

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 199
5560946

BETWEEN

GILLIAN WINKLMAIER
Applicant

A N D

BREADS OF EUROPE LIMITED
(IN LIQUIDATION)
Respondent

Member of Authority: Christine Hickey

Representatives: Peter Cahill, Advocate for the Applicant
No appearance by or for the Respondent

Investigation Meeting: 3 December 2015

Submissions received at the meeting and further
evidence supplied on 7 December 2015.

Date of Determination: 14 December 2015

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Breads of Europe Limited (in liquidation) must pay Gillian Winklmaier \$3,951.41 gross in lost remuneration plus interest of 5% from 20 April 2015 until the date of payment; and \$7,500 compensation for humiliation, loss of dignity and injury to her feelings.**
- B. Breads of Europe Limited (in liquidation) must reimburse Gillian Winklmaier \$71.56, the cost of making her application to the Authority.**

Introduction

[1] The respondent employer (Breads of Europe) was placed in liquidation on 27 October 2015 after these proceedings were filed and served and after the statement of reply had been filed and served, but before the matter came before the Authority for the investigation meeting.

[2] The liquidator, Mr Brenton Hunt, has provided the Authority with written consent for the investigation meeting to continue and for any determination to be made available to him. The Authority thanks Mr Hunt for allowing the Authority's process to continue.

[3] I explained to Ms Winklmaier the fact that the liquidator has been prepared to allow the Authority's process to continue is no guarantee that any remedies awarded will be able to be met by the company. Mr Hunt has indicated that any determination in Ms Winklmaier's favour will be able to be considered by him so long as she makes an application to add any amount owed to her to the list of other unsecured creditors. She is aware of the process for doing so.

Employment relationship problem

[4] Ms Winklmaier was employed by Breads of Europe as a delivery driver from 5 March 2015. She did not receive a written employment agreement.

[5] On 20 April 2015, near the end of her shift, she was called into the office for a meeting with Chris Middleton. Also present was one of Ms Winklmaier's supervisors, Linda Bale. Ms Winklmaier was not advised before the meeting began what it was going to be about. She was told by Mr Middleton that she was being dismissed. Mr Middleton told Ms Winklmaier that the reason she was being dismissed was that she had argued with both of her supervisors and that he had many complaints over the past month about that.

[6] After her dismissal Ms Winklmaier engaged Mr Cahill to assist her. On 24 April 2015 Mr Cahill wrote to Breads of Europe raising personal grievances of unjustified dismissal and unjustifiable disadvantage. He also alleged that Breads of Europe had failed to act in good faith to Ms Winklmaier during her employment.

[7] Mr Cahill requested the following:

- (a) The reasons for Ms Winklmaier's summary dismissal. He quoted s 120(1) of the Employment Relations Act 2000 (the Act) and advised Breads of Europe that the employer must provide a statement of reasons for dismissal to the applicant within 14 days of the request.
- (b) Ms Winklmaier's wages and time records. He quoted s 132(2) of the Act and advised Breads of Europe that a failure to comply with the request meant they risked being held liable for a penalty.

[8] He also asked for a copy of Ms Winklmaier's personnel file, a copy of her individual employment agreement and any other personal information the respondent held in relation to Ms Winklmaier as well as full details of her earnings. Over the subsequent months Mr Cahill made several further attempts to obtain the information requested.

[9] Mr Cahill suggested a face-to-face meeting or mediation to resolve the matter. On 18 September 2015 a dispute resolution coordinator of employment mediation from the Ministry of Business Innovation and Employment contacted Mr Cahill and advised him that Breads of Europe declined to participate although a mediation time had been confirmed for that day. On the same day Mr Cahill lodged the application which is now before the Authority on Ms Winklmaier's behalf.

[10] Ms Winklmaier claims that she was unjustifiably dismissed, unjustifiably disadvantaged and that Breads of Europe breached its duty of good faith to her. Those three claims rely on the same facts.

[11] Ms Winklmaier also claims that Breads of Europe failed to pay any wages in lieu of notice, failed to supply her with a written employment agreement, failed to supply written reasons for her dismissal and failed to supply wages and time records.

[12] By way of compensation Ms Winklmaier claims the balance of her lost wages for the period of 13 weeks after her dismissal, payment for a notice period, compensation of \$20,000 for humiliation, loss of dignity and injury to her feelings. She also claims interest on her lost income. She also claims the costs of the filing fee of \$71.56 and Mr Cahill's costs and disbursements which she expects to be charged.

[13] I have reserved the issue of costs apart from the claim for reimbursement of the filing fee.

The issues

[14] The Authority has to determine the following issues:

- (a) Was Ms Winklmaier unjustifiably dismissed?
- (b) Was Ms Winklmaier otherwise unjustifiably disadvantaged?
- (c) Did Breads of Europe breach its duty of good faith to Ms Winklmaier?
- (d) Should Breads of Europe pay Ms Winklmaier for her notice period?
- (e) Did Breads of Europe fail to supply Ms Winklmaier with a written employment agreement and, if so, should it pay a penalty for that failure?
- (f) Did Breads of Europe fail to supply reasons in writing for Ms Winklmaier's dismissal, and, if so, should it pay a penalty for that failure?
- (g) Did Breads of Europe fail to supply wages and time records and, if so, should it pay a penalty for that breach?
- (h) What remedies, if any, is Ms Winklmaier entitled to?

Was Ms Winklmaier unjustifiably dismissed?

[15] Ms Winklmaier was not on a 90 day trial period because she did not have a written employment agreement containing a 90 day trial period.

[16] On the evidence before me I am satisfied that she was unjustifiably dismissed from her employment. She was simply told on 20 April 2015 that she was dismissed effective immediately. There was no process followed.

[17] Section 103A of the Act sets out the test of justification that I need to apply. I am satisfied under that test that what Breads of Europe did, and how it did it, were not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In reaching that conclusion, I have considered whether Breads of Europe sufficiently investigated the allegations against Ms Winklmaier before dismissing her, whether Breads of Europe raised the concerns that it had with Ms

Winklmaier before dismissing her and whether Breads of Europe gave Ms Winklmaier a reasonable opportunity to respond to its concerns before dismissing her, and whether Breads of Europe genuinely considered Ms Winklmaier's explanation in relation to the allegations before dismissing her.

[18] It is clear that not one of those necessary procedural steps was followed.

[19] As part of the Breads of Europe's statement in reply, it supplied some notes apparently typed up by Mr Middleton in May 2015. Those notes do not appear to have been taken at the meeting during which Ms Winklmaier was dismissed, nor were they notes which Mr Middleton wrote before the meeting or gave Ms Winklmaier access to. Three handwritten statements were also supplied with the statement in reply. One is dated 2 April 2015 and signed by Dee Quinton and makes an allegation about Ms Winklmaier's honesty. This statement was never shown to Ms Winklmaier at any time before her dismissal.

[20] The second handwritten statement is dated 14 April and was apparently written by Ms Bale. This statement notes some dissatisfaction with Ms Winklmaier by Ms Bale. However, this statement was not shown to Ms Winklmaier at any time before her dismissal either. Further, I have some doubt whether it was actually written on 14 April, which is almost a week before Ms Winklmaier's dismissal because it starts *Throughout Gillian's time at BOE, she was repeatedly asked* It finishes *Gillian's overall attitude towards her work and workmates was not acceptable. She was not willing to fit in* This statement has the appearance of being written after Ms Winklmaier's employment had been terminated.

[21] A further handwritten statement was made by Pradeep Mehta, Ms Bale's co-supervisor. It is not very legible and is dated 29 March 2015. This statement was never shown to Ms Winklmaier at any time before her dismissal.

[22] The defects in the process were significant and resulted in Ms Winklmaier being treated unfairly.

Has Ms Winklmaier suffered a separate disadvantage?

[23] At the investigation meeting Mr Cahill made it clear that the unjustifiable disadvantage to which he referred in the statement of problem was the lack of fair process which led to the dismissal.

[24] This does not give rise to a separate personal grievance and I do not treat it as such.

Did Breads of Europe breach its duty of good faith to Ms Winklmaier?

[25] Clearly, in the lack of fair process used for Ms Winklmaier's dismissal, Breads of Europe did breach its duty of good faith to Ms Winklmaier particularly under s 4(1A)(c) of the Act. That required Breads of Europe, when it was proposing to make a decision that was likely to have an adverse effect on the continuation of Ms Winklmaier's employment, to give her access to information relevant to the continuation of her employment and to give her an opportunity to comment on that information. Ms Winklmaier should have been given Ms Bale's, Ms Quinton's and Mr Mehta's statements before the meeting and given an opportunity to comment on them before a decision was made about her employment.

[26] This did not happen. However, I consider this claim to have been subsumed by the unjustified dismissal finding I have already made. No separate remedy will be awarded for this breach.

Did Breads of Europe fail to supply Ms Winklmaier with a written employment agreement?

[27] There was a clear failure to provide a written employment agreement to Ms Winklmaier in breach of Breads of Europe's obligation under s 63A(2)(a). That renders Breads of Europe liable to a penalty imposed by the Authority of up to \$20,000.

Did Breads of Europe fail to supply Ms Winklmaier with a written statement of the reasons for her dismissal?

[28] Section 120 of the Act allows an employee within 60 days after the dismissal to request the employer to provide a statement in writing of the reasons for dismissal. An employer is obliged within 14 days on the day on which the request was received to provide a statement to the former employee. A breach of that section renders Breads of Europe liable to a penalty of up to \$20,000 for failure to comply.

[29] I am satisfied that Breads of Europe did fail to comply with Mr Cahill's request for a written statement of reasons for Ms Winklmaier's dismissal.

Did Breads of Europe fail to supply wages and time records to Ms Winklmaier as requested?

[30] Section 130 of the Act requires an employer to keep a record called a wages and time record and requires a number of pieces of information to be kept in relation to each employee.

[31] Under s 130(2) of the Act, every employer must when requested by an employee or by their authorised representative, provide access to, or a copy of, the wages and time record. Section 130(4) renders every employer who fails to comply with the request for a wages and time record liable to a penalty imposed by the Authority of up to \$20,000.

[32] I am satisfied that Breads of Europe failed to supply a copy of Ms Winklmaier's wages and time record in the format in which s 130 requires it to be kept. I acknowledge that once directed to by the Authority, Breads of Europe supplied copies of Ms Winklmaier's payslips. However, copies of payslips provided are not sufficient to meet the requirements of s 130 of the Act.

Remedies*Lost remuneration*

[33] Ms Winklmaier's work for Breads of Europe was part-time although it was her main source of income. Her other part-time job at Countdown was only for 12 hours per week. Upon her dismissal she immediately began seeking alternative work and I am satisfied that she mitigated her loss. She found new work as a cleaner for Absolute Domestic and is working as a contractor, not an employee. There was only a short period during which she had no pay, apart from Countdown, after loss of work at Breads of Europe.

[34] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Breads of Europe of the whole or any part of wages Ms Winklmaier lost as a result of his grievance. Section 128(2) of the Act provides that I must order Breads of Europe to pay Ms Winklmaier the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration. Since Ms Winklmaier obtained replacement work in the three months after her dismissal I need to award her actual lost remuneration for the three months after her dismissal.

[35] In reliance on some pay slips supplied by Ms Winklmaier, including her final one, I find that she earned an average of \$462.65 gross per week over her seven week employment with Breads of Europe. That being the case she would have earned $\$462.65 \times 13 = \$6,014.41$ over the three months, to 20 July 2015, after her dismissal had she not been unjustifiably dismissed.

[36] Ms Winklmaier's first pay for her work with Absolute Domestic was on 8 May 2015. In the first three months after her dismissal she earned \$2,063. The difference between what she would have earned at Breads of Europe and what she did earn is \$3,951.41 gross and that is the amount Breads of Europe must pay her.

Interest

[37] The Authority has the discretionary power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.¹

[38] Ms Winklmaier has been without the money that she would have earned if she had not been unjustifiably dismissed for some months now. I consider it reasonable that she is paid 5% interest on her lost remuneration from the date of her dismissal until the amount owed is paid in full.

Compensation

[39] Ms Winklmaier's evidence is that she was shocked by her dismissal, coming as it did out of the blue. She said it was *a really nasty thing to happen*. She says that she was depressed for a while and it would have made a difference if *they'd told me it was coming*.

[40] She says her confidence was knocked by her dismissal and now that she has another job she worries about whether she will be fired, without getting a chance to improve, if her employer considers she is not good enough. She would not have worried about that prior to being dismissed by Breads of Europe.

[41] Ms Winklmaier has established that she suffered injury to her feelings and a loss of dignity warranting compensation under s 123(1)(c)(i) of the Act. I am mindful of the need not to keep compensatory payments artificially low but need to balance

¹ Judicature (Prescribed Rate of Interest) Order 2011

that with a need for moderation in payments. That is the formulation for exercising discretion in awarding compensation recently expressed by Judge Inglis of the Employment Court in *Hall v Dionex Pty Ltd*.² I consider that \$7,500 is an appropriate award for Ms Winklmaier's particular circumstances.

Contribution

[42] In all the circumstances, there is no evidence of any blameworthy behaviour that contributed to the situation leading to Ms Winklmaier's personal grievance. There is no reduction to the remedies awarded.

Penalties

[43] The Authority's power to order a penalty is discretionary.

[44] Breads of Europe's behaviour in failing to provide a written employment agreement, failing to supply with a written statement of the reasons for dismissal and failing to supply wages and time records are breaches of the Act of the kind that would normally attract a penalty. Penalties are designed as a punishment and to deter the wrongdoer and others from breaching their obligations. However, in all the circumstances including that the business has been sold and Breads of Europe is in liquidation I do not consider any real purpose would be served by awarding penalties. I decline to do so.

Costs

[45] Breads of Europe must reimburse Ms Winklmaier the \$71.56 it cost to lodge her application in the Authority.

[46] The costs of representation of Ms Winklmaier by Mr Cahill are reserved. The unsuccessful party is usually expected to make a reasonable contribution to the successful party's costs.

[47] The usual amount of costs that is awarded for a full day's investigation meeting is \$3,500. The investigation meeting lasted less than an hour and on that basis would usually attract a pro rata amount of about \$550.00.

² [2015] NZEmpC 29

[48] The parties are invited to agree on costs. If that is not possible Mr Cahill may make an application for costs by 31 January 2016. If the liquidator intends to file any submissions in reply they should be filed within 14 days after the application for costs is filed.

Christine Hickey
Member of the Employment Relations Authority