

Determination Number; WA 110/05

File Number: WEA 147/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Peter Philipsen (applicant)
AND	Esther Monteith t/a The Central Café, Lyndon Road East, Hastings (respondent)
REPRESENTATIVES	Douglas Abraham for the applicant David McLeod for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 23 June 2005
DATE OF DETERMINATION	8 July 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Peter Philipsen said he was subjected to unjustified actions by Ms Esther Monteith that disadvantaged him and that she unjustifiably dismissed him – statement of problem received on 22 April 2005. He initially sought reinstatement but abandoned that claim during the Authority's investigation on 23 June. He continues to claim lost earnings, outstanding holiday pay, monies lost through he says unilateral reductions

of his hourly rate, compensation of \$15,000 for humiliation, etc, a penalty under s. 133 of the Act and costs.

2. Ms Monteith accepts that she dismissed the applicant without giving all of the reasons for the termination at the time “(but) *I did not do anything wrong.*” – statement in reply received on 23 May.
3. The parties did not undertake mediation in respect of their employment relationship problem as Ms Monteith refused to attend – telephone advice on 30 May to an Authority support officer from the respondent’s representative. Because of Ms Monteith’s robust approach to the requirements of the Act I determined that requiring the parties to undertake mediation would not, in this instance, contribute constructively to resolving the matter: s. 159 of the Act applied. Instead, I directed that this employment relationship problem would be investigated at a one-day conference in Napier commencing at 10.00 a.m. on Thursday 23 June 2005.
4. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Findings

5. I am satisfied from the parties’ evidence that the key findings are as follows.
6. Following his sale of the Café to Ms Monteith, Mr Philipsen was employed by her as a chef, on 1 March 2004. His terms and conditions of employment were recorded in a signed individual employment agreement. It recorded the parties’ agreement that, amongst other things, Mr Philipsen would be paid \$16.50 per hour.
7. In August 2004 Mr Philipsen’s pay was cut: he says he understood if he did not agree his employment would be terminated immediately. He also says he understood the pay-cut would be short term and would return to the amount recorded in the agreement. It was never restored to the original rate. He did not dispute the cut at that time.

8. Mr Philipsen also says that he regularly received wage payments less than what he was due, and that the difference was made up on a drip-feed basis by Ms Monteith. The applicant also says his normal pay day was varied without his agreement. He did not dispute these matters at the time they occurred.
9. On 16 February 2005 Mr Philipsen was invited by Ms Monteith to have a chat after work. He was not forewarned as to the purpose of the meeting. At it the respondent told him he was dismissed. Two reasons were provided, that it was unethical for the applicant – the former owner – to work in the Café and that the business could not afford him. He was handed a letter dated 15 February confirming his termination. The letter says, amongst other things, that

I have thought long and hard about the future and sadly I have concluded that it would not be the right move to include your services for the future. It is not a proper business arrangement to have the ex owner on the premises in a working arrangement. I have to move on into the new year with new ideas. So please accept that I have to let you go.

10. Mr Philipsen said he felt gutted, humiliated and dumb-founded as a result of the advice of his dismissal. He ceased working for Ms Monteith on Friday 18 February.
11. The applicant says his subsequent efforts to obtain copies of his time and wages record from Ms Monteith were unsuccessful as the respondent refused to provide those records. At the investigation Ms Monteith says, at her instruction, her accountants forwarded the relevant details by letter on 25 February. I have no reason to doubt the respondent's account.
12. Mr Philipsen's personal grievance advice of 1 March was delivered by hand to the respondent on the same day. It included the request that all communications be directed through his representative's office: shortly after receiving the advice Ms Monteith telephoned the applicant and left a message that he regards as threatening. A recording of the message, and a transcript of the same, were made available during the Authorities' investigation. They include the words,

Yes, it's Esther Monteith from the Central Café. I've just received a note from (your representative). You have given me no choice whatsoever, everything in this letter is a

blatant lie. I will now sue you for defamation of character, and this thing will go to Court, plus the contract for the business ... so you've made a huge mistake, and this is not the end, ok. Thank you for absolutely nothing.

13. Following his dismissal, Mr Philipsen took a break before commencing – on 1 April – a car importing partnership. He said it has yet to make any money.

Discussion and Findings

14. I have no doubt that Mr Philipsen was unjustifiably dismissed, both procedurally and substantively, for the following reasons.
15. The onus of proof is on the respondent to prove that there was good cause and that the dismissal was carried out in a procedurally fair manner.
16. There are few if any significant factual differences as to relevant events between the parties in this matter. It is agreed that Ms Monteith dismissed the applicant. It is clear she did so without warning and in such a way that Mr Philipsen had no opportunity to address her concerns. In fact, Ms Monteith's decision was predetermined, having been set out in writing by her on the day prior to it being communicated to her employee.
17. The four basic elements to procedural fairness that should normally be established by an employer are well established. They are: warning of misconduct unless it is serious misconduct warranting summary dismissal, investigation by the employer of the relevant facts and the communication of the results to the employee, reasons for the dismissal being communicated before the decision is effected and an opportunity to be heard and to offer an explanation as to the alleged misconduct – *Auckland CC v Hennessy* (1982) ERNZ Sel Cas 4. Mr Philipsen enjoyed none of these elements. I am satisfied his dismissal would be unjustified on grounds of procedural unfairness alone.
18. There must also be good cause for a dismissal. I find that Ms Monteith cannot rely on any claim of ethics to justify her dismissal of Mr Philipsen in that she cannot account why this was not a problem before February 2005 for the preceding 11

months, following her decision to employ Mr Philipsen. Moreover, Ms Monteith admits in her statement in reply that the applicant was dismissed for “*a number of reasons – but I only stated one or two*”. Not only did the respondent fail to put all of the reasons to the applicant before dismissing him, but her attempts to argue at the investigation that one of those problems – that his performance was less than satisfactory – was, I find, simply not credible: Ms Monteith admitted that she had never raised performance issues with Mr Philipsen but had instead praised his efforts.

19. It also emerged during the investigation that, behind Ms Monteith’s decision to terminate the applicant, was her view that she had been misled by Mr Philipsen in the sale of the Café and that she “*might have made a mistake*” purchasing it: no evidence was offered to support this view.

Remedies

Compensation for Humiliation, etc

20. Having established that he was unjustifiably dismissed, Mr Philipsen is entitled to seek compensation. I accept that he was humiliated, etc by his dismissal. It came without any warning whatsoever and was clearly a shock to him. It also came at a time when he had committed himself to building a new home: his ability to meet the costs of \$140,000 that he had committed himself to was severely compromised. I accept Mr Philipsen’s evidence that he was obliged to sell another (retirement) property to meet that commitment.
21. I also accept the applicant’s evidence that he has never been previously sacked, that he was shell-shocked by his termination and the effects were worsened by Ms Monteith’s gratuitous and offensive telephone call.
22. I also accept that Ms Monteith’s refusal to undertake mediation has deepened his injury to feelings and should be taken into account in determining an appropriate compensation. Having regard to the above I am satisfied that Mr Philipsen should be awarded in full the amended compensation he claimed at the investigation, of \$10,000.00.

Lost Earnings

23. I do not accept that Mr Philipsen is entitled to lost earnings. I reach this conclusion because of his evidence that, following his dismissal, he elected to take a break before venturing into a business partnership.
24. Because Mr Philipsen did not attempt to directly mitigate his losses it cannot be said that he has not lost any wages as a result of the grievance.

Unilateral Reduction of Wages

25. I do not accept there was a unilateral reduction of the applicant's wages and that he is entitled to recover his original pay rate. This is because of Mr Philipsen's evidence that he was faced with an option of a pay cut or no job. That is a difficult but not unreasonable situation: there is no evidence suggesting that the Café was not experiencing trading difficulties. I am therefore satisfied that a justifiable proposition was put to the applicant by his then employer and his agreement to a pay cut was freely given.

Penalty for Failure to Produce Time and Wage Record

26. I do not accept that a penalty is called for. As is made clear above, Ms Monteith says she instructed her accountant to mail relevant details to Mr Philipsen on or about 25 February. Unfortunately, Mr Philipsen did not receive those details. While frustrated by not receiving the information, I am not satisfied that the applicant has been disadvantaged by that failure or that it can be said Ms Monteith wilfully breached Mr Philipsen's entitlement to the same.

Holiday Pay

27. Leave is reserved to the parties to attempt to reach an agreement on this matter in the event that it is still live, having regard to Mr Philipsen receiving his wage and time record for the first time during the investigation.

Contributory Fault

28. In the absence of any warnings or opportunity to address his employer's concerns, it cannot be said that Mr Philipsen in any way contributed to his personal grievance: s. 124 of the Act applied.

Determination

29. For the reasons set out above I find in favour of the claim of unjustified dismissal brought by the applicant, Peter Philipsen, against the respondent, Esther Monteith trading as The Central Café, and direct the respondent to pay to the applicant the sum of \$10,000.00 (ten thousand dollars) as compensation under s. 123 (1) (c) (i) of the Act.
30. While costs are reserved at the request of the parties I make the following preliminary observations: given that the applicant has succeeded in his substantive claim it is likely that costs will follow the event. The approximate costs claim of \$3,000.00 tabled by the applicant during the investigation would, I anticipate, represent a reasonable contribution to his costs.

Denis Asher

Member of Employment Relations Authority

