

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 309
3009791

BETWEEN JORDYN HALL
Applicant

A N D STEPHANIE MORELLI T/A
LOVE & MR LEWIS
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: The applicant, Jordyn Hall in person
The respondent, Stephanie Morelli via telephone
conference

Investigation Meeting: 29 September 2017 at Auckland

Date of Determination: 6 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Ms Jordyn Hall, was a casual employee of the respondent, Ms Stephanie Morelli trading as Love & Mr Lewis.**
- B. Ms Hall was not dismissed. Accordingly, Ms Hall does not have a personal grievance claim.**
- C. During her employment from May 2016 until 10 April 2017, Ms Hall's hours would, more likely than not, have exceeded 10 hours a week, on average.**
- D. There is no order as to costs.**

Employment relationship problem

[1] The applicant, Ms Jordyn Hall, says she was employed by the respondent, Ms Stephanie Morelli trading as Love & Mr Lewis, as a florist from 18 May 2016 until she was dismissed on approximately 10 April 2017. Ms Jordyn Hall says in April 2017 after informing Ms Morelli she was pregnant, she was not offered any further shifts. Ms Hall took this action to mean that she had been dismissed. Ms Hall says the dismissal was not justified, and it caused her distress.

[2] As a result of the dismissal, Ms Hall seeks distress compensation of \$15,000 under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) together with lost remuneration of the equivalent of 3 months wages under s128(2) of the Act, totalling \$7800 gross.

[3] Ms Morelli says Ms Hall worked for her on a casual basis as and when she needed work and work was available for her. The arrangement was fluid and constantly changing. Ms Morelli trained Ms Hall voluntarily as a florist from time to time and when it suited them both. This arrangement became a casual employment arrangement whereby Ms Morelli continued to train Ms Hall and to pay her cash for any work she undertook as and when it suited them both.

[4] Ms Hall was undertaking a course of study during 2016 and fitted in her training and work with Ms Morelli, around these commitments.

[5] Ms Morelli and Ms Hall agreed on \$15 cash an hour for the hours worked by Ms Hall. There was no discussion about PAYE, Kiwisaver or holiday pay and these were not paid by Ms Morelli nor expected by Ms Hall. Ms Morelli says she did not dismiss Ms Hall. They had an email exchange on 9 and 10 April 2017, during which Ms Hall asked if she was working on 10 April 2017. Ms Morelli responded that she would text her for her next shift.

[6] There was no further contact until Ms Hall notified Ms Morelli of a personal grievance claim for unjustified dismissal on 25 April 2017.

Investigation meeting

[7] As permitted under s.174E of the Act, this determination has not set out all the evidence. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[8] The investigation in the Authority took just over half a day. Ms Hall filed a witness statement. Ms Hall's father, Mr David Hall, attended the Authority's investigation and asked to be heard and was heard by the Authority. For Ms Morelli, Ms Morelli filed a witness statement and answered the Authority's questions by phone, Ms Morelli's mother, Ms Christena Morelli, filed a witness statement as did Ms Christena Morelli's husband, Mr Lance Mould.

[9] Each witness confirmed on oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

Issues

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

- a. Was Ms Hall dismissed by Ms Morelli?
- b. If Ms Hall was dismissed, was it unjustifiable?

First issue – was Ms Hall dismissed by Ms Morelli?

Commencement of working relationship

[11] Ms Morelli owned and operated a flower stall called Love & Mr Lewis at Ponsonby Central in Auckland. Ms Morelli provided flower arrangements for clients at various events such as weddings.

[12] Ms Hall was interested in floristry and had purchased flowers from Ms Morelli's flower stall (Love & Mr Lewis) a few times. Ms Hall spoke with Ms Morelli on a number of occasions about floristry and asked if she had any work available. Ms Morelli did not have any work available but offered to teach floristry to Ms Hall on a voluntary basis.

[13] This is how Ms Hall says the working relationship between Ms Hall and Ms Morelli began. Ms Hall attended Love & Mr Lewis, was “shown the ropes” and was taught floristry by Ms Morelli, who was an experienced florist.

[14] In mid – late May 2016, Ms Hall says she and Ms Morelli reached an agreement in which she would work at Love & Mr Lewis each Sunday from 9am – 4pm and would do deliveries each Monday starting at 10am, usually finishing at about 4pm. There was no written employment agreement.

[15] Ms Hall says there was never a discussion about Kiwisaver, holidays, sick leave or other such employment entitlements, but she understood that she was a regular employee of Ms Morelli.

[16] Ms Morelli’s recollection of events differs. Ms Morelli says Ms Hall approached her on numerous occasions to learn floristry and seeking work at Love & Mr Lewis. After quite some time, Ms Morelli agreed to teach Ms Hall. The arrangement was very casual. In late May 2016, the voluntary training morphed into an arrangement whereby Ms Hall would work when she was available and there was work for her and was paid \$15 cash an hour.

[17] There was never any obligation on Ms Morelli to provide work and never an obligation on Ms Hall to accept work.

Working relationship in practice

[18] Ms Morelli says the relationship between them was always one in which she taught Ms Hall floristry. Ms Morelli was very pleased with the work that Ms Hall did for her and was keen for her to work whenever she was able. It was always casual, if Ms Hall was not able to work, she did not do so and was not required to do so.

[19] To assist it with its investigation into the working relationship in practice, the Authority was provided with copies of messages posted on Facebook, texts and emails. These were not easy to follow.

[20] There were supposedly rosters kept at the flower stall but copies were not provided to the Authority. It appears from the messages and texts provided that there were rosters. However, these seemed to change frequently. It was impossible to determine whether employees had regular rosters each week. A workbook was also

provided to the Authority. This workbook was kept at the flower stall. Staff recorded their hours of work each day in this workbook. It was not helpful to the Authority. There were notes scribbled on it and it was only for the months of April and May 2016. There was a calendar which Ms Christena Morelli provided to the Authority which set out the hours Ms Hall was offered work and the hours she actually worked. The calendar was not kept during the time Ms Hall worked, it seems to have been prepared afterwards and Ms Hall disputed this record of her hours.

[21] Ms Morelli paid Ms Hall cash for hours worked or, if Ms Morelli was not working, Ms Hall would take her own pay out of the shop till, as agreed with Ms Morelli. It was only when Ms Morelli was away during November and December 2016 and her mother, Ms Christena Morelli, looked after Love & Mr Lewis that money for hours worked by Ms Hall were paid by direct credit into her bank account. Bank accounts recording these payments were provided to the Authority along with Ms Hall's Inland Revenue Department (IRD) records. There was no record of Ms Morelli, as Ms Hall's employer, on the IRD records.

[22] Ms Morelli says that even though Ms Hall's work was very good, she was could not rely on her to work particular hours and shifts. Ms Christena Morelli and her husband Mr Mould, agreed that reliability was an issue. They said that they had to work considerable hours during November and December 2016 in order to ensure Love & Mr Lewis remained open for business.

[23] Ms Hall was studying for an aromatherapy massage certificate at Wellpark College during the time that she worked at Love & Mr Lewis during 2016. She attended Wellpark on Tuesdays, for a half day on Wednesday, and on Thursdays. During October and November 2016 she was also studying for her clinical exams on Saturdays. Sometimes her studies meant that she had commitments on other days of the week.

[24] Ms Hall would work as and when she could get around these commitments. Ms Morelli had other casuals who worked as and when they were able to at Love & Mr Lewis. All it seems, were paid cash.

[25] The casual working arrangements were challenging and Ms Morelli says she was finding it increasingly difficult to run Love & Mr Lewis. Often the stall was not opened on time and people did not come into work or if they did they were late.

Ponsonby Central has a strict policy regarding the hours its tenants must operate each day and Ms Morelli was threatened with a fine of \$1000 for each time Love & Mr Lewis was not open when it should have been.

[26] From the evidence available to me, it is my view that Ms Hall was a casual employee who made herself available to train and work at Love & Mr Lewis around her studies for her aromatherapy massage certificate and her other commitments.

[27] Ms Hall worked most weeks on days she was available, which would often include, but not always, a Sunday and/or a Monday. This seems to have been the case in the months of June, July and August 2016. In August 2016, it seems Ms Hall worked one Sunday out of four and three Mondays out of five. Extra hours were worked on one Tuesday and one Saturday that month.

[28] Ms Hall did not work Mondays and Sundays during September 2016 as she had study commitments.

[29] The email sent by Ms Hall to Ms Morelli on 9 September 2016 makes the casual nature of the working relationship clear, in my view. The email states:

Hey Steph. Sorry I've been stumped with assessments.

Here are the dates around November – January period I have already made commitments (this was when I thought you were leaving September).

I want to help out as much as I can but some of the commitments I cannot get out. – My course finishes Tuesday November 28th. All weeks prior I cannot work Tuesdays, Wednesdays and Thursdays. Open to the idea of doing the auction as it's in the morning. – And down the line w family for Xmas and my (Dad's bday is Xmas day and Mum's is the 28th). And we are going to raglan. So I have tried to be flexible and are willing to come back to all in between and go back down when I can. This is the days I wish to go: - Xmas 22-26 – ny/raglan – 30-9 (accommodation for raglan is non refundable and I don't think it's worth driving down to Akl on the 2nd only to drive back on the 6th).

Jan 23-28 (this is flexible and can wait until you're back if you prefer as I would like to take time to see my family outside of Akl).

I am sorry for any inconvenience I will cause and I don't want this to be a reflection of my dedication. I wasn't aware I would still have my job when I made these arrangements. I hope you understand. Jordyn.

[30] A further email was sent from Ms Hall to Ms Morelli on 8 October 2016 as follows:

Hi Steph, I have looked at the calendar and have tried moving some things around however I am unable to work also on the following days as it clashes with my classes which are now also held on Saturday. November 5th (Saturday), the weekend of the 11th, 12th and 13th. 19th (Saturday) and the 26th (Saturday).

[31] During October 2016, Ms Hall did not work any shifts at Love & Mr Lewis because of her own commitments and because another casual staff member was being trained up.

[32] November and December 2016 were unusual. Ms Morelli was away and her mother Ms Christena Morelli took over Love and Mr Lewis at this time. Ms Hall made herself available for more shifts but Ms Christena Morelli said that on a number of occasions she was not able to work the shifts that she said she was available to work. On 14 December 2016, Ms Christena Morelli offered Ms Hall extra hours to make Christmas wreaths if she was available. Ms Hall was away over the Christmas period from 22 December 2016 until late January 2017.

[33] In February 2017, Ms Hall discovered that she was pregnant. During this month, Ms Hall worked mainly Mondays, Tuesdays and Wednesdays. Ms Hall told Ms Morelli that she needed surgery and so did not tell her the news of her pregnancy until late in March 2017. Ms Hall asked for more hours of work because she needed the money. By this time Ms Morelli was training another casual employee, Sarah, to ensure appropriate cover at Love & Mr Lewis.

[34] On 2 April 2016, Ms Morelli and Ms Hall sat down at Ponsonby Central to talk. Ms Hall said she wanted to talk about her pregnancy. Ms Morelli thought the discussion was about Sarah and what her hours of work were to be.

[35] It appears Ms Hall recorded the conversation. A transcript has been provided by Ms Hall. The conversation starts off about Ms Hall wanting to apply for maternity leave and what hours and on what days of the week Ms Hall did or did not work and what work she will have in the future.

[36] Ms Hall says on 3 and 4 April 2017, she received texts from Ms Morelli which she took as meaning she no longer had any work. The first text was on 3 April 2017 at 5:07pm.

Text from Ms Morelli to Ms Hall as follows:

Hey I have to work tomorrow for a big job so I'll just do the full day.
Thanks though.

[37] A further text was sent on 4 April 2017 at 7:17pm from Ms Morelli to Ms Hall as follows:

Hey I'm sorry it's such late notice but I got orders for tomorrow from today so I'll just work tomorrow again.

[38] On 9 April 2017, Ms Hall messaged Ms Morelli at 7:38pm stating:

Just making sure I'm coming in tomorrow at 10:30 still to do deliveries.

[39] Ms Morelli responded the next morning at 7:29am:

Morning, shot (sic) sorry totally forgot to message you, I need to spend some time training Sarah but I'll message you for your next shift. She is picking things up fast which is great. Speak soon.

[40] Ms Hall says that was the last message she received from Ms Morelli and she took the view that "because she was pregnant she was no longer being offered any hours and had been silently dismissed".

[41] Ms Morelli says she did not hear from Ms Hall about what shifts she was to work, as was her normal practice. Ms Morelli was training Sarah and so did not contact Ms Hall during this time. Ms Morelli says she was shocked when she received a personal grievance claim from Ms Hall on 27 April 2017 claiming unjustified dismissal.

Determination

[42] It is my view that Ms Hall was a casual employee working as and when she was able for \$15 cash an hour. She notified Ms Morelli of her availability to work and would check with Ms Morelli to make sure she was to be working on a particular day before going into work. This was the practice as is evidenced by Ms Hall's emails on 9 September 2016 and 8 October 2016 setting out her work availability and her text to Ms Morelli on 9 April 2017 to check if she was working the following day.

[43] From the records it appears Ms Hall worked casually for Ms Morelli most weeks from 22 May 2016 until 3 April 2017, with the exception of October 2016

when there was no work performed. Considerably more hours were worked by Ms Hall in November and December 2016 to cover while Ms Morelli was away.

[44] Ms Hall did not take steps in April 2017 to seek further work from Ms Morelli and assumed she had been dismissed. Ms Hall did not telephone, visit or make further contact with Ms Morelli. I do not consider the failure by Ms Morelli to contact Ms Hall between 10 and 25 April 2017 to be action which could be said to have amounted to a dismissal. Given this finding, Ms Hall has no personal grievance claim. The claim is dismissed.

Parental Leave and Employment Protection Act 1987

[45] Ms Hall informed the Authority that she required a determination regarding her employment status for the purposes of paid parental leave.

[46] Based on the evidence available which is sparse because of the way in which Ms Morelli ran Love & Mr Lewis, it is my view that Ms Hall's hours over the period of her employment by Ms Morelli, from May 2016 to April 2017, would more likely than not, have exceeded 10 hours a week, on average.¹

Employer obligations

[47] It is necessary that I comment on the way in which Ms Morelli operated her business. Ms Morelli was an employer and subject to the raft of employment legislation that applies to employers and employees in New Zealand. It seems Ms Morelli failed to recognise the importance of these employment obligations.

[48] While not the subject of the Authority's investigation into Ms Hall's employment relationship problem, there are a number of legal obligations required of employers, which it appears Ms Morelli has failed to comply with. These have come to light as a result of Ms Hall's employment relationship problem.

[49] Ms Morelli paid her employees cash "under the table", did not deduct PAYE, and did not file employer monthly statements with the IRD. Ms Morelli did not offer or provide individual employment agreements or discuss Kiwisaver. It also appears

¹ s2BA, Parental Leave and Employment Protection Act 1987.

Ms Morelli may have failed to comply with her obligations in respect of holidays and minimum wages. This is not acceptable conduct for any employer in New Zealand.

Costs

[50] Neither party was represented so there is no issue as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority