

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 389  
5418124

BETWEEN

CHARLOTTE DALY  
Applicant

AND

HOT KITS LIMITED  
(PREVIOUSLY NAMED HOT  
WELLNESS LIMITED)  
Respondent

Member of Authority: Robin Arthur  
Representatives: Applicant in person  
Belinda Bennett for the Respondent  
Investigation Meeting: 16 September 2014  
Determination: 19 September 2014

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**DETERMINATION No. 2 OF THE AUTHORITY**

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- A. Hot Kits Limited (the company) ended Charlotte Daly's employment by a dismissal that was unjustified.**
- B. Within 28 days of the date of this determination the company must settle Ms Daly's grievance by paying her \$5000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. The company must also, within 28 days, pay Ms Daly:**
- (i) \$1187 in wage arrears; and**
  - (ii) \$408 for holiday pay; and**
  - (iii) \$460.70 in reimbursement of her expenses in bringing her claim in the Authority.**

### **Employment relationship problem**

[1] In an earlier determination the Authority found Charlotte Daly had been in an employment relationship with Hot Wellness Limited (now renamed Hot Kits Limited and referred to as ‘the company’ in this determination) and was entitled to pursue claims for wage arrears and a personal grievance for unjustified dismissal.<sup>1</sup> The Authority directed the parties to further mediation but the issues between the parties were not resolved and the Authority has now investigated those issues.

[2] Charlotte Daly worked for the company at a shop in Rotorua called Go Raw. The shop was attached to a gym called Go360 also operated by the company.

[3] Ms Daly’s employment began on 11 February and ended on 29 April 2013. One of two major issues to be determined was whether her employment ended by a resignation of her volition, by a direct dismissal or as a result of her feeling forced to resign by the company breaching obligations to her (that is a type of constructive dismissal). The other major issue was whether she was entitled to an order for wage arrears for hours that she worked but was not paid for by the company. Incidental to those issues was whether she was also entitled to an order for holiday pay.

[4] In investigating this matter I declined an oral application from the company’s director Belinda Bennett (made during a case management conference on 11 August 2014) to revisit the question of whether Ms Daly was an independent contractor or an employee. The company had not filed a challenge in the Employment Court about the Authority’s earlier determination on that preliminary issue, made by another Member and issued on 13 February 2014.

### **Investigation**

[5] For the Authority’s investigation witness statements were lodged by Ms Daly, Ms Bennett and two other people who had worked at the Go360 gym during the relevant months – Michelle Torstonson and Alan Solomon. Those four people attended the investigation meeting and, under oath, answered questions from me. Ms

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<sup>1</sup> *Daly v Hot Wellness Limited* [2014] NZERA Auckland 49 (13 February 2014).

Daly and Ms Bennett each had the opportunity to ask additional questions of one another and the other witnesses and then make a closing submission about the issues to be decided.

[6] In the 11 August case management conference with Ms Daly and Ms Bennett I had, among other directions, asked for two other witnesses to lodge statements and attend the investigation meeting. They were Eve Johnson and Paul Jeune. Ms Johnson is a shareholder in the company, was a friend of Ms Daly and had initiated the arrangement for Ms Daly to work for the business. Mr Jeune was appointed manager of the Go360 gym and the Go Raw store in the month after Ms Daly began work and, according to Ms Daly, dismissed her during a discussion about the terms of her employment agreement on 29 April 2013. Ms Bennett told me that she decided neither Ms Johnson nor Mr Jeune needed to provide a statement for, or attend, the Authority investigation. She said Ms Johnson was now in Christchurch and Mr Jeune had ceased working for the business in June 2013. Ms Bennett said she could have arranged for Mr Jeune to give evidence for the Authority investigation but was “*happy*” for him not to do so. She said he would, however, give evidence at an Employment Court hearing if the Authority’s determination was challenged.

[7] I considered evidence from Mr Jeune was important to the company’s case about whether Ms Daly’s account of what he said to her on 29 April was or was not true. However, because the company had ample opportunity to arrange evidence from him and deliberately chose not to do so, I have proceeded to determine the matter without hearing from Mr Jeune.

[8] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

### **The end of the employment**

[9] Ms Bennett submitted Ms Daly was not dismissed but had resigned because she was dissatisfied when the company would not agree to the terms on which she wanted to enter a full-time position. Ms Bennett argued that even if Ms Daly was

dismissed, it was not from that full-time position – which had been formally offered to her on 22 April – as the terms of employment for that role had not been agreed. Instead she said Ms Daly was still employed on a separate three-month contract or “*trial period*”, agreed orally, for her to work part-time while the viability of the store was assessed. On the basis of that latter description Ms Daly’s employment would have continued only to mid-May if the new full-time position was not agreed or the store was found not to be a viable commercial proposition.

[10] Ms Daly agreed that the job in the store was offered to her on a three-month trial basis but said the viability of the store was confirmed and she had already begun work on a full-time basis. She said Mr Jeune told her to start working full-time hours when he gave her the draft employment agreement to discuss.

[11] From the evidence available to me I have found the presentation of the written employment agreement did not change the basis of the employment relationship between Ms Daly and the company. It was entered into on a conditional basis – concerning the viability of the store – but that condition had been satisfied. Around mid-April Ms Bennett and Ms Johnson had discussed the store’s viability and agreed that the work done by Ms Daly since 11 February established there was sufficient business to support a full-time position. What was to be negotiated were the terms on which that relationship would continue. Both parties were discussing a variation to the existing terms of employment, not the end of one relationship and the beginning of another. Importantly, at law, that state of affairs also required the parties to deal with one another on a good faith basis.

[12] Ms Daly had taken the opportunity to negotiate terms seriously and raised several points about the draft agreement that Mr Jeune presented to her. It was based on a template used for other employees in the business. Mr Jeune’s notes of a meeting he had with Ms Daly on 24 April recorded that she wanted changes to a clause that could require her to work elsewhere on ‘secondment’ and to the leave clause to allow for a break of up to three months. She also asked for Ms Bennett to attend the next discussion with her about the draft agreement. Ms Daly explained that she made this request because she wanted Ms Bennett to confirm what she considered were earlier verbal undertakings about some conditions. Ms Bennett explained that she declined Ms Daly’s request to meet because she was too busy with other demands

of her business and Mr Jeune had been appointed as manager to deal with such matters.

[13] Ms Daly also sent Ms Johnson, Ms Bennett and Mr Jeune an email setting out terms she wanted in the written employment agreement. Those included commission of 3 per cent for reaching sales targets, an hourly rate of \$19 rather than her existing \$15 rate, a lower price for staff purchases, a company petrol card and a company mobile phone. She said that if previous verbal agreements were not met (that she said included a petrol card) she should be reimbursed for extra unpaid hours she had already worked. She ended that email with a statement that if open, honest communication was *“not possible and previous verbal agreements are not met, I will not be interested in a position at Go360”*.

[14] Notes made by Mr Jeune recorded him meeting again with Ms Daly on 29 April. He wrote that, after a 30 minute discussion, Ms Daly *“decided to reject the offer of employment and cease work”* for the business. He said she based her decision on *“an untenable work relationship between herself and Belinda Bennett”*.

[15] Ms Daly’s sworn evidence gave a starkly different account of that discussion. She said Mr Jeune told her that she *“had really stuffed up this time”*, that she *“had upset the girls”* (referring to Ms Bennett and Ms Johnson) and *“it was time for me to move on”*. She said Mr Jeune told her *“there was no way forward and no point at any reconciliation between myself and the ‘girls’ and that I could choose to leave immediately or finish out the week while they found a replacement”*. Ms Daly said she initially agreed to work out the day but was so shocked by what had happened that she found she could not stop herself crying at the shop counter and left the premises after Mr Jeune assured her she would be paid her wages.

[16] Ms Bennett denied Mr Jeune would or did dismiss Ms Daly in the manner described. She said she had checked with Mr Jeune and he told her that he did not use the words attributed to him by Ms Daly. However I have preferred Ms Daly’s account for three reasons – firstly, that was her sworn testimony; secondly, there was no contrary sworn and tested direct evidence from Mr Jeune; and, thirdly, it was corroborated, in part, by Ms Torstonson’s evidence.

[17] According to Ms Torstonson the subject of Ms Daly's departure from the business was discussed at a staff meeting held on 30 April. Mr Jeune, Ms Bennett and four other staff were present. Ms Torstonson said Mr Jeune described Ms Daly as having been "*let go*" and that Go360 staff were to have no contact with her. Her evidence was not limited to remembering use of that single and possible equivocal phrase. She recalled that Mr Jeune had said Ms Daly was 'let go' because she did not like the way things were run and that if other staff did not like how things were run, they would also find they were no longer required and would be 'let go'.

[18] Ms Bennett agreed Ms Daly's departure was referred to in the staff meeting but said that Mr Jeune described Ms Daly as having "*moved on*" and that "*it was to stay private and confidential*". Again, in the absence of any contrary sworn and tested evidence directly from Mr Jeune, I have preferred Ms Torstonson's evidence as more likely than not to be true.

[19] Consequently I concluded Ms Daly's employment was terminated by dismissal on 29 April, not by resignation. Mr Jeune's action of dismissing her, on the company's behalf, was a breach of the good faith obligations owed to Ms Daly. While there was clearly some distance between Ms Daly's expectations and Ms Bennett's view of what was commercially feasible for the store's on-going operation and staffing, a fair and reasonable employer would not have dismissed an employee in those circumstances without further discussion. Under s4 of the Act an employer and employee bargaining over an individual employment agreement – or for variation of one – are required to be active, constructive, communicative and responsive in maintaining a productive employment agreement. Further discussion was clearly needed with Ms Bennett over Ms Daly's view that certain terms had already been agreed or promised earlier about the basis on which her employment would continue from the point of confirming the on-going viability of the position. To dismiss Ms Daly in advance of or in the absence of that discussion was an unjustified action in all the circumstances. Her grievance on that ground was established.

### **Remedies for unjustified dismissal**

[20] Ms Daly's application to the Authority sought 'compensation' for her dismissal.

[21] Her evidence fell short of the requirements for an award under s123(1)(b) of the Act for wages lost in the period after her dismissal. She had not provided a sufficiently detailed account of her subsequent search for alternative work and earnings. In that respect she had not established she had made reasonable endeavours to mitigate her loss.

[22] She was however entitled to an award of compensation for humiliation, loss of dignity and injury to her feelings. She gave evidence of her shock and tearfulness at her sudden dismissal on 29 April. Ms Torstonsen's evidence confirmed that Ms Daly's dismissal was announced to other staff, including Ms Daly's flatmate at the time, in terms that Ms Daly understandably found humiliating. Ms Daly had moved to Auckland soon after her dismissal and spent some time living out of her car while she tried to find work, an experience directly attributable to the company's unjustified dismissal of her and which increased her sense of humiliation and loss of dignity. Considering the general range of awards, and Ms Daly's particular circumstances, an award of \$5000 was a modest and appropriate level of compensation under s123(1)(c)(i) of the Act.

[23] No reduction of the remedy awarded was required under s124 of the Act. While Ms Daly's requests for certain terms during negotiation of her employment agreement contributed to the situation giving rise to her grievance, there was nothing particularly unusual or blameworthy in such conduct, even if Ms Bennett may rightly have considered what Ms Daly sought was commercially unrealistic.

### **Wages arrears**

[24] Ms Daly sought an order for payment of 245 additional hours that she said she was required to work for the company but for which she was not paid. For her eleven weeks of employment she had received pay for 240 hours, at the rate of \$15 an hour.

For ten of those weeks she was paid \$360 a week, being pay for 24 hours a week at that rate. Pay due to her for the eleventh week's work was retained by the company to offset what it said was a \$430 'tab' on Ms Daly's staff account that she had agreed to pay.

[25] According to Ms Daly her weekly pay was calculated on the basis of six hours' work for the days Monday to Thursday. The value of a further six hours' work she did on Fridays was to be credited towards fees that the company would pay for a course on health and nutrition that she hoped to choose with Ms Bennett's guidance.

[26] Ms Bennett disagreed with that description. She said the 24 hours paid to Ms Daly each week were for five hours a day, Monday to Thursday, with a further four hours paid for work on the Fridays. She accepted there was an agreement about crediting the value of Friday work towards course costs for Ms Daly but said that was an arrangement for the future and had not become operative before the employment ended.

[27] To resolve the issues arising on this point it was necessary to make findings on

- (i) what arrangement was made about what hours would be paid or credited for another purpose; and
- (ii) whether Ms Bennett had authorised or required Ms Daly to work additional hours for which she was entitled to be paid; and
- (iii) what Ms Daly was due for her last week's wages and whether the company was entitled to keep some or all of it to offset money she owed on her staff account.

*(i) Hours to be worked – paid or credited*

[28] There was no direct documentary evidence to assist in finding what arrangements were agreed about Ms Daly's hours. She had no written employment agreement for the job she started on 11 February. Ms Bennett argued that was because Ms Daly's initial engagement was on an independent contracting basis – as a "consultant" exploring the viability of the Go Raw store – and no written agreement was therefore required. However the Authority's earlier determination found Ms Daly was, on the balance of probabilities, an employee.

[29] In that light, and for the following reason, I preferred Ms Daly's account on what was agreed about the hours she was to work and be paid. The gross value of six hours worked over 11 Fridays at the rate of \$15 an hour would have been \$990. That amount was very close to the sum of \$1000 that Ms Johnson decided should be offered to Ms Daly on 29 April after the events that I have concluded were her dismissal. In an email sent to Mr Jeune on 29 April (and copied to Ms Bennett) Ms Johnson wrote that "*we feel honour bound to support what [Ms Daly] believes she was promised*" and said the sum of \$1000 would be paid "*[f]or the Fridays only that she worked*" if Ms Daly provided "*an invoice for an educational course from a reputable school or university in the field of natural health/nutrition*". The similarity between the amount offered and the value of Friday hours Ms Daly said were to be worked (but not paid) may have been mere coincidence. However I concluded Ms Johnson's reference to 'Fridays only' added weight to Ms Daly's version of events. The benefit of any residual doubt also went to Ms Daly because the company was in the best position to properly document the arrangement with her but had failed to do so.

[30] Ms Daly was not however ever paid the \$1000 offered conditionally after her dismissal because she had not enrolled in a course and could not provide the invoice that the company required. For that reason she remained, I concluded, entitled to pay for the value of 60 hours worked on Fridays in ten of the 11 weeks of her employment (that was \$900). The hours worked on the eleventh Friday were covered by some different considerations about her pay in the final week, as explained later in this determination.

*(ii) Other unpaid hours*

[31] Ms Daly sought payment for a further 179 hours that she also said she had worked, at Ms Bennett's behest, without pay over the 11 weeks of her employment.

[32] Ms Bennett denied any further hours of work were requested or required and insisted none were authorised on a paid basis. She acknowledged that Ms Daly had spent additional hours at the store and, during some days in April, at another site

being set up by the business. However she said Ms Daly stayed at the store by her own choice and had volunteered to help at the other site without pay.

[33] While Ms Daly provided a list of additional hours she said she worked each day, she did not provide sufficient detail about what had happened on each day – specifically about requests or directions by Ms Bennett – for me to conclude that the work was required and should be paid. Ms Torstonsen and Mr Solomon confirmed that they had noticed how long Ms Daly spent at work and that they had each separately encouraged her to leave earlier but their evidence did not, I concluded, really corroborate Ms Daly’s account of why she was there. They could not say they had heard Ms Bennett direct or require her to work those hours.

[34] An email exchange between Ms Daly and Ms Bennett on 23 April did shed some light on the basis on which Ms Daly had spent 20 and 21 April at the site of a Go Raw café being set up elsewhere. A ‘timeline of events’ written by Ms Daly for her claim referred to “*helping*” at that café for 18 hours over those two days. Ms Daly’s 23 April email to Ms Bennett referred to that time as “*volunteering*” on those days and referred to have “*already given two hours of my own time over and above my paid hours just today*”. Ms Bennett replied by thanking her for her help over the previous two days but said she was “*happy*” for Ms Daly to stick to her hours “*and finish allocated work within them*”. She also noted that she had not asked Ms Daly to do extra hours and wrote: “*So please don’t use against me*”.

[35] I also doubted Ms Daly’s suggestion that Ms Bennett had agreed to pay for extra hours of work during her 11 weeks of employment. In each week of work Ms Daly provided an invoice – which was really akin to a timesheet – prepared from a company template. Each week’s invoice was for 24 hours only. If Ms Bennett had agreed to pay for extra hours in any week, the invoice for that week (logically) would or should have been for a higher amount.

[36] There were other likely reasons Ms Daly spent more time than expected at work. In part she probably put in extra hours to help ensure the viability of the store (and her long-term job prospects). While that was to the company’s benefit, she chose to spend those hours at work without having prior approval or agreement that she would be paid for those hours. Also, as she had only just moved to Rotorua for

the job, she had a limited social network and chose to spend more of her time at work than she might otherwise have done if she lived closer to family and friends.

*(iii) The staff account deduction and the last week's pay*

[37] Ms Daly had verbally agreed to pay her staff account but denied she had authorised deduction of that amount from her wages. She accepted she owed \$313 for various products and food but not the amount of \$430.37 stated in an invoice provided to her by the company.

[38] Under the Wages Protection Act 1983 the company was not entitled to deduct amounts for Ms Daly's staff account from her final pay without her written consent. No written consent was provided. She was entitled to her final week's pay without deduction.

[39] The final week's pay was not, however, only for 24 hours (that is \$360) but should have been calculated on the basis of the 40 full-time hours that I have accepted Mr Jeune told Ms Daly to work for the week beginning 22 April (that is \$600). That amount included a full day's pay for the Friday in that week, so was different from the calculation for other Fridays worked (as explained earlier in this determination).

[40] From the \$600 due for the eleventh and final week of work I deducted the \$313 Ms Daly agreed she owed the company for her staff account (and have not, in making a broad assessment, allowed any amount for hours on the day of her dismissal, 29 April). As a result I concluded the company owed Ms Daly a further \$287 in wage arrears for her final full week of work (which is added to the \$900 wage arrears owed for Friday work in the previous ten weeks).

**Holiday pay**

[41] Because the company treated Ms Daly as a contractor, she was paid no holiday pay, either during her employment or at its end. However this determination and the Authority's earlier determination have confirmed Ms Daly's rights as an employee, including her statutory right to holiday pay. Under s23 of the Holidays Act 2003 Ms Daly was entitled to holiday pay calculated at eight per cent of her total earnings.

[42] Her total earnings for the purposes of the holiday pay calculation comprised the following three elements - \$360 a week for ten weeks, \$600 for the eleventh week, and \$900 for hours worked on ten of the 11 Fridays. Eight per cent of the resulting total of \$5100 amounted to \$408 due to Ms Daly as holiday pay.

### **Tax**

[43] During the investigation meeting Ms Bennett raised the question of whether, as a result of the Authority's determination that Ms Daly was an employee, Ms Daly had paid all necessary tax and whether she would pay tax on any further payments ordered. It is up to Ms Daly and the Inland Revenue Department to ensure the correct proportion of tax on income has been paid. Tax matters are left in their hands.

### **Costs**

[44] Ms Daly and Ms Bennett confirmed during the investigation that neither party had incurred legal costs during this matter. Ms Daly was however entitled to an award, at the Authority's discretion, for her expenses incurred in attending the investigation meeting.<sup>2</sup> I thought an order for reimbursement of her airfares of \$389.14 and the \$71.56 fee for lodging her application was reasonable.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>2</sup> Clause 15 of Schedule 2 of the Employment Relations Act 2000.