

[12] The store operated between the hours of 5am – 9pm Monday to Friday and 6am - 9pm on Saturday and Sunday. The hours Ms Sullivan worked were initially between 9 to 30 hours per week at \$16 per hour until Ms B left in late September 2018. Ms Sullivan indicated the hours were dictated by Mr Singh posting a roster next to the counter for the following week. Mr Singh described the employment agreement as a "zero hours contract" which was a fitting description as no hours of work were detailed.

[13] Ms Sullivan recalled a telephone call from Mr Singh on 25 September 2018 indicating that Ms B had resigned and then her being offered Ms B's position on a full time basis with a 50c per hour pay rise. Ms Sullivan said she accepted the offer during the phone conversation and claimed a discussion shortly thereafter set her primary hours of work as Monday/Wednesday/Friday 5:30am – 3pm, Tuesday 5:30am – 1pm and Thursday 5:30 am – 2:30 pm. Ms Sullivan indicated that upon agreeing to the change in hours she arranged after school care for her daughter. However, no new employment agreement or variation to the existing one was signed.

[14] Mr Singh claimed that Ms Sullivan did not accept this full-time offer as she cited family and personal reasons for not being available full-time. This assertion of Mr Singh's was supported by a text exchange he provided of 24 September 2018 between himself and Ms Sullivan where she, in response to a tentative and incomplete hours of work proposal, indicated that she could not work full-time as her daughter had to be dropped off at school so a 5:30 am start was problematic and she could only start at 5:30 am during weekends. Ms Sullivan however, claimed a further discussion occurred finalising her full time hours and she agreed to the 5:30 am weekday starts as she arranged childcare for her daughter. Rosters provided support Ms Sullivan's claim.

[15] Ms Singh subsequently provided a social media advert he placed on 25 September 2018 that indicated: “Looking for Honest, Hard working Team Member for Dairy Shop & Takeaways. Flexible hours 25-30 hours per week. Located in Edendale”. The advert points to either Mr Singh seeking a part-time employee to support Ms Sullivan and the full time employee or that Mr Singh intended to cover the hours with two part-time employees. It is noted the job advert does not describe the position as casual. In the event no one responded to the advert and Ms Sullivan covered the hours available.

[16] As the relationship progressed and Mr Singh was struggling with some personal issues, Ms Sullivan worked weekends and was a ‘key holder’ sometimes opening the shop and operating sole charge. Mr Singh said he had unsuccessfully sought to engage an additional part-time assistant to help Ms Sullivan as her hours were becoming excessive. Mr Singh provided another advert that he had placed on 8 October 2018 that was not specific on hours offered (apart from a reference to “Some Early Morning Start”) and sought a ‘Reliable Team Member’. The advert did not specify if the job was casual or full time but I find that it could reasonably be concluded that he was seeking someone to support Ms Sullivan as the full-time employee.

[17] Mr Singh asserted that the employment of Ms Sullivan was still casual after September 2018. Mr Singh however, conceded (post-September 2018) that Ms Sullivan was working up to 50 hours a week on a regular basis including weekends (consistent with handwritten rosters and pay records provided by Ms Sullivan). When pressed what he would consider “full-time” hours, Mr Singh said over 30 hours per week but he maintained a stance that Ms Sullivan had not formally accepted the full time position because she had not signed a new employment agreement and the existing one continued to operate. Mr Singh did not provide any evidence that he had prepared a new agreement.

[18] When employed, Ms Sullivan was afforded credit to purchase items in the store that she would re-pay every two weeks. This was an informal arrangement with no written policy and Mr Singh extended credit facilities to Ms B when employed and to selected customers. Ms Sullivan said the credit facility had been in place since she commenced employment and would amount to around \$200 per fortnight with items such as cigarettes and groceries. Up until late October 2018, Ms Sullivan indicated that she always settled her debts - a premise

Mr Singh did not dispute but his written submission claimed that the last disputed debt was four weeks old.

*Events leading up to the dismissal.*

[19] On the afternoon of Thursday 1 November 2018, Ms Sullivan recalled a brief conversation with Mr Singh about her accumulated store debt that she could not pay immediately as she had left her wallet at a friend's house. Ms Sullivan left the store and collected her young daughter and headed home by car (a journey of 30 minutes). Ms Sullivan then recalled a phone call from Mr Singh about 15 minutes into her journey that she took in her car having pulled over to the roadside.

[20] Ms Sullivan said that Mr Singh demanded in an angry and aggressive tone, that she return to the store immediately and pay her store debt that Mr Singh said was now \$255.40. Ms Sullivan claimed Mr Singh used profane language in the call a matter Mr Singh denied. On being pressed about returning to the store, Ms Sullivan who had by this point collected her wallet, refused this request but offered to pay the debt the next morning when she returned to work and when later pressured, via a text from Mr Singh, by a bank transfer. Further text exchanges occurred around 4pm that day (Thursday) with Mr Singh insisting Ms Sullivan send him a screenshot evidencing the bank transfer and Ms Sullivan indicating that she had made the payment but was unable to do a screenshot.

[21] It is noted that despite denying the earlier use of profanities Mr Singh referred in one of his texts to "[Fucking] supplier are on my ass they need money" which he said was not directed at Ms Sullivan. In the event, Ms Sullivan conceded in evidence that she had not effected the transfer payment at this point but told Mr Singh she had, just to stop him harassing her. When asked why she did not simply return to the store, Ms Sullivan indicated that she feared a confrontation.

[22] In a further text, just after 5pm, Ms Sullivan indicated that she was going to take Friday, Saturday and Sunday off from work as she was stressed and had recently worked too many hours (10 days in a row) and that she intended to limit her future hours to "around 40 to 50" per week. Ms Sullivan in reference to the earlier telephone conversation texted:

I'm not being spoken to like that. I don't own the business and its not my fault the suppliers want money. I am getting stressed being at work all the time to

help you so that you dont have to and my family suffering. I love my job and I work hard.

[23] Ms Sullivan's text ended "...will be back Monday unless you dont want me back ". Mr Singh replied: "If you cant handle work stress let know. Not to worried. I can get someone else in. Let me know what u think ". Ms Sullivan responded within 5 minutes: "I can handle the work fine but when you stressed you take it out on me". A couple more texts immediately followed with Mr Singh displaying annoyance at Ms Sullivan not paying the store debt owed. Despite the acrimonious exchanges Ms Sullivan indicated generally that she had not received any other such treatment from Mr Singh but had witnessed him being angry with others. Then at 7:48 pm on the same Thursday evening, Mr Singh emailed Ms Sullivan with the subject line: "First Written Warning" in the following terms:

Im writing you this in regards as I have noticed in last few weeks.

You often having an excuse to be away from work during busy working days of the week. It starting to happen quite often now which is effecting my business and others.

Even after talking to you verbally, it's still happening.

If you have anything to say please come forward with your say.

I did offered you full time employment and with a wage rise from this pay cycle. You are very hard working and honest person but along u need to take responsibility not be away from work on busy days of the week.

It's my job and responsibility to ask my employees if they having any work issues or anything wrong happening to be away from work.

As u you know I'm pretty flexible with working hours and days off. On the other hand it's also important to be working on busy days as required. As you know Friday is town run. All the grocery and other stuff can't happen which will effect next week sales of the business. And As sales effect business adversely effect.

If this keep on continuing then I have to think to overcome this problem.

[24] Mr Sullivan said she accessed the above email soon after 8pm and conceded that she put a stop to the bank transfer that she had set up to cover the store debt as she was angry about the email.

[25] At 5:09 am the next morning (Friday 2 November), Mr Singh texted Ms Sullivan (she indicated that this woke her up) saying he had not received any payment of the store debt. Three further texts were exchanged around 6:15 am with Ms Sullivan explaining that she

stopped the payment because of the written warning and Mr Singh accusing her of lying about reversing the bank transfer.

[26] At 6:49 am Mr Singh emailed Ms Sullivan subject line: “Notice served” in the following terms:

This is to inform you that I can't have you at work bcoz of breaking employers trust, misleading, misbehaving nd away from work when needed,

It's effecting my work and business. So 2 weeks notice served with no work during the period as Im not feeling comfortable to have you back in shop safety and security. Can u plz hand over the keys and any other property u have ASAP without delay.

Your pending bills will be deducted through your full and final after 2 weeks.

I made the decisions after lots of thinking and suggestions. It's better for both parties to accept.

Regards

Garry.

[27] Ms Sullivan responded with three emails within 10 minutes, variously saying that she was seeking advice, wanted her payslips and was unhappy about the warning; indicating that “...if you had spoken to me nicely I would have been there Friday”. Ms Sullivan also expressed concern about being called a ‘liar’, asked what ‘misbehaving’ Mr Singh was referring to and concluded: “[Am] going for advice today will drop keys off on my way”.

[28] Ms Sullivan dropped the keys off at the store later on Friday 2 November, handing them to Mr Singh and then collected personal belongings. When questioned on what she could recall Mr Singh said at this time, Ms Sullivan indicated that he was ‘ok’ but said very little and she just told him that he was nasty to sack her like he had done and she left.

[29] Ms Sullivan when pressed on why she had not tried to reconcile with Mr Singh, said she was aware he was angry and she had knowledge of him being physically violent to another party and was wary of getting into a confrontation. Mr Singh could not explain to the Authority why he did not seek to resile from his warning/dismissal stance and he made several derogatory claims about Ms Sullivan’s general character and past employer references (that he repeated in his written submission).

[30] In explaining the reason for the dismissal, Mr Singh said that he 'did not feel safe to have her back' but did not elaborate further until his written submission that claimed that Ms Sullivan was abusive and confrontational during the time she returned to collect her personal belongings upon being dismissed.

[31] In assessing the credibility of each party's account I am minded to believe Ms Sullivan would have been angry when she returned to collect her property as she had already signalled that she was seeking advice on the manner of the dismissal. I consider that that would not be unusual in the circumstances of a summary dismissal that was not preceded by any meeting or ability for Ms Sullivan to be heard. Mr Singh belatedly urged the Authority to seek comment from Ms Sullivan's former employers but I did not do so on the basis that such comment was not relevant to these proceedings.

### **The Warning**

[32] On the facts before the Authority and considering Mr Singh's perspective, I find the written warning to be procedurally deficient. Mr Singh took no time to hear from Ms Sullivan, he did not put his specific concerns to her or meet to discuss them and did not consider her perspective of the situation.

[33] Overall, Mr Singh appeared to be driven by his anger around the exchange about the payment of the debt owing. Mr Singh argued that Ms Sullivan was casual on a 'zero hours' agreement but did not see the contradiction of administering a written warning to an employee for failing to come to work after ten days without a break, when it would logically follow that she had the contractual right to refuse to work.

[34] I have taken into account that Mr Singh is a small employer with no practical access to 'in house' legal advice and that however clumsily worded the emailed warning was, he could have been only wishing to point out to Ms Sullivan his expectations and expressing his concern after Ms Sullivan had reacted to the 'row' over the store debt not being immediately settled by refusing to come into work on the Friday. However, the defects in the process were not minor – there simply was no process and this resulted in Ms Sullivan being treated unfairly.

[35] Taking the warning in isolation, I understand where Mr Singh was coming from in his communication and the matter would not have come before the Authority if Mr Singh had not decided to dismiss Ms Sullivan soon thereafter.

### **Was Ms Sullivan's dismissal justified?**

[36] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act. Section 103A details factors that the Authority must objectively measure an employer's actions against before concluding whether the employer, in context, acted in a fair and reasonable manner, these summarised are:

- a) whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- c) was the employee afforded a reasonable opportunity to respond to identified concerns; and
- d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and any other factor the Authority regards appropriate.

#### *Applying factors identified by the Act*

[37] I find on the facts that Erman gave scant attention to all of the above factors. Mr Singh in 'a nutshell': did not initially identify specific concerns or put them to Ms Sullivan for comment, he held no meeting, carried out no investigation, did not allow Ms Sullivan any opportunity to get advice and he did not genuinely consider Ms Sullivan's explanations as he did not seek any.

[38] I have considered Erman's resources and that Mr Singh had no immediate access to HR advice and that Erman is a small business. I have looked carefully at the concerns Mr Singh raised in the immediate prior warning but I find on the facts that Mr Singh

summarily dismissed Ms Sullivan 'in the heat of the moment' by email, in response to her seeming obduracy in not promptly addressing the store credit debt and his fixed view that she had misled him by initially indicating that she had addressed the debt by a bank transfer.

[39] Mr Singh was under stress at the time but also may be seen to have brought this situation upon himself by failing to have proper written procedures and a more formal process over his store credit system. Mr Singh also failed to prepare a variation to Ms Sullivan's initial employment agreement clarifying his expectations whilst he exercised what he thought was total control over her working hours.

[40] The defects in procedure were not minor – the dismissal was so deficient in procedural fairness that it rendered the actual decision to dismiss to be unjustified. I will though, consider the substantive fairness of the decision as that may bear upon contribution issues.

#### *Substantive reason for the dismissal*

[41] This is an inquiry into whether the grounds advanced for the dismissal were such that a fair and reasonable employer could conclude dismissal was warranted. I first deal with Mr Singh's assertion that the employment relationship was contractually 'casual' and that he acted on this assumption. Mr Singh did ostensibly act on this assumption by giving Ms Sullivan two weeks' notice and then suggested no work was available during the notice period and he did not pay Ms Sullivan anything in lieu of notice (despite there being provision for such payment at the employer's discretion in the employment agreement). Mr Singh said he was of the belief that Ms Sullivan did not formally accept his offer of full time employment and signed no new employment agreement and therefore she continued on the agreed casual arrangement.

#### *Was the employment 'casual'?*

[42] I examine whether the employment relationship was casual from both the onset of the relationship and at the time of dismissal.

[43] The employment agreement describes the position as "On Call Casual Shop Assistant" and under the heading "Type of Employment" the agreement states: "The employee will work on a casual 'as required' basis with no expectation of ongoing employment" and it contains a 'balancing' provision that the employee "...may choose whether to accept or decline the

work” offered. Under the “Hours of work” clause the same concepts are reiterated and no minimum hours are offered. In describing annual leave it is specified that 8% on top of the employee’s earnings would be paid as a ‘pay as you go’ arrangement instead of paid holidays. All factors indicative of the relationship being casual at the outset.

[44] By contrast, the employment agreement had an abandonment clause, a restraint of trade provision, employee protection provision, parental leave provision and a mutual two week notice period – all indicative of ongoing employment.

[45] The relationship was not operationally clear cut. One typical feature suggesting a casual relationship would be if Ms Sullivan had been temporarily ‘on call’ to provide relief cover for an occasionally absent employee. Mr Singh was at times unavailable due to personal circumstances but gave no evidence of what the mix was between his availability and the actual need to employ a part time employee to assist Ms B. It may have been Ms Sullivan was casual for some elements of the relationship (i.e. when Mr Singh had unplanned absences) and not for others. The fact of a posted roster for the following week however, tends to suggest that this was regular ongoing, albeit part-time, work from the outset and not a genuine casual relationship. It is noted that in the final payslip provided by Ms Sullivan no provision is made for accumulated holiday pay and no indication was made that 8% was paid on top of the hourly rate.

[46] In addition to provisions in the employment agreement and the fact that the Act provides no definition of ‘casual employment’, useful guidance on determining what is a genuine casual relationship is found in the Employment Court decision *Jinkinson v Oceania Gold (NZ) Ltd*<sup>1</sup>, identifying the following relevant factors:

- a) The number of hours worked each week.
- b) Whether work is allocated in advance by a roster.
- c) Whether there is a regular pattern of work.
- d) Whether there is a mutual expectation of continuity of employment.
- e) Whether the employer requires notice before an employee is absent or on leave.

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<sup>1</sup> *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

f) Whether the employee works to consistent starting and finish times.

[47] Looking at it broadly, it would appear that Erman's initial needs stemmed from its span of operating hours and the people available to cover such. When Ms Sullivan commenced employment only one other full time employee was engaged (Ms B) and Mr Singh worked in the business.

[48] Ms Sullivan's actual hours of work were regular and rostered and, quickly grew from 9 to 30 hours per week as Mr Singh presumably saw the benefit of utilising her role. As such, Ms Sullivan was at this time, better described as a permanent part-time employee with no guarantee of minimum hours – this was as Mr Singh asserted, a zero hours contract but evidently not 'casual' as Ms Sullivan's working hours were set by a roster.

[49] However, as Ms Sullivan replaced Ms B by oral agreement from 25 September 2018 her hours became full time and at set times. I find Mr Singh's contention that Ms Sullivan was casual at the time of dismissal to be incorrect. The pattern of hours Ms Sullivan worked after Ms B resigned (between 40-50 per week) and Mr Singh's acknowledgement that he offered her the full-time position and his evidence that he had unsuccessfully tried to recruit another part-time employee, reinforce my finding that this was not a casual arrangement.

[50] Ms Sullivan's counsel also asserted that the expectation of ongoing work was mutual and Mr Singh, in an email of 1 November 2018, made it clear what days Ms Sullivan was expected to regularly be at work on and in what circumstances (delivery days being one example specified).

[51] I find overall, that although described in the employment agreement as "on call casual", this did not accurately describe the real nature of the employment relationship under s6 of the Act<sup>2</sup> which was permanent full-time at the crucial time of the dismissal. This finding is reinforced by the fact that Ms Sullivan was paid outstanding holiday pay owed at the time of the dismissal.

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<sup>2</sup> An approach taken in *Jinkinson* above note 1, with Couch J indicating that an assessment of employment status (whether 'casual' or not) needs to examine the real nature of the relationship under s 6 Employment Relations Act 2000 with the parties' description of the relationship in an employment agreement not being determinative.

[52] It is also from the above analysis, apparent that the nature of the relationship changed over time and that Ms Sullivan not signing a new employment agreement or a variation was not decisive; as the Court also indicated in *Jinkinson*<sup>3</sup>:

It is important to recognise that an employment arrangement may be varied over a period of time .... Occasionally, such changes will be the result of an explicit agreement between the parties. Much more often, changes occur in day to day conduct which justify the conclusion that the parties have implicitly agreed to vary their original agreement. Many of the decided cases deal with this sort of implied variation.

*The reasons for dismissal*

[53] Apart from several identified procedural issues that I find render this dismissal otherwise unjustified, I examine whether the dismissal was substantively justified. The reasons for the dismissal are set out in Mr Singh's email of 2 November reproduced in full at para [26] above. They appear to fall into two categories:

- a) A claim that the essential element of trust in the relationship had irrevocably broken down and:
- b) That Ms Sullivan did not attend work on Friday 2 November 2018 when expected to do so and that this absence was unauthorised

[54] I first consider whether the conduct of Ms Sullivan could reach the threshold of being construed as serious misconduct capable of destroying the essential element of trust and confidence an employer is entitled to place in an employee - if it could be construed so, then I have to assess whether the sanction of dismissal was an appropriate response in all the circumstances.

[55] This was a summary dismissal and guidance on how behaviour justifying dismissal is to be assessed was summarised recently by the Employment Court in *Emmanuel v Waikato District Health Board*<sup>4</sup>. In conducting this analysis, I have the emails and the various text messages to draw a conclusion that the 'trust' issue was that Mr Singh was convinced Ms Sullivan misled him over her having indicated that she had set up a bank transfer to pay her store debt and this formed a significant part of his decision to dismiss.

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<sup>3</sup> At [43] per Couch J.

<sup>4</sup> *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

[56] Whilst Ms Sullivan did not produce evidence to show that she reversed the initial payment, I do note that she conceded that she did initially mislead Mr Singh saying she had made the payment when she had not and then later, freely admitted (by text to Mr Singh) that she had stopped the payment in response to his emailed written warning). However, Mr Singh's contribution to this unfortunate situation was short of exemplary. I was provided with no credible evidence of why Mr Singh wanted the debt paid immediately. Ms Sullivan had initially agreed to pay the debt when she returned to work the next day which was objectively a reasonable response and Mr Singh could have chosen to leave it at that.

[57] I found Ms Sullivan to be a credible witness and I prefer her recollection of the initial phone conversation that Ms Singh was overbearing and abusive.

[58] Mr Singh conceded in cross examination that he was present when Ms Sullivan left the store and knew she had taken additional items on credit but he did not tackle her about this. The debt involved was not a large amount and had followed previous similar amounts that were always re-paid. Mr Singh also had the contractual facility that he later utilised, to deduct the debt from Ms Sullivan's wages. Mr Singh gave Ms Sullivan no opportunity to provide evidence that she actually had placed a stop on the bank transfer and Mr Singh did use pejorative language in his texts including accusing Ms Sullivan of being a liar even as Ms Sullivan had said she was going to come in at the weekend to pay her debt.

[59] Whilst I can understand Mr Singh's frustration, I consider that the conduct of Ms Sullivan fell short of a threshold of it being deemed serious misconduct. At worst, when the situation was unnecessarily escalated by Mr Singh, Ms Sullivan responded 'tit for tat' when she received the emailed written warning. She responded contesting such in mildly confronting language that impliedly addressed Mr Singh's authority. To find otherwise, would have been to categorise Ms Sullivan's 'behaviour' as deeply impairing or destructive of the basic trust and confidence Mr Singh was entitled to place in her. I find no reasonable employer could have concluded such in these circumstances. Mr Singh sadly overreacted and behaved in an unnecessarily overbearing manner

[60] On the second issue of whether Ms Sullivan was absent on the Friday without authorisation, I have already traversed this in considering the warning and found that it was a reasonable response from Ms Sullivan to having worked excessive hours and Mr Singh's overbearing conduct. Ms Sullivan clearly communicated her concerns. It is also not trite to

observe that if an employer is relying on a previous written warning to escalate a disciplinary sanction the warning should clearly spell out the consequences of continued non-compliance – here it did not.

[61] I also find from the texts that Mr Singh sent prior to issuing the emailed warning, that he accepted her absence. Ms Sullivan also made a further offer to travel to the store and pay the debt over the weekend even after she had received a written warning – this was an ‘olive branch’ Mr Singh unwisely ignored.

[62] I make a further observation that had Mr Singh genuinely, at the point of dismissal, believed Ms Sullivan was a casual then he had no justification in raising the issue of her non-attendance on 2 November. Part 2 of Ms Sullivan’s employment agreement under the heading ‘Hours of Work’ indicates that: ‘There is no obligation on the employer to offer work or the employee to accept offered work’. Given Mr Singh’s warning and dismissal were partially based on Ms Sullivan’s intended absence on Friday 2 November, I find no credence in Mr Singh’s assertion that Ms Sullivan was absent without authorisation.

[63] Had I found that Ms Sullivan was absent without authorisation, I would not in the circumstances consider this warranted her dismissal. Ms Sullivan explained in advance her reasons for non-attendance that included her distress over the way Mr Singh had approached the phone call and her ten working days without a break and those reasons appeared legitimate in terms of her seeking a break.

*Was the Personal Grievance raised within 90 days of the dismissal?*

[64] Mr Singh in his submission, received by the Authority on 7 May 2020, suggests that the personal grievance was first brought to his attention on 3 October 2019 (when filed with the Authority) and was thus filed out of time. This was the first time that this issue was raised and is contrary to the evidence provided by Ms Sullivan’s counsel that he raised the grievance by way of an emailed letter dated 28 January 2019 that was provided to the Authority. Mr Singh never suggested he had not received this letter and although he did not respond to it, he was provided a copy in the Statement of Problem.

[65] Section 114 of the Act provides that an employee must raise a personal grievance with their employer within 90 days of the action alleged to amount to a personal grievance

occurring. As Ms Sullivan was dismissed on 2 November 2018, I find that the personal grievance was properly and specifically raised within 90 days by counsel's letter of 28 January 2019.

[66] I find Ms Sullivan did not engage in misconduct sufficiently serious to warrant consideration of a sanction of summary dismissal. The dismissal in the circumstances was substantively unjustified and so was the warning.

## **Remedies**

### *Lost wages*

[67] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Sullivan should I find that she has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. Here I find Ms Sullivan's lost remuneration was attributed to the personal grievance. Ms Sullivan gave evidence that she secured alternative employment commencing on 10 January 2019 and I find that she properly tried to mitigate her loss in a relatively short period between jobs and that she provided evidence of jobs sought.

[68] The respondent is ordered to pay Ms Sullivan ten weeks' lost wages in the sum of \$4,872.45 gross (a sum lesser than 3 months but reflecting the actual loss in the intervening period between her employment ending and the new employment commencing). The sum, as claimed, was reasonably calculated by the applicant at an average of 29.53 average weekly hours over the entire 35 weeks of her employment at \$16.50 per hour.

[69] I decline to award an additional claimed two weeks-notice period as the ten weeks awarded above ran from the date of dismissal but I do acknowledge that Ms Sullivan would have accumulated holiday pay during the notice period and award that as claimed in the sum of \$77.96.

### *Compensation for hurt and humiliation*

[70] Ms Sullivan gave compelling evidence of the impact of the warning and her summary dismissal and the uncertainty it created at a difficult time to find immediate alternative

employment. She explained that she was shocked by the hurried and sudden nature of the dismissal particularly when Mr Singh had described her in his email accompanying the warning as a “hard working and honest employee” and she had been working excessively long hours to assist in Mr Singh’s dealing with personal issues. She felt hurt by this not being taken into account when Mr Singh decided to dismiss her and further, when he had time to reflect upon what he had done to contribute to the situation. She also described being supportive to a close family member of Mr Singh.

[71] With some justification, Ms Sullivan felt Mr Singh had been angry and verbally abusive to her and then dispensed with her services in a callous fashion and that he was unwilling to discuss the situation or listen to her perspective on how she was not coping with excessive working hours. Essentially, Ms Sullivan was afforded no dignity and she thus suffered humiliation as a direct result of how she was dismissed.

[72] The timing of the dismissal led to uncertainty over the Christmas period and Ms Sullivan indicated worry about meeting financial commitments and that she was unable to afford suitable Christmas gifts for her then eight year old daughter and grandchildren. Ms Sullivan described a strain on the relationship with her partner and daughter and personal ill health, including: feeling run down, she would burst out crying, had difficulty sleeping and having to take an increase in anti-depressant medication. Ms Sullivan also described symptoms of anxiety at not being able to quickly secure alternative ongoing employment.

[73] I am convinced that at the time, Ms Sullivan suffered humiliation, loss of dignity and injury to feelings but has now moved on. Taking into account the circumstances and awards made by the Authority and Court in similar situations and the manner by which Mr Singh effected this dismissal, I consider Ms Sullivan’s evidence fully warrants her claimed compensation of \$15,000 under s 123(1)(c)(i) of the Act and the respondent is ordered to pay this sum. I make the observation that the claimed sum was not excessive in the circumstances and had more been suggested, I may have increased the amount I have awarded.

### **Contribution**

[74] Section 124 of the Act states that I must consider the extent to what, if any, Ms Sullivan’s actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy

should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>5</sup>.

[75] I do find that Ms Sullivan, on her own admission, initially misled Mr Singh about the bank transfer and that she could have sought to be less reactive in the timing of her texts to her employer. Against this observation, Ms Sullivan would have been stressed by Mr Singh's insistence she return immediately to work and address the debt owing. Mr Singh's communication and actions were overbearing but Ms Sullivan's responses were in part evasive and did contribute to Mr Singh's sense of outrage that she had misled him. I have also considered Ms Sullivan's evidence that she felt overwhelmed by Mr Singh's approach and the fact that the debt was not contested and she had signalled she would resolve it reasonably promptly.

[76] Overall, I find Ms Sullivan did contribute to the situation giving rise to the personal grievance but I have to balance that up with my finding that Mr Singh had no procedural or substantive grounds to issue a written warning and then dismiss Ms Sullivan. Ms Sullivan cannot be blamed for the deficiencies in process and an outcome that significantly worked against her. The hasty decision to dismiss in context was a wholly disproportionate response and any reasonable employer would have easily perceived that they had overreacted. I cannot therefore objectively deem Ms Sullivan's conduct to have been 'culpable' – she responded to what I have found to be unreasonable behaviour and that response in context was understandable so the extent of her contribution could not be deemed blameworthy.

[77] On balance, considering the actions of both parties in context, I find that Ms Sullivan's contribution to the situation does not warrant any reduction in the remedies I have awarded.

### *Summary*

[78] **I have found that:**

- a. Kelly Anne Sullivan was unjustifiably dismissed from her employment with Erman.**
- b. Erman must pay Ms Sullivan the sums below:**

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<sup>5</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

**(i) \$4,872.45 gross lost wages;**

**(ii) \$77.96 holiday pay.**

**(iii) \$15,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act;**

### **Costs**

[79] Costs are at the discretion of the Authority and here Ms Sullivan was wholly successful in her claims and is entitled to a contribution to her costs incurred. Ms Sullivan was legally aided but nevertheless this is a grant that has to be re-paid. Applying the principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>6</sup> that costs are to be modest and taking into account this was a half day hearing conducted by telephone, I find an award of half the notional daily tariff (\$4,500) is appropriate with a modest uplift to take account that submissions had to be timetabled due to Erman's failure to properly engage in the Authority process.

**[80] Erman is ordered to pay Ms Sullivan \$3,000.00 as a costs contribution.**

David Beck  
Member of the Employment Relations Authority

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<sup>6</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.