

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 35
5422530

BETWEEN RACHEL MARIE STEPHENS
 Applicant

A N D MEJA LIMITED (previously
 known as THE FISH N CHIP
 SHOP (PALMERSTON) LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Benjamin Nevell, Counsel for Applicant
 Natasha Bates, Advocate for Respondent

Investigation Meeting: 29 January 2014 at Dunedin

Submissions Received: On the day

Date of Determination: 26 February 2014

DETERMINATION OF THE AUTHORITY

- A The applicant was unjustifiably disadvantaged in her employment and unjustifiably dismissed.**
- B The respondent has been ordered to pay the applicant:**
- (a) **Lost wages in the sum of \$4,080 gross;**
 - (b) **Compensation in the sum of \$6,400 without deduction;**
 - (c) **The sum of \$217.90 gross being loss of the benefit of the employer's KiwiSaver contribution.**

- C Leave is reserved for Mr Nevell to return to the Authority if required to calculate any loss of member tax credits.**
- D There is no award of interest in the circumstances on the above amounts.**
- E Costs are reserved and a timetable set for an exchange of submissions.**

Employment relationship problem

[1] Rachel Stephens was employed for a second period of employment by The Fish N Chip Shop (Palmerston) Limited, hereafter referred to as the company or the shop, as a shop assistant/sole charge (when required), from 1 June 2012 to 11 February 2013 when she was summarily dismissed. Effective from 9 January 2014 the company changed its name to MEJA Limited.

[2] Ms Stephens says that she has two personal grievances against the company. The first is that she was unjustifiably disadvantaged in her employment by the issuing of two written warnings, and the second is that her dismissal on 11 February 2013 was unjustified.

[3] The Company does not accept that Ms Stephens was unjustifiably dismissed or disadvantaged in her employment and further does not accept that Ms Stephens was given two warnings and says that she was only given one written warning.

[4] Ms Stephens seeks the following remedies:

- compensation for loss of wages;
- compensation under s.123(1)(c)(i) of the Employment Relations Act 2000;
- compensation for non-payment of Kiwi Saver employer contributions and for loss of member tax credits
- interest;
- costs.

The issues

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

- Was the letter of 1 February 2013 a written warning?
- If the letter of 1 February 2013 was a written warning then applying the test of justification in s.103A of the Employment Relations Act 2000 was it, and an earlier warning on 7 January 2013, what a fair and reasonable employer could have done in all the circumstances at the time they were issued?
- Was Ms Stephens' dismissal justifiable?
- If it is found that Ms Stephens' dismissal was not justifiable, what remedies is she entitled to, are there issues of contribution or mitigation and is there an entitlement to employer KiwiSaver contributions?

Background against which these issues are to be assessed

[6] The company operated a fish and chip shop in Palmerston which has subsequently been sold. The two directors of the company are Natasha Bates and Christopher Arbuckle. Ms Stephens had worked previously at the shop from in or about November 2011 until March 2012. She had left the job at that time because she needed hours that enabled her to look after her two children and had worked at the local garage.

[7] Ms Bates then talked to Ms Stephens about returning to work for the company at a higher hourly rate of \$15.00 per hour with working hours that enabled Ms Stephens to be home for her children being 9.00am – 3.00pm three days a week and 4.00pm – 9.00pm one night a week.

[8] Ms Stephens was party to an individual employment agreement (the agreement) with the company that she signed on 13 June 2012. The agreement provided that Ms Stephens was employed on a permanent part-time basis and that her hourly rate was \$15 per hour. Clause 4 of the employment agreement is headed *Hours of Work*. Clause 4 sets out the trading hours for the shop and provides that the employee is required to be available to work weekends, statutory holidays and outside

trading hours. It further provided that the total hours to be worked by the employee will be approximately 20 per week with the days and hours to be worked to be agreed with the employer.

[9] The agreement also contained examples of behaviour that could lead to a warning that employment was in jeopardy and examples of behaviour that could lead to dismissal.

[10] Ms Stephens said that issues that led to her dismissal started when she requested a week's holiday for the period 8-12 January 2013. The evidence supports the request was made before 1 January 2013 to Ms Bates. Ms Bates considered that leave would be inconvenient over that period as it is the busy holiday period. Notwithstanding that leave was approved.

[11] There was at or about the same time a disagreement about Ms Stephens' availability to work a shift on 18 January 2013. Ms Stephens says that she was told that if she did not work that evening then she would not have leave and she was duly rostered onto work.

[12] Ms Stephens' said that over the week from 1 to 7 January 2013 Ms Bates came into the shop each day and monitored the cameras. Ms Bates in her evidence said that she came in because that period is the busiest time in the year. I accept that although the evidence did support that Ms Bates considered some of the camera footage over that period.

First Warning

[13] On 7 January 2013 Ms Stephens was handed a letter in an envelope at or about 3pm which was her finishing time. Ms Bates wanted Ms Stephens to open the envelope and read the letter but Ms Stephens was keen to get away and be with her children. The letter was expressed to be a written warning and was from Ms Bates and Mr Arbuckle. It referred to several matters. There was reference to lateness, use of cellphone, issues with Ms Stephens' attitude and using swear words in the kitchen area, issues around cleaning the floor, smoking at work and the need to pay for food and drink at the time it is taken or ordered.

After the issue of the 7 January 2013 warning

[14] Ms Stephens was then on leave from 8 January 2013.

[15] On Sunday 13 January 2013 Ms Bates attempted to discuss the warning letter with Ms Stephens. Ms Stephens did not want to discuss it at that time because she thought an argument may arise.

[16] On Monday 14 January 2013 Ms Stephens intended to take the day off work because her teenage niece who had been living with her had run off and she had to deal with that situation. Ms Stephens sent a text message to Ms Bates explaining what had occurred but she received no reply by the time her shift commenced at 9.00am and so she attended at the workplace. Ms Stephens described Ms Bates as helpful and there was a discussion about altering later shifts so that Ms Stephens could still care for her children as her niece would no longer be available to do so. Ms Bates undertook Ms Stephens shift on 14 January 2013. Ms Stephens did I find say something to Ms Bates to the effect that her job may be in jeopardy. She explained that this was because of difficulties she had had on occasion with combining the job and childcare issues.

18 January 2013

[17] For the two shifts before 18 January 2013 Ms Stephens had some dental issues and could not attend work so Ms Bates said that she decided to roster another person on the shift for that day as well. Ms Bates said that she anticipated Ms Stephens would not be able to work that shift. Ms Stephens did not get a text message from Ms Bates about the change and attended at the shop. She then saw that she had been rostered for the following week hours of 9.00-3.00pm on Monday, 9.00-5.00 Thursday and 4.00pm until closing on Friday. She raised her concerns with Ms Bates that she would not be able to work the hours because she had to care for her children. Ms Bates said that the younger child could stay out of the back of the shop from 3.00pm to 5.00pm on the Thursday shift. Ms Stephens asked Ms Bates to put in writing confirmation that her child was allowed in the shop for that time.

Second letter dated 1 February 2013 -was it was a warning?

[18] The evidence supports it was not until 5 or 6 February 2013 that Ms Stephens received a second letter dated 1 February 2013 from Ms Bates and Mr Arbuckle. She recalled it was in an envelope on the desk next to the roster.

[19] The letter was expressed to be a follow up letter to the conversation on 18 January 2013. It confirmed that Ms Bates had advised Ms Stephens that her shifts had changed and would be subject to change with at least one week's notice (*to the best of our abilities*).

[20] It then referred to an offer to change her start times to eliminate lateness that had been refused and confirmed the start time as 9.00am, no later, on morning shifts. There was confirmation that the younger child could stay in the back of the shop but that this was not to be an everyday occurrence and if it became a problem or an issue with performance then the option would be terminated. There was again reference to Ms Stephens' attitude and requirement to carry out her duties. There was reference to phone calls being for emergencies only and not personal calls and the need to turn the cell phone off except during breaks. Smoking was referred to and that food and drink is to be paid for. There is then a reference to what I have taken to be the 14 January conversation and Ms Stephens' view that her job may be in jeopardy because of her other commitments – *As you stated to me you were fully prepared to have lost your job, and we on the other hand are trying to help you out.*

[21] The letter stated towards the end – *Rachel you must be aware this is your last chance. We will no longer be taken advantage of, we will however monitor what is happening and if we feel that nothing has or will change then your employment will be terminated.*

[22] Ms Stephens took the letter to be as further warning. Ms Bates said that it was not intended to be a warning. Objectively assessed, I find that the letter dated 1 February 2013 had all the usual characteristics of a warning. It referred to issues that the employer was unhappy about and included a clear and unequivocal warning that if nothing changed then there was the possibility of dismissal. Ms Stephens I find was able to conclude in the absence of any advice to the contrary that the letter of 1 February 2013 was a warning to her that her employment was at risk if nothing changed in her employment.

8 February 2013

[23] On 8 February 2013 Ms Bates advised Ms Stephens and another employee, Rebecca, that there had been a shortfall in the till of \$50.80. Ms Stephens formed a view that Ms Bates held her responsible for the missing money although did not say anything directly to Ms Bates at that time. Ms Bates accepted that she told Ms Stephens *don't take it personally Rachel*. The Authority also heard from two previous employees of the company who had worked with Ms Stephens, Sharon Linklater and Gay Mills who gave evidence about concerns they had regarding accusations made by Ms Bates at various times about the issue of missing money.

11 February 2013

[24] At or about 9am on 11 February 2013 Ms Stephens arrived at work and saw that both Mr Arbuckle and Ms Bates were present. She requested a meeting with them to discuss matters raised in the February letter and the money going missing. Ms Stephens wanted Mr Arbuckle to be present at any meeting. Ms Bates said that Ms Stephens' tone was aggressive and she advised Ms Stephens that she was not prepared to have a meeting. Ms Stephens said the word *ridiculous* was used by Ms Bates about a meeting and I accept that evidence. As Ms Bates and Mr Arbuckle left the store Ms Stephens made the comment to the effect; *well you better hope your till is not down today then*. Ms Bates said in her evidence that Mr Arbuckle took offence at the comment

[25] Ms Bates and Mr Arbuckle then left the shop.

[26] Ms Stephens telephoned another employee, Sharon Linklater, and told her that she thought she was about to be dismissed. Ms Linklater advised Ms Stephens to stay calm and told her that she would type a formal request for a meeting on her behalf.

[27] At about 1pm Ms Bates returned to the shop. She gave Ms Stephens a letter addressed to all staff members. The letter asked staff to be more careful with money counting and transactions as a result of the shortfall of \$50.80 in the till during 6 and 7 February 2013. She also advised Ms Stephens that Mr Arbuckle had not been impressed with Ms Stephens' attitude that morning. Ms Stephens responded that she was trying to request a meeting to discuss outstanding issues. Ms Stephens said that she remained calm; but Ms Bates said that she felt she had to ask Mr Arbuckle to come to the store because of comments made by Ms Stephens.

[28] After Mr Arbuckle arrived at the shop there was some discussion. Ms Stephens accepted that she had arrived late on occasions, including it would appear on 11 February 2013, and that she had used the cell phone during work hours but had now restricted her use and it was no longer a problem. She was hoping to discuss the issues at a proper meeting. Ms Bates said that she felt Ms Stephens' attitude including the comment made earlier in the day about the till was inappropriate and she concluded that she could no longer have Ms Stephens in the shop.

[29] Ms Bates advised Ms Stephens then to leave the property and told her that she was dismissed. Ms Stephens then left. Ms Linklater had sent her daughter with a letter requesting a meeting but by the time she got to the shop her daughter heard arguing inside and did not go in.

[30] Ms Linklater in her evidence said that Ms Bates made it clear to her after the dismissal that she blamed Ms Stephens for the discrepancy with the till although Ms Bates denied that she had said this. The evidence of Ms Linklater and Ms Mills was that there were often accusations about the till being down and they felt vulnerable as a result that they may fall under suspicion. For a variety of reasons not relevant to the matters in front of me they both resigned after Ms Stephens's dismissal.

[31] I do not find that Ms Bates advised Ms Stephens at the time she was dismissed why that was. Ms Bates said when I asked her for the reason that it was Ms Stephens' attitude in the morning and the comment made about the till that she regarded as a threat and the fact that she was late to work on 11 February as well and did not record that in her timesheet.

[32] Ms Stephens said that she concluded that she had been dismissed because Ms Bates thought she had taken the money from the till. She advised a prospective employer, a rest home in Palmerston, when giving the shop as a reference that her honesty had been called into question. She did not get the position. Ms Bates said and this is confirmed in a letter from the rest home that she advised the home the issues about Ms Stephens were about lateness, unreliability because of issues at home and using her phone during work hours.

[33] Ms Stephens obtained some part-time work in late August 2013 but then decided that she should move away from Palmerston and went to live in Dunedin.

Were the warnings justified?

[34] The Authority is required to apply the test of justification in s.103A of the Employment Relations Act 2000 in respect of both the warnings and the dismissal. That requires the Authority to objectively determine whether what the company did and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the action or dismissal.

[35] Having found that there were two warnings given to Ms Stephens then the onus falls to the company to justify that was what a fair and reasonable employer could have done in all the circumstances.

[36] There are four procedural steps in s.103A that the Authority must consider. None of these were complied with before the warnings were given to Ms Stephens that her employment was in jeopardy. There was no process at all. There were issues with Ms Stephens' lateness, and on occasions cell phone use that could, had there been a fair process, have justified a warning but Ms Stephens said that she had explanations about those issues and others in the letters which she was not given an opportunity to respond to.

[37] It is further unclear if the conduct which was of concern continued before the second warning. It is unclear if it did what the conduct was and when it happened. There was no process before that warning was issued.

[38] A lack of process in this case I find meant that the company was not in a proper position to determine whether it had a good reason for issuing the two warnings and what behaviours or concerns should be the subject of warnings and/or whether a warning was an appropriate response to the behaviour or whether there should be some other response to the concerns.

[39] I find that the warnings were procedurally unjustified. In terms of substance the evidence supported some justifiable concerns about lateness and cell phone use. In relation to the other matters it is at best unclear if there had been a fair and proper process they could have justified a warning.

Was Ms Stephens' dismissal justifiable?

[40] There is no dispute that there was a dismissal and accordingly the company is required to justify its dismissal of Ms Stephens. Again, as with the warnings there was no proper process before Ms Stephens was dismissed. Ms Bates described a situation where she had no option but to ask Ms Stephens to leave immediately.

[41] If there was a concern about the situation getting out of control then a fair and reasonable employer could have arranged to have a meeting at a later date, when the air had cooled, before which it could have raised specific concerns with Ms Stephens so that she could have had a chance to respond. Objectively assessed much of the tension arose on the day because Ms Stephens thought she was being accused of theft. She wanted a meeting to discuss that and the earlier issues. Ms Bates did not agree to that. Ms Stephens was unhappy and made an inappropriate comment about the till.

[42] Later that afternoon Ms Stephens was dismissed. Although Ms Bates said that it would have been clear to her why she was being dismissed I am not satisfied that it was. Ms Stephens I find thought she was being dismissed for taking money rather than because of lateness that day and her comment/attitude. There was no evidence put forward to support Ms Stephens had anything to do with the till being down. The absence of any fair and proper process led to the reason for the dismissal being unclear. Had there been a proper process with the allegations being clearly put then the reason(s) would have been clear.

[43] The fact that there was a subsequent complaint laid with the police, which was not advanced, by Ms Bates and Mr Arbuckle about Ms Stephens, reinforced to her that she was being dismissed for dishonesty.

[44] As there was no process in respect of the action of 11 February 2013 there was no opportunity for the company to properly and fairly determine whether in all the circumstances it had good reason to conclude serious misconduct and in turn whether the appropriate outcome could be dismissal. A fair and reasonable employer could have been expected to have taken into account Ms Stephens belief that she was being blamed for the missing money in assessing her attitude and the comment that day and that she wanted a meeting to talk about issues including the earlier letters.

[45] I find in all the circumstances that Ms Stephens' dismissal was unjustified.

[46] Ms Stephens has personal grievances that the warnings and her dismissal are unjustifiable. She is entitled to remedies.

Remedies

Lost Wages

[47] I am satisfied that Ms Stephens looked for other positions and in that way attempted to mitigate her loss. I accept that was difficult in a small place like Palmerston. Ms Stephens has asked for six months and two weeks wages. I am minded to exercise my discretion and made an award of more than three months ordinary time remuneration but for four months or 17 weeks rather than six months. There was an issue raised about the rest home reference but the company did have concerns about lateness and cell phone use and that did not seem to be the only reference relied on by the rest home.

[48] I have based Ms Stephens' average hours of work on the evidence and clause 4 of her employment agreement that her total hours of work will be approximately 20 per week. Her hourly rate was \$15.00. I have calculated an average weekly wage of \$300 gross on that basis.

[49] Subject to any findings about contribution that is the sum of \$5100 gross being 17 weeks lost wages.

Compensation

[50] Ms Stephens gave evidence of her embarrassment and distress because she thought she had been dismissed for stealing. She also talked about the significant impact on her finances when her income dropped by \$150 per week, particularly at the start of the new school year. She said, although Ms Bates did not accept this, that she had stopped socialising for a while. She said that there were rumours. The evidence focused more on the dismissal than the warnings. I have taken that into account.

[51] I find that there was significant distress caused to Ms Stephens. Subject to any findings about contribution the sum of \$8,000 is a fair and reasonable award for humiliation, loss of dignity and injury to feelings.

Contribution

[52] I am required to assess the extent to which Ms Stephens contributed to the situation that gave rise to her personal grievance and if I find that she did contribute am required to reduce the remedies accordingly. There has to be some blameworthy conduct by Ms Stephens and I have to be satisfied that it occurred on the balance of probabilities.

[53] I find that there was some blameworthy conduct. I am satisfied Ms Stephens was late to work on occasions. Although she would usually record this on her time record she did not always do so. Her evidence was to the effect that this was not a big issue. That is not the point. It was an issue for her employer who paid her to start at that time and I find it was an issue on 11 February 2013. I am satisfied that there were issues from time to time with Ms Stephens' attitude in the sense that she did not always recognise Ms Bates was in charge and could reasonably tell her what jobs to do even if Ms Stephens' view was that Ms Bates was difficult. The comment on 11 February 2013 about the till was inappropriate even allowing for a sense of unfairness about being blamed for the till being down.

[54] I find that there should be a reduction in the remedies for contribution of 20 %.

Orders

[55] Applying contribution to the amounts set out above for lost wages and compensation I make the following orders:

[56] I order MEJA Limited (previously known as The Fish N Chip Shop (Palmerston) Limited) to pay to Ms Stephens the sum of \$4080 gross being lost wages under s.128 (3) of the Employment Relations Act 2000.

[57] I order MEJA Limited (previously known as The Fish N Chip Shop (Palmerston) Limited) to pay to Ms Stephens the sum of \$6,400 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s.123 (c) (i) of the Employment Relations Act 2000.

Kiwi Saver employer contribution

[58] Ms Stephens' evidence is that she wanted to continue with KiwiSaver but was told that was not possible. Ms Bates says that there was no such approach. Even if

there was not there was no evidence that Ms Stephens opted out of the KiwiSaver scheme. I find that Ms Stephens is entitled to be reimbursed for the loss of the benefit of her employer's contribution. I have calculated that at the rate of 2% which was applicable at that time. Ms Stephens' gross income as shown on her final pay slip is \$10,895.25. The value of the lost benefit is \$217.90 gross.

[59] I order MEJA Limited (previously known as The Fish N Chip Shop (Palmerston) Limited) to pay to Ms Stephens the sum of \$217.90 gross being the loss of the benefit of the Kiwi Saver employer contribution under s.123 (c) (ii) of the Employment Relations Act 2000.

[60] Mr Nevell also asked for the loss of the member tax credit but provided no information about this. That may be able to be agreed between the parties failing which I reserve leave to return to the Authority.

Interest

[61] I am not minded in the circumstances of this case to award interest on the awards made.

Costs

[62] I reserve the issue of costs. Mr Nevell has until 12 March 2014 to lodge and serve submissions as to costs and Ms Bates has until 26 March 2014 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority