

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 142
3009012

BETWEEN NATALIE KERR
 Applicant

AND MICHELLE KELLY t/a HOTEL
 MOTUEKA
 First Respondent

AND TASMAN BAY LIMITED
 Second Respondent

Member of Authority: Helen Doyle

Representatives: Rowland Ingram, Advocate for Applicant
 No appearance by or for Respondent

Investigation Meeting: 16 August 2017 at Nelson

Submissions received: 16 August 2017 from Applicant

Determination: 24 August 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Natalie Kerr was unjustifiably dismissed from her employment with Michelle Kelly and Tasman Bay Limited.**
- B Michelle Kelly and Tasman Bay Limited are jointly and severally ordered to pay to Natalie Kerr the following sums:**
- (i) The sum of \$7541.82 gross being reimbursement of lost wages under s123(1)(b) of the Employment Relations Act 2000.**

- (ii) **The sum of \$10,000 without deduction being compensation under s123(1)(c)(i) of the Employment Relations Act 2000.**

C I have reserved the issue of costs and set a timetable for an exchange of submissions.

Employment relationship problem

[1] Natalie Kerr says that she was unjustifiably dismissed from her employment as Duty Manager at Hotel Motueka with either the first and/or second respondent on 20 April 2017.

[2] She seeks in her amended statement of problem three months lost wages in the sum of \$8840, compensation for humiliation, loss of dignity and injury to feelings in the sum of \$15,000 and reimbursement of costs and her filing fee.

[3] Ms Kerr's first statement of problem named the first respondent only. An amended statement of problem was then lodged naming additionally the second respondent.

Service on the first and second respondent

[4] I am satisfied from the administration file that the statement of problem and amended statement of problem were served on the first respondent and the amended statement of problem at the registered office of the second respondent.

[5] No statement in reply in the required form was received from either respondent but there are emails between an Authority officer and Ms Kelly that confirm lodging a statement in reply was discussed and there was a discussion that Ms Kelly could be represented at an investigation meeting. The Authority officer also received advice that Ms Kelly did not want to participate in a case management conference but there was nevertheless an attempt to connect her to the telephone call which was unsuccessful.

[6] I am satisfied that the notice of investigation meeting and notice of directions following a teleconference on 15 March 2017 was served on the first respondent and further that the second respondent was aware of the date for the investigation meeting.

[7] The administration file confirms that there were questions asked by Ms Kelly of the Authority officer about witnesses for the investigation meeting and advice that only one

witness would be called and once that witness statement was completed it would be immediately forwarded.

The response to the statement of problem

[8] A letter was lodged with the Authority on behalf of both the first and second respondents dated 21 July 2017. The letter denied Ms Kerr's claim of unjustified dismissal and set out the view of the first and second respondent about what occurred on 20 April 2017 including that there was a trial period in the employment agreement.

[9] That response, although not in the form of a statement in reply, advised that the allegation would be strongly defended and that Ms Kerr's claim was without merit.

No appearance by or on behalf of the respondents

[10] On the day of the investigation meeting, there was no appearance by the first respondent or by any representative on behalf of the first and second respondent. The Authority delayed the commencement of the investigation meeting for a short period of time and contacted the office of the Authority to see if there was any message from the respondents as to why there was no appearance. No message had been received.

[11] I then proceeded to hear evidence from Ms Kerr in the absence of any advice that would support good cause as to why the first respondent and second respondent had failed to attend or be represented at the investigation meeting.

[12] In undertaking its investigation the Authority had regard to the information supplied on behalf of the first and second respondents and questioned Ms Kerr about the matters raised.

The issues

[13] The following issues are required to be determined by the Authority:

- (a) Who is the employer;
- (b) Was there a valid trial period in the individual employment agreement;

- (c) Was Ms Kerr dismissed from her employment on 20 April 2017 or did she, as the letter provided on behalf of the first and second respondents states resign from her employment;
- (d) If Ms Kerr was dismissed, then was that dismissal unjustified; and
- (e) If Ms Kerr was unjustifiably dismissed, then what remedies is she entitled to and are there issues of mitigation and contribution?

Who is the employer?

[14] Michelle Kelly is named as Ms Kerr's employer in clause 3 of the individual employment agreement. It is further stated in the employment agreement that she shall be referred to thereafter as the "employer" throughout the agreement. It would appear initially clear that Ms Kelly employed Ms Kerr.

[15] Schedule A of the employment agreement which contains the summary of terms and conditions of employment refers to the employer as Tasman Bay Ltd, Michelle Kelly and Mitchell Hedges. Ms Kerr explained in her evidence that Mr Hedges is the General Manager of Hotel Motueka. I am satisfied that Mr Hedges was not Ms Kerr's employer.

[16] Ms Kelly is the sole director of Tasman Bay Limited (Tasman Bay). Additional information in the company register describes the business of Tasman Bay as a "hotel operation – mainly drinking place."

[17] There is some confusion in the employment agreement about the identity of the employer from schedule A. Payment of wages to Ms Kelly for work she performed at Hotel Motueka were by way of direct credit and show on her bank statement as having been made by Tasman Bay.

[18] In those circumstances I accept Mr Ingram's submission the claim should be against both the first and second respondents. If the point is reached that remedies are awarded orders will be made jointly or severally against both respondents.

Was there a valid trial period in the individual employment agreement?

[19] Ms Kelly in her letter to the Authority referred to clause 7 of the employment agreement which is headed trial period. The letter states that Ms Kelly relies in particular on clause 7.3 and 7.4 of the employment agreement. There is a trial period contained in clause 7 of the employment agreement. It provides for employment on a trial period for the first 90 calendar days of employment commencing on the employees first day of work to enable determination of suitability for permanent employment. It also provides where conduct or performance is likely to affect continued employment, the employer shall advise the employee about the area of dissatisfaction, improvement required and the period of time by which improvement is to be achieved.

[20] Clause 7.3 provides that the employer may during the trial period terminate the employment for any reason and the employee will not be able to challenge the dismissal as a personal grievance. Clause 7.4 provided that the employee where their employment is terminated under clause 7 shall receive one week's notice of termination.

[21] Section 67A of the Employment Relations Act 2000 (the Act) provides for a trial period of 90 days or less as defined in subsection (2) to be entered into by an employer and an employee. Employee is defined in s 67A (3) of the Act as below:

(3) Employee means an employee who has not been previously employed by the employer.

[22] Section 67B of the Act provides the effect of a trial period under s 67A if an employer terminates an employment agreement containing a trial provision under s 67A by giving notice of the termination before the end of the trial period. Subsection 67B(2) provides:

(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

[23] In order for the trial period to be valid and able to be relied on by Ms Kelly and Tasman Bay Ms Kerr had to have been a new employee when she signed the employment agreement containing the trial period.

[24] The employment agreement was signed on Tuesday 21 March 2017. Ms Kerr said in her evidence that she commenced her employment on 1 March 2017. She said that shortly before 21 March 2017 she called into Hotel Motueka to pick something up and someone said “Mitch left this for you”. It was the employment agreement. Ms Kerr took the agreement home and signed and returned it.

[25] Some independent confirmation of the start date is able to be found from Ms Kerr’s bank statements. These support that the first payment recorded in Ms Kerr’s bank statement from Tasman Bay was on 14 March 2017 in the sum of \$661.14. It is more likely than not that Ms Kerr had commenced her employment before that payment and that was before 21 March 2017.

[26] I accept Ms Kerr’s evidence that she commenced her employment before she signed the employment agreement. I do not find that the trial provision in the employment agreement is able to be relied on because Ms Kerr was not under s 67A (3) an employee who had not previously been employed by Hotel Motueka. Ms Kerr therefore is not prevented from bringing a personal grievance in respect of an alleged dismissal.

Was Ms Kerr dismissed or did she resign?

[27] In her evidence Ms Kerr said that she enjoyed working at the hotel. Her role as duty manager from the job description included the serving of alcohol and required Ms Kerr to adhere to rules, regulations, industry standards and hotel procedures. There was reference to van driving and gaming maintenance shift work and a focus in the job description on minimising and preventing harm. Ms Kerr said that she undertook some cleaning although there was a cleaner Tuesday to Saturday. Sometimes Ms Kerr undertook vacuuming and mopping.

20 April 2017.

[28] On 20 April 2017 Ms Kerr was asked by Ms Kelly to store a cardboard box in a cupboard. Ms Kerr recalled a brief exchange with Ms Kelly about the content of the cardboard box as she could see tinsel in the box.

[29] When Ms Kerr went to put the cardboard box up into the cupboard, Ms Kelly asked her if she could do some dusting of the closet. Ms Kerr said that she suffers from hay fever and she advised Ms Kelly that she needed to “preload on antihistamines” before she

undertook the cleaning because she gets asthma and swells up from hay fever becoming quite unwell. Ms Kerr said that she made it clear that she would do the dusting after she had taken the antihistamines.

[30] Ms Kerr said that she was then advised by Ms Kelly that she did not have a job anymore. Ms Kerr said that she then picked up the cardboard box and put it into the cupboard in front of the bar and she recalled then receiving a message from another employee Julie asking her if she was okay.

[31] Ms Kerr said that she explained to the other employee, Julie, that she had been fired and Julie came down and spoke to Ms Kelly who confirmed that to be the position. Ms Kerr said she left the premises at that point and went to her home where her grandfather and cousin were staying with her.

Return back to the Hotel

[32] Ms Kerr explained to her grandfather and cousin that she had been fired. She said that her grandfather advised her that she should try and sort it out because in the heat of the moment things can be said. Ms Kerr and her cousin returned to the hotel about two hours later and Julie was at the hotel as acting manager. Julie confirmed that Ms Kerr had been dismissed and took her work keys from her. Ms Kerr's cousin questioned Julie about the reason for the dismissal and Ms Kerr said that Julie responded that "*Michelle loses staff*".

[33] Photos were provided to the Authority of entries from what Ms Kerr said was the work journal. Ms Kerr confirmed that these entries were made by Julie. Ms Kerr's cousin advised her to take photos of the entries on her phone which she did. One entry into the work journal provides as follows:

Natalie has been fired and has left pending a week's pay.

[34] Ms Kerr was asked to sign the entry and Julie signed it as well. There is a second entry made on a different page on Thursday, 27 April 2017 which provides:

Natalie last official day. Days to be paid in advance because of being fired.

[35] This entry was also signed by Ms Kerr and Julie. Ms Kerr confirmed to the Authority that in fact she had not received an extra week's pay.

[36] In the letter provided on behalf of the first and second respondents, a summary of what Ms Kelly says occurred on 20 April 2017 is set out. Consistent with Ms Kerr's account Ms Kelly asked her to store some cardboard boxes in the storeroom. Ms Kelly in her response says that Ms Kerr said "*I don't do dust*". The document then provides Ms Kelly responded with "*why would you take on a position in an environment such as this when the hotel is full of dust?*" That last statement seems on its face consistent with Ms Kerr advising about her hay fever.

[37] The letter then provides that Ms Kerr became immediately upset and stormed off and then advised the assistant manager, Julie, that she quit. The statement provides that Julie informed Ms Kelly of this and Ms Kerr left the premises. It then states that Ms Kerr later returned to the hotel and advised that she had changed her mind and wanted to remain as a staff member but Ms Kerr was advised that her resignation was accepted and she was no longer required.

[38] I put the statement to Ms Kerr. Ms Kerr accepted that when she had advised that she could not do the dusting immediately before preloading on antihistamines, that Ms Kelly did respond with the question, "*why would you on a position in an environment such as this when the hotel is full of dust?*".

[39] Ms Kerr was quite adamant that she did not storm off and said that Julie in fact confirmed with Ms Kelly first before she left the hotel that Ms Kerr had been dismissed. The accounts are similar that Ms Kerr returned to the hotel but Ms Kerr said that on returning there was simply confirmation that she had been dismissed and could no longer work. She does not accept that she resigned at all.

[40] I am satisfied from the evidence that I heard it is more likely than not that Ms Kerr was dismissed. I do not find that Ms Kerr resigned.

Was the dismissal unjustified?

[41] When the Authority is considering the justification of an action or dismissal, it is required to apply the test which is set out in s.103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider, on an objective basis, whether the actions of Ms Kelly and

Tasman Bay and how they acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[42] The Authority must also consider the four procedural fairness factors set out in s.103A (3) of the Act. These are whether the allegations against Ms Kerr were sufficiently investigated, whether the concerns were raised with her, whether she had a reasonable opportunity to respond to them and whether such explanations were considered genuinely by Ms Kelly and Tasman Bay before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[43] Ms Kelly and Tasman Bay as fair and reasonable employers could be expected to comply with the good faith obligations set out in s 4 of the Act.

[44] I do not find that there was any procedural fairness preceding the summary dismissal of Ms Kerr. Clause 13 of the employment agreement provides disciplinary procedures and there was no adherence to those procedures. The process did not meet the procedural fairness requirements in 103A (3) of the Act.

[45] Ms Kerr was not advised that her employment was in jeopardy if she did not dust the cupboard and she gave a reasonable explanation as to why she could not immediately undertake that task. There was no ability for Ms Kerr to respond to any concerns and have those concerns considered genuinely before her employment was terminated. If the words of dismissal and sending away were in the heat of the moment, then Ms Kerr gave Ms Kelly a further opportunity to clear the matter up on her return to the hotel a short time later. At that time, I find the dismissal was simply confirmed. There was fundamental procedural unfairness.

[46] I do not find that there was substantive conduct on the part of Ms Kerr that would have justified dismissal. I find the dismissal was unjustified, both procedurally and substantively.

[47] Ms Kerr has a personal grievance that she was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Lost wages

[48] Ms Kerr provided copies of applications through Trade Me for about 30 roles since her dismissal. She has not been able to secure new employment and has been on a job seekers benefit since her dismissal on 20 April. That is confirmed by records from Inland Revenue up to the date of the investigation meeting that I was provided with.

[49] The Authority under s 128 (2) of the Act must where a personal grievance is established which has resulted in lost remuneration order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. The Authority may in its discretion under s 128 (3) of the Act order an employer pay to an employee a sum greater for lost remuneration

[50] I am not minded in this matter to exercise my discretion and order a sum greater than reimbursement of 3 months ordinary time remuneration. I have taken into account that there is no claim for that in the amended statement of problem. I am satisfied that there was for the 3 month period acceptable attempts to mitigate loss.

[51] The sum claimed for lost wages for three months in the amended statement of problem is \$8840. The employment agreement provided for an hourly rate of \$17 per hour and the hours of work were 30-45 per week and specifically stated that they may vary week to week. Ms Kerr said that she usually worked between 34 – 35 hours per week.

[52] I intend to calculate the appropriate weekly amount for earnings in those circumstances on the basis of the IRD records that show gross earnings received by Ms Kerr divided by the period of actual employment from 1 March 2017 to 20 April 2017 which is a period of 7 weeks and one day. The total gross earnings received by Ms Kerr for her work over that period is \$4061 gross. \$4061 divided by 7 weeks is an average of \$580.14 per week. That weekly sum is in accordance with Ms Kerr's own evidence about hours worked per week. For completeness I am not satisfied that Ms Kerr was paid an additional one week's pay after she was dismissed.

[53] Subject to any issues of contribution Ms Kerr is entitled to reimbursement of lost wages in the sum of \$7541.82 gross under s 123(1)(c) of the Act. Ms Kerr will have to advise

WINZ of this award and they may require reimbursement of any payments made for the 13 week period.

Compensation

[54] Ms Kerr had shifted to Motueka to take up the role from her home town of Hokitika. She had entered into financial commitments such as a lease for a home in Motueka that required her to have reasonable earnings. When she lost her role she said that she suffered physical symptoms such as headaches and struggled to breath and sleep. Her family urged her to seek medical advice. She went to see a doctor on 24 April 2017, four days after dismissal, and was prescribed Diazepam for anxiety. Ms Kerr said that she had not been prescribed medication previously for anxiety or depression. Ms Kerr said that she did not know anyone in Motueka and felt isolated, alone and humiliated. She struggled financially and had to borrow increased sums of money from her mother to meet payments for her accommodation and car.

[55] Even though this was a relatively short period of employment I accept that the effect on Ms Kerr of her dismissal was significant. Her dismissal was a shock and she tried to keep the relationship on foot just in case it was a statement made by Ms Kelly in a heated moment only to have it confirmed that she had been dismissed.

[56] Subject to any issue of contribution I find Ms Kerr is entitled to an award for compensation of \$10,000 without deduction under s 123 (1)(c) (i) of the Act.

Contribution

[57] Where the Authority has found a personal grievance it is required to consider the extent to which the actions of Ms Kerr contributed, if indeed they did, to the situation that gave rise to the personal grievance claim under s 124 of the Act. If there is contribution then I am required to assess whether there should be a reduction to the remedies she would otherwise have been awarded.

[58] I do not find that Ms Kerr contributed to the situation that gave rise to the personal grievance. Although she said she could not dust the cupboard immediately I am not satisfied that she refused to do the dusting at all but rather wanted to take antihistamines first.

[59] There will be no reduction to remedies.

Orders of the Authority

[60] I order Michelle Kelly and Tasman Bay Limited jointly or severally to pay to Natalie Kerr the sum of \$7541.82 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000

[61] I order Michelle Kelly and Tasman Bay Limited jointly or severally to pay to Natalie Kerr the sum of \$10,000 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000

Costs

[62] I reserve the issue of costs. They will in all likelihood be based on the daily tariff of \$4,500 adjusted to reflect that the investigation meeting took about one hour. Mr Ingram is to provide any submission he may wish about costs by 1 September 2017 and Ms Kelly has one further week to respond by 8 September 2017.

Helen Doyle
Member of the Employment Relations Authority