

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 325
5536628

BETWEEN

ANNA FAULLS

Applicant

A N D

GATHER SUPERMARKET
CHAIN LIMITED trading as
ITALIA SQUARE

Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Nathan Santesso, Representative for the Applicant
Sean Aram, Director of the Respondent

Investigation Meeting: 14 October 2015 at Auckland

Date of Determination: 19 October 2015

DETERMINATION OF THE AUTHORITY

- A. Gather Supermarket Chain Limited trading as Italia Square (Italia Square) unjustifiably dismissed Ms Faulls from her employment.**
- B. Within 21 days of the date of this determination, Italia Square must settle Ms Faulls personal grievance claims by paying her:**
- (a) \$6342.50 gross as reimbursement of lost wages;**
 - (b) \$592.80 gross being unpaid holiday pay;**
 - (c) \$6000 as compensation for humiliation, loss of dignity and injury to her feelings in respect of her unjustifiable dismissal.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Sean Aram is the sole shareholder and director of the respondent, Gather Supermarket Chain Limited.

[2] Gather Supermarket Chain Limited owns and operates Italia Square (Italia Square), an Italian café/restaurant, bar and deli in Parnell, Auckland.

[3] Ms Anna Faulls, a student at Auckland University applied for a summer job at Italia Square as a bartender. Ms Faulls was employed and began work on 1 December 2014.

[4] Ms Faulls says that on 9 December 2014 she was working at Italia Square and spoke with Mr Aram's wife, Ms Izumi Aram, about the likelihood of the almost completed restaurant and bar opening that evening. Ms Faulls says that she and Ms Aram agreed that it was unlikely the restaurant was going to be ready to open. Therefore, it was agreed that staff should be sent home as long as they could come back in at a moment's notice if the restaurant was to open that night. Accordingly, Ms Faulls told staff to go home.

[5] Ms Faulls says when Mr Aram found out about this, he became angry and she was dismissed immediately. Ms Faulls says she was unjustifiably dismissed.

[6] Mr Aram accepts dismissing Ms Faulls on 9 December 2014. However, Mr Aram says this was because Ms Faulls had sent staff home without authority or his permission at a time when the restaurant and bar was about to open.

[7] Mr Aram says he was under a considerable amount of pressure dealing with construction workers and organising liquor licensing and fire permits to ensure the restaurant was able to open on time and Ms Faulls' actions in sending staff home when they were needed, caused the business considerable damage and loss.

Issues

[8] The issues for the Authority to determine are as follows:

- (a) Was Ms Faulls unjustifiably dismissed by Italia Square?
- (b) If the answer to (a) above is yes, what remedies, if any is Ms Faulls entitled to?

(c) Did Ms Faulls contribute to her dismissal?

Investigation meeting

[9] At the investigation meeting the Authority heard evidence and considered a number of documents produced by the parties.

[10] Under s.174E of the Employment Relations Act 2000 (the Act) the Authority will not be referring to all the evidence. Findings will be made in order to dispose of this matter as efficiently as possible.

[11] Two important witnesses, Mr Aram's wife, Ms Izumi Aram and Mr Mohammed Khan for Italia Square did not appear at the Authority's Investigation Meeting. This was a surprise as at the teleconference convened to timetable the Meeting, the Authority was informed they would be filing witness statements and would appear to give evidence.

[12] Witness statements were filed in accordance with the agreed timetable. However, there was no appearance by the two witnesses. The reason advanced by Mr Aram for the non appearance of these witnesses was that they were too busy.

[13] Three minor witnesses for Ms Faulls also failed to appear despite filing witness statements. Mr Santesso for Ms Faulls says they were not in Auckland and were unavailable. The parties were informed that in the circumstances very little weight, if any, would be accorded to the evidence of these witnesses.

[14] Mr Aram for Italia Square was not a credible witness in my view. Mr Aram's evidence about the circumstances of Ms Faulls employment and the events leading up to her dismissal was inconsistent and contradictory. I prefer the evidence of Ms Faulls and her supporting witnesses.

First Issue

Was Ms Faulls unjustifiably dismissed by Italia Square?

[15] In late 2014, Mr Aram was in the process of establishing a new concept restaurant, bar, café and deli called Italia Square, in Parnell. In about November 2014, Mr Aram requested Student Job Search to place an advertisement on its website

seeking various staff for Italia Square, including barista, wait staff, bar staff and kitchen hands.

Advertising for staff

[16] The job description in the advertisement placed by Student Job Search stated:

BARISTA/WAITSTAFF/BARSTAFF/KITCHEN HANDS- PARNELL-FULLTIME

...

This exciting employer is looking for experienced students to work in his Italian super café. This is a new establishment, combining café, restaurant, bar and Italian supermarket all under one roof. There are openings for multiple positions including:

- *Baristas*
- *Wait staff*
- *Bar staff*
- *Kitchen hands*

You MUST have at least one year's working experience in one of these roles to apply. The employer is looking for students who can get up and go. Pay will be dependent on experience.

Both full time and part time roles are available, but priority will be given to those who can offer more hours. This is ongoing work, might suit someone looking for a full time role over the holidays and then part time through next year. You will definitely need to be available to work through the busy summer season.

[17] Ms Faulls says this arrangement suited her as she was available to work fulltime until her wedding on 21 February 2015. After her wedding and honeymoon and when she returned to her studies on 3 March 2015, Ms Faulls wished to undertake part-time work.

Interview for employment

[18] Ms Faulls attended an interview with Mr Aram on 19 November 2014, at which time she also met his wife, Izumi who was there for the duration of the interview but did not participate in it.

[19] Ms Faulls says she discussed the bartender position with Mr Aram. Mr Aram informed Ms Faulls that the role was full time over the summer period from December 2014 to February/March 2015 and that when she returned to her studies in March 2015, the role would become part time. Mr Aram agrees that he wished to

employ Ms Faulls fulltime as a bar tender over the summer break and part time when she resumed her studies in early 2015.

[20] Hours of work were discussed with Mr Aram. Ms Faulls says she told Mr Aram she was available to work 40 hours a week together with any extra hours available. Ms Faulls says Mr Aram was looking for employees who had the availability to work many hours. Ms Faulls was available and experienced and was told by Mr Aram that she could be the head bar tender. Ms Faulls expected to work at least 40 hours or more a week during the summer period.

[21] Mr Aram asked Ms Faulls at the interview if she had a Licence Controller Qualification (LCQ). Ms Faulls told him she did not and Mr Aram said if she obtained an LCQ she could become the duty manager on a higher hourly rate. There was no discussion about the employment being casual.

Employment at Italia Square

[22] Ms Faulls accepted employment as a bartender on a full time basis over the summer break and on a part time basis when University resumed. The agreed hourly rate was \$17 gross.

[23] Ms Faulls decided to obtain an LCQ and confirmed this to Mr Aram in an email after the interview.

[24] The email was sent at 4.53pm on 19 November 2014 as follows:

*Hi Sean,
It was lovely meeting you today. I have just called up and booked in for an LCQ course, which is on next Monday. I will then have an exam on December the 1st, from 9am- 12pm. I will have to be working with you for a few months, but will be able to get my managers certificate early next year if all goes well!
Anna*

[25] Ms Faulls paid for the LCQ course, attended the course and obtained her certificate in the mail on the day of her dismissal.

[26] Ms Faulls says she began work as a bartender at Italia Square on 1 December 2014 and that from the first day she was put in charge of organising the bar and restaurant staff, supervising shifts and essentially doing the work of a manager. Ms Faulls did not have an employment agreement.

Employment Agreement

[27] On 4 December 2014, Mr Thomas Jung, who was in charge of the café at Italia Square emailed staff an employment agreement entitled “*Casual Employment Agreement*”. Mr Jung had been asked to do this by Mr Aram because Mr Jung had email addresses for staff members. Upon receiving the employment agreement, Ms Faulls rang Mr Jung about it as this was the first time she had heard her employment was casual.

[28] Mr Jung had received complaints from other staff about the casual employment agreement and had raised these with Mr Aram. Mr Aram told him that the “*casual employment agreement*” (“employment agreement”) was a temporary measure until the business had settled down and that he was working on preparing fulltime employment agreements. Mr Jung passed this information on to Ms Faulls.

[29] Ms Faulls reluctantly signed the employment agreement on 8 December 2014 believing it was temporary and that fulltime employment agreements were going to be provided shortly.

[30] The employment agreement stated:

4. *Agreement for daily employment.*

This agreement is for a specified period of casual employment. Each day or part thereof is a separate engagement. This agreement contains the terms and conditions of employment, which will apply to each separate period/day of casual employment.

5. *Further employment not guaranteed*

The parties accept that the need for casual employment will arise as and when the employer has a need for such casual employment. Accordingly, there is no guarantee of further employment following any period of casual employment.

[31] These terms and conditions were not those that had been advertised and were not those agreed at the interview on 19 November 2014. The role to be performed by Ms Faulls was left blank in the employment agreement. Hours of work were stipulated as between 7am to 10pm Monday to Sunday and the hourly rate was \$17 gross.

[32] Ms Faulls worked 52 hours in the first week of her employment and approximately 20 hours in the second week until her last day on 9 December 2014.

9 December 2014

[33] On 9 December 2014, Ms Faulls says she went into Italia Square to set up the bar and restaurant for the opening night. Construction of the restaurant was not yet complete. The head tradesman, who was the father of one of the employees at Italia Square, approached Ms Faulls about the legality of the bar/restaurant. The tradesman was concerned about not having received a fire permit before the restaurant opened and told Ms Faulls that he had tried to discuss this with Mr Aram who was not receptive. Ms Faulls says the restaurant was supposed to be opening that evening.

[34] Ms Faulls was concerned the restaurant may not be able to open. There were tradespeople still working, the fire permit and liquor licence had apparently not been obtained and staff were not sure what they were supposed to be doing. Ms Faulls rang Mr Aram to discuss these issues. However, Mr Aram did not answer his phone. Ms Faulls then went looking for Mr Aram but was unable to find him.

[35] Ms Faulls spoke with Mr Aram's wife, Ms Izumi Aram. Ms Aram was concerned to keep staff costs down and so after discussion it was agreed that staff be sent home on the basis that if the restaurant/bar was to open they would need to be available to return at a moment's notice. As mentioned, Ms Aram provided the Authority with a witness statement but did not appear at the Investigation Meeting and did not inform the Authority that she was not attending. In the circumstances I prefer Ms Faulls' evidence.

[36] As agreed with Ms Aram, Ms Faulls says she sent staff home.

Dismissal

[37] Ms Faulls went on a lunch break with her partner, (now husband) Mr Dion Celligoi and when she returned Mr Aram yelled at her about sending staff home. Mr Aram would not allow her to explain why she had sent the staff home. After letting him cool down for a period of time, Ms Faulls went to speak to Mr Aram again. However, Mr Aram told her to go home. Ms Faulls attempted to clarify this and was told by Mr Aram that Italia Square did not need her any longer. Ms Faulls took that to mean she was dismissed.

[38] Ms Faulls went to the car where Mr Celligoi was waiting for her. Mr Celligoi said Ms Faulls was in tears and very upset. Mr Celligoi went to the café to retrieve Ms Faulls bag and spoke to Mr Jung, telling him that Ms Faulls had just been “fired”. Mr Jung went to the car and spoke to Ms Faulls. Ms Faulls explained what had happened and that she had been “fired.”

[39] At 10.40pm that evening Ms Faulls sent an email to Mr Aram as follows:

*Sean,
I would like to request that you give me information regarding my dismissal tonight. What were your reasons for doing so? I look forward to your prompt reply.
Anna Faulls*

[40] At 11.32pm, Mr Aram replied:

*Anne,
Because you involved yourself to make decisions without my confirmation.*

[41] At 11.39pm Ms Faulls again emailed Mr Aram as follows:

*Sean,
I feel as though this was unfair as I consulted with your wife and co-owner while you were not available on the premises. Due to past conversations about cutting down staff costs, it was assumed by many people that you would prefer staff who were un-needed to be sent home. They did so after confirming that they were available on an on-call basis for this evening. The decision was not made lightly, however, due Azumi agreeing to it, it was done, as she was in a higher position of power than I was. I look forward to your prompt reply.
Anna.*

[42] There was no response from Mr Aram to this email.

[43] At the Investigation Meeting Mr Aram said he had dismissed Ms Faulls. Later he tried to say he had not and that Ms Faulls could have returned to work. This was one of many inconsistencies in Mr Aram’s evidence. I prefer the evidence of Ms Faulls and her witnesses. I find that Ms Faulls was dismissed. The question is whether it was justified.

The law

[44] Section 103A(1) of the Employment Relations Act 2000 (the Act) provides that employers must justify their decisions to dismiss. Whether a dismissal was “justifiable” must be determined, on an objective basis, by applying the test in subsection (2) which states:

The test is 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 or action occurred.

The test of justification requires that the employer act in a manner that is substantively and procedurally unfair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[45] I do not accept the decision to dismiss Ms Faulls was justified.

[46] Ms Faulls attempted to discuss her actions in sending staff home with Mr Aram, but was not allowed to explain. Mr Aram shouted at Ms Faulls and refused to listen to her. In my view, Ms Faulls had acted in a manner which was reasonable in the circumstances. Ms Faulls had tried to contact Mr Aram on the phone to talk about the issues being raised with her concerning the opening of Italia Square, tried to locate him and when she was unable to do so spoke with Ms Aram who held herself out as a person in charge and who could and did issue instructions to staff.

[47] As agreed with Ms Aram staff were sent home on 9 December 2014 until Ms Faulls was able to establish with Mr Aram if they were needed. This was because it seemed unlikely the restaurant was going to open that night. Mr Aram could have warned Ms Aram, he did not, he “*sent her away*”. In the circumstances this amounted to a summary dismissal.

[48] When he received Ms Faulls’ email later that evening, Mr Aram could have addressed the situation and requested that Ms Faulls return to work, he did not. In dismissing Ms Faulls summarily, Mr Aram did not act as a fair and reasonable employer could have.

[49] I find that Ms Faulls was unjustifiably summarily dismissed and is therefore entitled to remedies under the Act.

Remedies

Loss of wages

[50] Ms Faulls was employed by Italia Square for eight days, from 1 December 2014 until 9 December 2014. Ms Faulls was led to believe by the advertisement placed by Italia Square and from the interview with Mr Aram that she was to be employed on a full time basis, working a minimum of 40 hours a week until her wedding on 21 February 2015. When she resumed her studies on 3 March 2015, if Ms Faulls still wanted to work at Italia Square, she was to be employed part time. Mr Aram confirmed to the Authority that this was the agreement.

[51] The employment agreement signed on 8 December 2014 after Ms Faulls began her employment, referred to a “*daily engagement*”. This was not what was verbally agreed. The “*casual employment agreement*” was incomplete and was put in place while Mr Aram was in the process of providing Ms Faulls and other staff with full time employment agreements.

[52] It is my finding that Ms Faulls had a reasonable expectation of a minimum of 40 hours work a week with Italia Square up until 21 February 2015, the date of her wedding and thereafter part time work.

[53] Ms Faulls would have worked for 40 hours a week for 11 weeks at the rate of \$17 gross an hour but for her dismissal. This amounts to \$7480 gross.

[54] Ms Faulls attempted to find other work and applied for a number of positions. However, because of the time of the year, Ms Faulls was only able to find limited nannying work. Ms Faulls earned a total of \$1137.50 gross in the period of time from 9 December 2014 until 21 February 2015.

[55] Taking into account the wages earned by Ms Faulls in the period from 9 December 2014 to 21 February 2015, Italia Square is ordered to pay Ms Faulls loss of wages totalling \$6342.50 gross under s128 of the Act.

[56] Italia Square is to pay Ms Faulls the sum of \$6342.50 gross within 21 days of the date of this determination.

Holiday Pay

[57] Ms Faulls was not paid holiday pay. Pursuant to the Holidays Act 2003, Ms Faulls is entitled to holiday pay at the rate of 8% of the gross amount of wages she earned from 1 December to 9 December 2014, totalling \$1,067.60 gross. Ms Faulls is also entitled to holiday pay on gross wages she would have earned from 9 December 2014 up until 21 February 2015, totalling \$6342.50. Ms Faulls is entitled to holiday pay on these amounts of \$592.80 gross.

[58] Italia Square is ordered to pay holiday pay of \$592.80 gross to Ms Faulls within 21 days of the date of this determination.

Compensation under s.123(1)(c)(i) of the Act

[59] Ms Faulls gave evidence of the stress she suffered by being summarily dismissed. Mr Aram shouted at her and dismissed her in front of other staff, contractors and suppliers. Ms Faulls was shocked and distressed by this. Ms Faulls says she lost a great deal of confidence as a result of her sudden and humiliating dismissal.

[60] Considering Ms Faull's particular circumstances and the general range of awards, the Authority concludes \$6000 to be the appropriate sum at which compensation for her humiliation, loss of dignity and injury to feelings should be set.

[61] Italia Square is ordered to pay Ms Faulls compensation in the sum of \$6000 within 21 days of the date of this determination.

Contributory Conduct

[62] As required by s124 of the Act the Authority considered whether the evidence established any conduct by Ms Faulls of a sufficiently blameworthy nature had contributed to the situation giving rise to her personal grievance. There was no such contribution to justify a reduction in the remedies awarded to Ms Faulls.

Costs

[63] Costs are reserved. The parties are encouraged to resolve costs between themselves. If they are not able to do so and an Authority determination on costs is

required, Ms Faulls is to lodge and serve a memorandum as to costs within 14 days of the date of this determination.

[64] From the date of service of Ms Faulls' memorandum as to costs, Italia Square has 14 days to file a reply memorandum.

Anna Fitzgibbon

Member of the Employment Relations Authority