

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 221
5415486

BETWEEN ROSALYN MARY BRIEN
Applicant

A N D TONY RUSBATCH AND
JANET RUSBATCH
t/a THE TOP SHOP
Respondent

Member of Authority: M B Loftus

Representatives: Warwick Heal, Counsel for Applicant
Graeme Downing, Counsel for Respondent

Investigation meeting: 17 October 2013 at Nelson

Submissions Received: At the investigation

Date of Determination: 23 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Rosalyn Brien, claims she was unjustifiably dismissed by Mrs Rusbatch on 27 January 2013.

[2] Mrs Rusbatch accepts she dismissed Ms Brien but contends her actions were justified.

Background

[3] The Top Shop is a convenience/fast food outlet in Takaka which specialises in producing a range of homemade pies. Ms Brien was employed as a shop assistant and kitchen hand commencing on 1 October 2012.

[4] Aside from one performance concern noted in November little untoward occurred until early December 2012. Mrs and Mr Rusbatch then noticed what they considered a change in Ms Brien's attitude and from that point there were an increasing number of concerns. Between then and 8 January 2013 Mrs Rusbatch noted some of these in her diary, along with a record of admonitions given to Ms Brien about the latter's performance.

[5] On 8 January Mrs Rusbatch challenged Ms Brien about her mistakes. She says Ms Brien conceded she was making mistakes but could give no explanation. Mrs Rusbatch says she went on to advise she could not afford to have it continue and concluded the meeting by giving a formal warning.

[6] Ms Brien accepts the discussion occurred and she acknowledged making mistakes. However, she denies receiving a warning on the 8th though subsequent questioning indicated confusion, with Ms Brien answering both *no* and *yes*.

[7] Dissatisfied there was no noticeable improvement Mrs Rusbatch again challenged Ms Brien about her performance on 12 January. She says Ms Brien again acknowledged there was a problem but offered an inadequate and irrelevant excuse. Mrs Rusbatch's response was to advise the implementation of a performance improvement programme focussing on the process of heating and displaying the pies.

[8] Mrs Rusbatch says she intended the programme would last four weeks with Ms Brien taking increased responsibility, under direct supervision, over that period. During the first week she would be responsible for pie stocking in the morning. Afternoon replenishment would be added in the second week. The busy lunch period would be added in the third week giving her complete responsibility and the fourth would hopefully provide confirmation all was well. Mrs Rusbatch says this was explained to Ms Brien.

[9] Ms Brien's recollection of the discussion which led to the introduction of the performance improvement programme was vague. She said it was all about the pies and the fact neither Mrs Rusbatch nor another employee, Hilary, thought she was coping. She claims Mrs Rusbatch said it would help but she had no idea of how long the process would last.

[10] On 18 January Ms Brien made three large errors while operating the till. Mrs Rusbatch says while she was not present she was told another employee had

picked up the worst of them and challenged Ms Brien who could not say how it had occurred. Mrs Rusbatch says she thought about the information she had been given and decided to give Ms Brien a warning which she did the following day.

[11] In respect to that Ms Brien says:

I do recall that on the 19th of January 2013 Janet ... spoke to me about my performance on the till. I had made a mistake and I apologised to her and told her that I would try harder not to let it happen again. There was no suggestion from Janet that if I did not improve I would be sacked.

[12] That final sentence is one with which Mrs Rusbatch agrees. She accepts none of her warnings included advice as to possible consequences should there be no improvement.

[13] From there the situation deteriorated rapidly, with both staff and customers complaining as a result of *Ros's stuff ups*.

[14] On 26 January Mrs Rusbatch again confronted Ms Brien who, it is alleged, *spat the dummy* and accused both employer and colleagues of picking on her.

[15] Mrs Rusbatch goes on to say:

After considering Ros's response ... and her failure to improve after being given so much help and time, Tony and I decided to terminate Ros's employment. On 27 January we advised Ros that we were terminating her employment, and gave her a letter of termination.

[16] In responding to the accusation she *spat the dummy* Ms Brien says she was upset at her employer's attitude. She felt both employer and other staff were picking on her and said so. She says the performance improvement programme evidenced the employer's vindictiveness and that she was considered a dummy.

[17] With respect to the dismissal Ms Brien states that approximately half an hour before her normal finishing time Mrs Rusbatch approached her and told her she should go home because her shift was over. Ms Brien says she raised the fact she still had approximately half an hour to go, to which Mrs Rusbatch responded *Ros, I don't know how to tell you this, but I don't want you back in my shop after today.*

[18] Ms Brien says she was then handed what turned out to be a letter of dismissal. She responded by saying Mrs Rusbatch couldn't do it and was supposed to give two weeks notice which she (Ms Brien) had to work out. Mrs Rusbatch's response was *no, you're going now*.

[19] Mrs Rusbatch accepts Ms Brien's evidence about the final conversation is essentially accurate.

Determination

[20] As already said The Top Shop accepts it dismissed Ms Brien. In doing so it also accepts it is required to justify the dismissal. Its position is there was frequent counselling and cautioning enhanced with assistance and supervision. Ms Brien failed to respond which led to both customer complaints and a staff mutiny with colleagues saying either she goes or we go. They reacted and dismissed.

[21] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[22] In applying the test the Authority must consider whether:

- (a) Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- (b) The employer raised its concerns with the employee prior to taking action;
- (c) The employer gave a reasonable opportunity for response;
- (d) The employer genuinely considered the explanation before taking action; and
- (e) Any other appropriate factors.

[23] In essence points 22 (b) to (d) summarise that which has long been accepted. An employer is required to put issues in its mind, allow an explanation and consider them.

[24] It is clear there was no compliance with these requirements with respect to the decision to dismiss. Mrs Rusbatch accepts the decision was a reaction to the events of 26 January made in consultation with her husband. There was no discussion with Ms Brien and the first she heard of the possibility of dismissal was when she was told the decision had been made.

[25] Putting aside the issue of resources (refer 22(a) above), the failure to comply with statutory requirements must render this dismissal unjustified. When considering the issue of resources I note the Top Shop is a small trader, but conclude that does not excuse the extent of these deficiencies. There was absolutely no compliance with the requirements of either the Act or the principles of natural justice. The Court has noted, in similar situations of complete failure, that it is neither minor nor excusable (see *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152 at paragraphs 94 and 95).

[26] There is then the issue of the alleged warnings. Notwithstanding the dispute over their exact form I conclude, given Ms Brien's answers when giving oral evidence, she was clearly told about her employer's displeasure. What she was not, however, told was that her continued employment was in jeopardy and this is another significant failure in respect to the employers duty to act fairly and reasonably.

[27] The unfairness is further compounded by the fact (accepting Mrs Rusbatch's evidence) Ms Brien had only recently been told she was on a four week improvement programme. She was entitled to expect the programme would run its course.

[28] The conclusion the dismissal was unjustified raises the issue of remedies. Ms Brien seeks wages lost as a result of the dismissal and an unspecified amount as compensation for hurt and humiliation.

[29] Ms Brien has quantified her wage loss at \$10,271. This is the difference between what she would have received had she remained at the Top Shop till the date of this investigation and what she earned in various roles she attained in Reefton.

[30] There are, however, a couple of problems with the claim. First s.128(2) of the Act provides the Authority order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. That may be increased but there is a requirement the successful applicant attempt to mitigate their loss.

[31] I have no evidence of the extent of Ms Brien's mitigation efforts though I know she got at least one part time job with alacrity. She started on 15 February 2013 which was only four days after she ceased being paid by the Top Shop. I must also be cognizant of an answer she gave stating that at one point during the period for which she seeks wages she chose not to take an available opportunity. That tends me to conclude it is inadvisable to consider an award beyond the statutory three months.

[32] There is then the fact an award should recognise the actual loss attributable to the dismissal. I do not know what it is. While I know Ms Brien's earnings in her new job were generally less than she received from the Top Shop, those records do not start till 1 April. I have no knowledge of what was earned in the intervening period which creates uncertainty about the veracity about any award I may make.

[33] There is then the fact Ms Brien is an undischarged bankrupt. An award of wages constitutes property under the Insolvency Act 2006 which in turn means the award (or a portion there-of) vests to the Official Assignee who must first approve its pursuit and enter into an arrangement determining the extent of the vesting (refer the discussion in *Young v Bay of Plenty District Health Board* [2013] NZEmpC 131). I have no evidence the Official Assignee gave the required approval even though the issue was raised when preparing for this investigation.

[34] In the circumstances, and given the only wage award I can safely make is minimal, there shall be none.

[35] Turning to the claim for compensation. The evidence tendered in support was relatively brief and emphasises three points. They were the fact she was *forced* to leave Takaka to find employment; that *My dismissal from the Top Shop was a major blow to me. It destroyed my self confidence* and an offensive and derogatory letter written to Ms Brien's new employer in Reefton.

[36] While it is clear some angst must result from an unheralded dismissal, the evidence does not convince me a large sum is justified. The evidence is Ms Brien was going to Reefton in any event though the dismissal did hasten her departure from Takaka. There is then the point her loss of confidence and any distress she felt is not wholly attributable to her dismissal. There were other events in Ms Brien's life which had a similarly negative effect and for which she was already receiving counselling when dismissed.

[37] Finally there is the letter. While Ms Brien attributes its authorship to Mrs Rusbatch there is no evidence to support that accusation. Mrs Rusbatch denies authorship and I do not accept Ms Brien's assertion only Mrs Rusbatch could have known of the issues canvassed therein. Any staff member of the Top Shop could have had the required knowledge and Takaka is a small town - people talk. The letter will therefore be disregarded, especially as it had no material affect with the recipient seeing it for what it was - vindictive.

[38] Having considered the evidence I conclude it can only support a modest award. I consider \$3,000 appropriate.

[39] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Brien contributed to her dismissal in a significant way. There can, given the evidence, be no doubt her performance was less than her employer desired. There can also be no doubt she was aware of the dissatisfaction but the employer's failures, and especially the failure to advise possible consequences, leaves me unable to conclude she was aware of the true level of dissatisfaction and therefore deprived of an opportunity to react appropriately. She cannot, I conclude, be held to have contributed to an extent warranting a reduction in remedies.

Conclusion and Orders

[40] For the above reasons I find Ms Brien has a personal grievance in that she was unjustifiably dismissed.

[41] As a result the respondents, Mr Tony and Mrs Janet Rusbatch, are ordered to pay the applicant, Ms Rosalyn Brien, the sum of \$3,000 (three thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[42] Costs are reserved.