IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 3/10
5272415

	BETWEEN	MICHELLE MORGAN Applicant
	AND	THRU NOW LIMITED trading as LONE STAR CAFÉ AND BAR Respondent

Member of Authority:	Phillip Cheyne
Representatives:	Jon Beck and Joanna Rolfe, Counsel for Applicant Jonny Sanders, Advocate for Respondent
Investigation Meeting:	19 November 2009 at Dunedin
Determination:	13 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Thru Now Limited operates a restaurant in Dunedin called Lone Star Café and Bar. The company employed Michelle Morgan from November 2008 until March 2009. Ms Morgan says that she was unjustifiably disadvantaged and/or dismissed.

[2] The company says that Ms Morgan commenced work under a casual employment agreement, that it offered permanent part-time work under a new employment agreement which she did not agree to and that Ms Morgan remained off work as the result of a work related injury from late March until July 2009 when it received Ms Morgan's statement of problem. The company denies that it disadvantaged or dismissed Ms Morgan.

[3] To determine this matter I must resolve conflicting evidence about the exchanges between the parties in March 2009. It is helpful first to say something about Ms Morgan's original terms of employment.

The employment agreement

[4] There is a written agreement dated 7 November 2008 but signed by Ms Morgan on 23 November 2008. The agreement says that employment is on a casual basis for intermittent and irregular work and that the employer is not obliged to offer work or the employee to accept it. The position is described as *Kitchen hand* and remuneration set at $12.96 per hour being an hourly rate of $12.00 and holiday pay of 96 cents per hour.

[5] From the outset Ms Morgan usually worked five evenings per week in accordance with a roster posted in advance with which she was expected to comply. Ms Morgan's actual days of work and hours varied in accordance with that roster. Ms Morgan usually worked as a kitchen hand but sometimes as a cook. Ms Morgan was paid weekly in arrears by direct credit.

[6] Nick Nilsen is a director of the company. He operates a Lone Star restaurant in Nelson as well as Dunedin. For much of the relevant time in this matter, Mr Nilsen was in Nelson. His evidence is that he instructed his Dunedin general manager (Dave Belle) to offer Ms Morgan an appointment as a permanent part-time employee. On or about 12 January 2009 Mr Belle gave Ms Morgan a new employment agreement to that effect.

[7] Ms Morgan's evidence, which is not contested, is that no response was required from her and she continued working as normal.

[8] Shortly after this Mr Belle went on leave and returned to work in March 2009.

Events in March

[9] On 4 March Ms Morgan developed dermatitis on her hands as a result of her work. She recorded that in the company's accident book and spoke to the chef (Todd Trewek) and assistant general manager (Kelvin Thomson).

[10] Over the following weeks Ms Morgan asked and was allowed to finish work early on a couple of occasions because of the irritation caused by her dermatitis.

Apparently gloves were not always available for her to use which exacerbated the problem.

[11] Both Mr Trewek and Mr Thomson in their evidence say this placed significant pressure on other staff and that it was a cause of concern to them at the time. However, they did not raise any such concern with Ms Morgan.

[12] For the week beginning Monday 23 March Ms Morgan says in her prepared statement of evidence that she was rostered to work on the Monday to the Thursday (23-25 March). Ms Morgan usually wrote down her roster in a notebook but she says that the notebook was thrown away. Mr Trewek says that his recollection is that Ms Morgan was rostered to work Monday, Tuesday, Wednesday and during the subsequent weekend. When questioned, Mr Trewek said that Ms Morgan's usual working week was Saturday to Wednesday and when asked about that, Ms Morgan thought that it might be accurate.

[13] Mr Nilsen's evidence is that the actual roster for the week in question was discarded, as usual, once the subsequent roster was posted, so the actual roster is no longer in existence.

[14] From all this, I conclude that Ms Morgan's roster for the week starting Monday 23 March was probably Monday, Tuesday, Wednesday, Saturday and Sunday.

[15] Ms Morgan's evidence is that she worked on Monday 23 March as usual. At some point during that shift Mr Belle gave her a letter of that date that reads:

> *Dear Michelle*
>
> *Currently you are employed on a casual contract at the Lone Star Café Dunedin which was to fill a position over the summer period when many of our full time employees take summer vacation.*
>
> *We are in a position to offer you permanent part time employment which will entail different duties in the kitchen in which you have received a contract and formal offer.*
>
> *As yet we have not received the contract back and would appreciate you letting us know your decision by 5pm Tuesday 24th March, 2009 as we are not in a position to offer further casual hours in your current role.*
>
> *Please get in touch with us if you have any queries.*

Regards,
[unsigned]
Nick Nilsen
Director
Lone Star Café

[16] There is some confusion in Ms Morgan's evidence about what happened next. Ms Morgan made some notes dated 25 March where she says she went in to work at midday on Tuesday 24 March and went in an hour later to speak to Mr Belle about concerns over the proposed contract wording. Ms Morgan returned again at about 4pm when she was given a second letter that extended the deadline for her response to 5pm Wednesday 25 March but was otherwise identical. The notes then refer to a fourth visit by Ms Morgan to her workplace later that evening. However, in her written evidence, Ms Morgan mentions two visits to the premises on Tuesday 24 March. When questioned, Ms Morgan became confused about the sequence of events that day.

[17] Surprisingly, the company did not provide any evidence from Mr Belle. I asked about his availability but I was told that he could not be contacted. Neither Mr Trewek nor Mr Thomson could tell me anything about Ms Morgan's dealings with Mr Belle on 24 March. Mr Nilsen was in Nelson at the time so could not give any first hand evidence about the exchanges between Mr Belle and Ms Morgan either. Mr Nilsen's evidence is that the two letters given to Ms Morgan were emailed by him to Mr Belle who printed them out and then gave them to Ms Morgan. I asked Mr Nilsen to retrieve copies of the emails to see if there was any comment to shed light on the sequence of events, but I am told that the emails have been deleted and attempts to recover them unsuccessful.

[18] There is evidence from Bart Eggers, a friend of Ms Morgan. He says that he went with Ms Morgan to the workplace after she had received the second letter on Tuesday, 24 March and they caught Mr Belle during the 4pm rush. He heard Ms Morgan tell Mr Belle about her concerns over the wording of the contract. Mr Belle went away upstairs apparently to phone Mr Nilsen. When Mr Belle returned, he told Ms Morgan that he had spoken to Mr Nilsen who would contact her at home or on her cellphone. Mr Nilsen's evidence is that he had two phone discussions with Mr Belle on Tuesday, 24 March and told Mr Belle to tell Ms Morgan that she should ring Mr Nilsen directly if there were any further concerns. From

Mr Nilsen's evidence, I am left to infer that Mr Belle faithfully passed on this instruction to Ms Morgan.

[19] Mr Eggers impressed as a reliable witness generally and I accept his evidence about what happened on Tuesday 24 March. In particular, Ms Morgan must have attended the workplace some time during the afternoon on Tuesday 24 March when she was given the second letter with the extended deadline. Ms Morgan and Mr Eggers then returned to the restaurant at about 4pm where they spoke to Mr Belle. Mr Belle went away to ring Mr Nilsen. When he came back he told Ms Morgan that Mr Nilsen would ring her, so she left to await the call. Later in the evening, when she had not received this call, Ms Morgan returned to the restaurant again accompanied by Mr Eggers. However, this time Mr Eggers did not overhear the exchanges between Ms Morgan and Mr Belle. The only evidence about this is Ms Morgan's note which states that Mr Belle told her he could not help her further and to contact Mr Nilsen herself. While Ms Morgan's evidence is that such a conversation took place on 26 March I find that it probably was said to her late on 24 March.

[20] In her written evidence, Ms Morgan says that she tried to contact Mr Nilsen directly but was only able to leave messages which went unanswered. When questioned, Ms Morgan said that she left only one message for Mr Nilsen to ring the Lone Star in Dunedin, but she did not say who was calling or what it was about. Ms Morgan was asked to provide phone records but has apparently not been able to access them. Mr Nilsen's evidence is that he did not receive any message to contact Ms Morgan from 23 March onwards. In light of Ms Morgan's evidence about the message she left, I accept Mr Nilsen's evidence on this point. It must be that Mr Belle mistakenly told Ms Morgan on the Tuesday afternoon that Mr Nilsen would ring her.

[21] Ms Morgan saw her doctor about her dermatitis on 25 March 2009, having made that appointment the day before. On 1 April 2009 ACC sent a fax to Lone Star Dunedin advising about Ms Morgan's ACC claim. That was forwarded to Mrs Nilsen in Nelson on 2 April and, not having received a response, ACC made a further request for information on 22 April. It must have taken Mrs Nilsen some time after that to respond because Ms Morgan was not advised that her ACC claim had been accepted until ACC wrote to her on 3 June 2009. Medical certificates dated 26 June, 7 July, 12 August and 27 August 2009 record that Ms Morgan was certified unfit for work

from 9 April 2009 until 30 August 2009. Ms Morgan provided copies of these certificates to Lone Star Dunedin.

Ms Morgan's removal from the roster

[22] Despite the ultimatum in the letters given to Ms Morgan on 23 and 24 March, the company says that Ms Morgan was never dismissed or disadvantaged.

[23] Mr Trewek says that Ms Morgan finished work early on Sunday 22 March because of her dermatitis. He says that she told him she was going to see her doctor. He says that he attempted to contact her on Monday 23 March to see if she was fit for work that evening, as per the roster. When he was unable to contact her he removed her from the roster for 23, 24 and 25 March and organised replacement staff. Mr Trewek's evidence is that he left Ms Morgan on the roster for the weekend anticipating that she might be well enough by then. His evidence is that when Ms Morgan arrived for work on 23 March he allowed her to work her shift even though he had organised a replacement staff member.

[24] Mr Trewek did not claim to have spoken to Ms Morgan about these arrangements. Ms Morgan's evidence is that Mr Trewek simply told her that she was not working for the rest of the week shortly after she had seen her name removed from the roster on 24 March.

[25] The company says that Mr Trewek's decision to remove Ms Morgan from the roster simply related to whether or not she was well enough to work and had nothing to do with the ultimatum in either letter.

Unjustified disadvantage?

[26] Part of Ms Morgan's problem is her claim that her employment was affected to her disadvantage by an unjustified action by her employer.

[27] For present purposes, I will accept as accurate Mr Trewek's evidence that he removed Ms Morgan from the roster on 23 March due to concerns that she might not be available for three days because of her dermatitis. Justification for that action must be determined objectively, by considering whether the action and how the employer acted were what a fair and reasonable employer would have done in the circumstances at the time.

[28] Again I will also make an assumption that Ms Morgan was truly a casual employee in accordance with the terms of employment expressed in the November 2008 agreement. On these assumptions, the situation would be that Ms Morgan had been offered and accepted work on the Monday, Tuesday and Wednesday. Ms Morgan must be regarded as an employee as defined in the Employment Relations Act 2000 throughout this period: see *Jinkinson v Oceana Gold (NZ) Ltd* (2009) 9 NZELC 93,341. There is no evidence that Ms Morgan was not fit to perform work on these days and indeed it is common ground that Ms Morgan did actually work on the Monday. The company breached the agreement to employ Ms Morgan when it removed her from the roster for the Tuesday and the Wednesday. That is sufficient for Ms Morgan to establish an unjustified disadvantage grievance.

[29] The company did not act as a fair and reasonable employer either. Mr Trewek should have discussed with Ms Morgan his concerns about her fitness for work before making the decision to remove her from the roster. However, the only evidence of any communication is Ms Morgan's evidence, which I accept, that she was told by Mr Trewek that she would not be working shortly after she had seen her name removed from the roster.

[30] On these assumptions, Ms Morgan could establish an unjustifiable disadvantage grievance and would be entitled to an assessment of lost remuneration and compensation for distress.

Dismissal?

[31] Neither assumption is supportable on the evidence before the Authority. I have already referred to Ms Morgan's pattern of work as not reflecting the term in the employment agreement dated November 2008 about casual employment. There is also Mr Trewek's evidence about Ms Morgan's regular working week being Saturday to Wednesday. From at least January 2009, the real nature of the employment relationship was that of permanent part time employment even though Ms Morgan had done nothing more about the new employment contract that had been given to her.

[32] It is improbable that Mr Belle would have twice given a letter to Ms Morgan telling her that she would not be offered further casual work without telling either Mr Trewek as chef or Mr Thomson as assistant manager about that. If Mr Trewek

had not been told, the ultimatum would have been meaningless as he did the rostering. Most likely, Mr Trewek was told sometime on or about Monday, 23 March and removed her name from the roster, giving effect to the ultimatum, sometime after Ms Morgan had left the premises after work on the Monday. That fits with Ms Morgan's evidence that she saw her name removed from the roster when she went into the Lone Star on Tuesday afternoon and I accept that evidence. Mr Trewek did not need to tell Ms Morgan why he had removed her from the roster because he knew that Mr Belle had given her the letter telling her that there was no further casual work. Having replaced Ms Morgan from the Tuesday, the company had no need to adjust the roster despite the later date mentioned in the second letter. I do not accept Mr Trewek's evidence that Ms Morgan was rostered to work at the weekend. Rostering her at the weekend would have been inconsistent with the ultimatum in the letters. Further, it is unlikely that Mr Trewek would not have attempted to contact Ms Morgan if she was genuinely expected at work at the weekend but did not show.

[33] I do not accept Mr Nilsen's evidence that he understood Ms Morgan to be still employed by the company although on extended sick leave. Mr Nilsen knew very well why Ms Morgan was not at work because both letters were in his name and he sent the letters to Mr Belle to give to Ms Morgan. Ms Morgan did not go to the doctor until 25 March and there was no notice to the company about the outcome of that consultation until 1 April. That advice from ACC did not explain Ms Morgan's absence. Her absence was not explained by ACC until 26 June when she first received a certificate saying that she had been unfit for work from 9 April.

[34] Ms Morgan was apparently not removed from the company's computer payroll system. There is a report printed on 10 July 2009 that records Ms Morgan receiving zero pay for each pay period after 31 March 2009. However, the company had no reason from its perspective to remove Ms Morgan from its payroll record. Under the November 2008 employment agreement Ms Morgan's holiday pay was to be paid weekly and the payroll report shows that is what happened. From the company's perspective it had met all its payroll obligations and it did not need to pay any holiday pay or calculate final wages. As an aside I understand that Thru Now may have paid Ms Morgan holiday pay since the investigation meeting. I have not been asked to consider whether the circumstances of Ms Morgan's employment fall within the Holidays Act 2003 tests for paying holiday pay on a *pay as you go* basis. Whether the company complied with the law about holiday pay is immaterial for

present purposes. The only point is that the company not taking any action to remove Ms Morgan from it payroll system does not necessarily answer the point about whether her employment was terminated.

[35] An argument for the company is that Ms Morgan must have considered herself still employed because she copied the medical certificates dated 26 June, 7 July, 12 August and 27 August 2009 to the company. Ms Morgan's evidence is that she did this because it was an ACC requirement. I note that the letter dated 3 June 2009 from ACC says *As your injury happened at work, please remember to let your employer know*. There is a similar request on the medical certificates themselves. I accept Ms Morgan's evidence by way of explaining why she copied the certificates to the company and I do not accept the company's assertion that her actions show she did not consider her employment at an end. In addition I note that Ms Morgan's solicitor wrote to the company on 25 May 2009 conveying her instructions that the employment had been effectively terminated.

[36] Given the finding that the true nature of Ms Morgan's employment was ongoing rather than casual, the company's decision to remove her from the roster and not offer her any further work, must be seen as a sending away or a dismissal. There was no attempt by the company to justify a dismissal. Accordingly, I find that Ms Morgan was unjustifiably dismissed and she has a personal grievance against the company.

Post dismissal matters

[37] There are two matters that should be mentioned.

[38] First, Mr Eggers was served with a trespass notice on 16 April 2009 in respect of the company's business premises in Dunedin. He says he was told that it was on Mr Nilsen's instructions because he had supported Ms Morgan. Mr Nilsen says that the trespass notice was issued to Mr Eggers because he was swearing and being abusive while at the premises. It is not necessary to resolve this matter. However, I considered and discarded the possibility that Mr Eggers might have been motivated to give false evidence because of this incident.

[39] Ms Morgan instructed a solicitor who wrote to the company on 25 May 2009. The letter was addressed to the company at its street address which is also its registered office and address for service. Most business mail is apparently sent to the

company's PO Box number. Mr Nilsen says that he never saw the 25 May letter until after he received the statement of problem in July 2009. He further says that the company therefore had no reason before July to question its view that Ms Morgan was on unpaid sick leave. It is not necessary to make a finding about Mr Nilsen's evidence about the 25 May letter. I have already rejected the contention just mentioned. The company had no reason to think that Ms Morgan was on sick leave until it received the ACC certificate dated 26 June 2009. The reason Ms Morgan was not at work was because of the ultimatum in the letters which were issued on Mr Nilsen's instructions.

Remedies

[40] There is a submission for the respondent that Ms Morgan contributed to the circumstances giving rise to any grievance because she did not raise the rostering issue with Mr Trewek and did not communicate with the company during her absence on ACC. I do not accept these submissions. Ms Morgan received letters telling her she would no longer be rostered, she saw her name removed from the roster and she was told that by Mr Trewek. Ms Morgan endeavoured through Mr Belle to raise concerns about the proposed contract but the company did not properly engage with her about that issue. She was issued an ultimatum and told to wait until she was contacted. It might be said that Ms Morgan could have persisted or been more specific in her subsequent attempt to contact Mr Nilsen but it was the company that first failed to communicate with her, she having been told to await a phone call.

[41] In any event, none of that bears on the real cause of the grievance. That was the decision to impose an ultimatum and remove her from the roster in breach of the company's contractual obligations to Ms Morgan and with complete disregard to fairness to her. Ms Morgan did not contribute to that grievance at all.

[42] There is a claim for reimbursement of lost wages for the 13 weeks following the end of the employment. However, the evidence is that Ms Morgan was unfit for work from 9 April for more than 13 weeks. The only loss suffered by her as a result of her grievance occurred between Tuesday 24 March and Wednesday 8 April (inclusive), a period of 2.4 weeks. The company must reimburse Ms Morgan for her lost remuneration over that period at the rate of her weekly average earnings for the prior four weeks. Leave is reserved if there is any difficulty with this calculation.

[43] There is a claim for $4,000 compensation for distress. That is a modest enough claim however there is almost no evidence about the effects on Ms Morgan of the grievance. In her written evidence Ms Morgan says she was greatly frustrated by finding her name removed from the roster and she considered it unfair that she was not offered further work. There is an obvious frustration in her evidence about the company's poor communication with her. It is also clear that Ms Morgan was affronted by the company's later claim that her dermatitis was the reason for her removal from the roster. To a limited extent this evidence establishes that Ms Morgan suffered some distress which can be remedied by an award of $1,500.00.

Summary

[44] Thru Now Limited is to pay Ms Morgan compensation for lost remuneration amounting to 2.4 weeks wages pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000. Leave is reserved in case of any difficulty with this calculation.

[45] Thru Now Limited is to pay Ms Morgan compensation of $1,500.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[46] Costs are reserved. Any claim must be made within 28 days by lodging and serving a memorandum and the other party may lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority