

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 469/10
5288566

BETWEEN LEANA WATSON
 Applicant

AND RESTAURANT HOLDING
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael Smyth, counsel for Applicant
 Thelma French, advocate for Respondent

Investigation Meeting: 12 August 2010

Determination: 2 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Ms Leana Watson was employed by the respondent company Restaurant Holding Ltd from 8 June until 23 December 2009. Ms Watson claims that during her employment as a waitress and café manager, her employer breached statutory and contractual terms and conditions of employment causing her distress and financial loss. Ms Watson claims that because of the employer's breaches of duty she could no longer put up with working under the conditions that prevailed and was forced to resign.

[2] To remedy her employment relationship problem Ms Watson claims to recover wages due under the employment agreement and not paid to her, and lost wages for a period following the termination of her employment. Further, she claims compensation for disadvantage caused by her employer's alleged unjustified actions including termination of her employment. She contends that her resignation was a

constructive dismissal and that it was not justifiable under the test of s 103A of the Employment Relations Act 2000.

[3] Before bringing her problem to the Authority for investigation Ms Watson tried to resolve it through mediation with her employer but was not successful.

[4] There is no dispute by Ms Watson and Restaurant Holding Ltd that they entered into an individual employment agreement. It was signed by Ms Watson and a director of the company, Mr Vladislav Dimitrov, on 1 May 2009. The agreement provided that Ms Watson would be employed from 1 June 2009 in the position of café manager and would be paid \$16 per hour. The hours and days of work were agreed under the following provision;

4. *You are employed for 40-45 hours per week, to be carried out on any day Monday through Saturday. The hours of work may vary and will be related to the needs of the business.*

[5] Provision for meal and rest breaks was made in the agreement as follows;

You will not be required to work for more than five hours continuously without an uninterrupted unpaid meal break of not less than half an hour.

If you work more than three hours you may take a paid 10 minute break at a time convenient to us.

We will make morning and afternoon and/or evening tea and coffee available for you to consume during your 10 minute break.

[6] The employment agreement was stated to comprise *Individual Terms* set out on a single page and *Standard Terms* contained in a longer document apparently drafted by the Restaurant Association. The *Standard Terms* conflicted to some degree with clause 4 (above) of the *Individual Terms* by providing that Ms Watson could be rostered to work on any of the 7 days in a week, not just the six days *Monday through Saturday*.

[7] Another term of the agreement provided that where the *Standard Terms* were inconsistent with the *Individual Terms* the latter would prevail. It was also provided that the terms and conditions were deemed to be a complete record of the parties' agreement and could only be varied by mutual consent, which was to be recorded in writing.

[8] The agreement signed by Ms Watson and Mr Dimitrov provided that wages were to be paid from the first day of the pay week commencing after entry into it. All other provisions of the agreement were expressed to come into force on the date it was entered into, which was 1 May 2009. Ms Watson's claim to recover unpaid wages does not run from then but from 1 June 2009, the date on which the employment was expressed to start.

Delayed start of the employment

[9] There is no dispute that Ms Watson did not start working for Restaurant Holding Ltd on 1 June. This was because a new café the company had been getting ready to open in Dominion Road and in which it was intended Ms Watson would work, had still to be connected to the mains gas supply. It was not until 27 July after a permit had been issued for the connection that Ms Watson was able to start in the café.

[10] In reliance on the employer's contractual promise, made on 1 May, Ms Watson resigned from a restaurant job she had had for some years by giving two weeks' notice. After working for that period she took a holiday for two weeks until the end of May, expecting to start her new job at the beginning of June. The employer's failure to comply with the contract meant that she had no income and needed a benefit for financial assistance. The situation was not one of her making and there was nothing she could reasonably have done to stop it occurring.

[11] Between about 7 June and 27 July at her request Ms Watson was given some part time work at another café run by Restaurant Holding Ltd near its Dominion Road site. That work was for less than the 40 to 45 hours a week the employer had promised in the employment agreement.

[12] While Ms Watson knew in May when accepting the employment that the Dominion Road was still being completed, I do not accept as suggested by Mr Dimitrov in his evidence that Ms Watson had undertaken to be flexible about her start date to an extent where the delay was nearly two months until the end of July.

[13] It may have been open to the employer, in the circumstances, to terminate the employment agreement on notice, on the grounds of its unforeseen inability to open the premises on or reasonably near 1 June. The notice period was however stipulated

to be one month and Ms Watson would have been entitled either to have work as per the terms of employment for that period or to be paid in lieu of notice.

[14] The employer remained obliged to provide work for Ms Watson who remained ready, willing and able to perform it in return for the stipulated hourly rate of pay. She mitigated her loss with the part time employment.

[15] To the employer's credit it did make adjustments in its business to enable some hours of paid work to be provided in the Kingsland café for Ms Watson, until the Dominion Road café was ready to open. There was, however, no written variation recorded to the employment agreement to replace the original terms with lesser hours of work and I am satisfied in the circumstances that Ms Watson did not, by her conduct, affirm a variation or acquiesce in the breach of the contract. I find that the period from 1 June until 27 July was not of sufficient length for her conduct to amount to affirmation or acquiescence.

[16] Although Ms Watson did not claim to recover the difference between the 40 to 45 hours work and the work actually provided in the Kingsland café up to 27 July while she was employed, she was not prevented from bringing her claim for unpaid wages after her employment had ceased.

[17] I find the claim is made out in fact and in law. I am satisfied that in the circumstances Restaurant Holding Ltd, as a contracting party, failed to comply with an express term of the employment agreement it entered into with Ms Watson that she would be employed from 40 to 45 hours a week at \$16 per hour from 1 June 2009.

[18] Ms Watson is entitled to recover the difference between what she would have been paid, had the agreement been complied with by the employer, and what she was paid for work between 1 June and 27 July. The amount is \$4,448. Any benefit she received in that period is not to be deducted from this amount but may be something Ms Watson is required to account for to the agency that provided the benefit to her.

Reduction of work hours

[19] I am satisfied from the evidence that there was a further breach by the employer in October 2009 when, without consultation, Mr Dimitrov unilaterally reduced Ms Watson's hours of work from the minimum 40-45 promised to about 33 a

week. No variation was obtained by consent and recorded in writing as required, and no notice was given under the employment agreement.

[20] Ms Watson and another worker were simply told this reduction was necessary and the only input she had was in deciding how the reduced hours would be split or shared with her colleague. After three or four weeks in October working the reduced hours Ms Watson told Mr Dimitrov she would need to take a second job to keep her earnings at the level she was expecting. Mr Dimitrov thereupon reinstated her hours to 40 a week. Mr Watson is entitled to recover \$672 as claimed in respect of earnings lost from the unilateral reduction in her hours during October.

[21] Restaurant Holding Ltd is therefore ordered to pay the amounts of \$4,448 and \$672 to Ms Watson. It is also appropriate that she should be paid interest for the loss of use of that money. The company is ordered to pay interest at the rate of 4.5% per annum on the amount of \$4,448 from 1 August 2009 until paid and on \$672 from 1 January 2010 until paid.

Rest and meal breaks

[22] Ms Watson claims that she was not permitted to take rest and meal breaks. Her complaint was more about the 10 minute rest breaks, this being the issue she says that caused her eventually to resign.

[23] The employment agreement provided for breaks, as did the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008. The statute provides at s 69ZD that if an employee's work period is two hours or more but not more than four hours, the employee is entitled to one 10-minute paid rest break. It also provides:

(3) *If an employee's work period is more than 4 hours but not less than 6 hours, the employee is entitled to –*

(a) *One 10-minute paid rest break; and*

(b) *One 30-minute meal break.*

[24] The section goes on to provide that if an employee's work period is more than six hours but not more than eight hours, the employee is entitled to two 10-minute paid rest breaks as well as one 30-minute meal break.

[25] During any work period the breaks are to be observed either at times agreed between employee and employer or at specified intervals. These are not strictly to be applied but are subject to what is *reasonable and practicable* in the circumstances of a particular workplace. The employment agreement simply provided that 10 minute rest breaks were to be taken *at a time convenient to us*. In the agreement the employer is the party referred to as *us* and *we*.

[26] The statutory requirements were in force by the time Ms Watson commenced working for Restaurant Holding Ltd and as an employer the company was expected know and follow them.

[27] The Act requires an employer to *provide* the stipulated rest and meal breaks. Within the flexibility of what is *reasonable and practicable* and *a time convenient to us*, I am satisfied from the evidence that Mr Dimitrov did provide rest breaks although he required Ms Watson to carry on working during peak times in the café after she had become entitled to the first 10-minute break.

Disadvantage grievance

[28] In relation to rest breaks I am not satisfied that the employer acted without justification or that Ms Watson suffered any disadvantage as a result. She therefore does not have a personal grievance.

Constructive dismissal claim

[29] In relation to the claim of constructive dismissal find that when Ms Watson spoke to Mr Dimitrov on 18 November about her entitlement to have a break in the morning of 10 minutes, although he was begrudging about it Mr Dimitrov consented to her having the break when she wanted to take it.

[30] Discouraged by Mr Dimitrov's attitude Ms Watson gave one months notice of resignation on 23 November. The following day she took legal advice and the same day Mr Smyth wrote to Mr Dimitrov raising several complaints about his treatment of Ms Watson, including the claim that she had been constructively dismissed. Claims for monetary remedies were also made then.

[31] I find that on 23 November when she resigned Ms Watson had not viewed herself as having been dismissed. When the claim of constructive dismissal was

made on 24 November on Ms Watson's behalf she had not been dismissed at all, constructively or in any other way. She had given notice of her intention to resign with effect from 23 December. The grievance in this regard was raised prematurely, although from it the idea seems to have grown that the termination was by dismissal.

[32] Although Ms Watson did not return to work after 23 November this was on medical advice. The employment must be regarded as having ended on about 15 December when Ms Watson found work with another employer, part time initially.

[33] I find that the circumstances fall well short of amounting to a constructive dismissal. There was an opportunity of one month during the notice period for Ms Watson's issues to be resolved. Mr Dimitrov finally did not deny Ms Watson her right to rest breaks although the attitude he showed about this left her feeling, as she said in her evidence, that the employment relationship was broken and leading her to give notice and work the period out.

[34] It does not appear from the evidence that Mr Dimitrov planned to act in a certain way so as to coerce a resignation from Ms Watson. Neither I find did his conduct amount to a breach of duty which was serious enough to make it reasonably foreseeable that Ms Watson would resign rather than put up with it. This latter category of constructive dismissal is dealt with in *Auckland Power Board v. Auckland Local Authorities IUOW* [1994] 1 ERNZ 168, at 172.

[35] I find that as at 23 December nothing had occurred in relation to the rest break issue that amounted to a breach of such seriousness as to amount to a constructive dismissal. When Ms Watson worked for the last time on about 24 November the employer had acknowledged that she could take the rest breaks as requested by her at the times she was entitled to have them.

[36] If there had previously been a breach of duty in relation to rest breaks it did not continue after about 18 November and from then on it could not have been reasonably foreseeable to the employer that Ms Watson would resign because of the earlier failure and work out a month of notice.

[37] It is likely that to some extent a contrast of temperaments and personalities led to the resignation of Ms Watson. Mr Dimitrov it seems is blunter and more assertive in his manner, while Ms Watson is uncomplaining, obliging and accommodating. But as the courts have held, an employer must do something more than show a lack of

courtesy and consideration, or an attitude, before the circumstances will amount to a constructive dismissal. *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* [1990] 2 NZLR 438 is the case usually referred to in this regard.

[38] I find that Ms Watson does not have a personal grievance in relation to the termination of her employment, as this occurred by her resigning freely although unhappily rather than her being dismissed.

Costs

[39] Costs are reserved. If Mr Smyth and Ms French are not able to resolve this question themselves given the partial success each party has had, an application can be made in writing to the Authority within 21 days of the date of this determination. A reply from the respondent can be made within a further period of 21 days.

A Dumbleton
Member of the Employment Relations Authority