

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Amanda Richardson (Applicant)

AND James Ng and Siaw Ling Aw trading as the Hot Plate Restaurant
(Respondents)

REPRESENTATIVES Graeme Ogilvie¹ for the Applicant
The Respondents in Person

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Wellington, 12 June 2006

DATE OF DETERMINATION 22 June 2006 and 23 June 2006 (correction of dates)

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem about the payment of outstanding holiday pay, the circumstances in which the employment relationship ended and how the employment relationship problem should be resolved.

The facts

[2] The brief facts can be summarised as follows. Amanda Richardson and James Ng signed off an employment agreement for Ms Richardson to work as a trainee kitchen hand at the Hot Plate Restaurant in Levin for \$10 per hour as required. The term of the agreement was until 23 January 2005. Arrangements were made for a Job Plus subsidy from Work and Income, and the Respondents agreed that Ms Richardson would work a 30 hour roster. She attended work on her rostered days: 24, 27, 28, 29, 30 & 31 December 2004. Her gross wages paid for these days was \$280 for 28 hours work. She was rostered to work on 27 January but was sick and did not work and was not paid for the day.

[3] She returned to work on 1, 2, 3, 4, 6 & 7 January 2005 and worked 30 hours. She was paid a total of \$350 for these days (including the Statutory Holiday pay loading) although the Respondents believed they had an agreement for her to attend work without pay for training on 1 and 2 January, the Statutory Holidays. She called in sick on 8 January. The Applicant says she was not offered any work from 9 January despite going into work. She says she was told to go home. The

¹ Mr Ogilvie represented the Applicant during the Authority's investigation meeting. She was previously represented by lawyers from Levin.

Respondents say that the Applicant voluntarily resigned on 10 January when she decided not to work any more and wanted her pay. The Applicant denied this. She says she went into work with her mother on 9 January to find out what was happening with her hours because the Respondents would not give her any work until she explained to Work and Income the circumstances regarding her inability to work her 30 hour roster and found out if the subsidy would apply for fewer hours.

[4] The Respondents say they sought legal advice and arranged a Trespass Notice. On 18 January the Applicant says she received a letter containing the Trespass Notice.

[5] On 14 January Ms Richardson and her grandfather went into the restaurant and the Applicant raised a personal grievance by giving the Respondents a grievance letter dated 14 January.

[6] The Applicant sought legal advice. She provided her lawyers at the time with a written statement of her version of the facts. Mediation occurred on 10 October 2005. The matter was not settled. A statement of problem was filed in the Authority on 24 January 2006 and statement in reply received on 17 February 2006.

The Issues

[7] The Respondents agreed that the Applicant is owed outstanding holiday pay and agreed they would pay the sums owing. I did indicate a sum of holiday pay during the investigation meeting. Upon recalculating the amount from the pay details provided the parties will see that this is less than I thought.

[8] The Applicant claims that she was not offered on-going work from the 9th of January that she believed she was entitled to. She denies resigning. The Respondents say that on legal advice they have done nothing wrong and they needed to get clarity about the Job Plus subsidy and they say the Applicant resigned.

Holiday pay claim

[9] I hold that the Applicant would have otherwise worked on 1 and 2 January 2006.

[10] Ms Richardson was properly paid her statutory holiday pay loading for working on the statutory holidays although she was paid for a total of 10 hours worked on 3 and 4 January 2006 at time and one half. She signed receiving her pay, including \$50 extra holiday pay loading.

[11] The Applicant is entitled to two days in lieu for work on statutory holidays transferred to 3 and 4 January and she should be paid for these, since she is no longer working for the Respondents. The sum due to her is \$115 gross wages calculated using her average hours worked during her employment.

[12] In addition the Applicant is entitled to 6% of her average earnings for her annual leave entitlement since her employment was less than 12 months. She is due \$40.80 gross.

Termination of the employment relationship

[13] The Applicant's employment effectively ended on 7 January 2006 when there was no further work offered to her. James Ng required the Applicant to go to Work and Income about the subsidy and Ms Richardson says that on 9 January the Respondents told her that she was required to get

Work and Income to sort out the payment of the subsidy before they could pay her for working fewer hours. There is a dispute about whether or not the Applicant verbally resigned on 10 January 2006. She denies resigning but says she went into work with her mother on 9 January to enquire about work. She says she also went into work on 14 January with her grandfather to raise a personal grievance for breaches to her terms and conditions of employment and not being given work she says she was entitled to.

[14] The Applicant received a Trespass Notice on 18 January 2006 by courier. The Respondents say the Trespass Notice was obtained to avoid conflict with the Applicant and her mother. The Respondents hoped the Applicant would continue to communicate about continuing her employment later (Mr James Hg's evidence). This action confirmed the Applicant's employment had ceased. In other words the Applicant could have reasonably concluded her employment had ended when she received the Trespass Notice.

[15] The parties signed off an employment agreement that provided for her to work on an as required basis with no fixed hours in what the employer called a "casual" and fixed term agreement. However the parties verbally agreed the Applicant would work on a 30 hour roster. James Ng says that he was prepared to employ the Applicant on a 30 hour roster with a Job Plus subsidy and understood that he had to pay her under the terms of the employment agreement.

[16] The Applicant says she expected to work at least until 23 January 2006 and there was a review of her employment as a trainee (under the term of the agreement), and if she was satisfactory in her work, she hoped to work in the position longer. She says she could reasonably have expected to work beyond this date because the employer had a Job Plus subsidy with Work and Income to employ her for 26 weeks on a 30 hour roster at \$10 per hour. Also the Respondents' statements referred to in the evidence suggested that they would employ her longer and continue her employment. The agreement therefore could not be considered a fixed term agreement and indeed does not meet the requirements of a fixed term agreement under the Act, I hold.

[17] During her employment the Applicant had not turned up to work on several days due to sickness and supporting her family. The Respondents became concerned about the approval of the Work and Income Job Plus subsidy and requested the Applicant to find out what Work and Income would do about her working fewer hours than the agreement stipulated. I hold that this is not relevant because the Respondents were later paid the subsidy based on the hours the Applicant worked and that could be claimed. Also they had an employment agreement with the Applicant that they had to honour despite the fewer hours the Applicant worked being consistent with their view of the nature of the "casual agreement" they had with her. They accepted she was sick and had family responsibilities although she was not eligible for sick leave. In any event it was an unreasonable request for the Applicant to be asked to find out what Work and Income had decided. This disadvantaged the Applicant because she was not offered any work and the financial impact was that her wages ceased.

[18] It was unjustified for the Respondent to withhold work from the Applicant, when it was available, without proper cause, thus affecting her in her entitlement to her terms and conditions of employment. She was disadvantaged because she lost her income and job. Therefore the Applicant has a personal grievance.

Resolution of the employment relationship problem

[19] James Ng and Siaw Ling Aw trading as the Hot Plate Restaurant are to pay the Applicant \$115 gross wages for two days in lieu for working on two statutory holidays.

James Ng and Siaw Ling Aw trading as the Hot Plate Restaurant are to pay the Applicant \$40.80 gross holiday pay being 6% of her average earnings for her annual leave entitlement since she was employed less than 12 months.

[20] The Applicant is entitled to remedies for her personal grievance. This matter has come about because of dreadful communication between the parties on the work arrangements for pay, the hours of work and the Work and Income job subsidy. Woeful decisions were taken by the parties to try and resolve the problem. The proper and appropriate procedures were not followed and the applicant who was represented should have accessed mediation services from the Department of Labour much earlier. Earlier and more appropriate interventions would have assisted both these parties and involving fewer costs.

[21] I have decided to restrict the Applicant's lost wages to the expiry date of her employment agreement on 23 January 2006. She did not adequately explain what she did to mitigate her losses with alternative work, except in very general terms and did not produce enough detail. She did not obtain any work and started full time study by correspondence on 1 February 2006. She has to take some of the responsibility for this matter not being pursued more quickly than it was because there was an ongoing relationship and any reasons for it ending were unclear, including sorting out the parties' rights and obligations. Therefore I award \$600 being the equivalent of two weeks wages. James Ng and Siaw Ling Aw trading as the Hot Plate Restaurant are therefore to pay the Applicant \$600 lost wages.

[22] Her claim for compensation filed in the Authority was manifestly unrealistic and created undue expectations and caused unnecessary distraction for the respondent. If the proper procedures and better practice were followed both parties' needs could have been better met earlier. The Applicant has to take some responsibility for how the situation developed in that she was being represented and should have got advice on using mediation services to help. The delay in arranging mediation services is quite unacceptable when such services are able to be provided speedily, quickly and cheaply. I note that the Respondents were responsible for producing the employment agreement and modified the holiday provisions, and excluded the plain language explanation of the services available for the resolution of employment relationship problems. In this respect no blame can be placed on the Applicant.

[23] The Applicant was unable to explain the impact of her employer's actions on her in regard to the individual claims put together by her then legal representative in the statement of problem. Her evidence lacked sufficient detail and specificity. There was the issue of the Trespass Notice, and unless there was some other reason for it, such an action is wholly inappropriate in trying to resolve conflict in an employment relationship. Also the Applicant was requested to sign a resignation letter, which she refused to do. The Respondent says it wanted to assist the Applicant with her benefit. The Respondents also say they wanted the Applicant to communicate about the furtherance of her employment. The Trespass Notice was an unacceptable intervention in the employment setting. Without some very delicate intervention from somewhere else the Respondents exacerbated the situation with the Trespass Notice considering the Applicant says she did not resign.

[24] The Applicant has not established her claim for \$15,000. It was telling that she told me that \$3-\$4,000 would resolve the matter (instead of \$15,000 in the statement of problem). I have also considered that she initially only wanted the equivalent of a weeks pay for stress. Given this situation it is entirely understandable how the employer has reacted although it does not justify the Respondents not paying the holiday pay properly due. In many situations I would have no hesitation to make an award in the region of the \$3-\$4,000 amount because it is modest and realistic. However, I have decided to only award her \$1,000 in equity and good conscience because

of the length of the Applicant's employment with the Respondents in their business, her very limited employment history, the paucity of evidence produced to support her claim for compensation, her position with the respondents was casual and seasonal and there was no certainty of permanent and continuing employment. I hold a modest award should be made for the impact of the employer's actions on the Applicant and the mitigating factors above.

[25] The Applicant has been successful and costs follow the event. There have been attempts to settle and mediation was used to try and save costs, albeit too late. The Applicant is on legal aid for the Authority's investigation that includes disbursements and the \$70 filing fee. She has contributed \$50 for legal aid. At the last moment she obtained the services of another advocate, who commendably, came to grips with the issues above and was able to provide succinct submissions to assist without delaying the matter any further. It is my decision that James Ng and Siaw Ling Aw trading as the Hot Plate Restaurant pay the Applicant a contribution towards her costs in the sum of \$700 and the \$70 filing fee. My reasons are: the Applicant was successful. Her costs would involve more than the \$50 contribution involving a grant of legal aid for the Authority's investigation meeting and would include the \$70 filing fee for which a receipt was issued. The investigation meeting was set down for one day but did not take up the full day. The \$700 is based on 5 hours (for preparation and attendance) at \$140 per hour. The Applicant is entitled to the full amount as a contribution to her costs.

Conclusion

James Ng and Siaw Ling Aw trading as the Hot Plate Restaurant are to pay the Applicant

- \$115 wages for two days in lieu for working on two statutory holidays
- \$40.80 gross annual leave entitlement
- \$600 lost wages
- \$1,000 compensation for humiliation, loss of dignity and injury to feelings
- \$700 contribution to costs and the \$70 filing fee

P R Stapp
Member of the Authority