

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 239
5521948

BETWEEN

HEATHER TAIT
Applicant

AND

RICHIE ROBIN and ALAN
SHERSON t/a SILVER BIRCH
HOLIDAY PARK & MOTEL
Respondent

Member of Authority: Vicki Campbell

Representatives: Warwick Reid for Applicant
Richie Robin and Alan Sherson in Person

Investigation Meeting: 5 August 2015

Oral Determination: 5 August 2015

Record of Oral
Determination: 10 August 2015

ORAL DETERMINATION OF THE AUTHORITY

- A. Ms Robin and Mr Sherson are ordered to pay Ms Tait wage arrears pursuant to section 131 of the Act totalling \$621.03 within 28 days of the date of this determination.**
- B. Ms Tait was unjustifiably dismissed.**
- C. Costs are reserved.**

Employment relationship problem

[1] Ms Heather Tait claims she was unjustifiably dismissed from her employment with Richie Robin and Alan Sherson of Silver Birch Holiday Park & Motel (“the

Holiday Park”). Ms Tait also claims arrears of wages in the amount of \$360 including \$110 for moneys unlawfully deducted from her final pay.

[2] Ms Robin and Mr Sherson deny all claims.

[3] The respondents failed to lodge a statement in reply within the statutory timeframe. An application for leave to respond to the matter was lodged. As it is always preferable that an application be dealt with on its merits and because I did not perceive any prejudice to Ms Tait in granting leave, Ms Robin and Mr Sherson were granted leave to respond.

Background

[4] Ms Tait commenced employment at the holiday park as a cleaner on 21 December 2013. On 1 January 2014, Ms Tait found some discarded towels and received permission from Ms Robin to take the towels, with the exception that any white towels be washed for later use. Ms Tait says she was requested to and returned four coloured towels, four white towels and two sleeping bags.

[5] On 5 January 2014, Ms Tait was requested to attend a meeting at the end of which she was summarily dismissed.

Issues

[6] The issues for determination are whether:

- (a) Ms Tait is owed arrears of wages; and
- (b) Ms Tait was unjustifiably dismissed from her employment as a cleaner and if so, what, if any remedies should be awarded.

Is Ms Tait owed arrears of wages?

[7] Ms Robin says Ms Tait worked a total of two weeks. The first week she worked 10 hours 20 minutes and the next week she worked 10 hours and 15 minutes. This equates to 20 hours and 35 minutes. Ms Tait says she worked more hours than is recorded in the wage and time record but was unable to say with any certainty what they were.

[8] Ms Tait worked on 1 January 2014 which is a public holiday. Ms Tait is entitled to an additional payment of half her hourly rate for each hour worked on the public holiday plus payment for the day in lieu.

[9] Ms Tait worked 4 hours 15 minutes on 1 January 2014. This equates to an additional payment of \$29.75 for the hours worked plus \$70 for the day in lieu for having work on the public holiday.

[10] The wage and time record does not record the hours worked by Ms Tait on the day of her dismissal which was Sunday, 5 January 2014. From the evidence, I am satisfied that Ms Tait worked from 9am to 1.30pm being 4.5 hours. This equates to \$63 for the day's work.

[11] Ms Tait is entitled to payment of 8% holiday pay on her gross earnings. This amounts to \$185.53. Ms Tait has received total holiday pay payments from Ms Robin and Mr Sherson in the amount of \$22.78. The balance of \$162.75 remains outstanding.

[12] The following deductions were made from Ms Tait's final pay:

- (a) \$35 for stolen wine;
- (b) \$35 to replace the wine;
- (c) \$40 for towels taken beyond those for which permission was given.

[13] The total deductions amount to \$110. Ms Robin and Mr Sherson say they were justified in making the deductions as Ms Tait had taken the items without permission and Ms Robin says Ms Tait took more towels than agreed.

The law

[14] Section 5 of the Wages Protection Act 1083 requires employee's to provide their express consent before any deductions may be made from wages owed.

Findings

[15] In the absence of Ms Tait's express consent, I find the deductions unlawful. Ms Tait is to be paid the \$110 unlawfully deducted from her final pay.

[16] I am satisfied Ms Tait has not been paid all moneys due to her and is entitled to be paid \$511.03 as arrears of wages for work carried out on a public holiday and for hours worked on 5 January 2014.

Was Ms Tait unjustifiably dismissed from her employment as a cleaner?

[17] Ms Tait was dismissed without notice on 5 January 2014 for taking a bottle of wine. Ms Robin says the summary dismissal of Ms Tait was justified given her finding that she had stolen towels and was complicit in stealing the wine.

The law

[18] The fact that Ms Tait's employment was terminated is accepted. The onus falls on Ms Robin and Mr Sherson to justify whether their actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred¹.

[19] In applying the test of justification, the Authority must consider the matters set out in section 103A(3) of the Employment Relations Act 2000 ("the Act"). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[20] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly². A failure to meet any of the section 103A(3) tests is likely to result in the dismissal being found to be unjustified.

Finding

[21] I have accepted Ms Tait's evidence that her colleague took the wine on 5 January 2014, had it in her bag and acknowledged this to Ms Robin in the meeting.

[22] Ms Robin and Mr Sherson have failed to undertake a full investigation into any of the allegations against Ms Tait.

[23] When Ms Tait went into the meeting on 5 January she had no idea that the meeting was to investigate an allegation of theft nor did she know that her employment was in jeopardy.

[24] I am satisfied, given the swiftness of the meeting that Ms Robin failed to genuinely consider any explanation Ms Tait may have provided at the meeting on 5 January 2014. These are not minor procedural defects.

¹ Section 103A(2) of the Employment Relations Act 2000 ("the Act").

² Section 103A(5) of the Act.

[25] I find the dismissal of Ms Tait to be unjustified.

Remedies

[26] Ms Tait seeks reimbursement of three months' lost wages, payment for compensation for hurt and humiliation and a contribution to her costs.

Lost wages

[27] In considering an order for reimbursement under section 123 of the Act, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether the employee seeks reinstatement³.

[28] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate, there is no statutory requirement to order reimbursement⁴.

[29] The evidence from Ms Tait as to her attempts to mitigate loss is sparse. I am not satisfied that Ms Tait has taken steps to mitigate her loss and therefore will make no award for lost wages.

Compensation

[30] The Employment Court's recent decision in *Hall v Dionex Pty Ltd*⁵ noted commentary on the average level of compensatory awards having remained stagnant for the last 20 years despite the inflationary effect that might otherwise be expected to have increased them.⁶

[31] The Court observed that while there was a need for a degree of consistency with other cases, there was a danger of using consistency to keep awards at an artificially low level. It emphasised the particular circumstances of each case was the starting point for an appropriate level of compensation.

[32] Having said that, in *Scarborough v Micrcon Security Products Ltd*⁷, the Court reminded us that an applicant who seeks relief must lay an evidential foundation for an award in their favour. Simply establishing the basis for a personal grievance does not suffice.

³ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05).

⁴ *Finau v Carter Holt Harvey Building Supplies* [1993] 2 ERNZ 971 at 977.

⁵ [2015] NZEmpC 29.

⁶ *Ibid* at [87].

⁷ [2015] NZEmpC 39.

[33] Ms Tait has provided no evidence to support a claim for compensation and I have declined to award any.

Orders

[34] Ms Robin and Mr Sherson are ordered to pay Ms Tait wage arrears pursuant to section 131 of the Act totalling \$621.03 within 28 days of the date of this determination.

[35] Ms Tait was unjustifiably dismissed but the reasons set out no remedies will be awarded.

Costs

[36] Costs are reserved. The parties are encouraged to resolve any issue as to costs between themselves. If they are not able to do so, Ms Tait may lodge and serve a costs memorandum with 28 days of the date of this determination. Once served, Ms Robin and Mr Sherson will then have 14 days to lodge a reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Vicki Campbell
Member of the Employment Relations Authority