

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA193/10
5302248

BETWEEN PAIGE LOUISE WARD
Applicant
AND MALCOLM TUBB t/a
OTIPUA TAKEAWAYS
Respondent

Member of Authority: Helen Doyle
Investigation Meeting: 13 August 2010 at Timaru
Determination: 8 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paige Ward started working at Otipua Takeaways, a business owned and operated by Malcolm Tubb, in October 2009 when she was still at high school. Ms Ward described her usual hours and days of work as Wednesday through to Saturday between 5-8pm.

[2] Ms Ward says that she was unjustifiably dismissed from her position in the takeaway business on 25 February 2010 when she received the following text messages and responded to them:

Mr Tubb: *Barbs can't work with you so I'll have to terminate your employment from last night.*

Ms Ward: *Who is this?*

Mr Tubb: *Malcolm Tubb.*

Ms Ward: *How can Barb not work with me, I have done nothing wrong.*

No reply.

[3] Ms Ward says that her dismissal from her position, following the text exchange was unjustified. In the statement of problem lodged with the Authority, Ms Ward asked that her problem be resolved by payment of three weeks' notice in the sum of \$360 net, Mr Tubb signing a letter in the nature of a reference and reimbursement of the \$70 filing fee.

[4] Mr Tubb said in reply to the claim that his manager could no longer work with Ms Ward because of Ms Ward's attitude towards her and Ms Ward's work. He set out some of the performance concerns as over-cooking, under-cooking, product left out, orders not finished and *slap-happy* cleaning. Mr Tubb said Ms Ward was employed on a casual basis and the work performed by her was intermittent and irregular.

[5] At the Authority's investigation meeting, Mr Tubb made it clear that he would not sign the letter of reference Ms Ward had provided to him earlier. I explained to both parties that a written reference is not one of the remedies I am able to award under s.123 of the Employment Relations Act 2000.

[6] Ms Ward was accompanied by her father at the investigation meeting and, it was agreed that Ms Ward would talk to her father about that matter and they may consider another remedy. Ms Ward was asked to correspond with the Authority in that regard in writing. Mr Tubb had to leave the investigation meeting in a hurry to catch an aeroplane.

[7] Mr Tubb was also asked to provide a copy of Ms Ward's time and wage record.

[8] Following the investigation meeting, Ms Ward provided a letter dated 17 August 2010 to the Authority in which she said she had reflected on what was said during the investigation meeting. She asked for the same amount for lost wages in the letter. As an alternative remedy to that previously requested by way of a reference that she could show prospective employers she sought compensation in the sum of \$2,000.

[9] Mr Tubb provided wage and time records. Both parties were sent copies of the other's communication in this regard.

[10] If I get to the point of finding that Ms Ward has been unjustifiably dismissed from her employment, then I am satisfied there was sufficient evidence given at the investigation meeting about her reaction following the text exchange to properly assess such a remedy.

Issues

[11] The Authority is required to determine the following issues in this case:

- Was Ms Ward a casual employee;
- Was Ms Ward dismissed from her employment;
- If Ms Ward was dismissed from her employment, then was such dismissal unjustified;
- If Ms Ward was unjustifiably dismissed from her employment, then what remedies is she entitled to and are there issues of mitigation and contribution?

Was Ms Ward a casual employee?

[12] Both Ms Ward and Mr Tubb described the employment relationship at the takeaway business as casual. The Authority did not have the benefit at the investigation meeting of wage and time records because any communication that Mr Tubb had had with the Authority was limited. The Authority did not receive a statement in reply until after the matter had been set down for an investigation meeting although Mr Tubb said that he had posted it earlier.

[13] There was no written employment agreement between Ms Ward and Mr Tubb. I have therefore paid particular attention to the wage records. An analysis of the wage records show 19 separate weekly pay periods from the week ending 22 October 2009 to Ms Wards final week ending 25 February 2010. The pay week was from Thursday to Thursday.

[14] For each of the first seven weeks of employment until 10 December 2009 Ms Ward worked Friday, Saturday, Wednesday and Thursday with her total hours each week ranging from 12 to 14. For the last of those seven weeks Ms Ward also worked a Tuesday. For the week ending 10 December 2009 Ms Ward did not work the

Wednesday but did work the Friday, Saturday and Thursday. For the next week ending 17 December 2009 Ms Ward worked Friday, Saturday, Wednesday and Thursday for 12 hours. For the week ending 24 December 2009 Ms Ward worked Friday, Wednesday and Thursday but not the Saturday for 9 hours. For the week ending 31 December 2009 Ms Ward did not work at all.

[15] For the next week ending 7 January 2010 Ms Ward worked on Monday, Wednesday and Thursday for 9 hours. For the next week ending 14 January 2010 Ms Ward worked on the Friday, Saturday, Sunday, Wednesday and Thursday for 15 hours and for the week ending 21 January 2010 on Friday, Saturday and Thursday for 9 hours. For the next two weeks Ms Ward worked Friday, Saturday, Wednesday and Thursday and for the week ending 11 February 2010 Ms Ward worked those four days and Sunday as well for 18 hours. For the week ending 18 February 2010 Ms Ward worked Friday, Sunday and Wednesday and Thursday and for her final week ending 25 February on the Wednesday.

[16] Out of 12 of the 19 pay periods therefore, Ms Ward worked Wednesday through to Saturday. Ms Ward did not work at all for one of the seven remaining weeks and one was her final week.

[17] A casual employee is an employee who is hired for a short period of time to do specific work and generally no regular work pattern or expectation of ongoing employment exists for those employees.

[18] Ms Ward agreed that her employment was casual but it is for the Authority to consider the nature of the employment having regard to the legal tests to see whether in fact Ms Ward's employment had an expectation of ongoing employment. There was no written employment agreement in this case between the parties from which the Authority can obtain any guidance.

[19] The Employment Court has considered the issue of casual employment in *Jenkinson v. Oceana Gold (NZ) Ltd* [2009] 9 NZELC 93, 341. I have had regard to that case alongside the hours and days that Ms Ward worked.

[20] I find that the nature of the work that Ms Ward undertook at the takeaway business was predictable. She worked 18 of the 19 weeks in the wage records. From the very start of her employment she usually worked Wednesday, Thursday, Friday and Saturday. Sometimes Ms Ward would undertake work on other days if requested,

but when the weeks that she worked are considered, the pattern of work had become predictable, to the extent that it can be said Ms Ward had an expectation of ongoing work

[21] This is an important finding in terms of this case because Mr Tubb was of the view that as Ms Ward was casual her employment could be terminated relying on her casual status and that she had no expectation of ongoing employment . I find, however, that Ms Ward's employment became regular quite early on in her employment creating an expectation that her employment would be ongoing. Given that finding, Ms Ward's employment could only be terminated for a good substantive reason and after a fair and reasonable process had been undertaken. In other words, she could not simply be advised that there was no further work for her as is the case with a true casual.

[22] I find that Ms Ward was not a casual employee of the takeaway business but a permanent part time employee.

Was Ms Ward dismissed?

[23] There was no dispute that the text exchange as provided by Ms Ward was accurate. Mr Tubb said in his evidence that he as a casual employee he was entitled to simply advise Ms Ward there was no more work for her.

[24] Mr Tubb also said in his evidence that a worker, Barbara, had telephoned him on the Wednesday evening, 24 February, and said that she could not work any more because Ms Ward and another employee were up to *high jinx*.

[25] Mr Tubb said that prior to that evening he had been aware that Barbara had been having issues with Ms Ward and described the period in that regard as a month or six weeks. He accepted he probably did not talk to Ms Ward about those matters. Mr Tubb said that he was not always in the takeaway business but that he did occasionally see things in the bin that should not have been there because they were overcooked and that he felt the cleaning was *slap happy*. Mr Tubb thought that Barbara had given a warning to Ms Ward, although that was not accepted by Ms Ward in her evidence.

[26] Ms Ward said she was not told she was doing a bad job and that issues were raised with her as part of everyday routine matters that one would expect to have

raised during the working period. Ms Ward said that when Barbara told her to do something she would do it and that she thought the relationship was good between her and Barbara.

[27] Mr Tubb said that the difficulty was that Barbara had a food handling licence and Ms Ward did not so that it was essential to retain Barbara but not so Ms Ward.

[28] Given my findings that Ms Ward was in fact a permanent part time employee, I find that she was dismissed from her employment.

Was the dismissal justified?

[29] Mr Tubb put forward in his evidence three matters to justify the dismissal. The first was that Ms Ward was a casual employee with no expectation of on going employment. I have found Ms Ward was not a casual employee. The second was that there was incompatibility between Barbara and Ms Ward. The third matter was that there were performance issues with Ms Ward's work. I heard from Barbara Tubb, Mr Tubb's wife, who said that Barbara the worker was in tears when she telephoned her on the evening of 24 February 2010 about the attitude of Ms Ward and the other worker. She said that there had also been complaints from customers and that they could not afford to lose Barbara.

[30] An employee can be dismissed for incompatibility and performance issues. Dismissal needs to be preceded in both situations by a fair process which includes warning an employee that their position is at risk if they do not improve their performance or address relationship issues. Without such a process or indeed any process the Authority cannot say that dismissal is what a fair and reasonable employer would have done. Ms Ward did not accept that there were issues with her relationship with Barbara and the performance concerns.

[31] These matters were never clearly put to Ms Ward so that she could provide an explanation knowing that if it was found that her performance was in some way below the standard expected and there was a failure to improve her job would be at risk.

[32] I am not satisfied that Ms Ward's dismissal on 25 February was justified. The dismissal was not what a fair and reasonable employer would have done in all the circumstances. Ms Ward has a personal grievance that she was unjustifiably

dismissed from her employment with Mr Tubb and I will now assess the issue of remedies.

Remedies

Contribution

[34] I am not satisfied that Ms Ward contributed to the personal grievance that I have found in circumstances where she was a casual employee and there was no fair process in terms of any workplace issues.

Lost Wages

[33] Ms Ward seeks three weeks' pay in the sum of \$360 net. In her letter to the Authority Ms Ward said she wanted a sum of \$320 and not \$360. I am satisfied that after her dismissal, Ms Ward did attempt to find another position. However, these attempts were not successful. I am satisfied that this claim for three weeks' pay is reasonable.

[34] I find that Ms Ward is entitled to three weeks lost wages based on 12 hours per week. I calculate it in this way. Ms Ward's hourly rate was \$12.50 and therefore the sum for 36 hours is \$450 gross.

[35] I order Malcolm Tubb to pay to Paige Louise Ward the sum of \$450 gross being reimbursement of lost wages for a three week period.

Compensation

[36] Section 101 (ab) of the Employment Relations Act 2000 which section sets out the object of Part 9 of the Act with respect to personal grievances, disputes and enforcement provides *to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship.*

[37] Ms Ward attempted to resolve the matter directly with Mr Tubb after the text exchange by going to the shop to collect her final pay and attempting to discuss the matter with Mr Tubb. Ms Ward said that she was advised, and Mr Tubb accepted this, that he had to terminate her employment because Barbara had a food licence and it was either her or Ms Ward. Ms Ward said that she was unhappy by the way the

relationship ended because she had thought the relationship between her and Barbara was a good relationship.

[38] Ms Ward then on 26 February 2010 wrote to Mr Tubb at that early stage, simply wanting a letter of employment to be signed and payment of three weeks' notice of \$360 net. She explained in her letter that she was new to the workforce and wanted to build up a record of good employment. Mr Tubb refused to respond to that letter and therefore the matter proceeded to the Authority. A suggestion that the matter be mediated was not taken up. Ms Ward simply wanted to move forward in her working life.

[39] Given however that the earlier attempts to resolve the matter were unsuccessful I must now turn to consider the remedy Ms Ward seeks of compensation. I am satisfied that Ms Ward did suffer loss of dignity and injury to her feelings by virtue of her dismissal. It was clear from my observation of her during the Authority meeting that she was still moved on several occasions to tears as she considered she had not previously had an opportunity to respond to the concerns that were now being advanced by Mr Tubb about her performance and relationship with Barbara.

[40] Ms Ward's claim for compensation is not excessive and, in all the circumstances, I am of the view that a fair and reasonable award of compensation for Ms Ward would be the sum of \$2,000.

[41] I order Malcolm Tubb to pay to Paige Louise Ward the sum of \$2,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 being compensation for humiliation, loss of dignity and injury to feelings.

Costs

[42] Both parties in this matter were unrepresented. Ms Ward, having been successful, is entitled to reimbursement of her filing fee.

[43] I order Malcolm Tubb to pay to Paige Louise Ward the sum of \$70 being her filing fee.

Helen Doyle
Member of the Employment Relations Authority

