

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 382  
5599265

BETWEEN JULIETTE CAZABAT-ALLIOD  
Applicant

AND EMPIRE ENTERPRISES LIMITED,  
HAMILTON EMBASSY  
ENTERPRISES LIMITED T/A LE  
CHEF VULCAN LANE  
Respondent/s

Member of Authority: Jenni Trotman

Investigation Meeting: 6 December 2017

Determination: 11 December 2017

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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- A. Empire Enterprises Limited unjustifiably dismissed Juliette Cazabat-Alliod.**
- B. Empire Enterprises Limited is ordered to pay to Ms Cazabat-Alliod the following amounts within 14 days of the date of this determination:**
- i. The sum of \$1,209.60 gross for wages lost as a result of her personal grievance;**
  - ii. Interest on the sum of \$1,209.60 from 8 November 2015 at the applicable rate of 5% per annum continuing until payment.**
  - iii. The sum of \$71.56 for costs.**

## **Employment Relationship Problem**

[1] Ms Cazabat-Alliod was employed by Empire Enterprises Limited on 21 September 2015 as a barista/waitress. The parties' relationship was without issue until Ms Cazabat-Alliod's last day of employment on 8 November 2015.

[2] On 8 November 2015, Ms Cazabat-Alliod claims that Empire summarily dismissed her. She claims this dismissal was unjustified. She seeks two weeks' wages being the notice period she was entitled to under the Individual Employment Agreement (IEA).

[3] No Statement in Reply has been filed by Empire. In addition, there was no appearance for or on behalf of Empire at the investigation meeting. The notice of investigation meeting was served on Empire at its registered office on 10 August 2017. It was signed for by Ms Way at 8.25 am. No good reason has been provided for Empire's failure to attend or be represented. As provided for in Clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act as fully in the matter before me as if Empire had duly attended or been represented.

[4] As permitted by s 174E of the Act, this determination has not recorded all the evidence and submissions received from the applicant 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.

### **Issues:**

[5] The issues to be determined are:

- (a) Does the Employment Relations Authority have jurisdiction to hear Ms Cazabat-Alliod's claim?
- (b) If so, was Ms Cazabat-Alliod unjustifiably dismissed from her employment with Empire?
- (c) If Ms Cazabat-Alliod was unjustifiably dismissed what remedies should be awarded?

(d) If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by Ms Cazabat-Alliod that contributed to the situation giving rise to her grievance?

(e) What costs, if any, are payable?

**Issue One: Does the Employment Relations Authority have jurisdiction to hear Ms Cazabat-Alliod's claim?**

[6] Whilst Empire did not file a Statement in Reply, I viewed email correspondence from Empire to Ms Cazabat-Alliod, shortly after her termination. This correspondence was from Edouard Le Goff, Ms Cazabat-Alliod's manager. It advised that Ms Cazabat-Alliod was being terminated under the trial provision set out in her individual employment agreement (IEA). Ms Cazabat-Alliod said Mr Le Goff also told her this verbally and repeated it in text messages.

[7] Sections 67A and 67B of the Act set out criteria for an employment agreement to include a trial period. If those criteria are met, then a worker is prevented from bringing a personal grievance or legal proceedings in the event she or he is given notice of dismissal before the end of the trial period.

[8] Section 67B(2) includes a particular requirement before the statutory bar against pursuing a grievance is triggered. The trigger is that the employee's employment agreement must have been terminated in accordance with subsection (1) i.e. the employee must have been given notice of the termination before the end of the trial period. As explained by the Employment Court in its decision in *Smith v Stokes Valley Pharmacy (2009) Limited*:<sup>1</sup>

... [D]isqualification from bringing a personal grievance is dependent upon lawful termination of the employment agreement under subs (1). If there is no lawful termination in subs (1), then the personal grievance barrier under subs (2) does not apply.

[9] In *Smith* the Court held the reference to notice in subsection (1) means more than the worker being told of the fact of dismissal. The Court considered the subsection also contemplated advice about when, in the future, the dismissal would take effect.<sup>2</sup> It

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<sup>1</sup> [2010] NZEmpC 111 at [62]

<sup>2</sup> *Smith*, above n 1, at [61]

found the notice which must be provided cannot be inconsistent with the contractual notice agreed between the parties.<sup>3</sup>

[10] Clause 7.3.2 of Ms Cazabat-Alliod's IEA provided that Ms Cazabat-Alliod was to receive notice of termination as provided in Clause 12.1. Clause 12.1 provided that where her employment was terminated the employer or the employee must give the other 2 weeks' notice of termination or resignation. Empire did not comply with this contractual notice period. The personal grievance barrier in s 67B(2) does not therefore apply.

[11] For completeness I record that even if notice had been provided by Empire in accordance with the IEA I would still have found it could not rely on the trial provision clause. This is because when Ms Cazabat-Alliod signed the IEA she was not "an employee" in terms of s 67. Section 67A(3) defines an employee as one "who has not been previously employed by the employer". The evidence was that Ms Cazabat-Alliod commenced work with Empire on 21 September 2015. The IEA was not signed until 9 October 2015 i.e. when she was an existing employee. The trial period was therefore not in compliance with s 67A. The benefits to Empire of a trial period, including its ability to dismiss Ms Cazabat-Alliod within the first 90 days of employment without risk of challenge by personal grievance, were not available to it.<sup>4</sup>

**Issue Two: Was Ms Cazabat-Alliod unjustifiably dismissed from her employment with Empire Enterprises?**

[12] As Empire cannot rely upon the 90-day trial period to restrict a claim for unjustifiable dismissal, it has the onus of proving that the dismissal was justifiable.

[13] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Empire, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[14] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, an

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<sup>3</sup> *Smith*, above n 2, at [106] and confirmed in *Farmer Motor Group Limited v McKenzie* [2017] NZEmpC 98 at [17]

<sup>4</sup> *Smith*, above n 2, at [85]

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.

[15] The process leading to Ms Cazabat-Alliod's dismissal was defective. There is no evidence Empire met any of the mandatory considerations set out in s 103A(3). There was no investigation before dismissal. There was no raising of concerns before dismissal. There was no opportunity to respond to the concerns before dismissal. There was no genuine consideration of the explanation before dismissal. In effect the dismissal was immediate and abrupt.

[16] Empire's failure to comply with the statutory requirements was not minor and did result in Ms Wood being treated unfairly.<sup>5</sup> A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made.

[17] I find therefore that Ms Cazabat-Alliod was unjustifiably dismissed from her employment with the Company and is entitled to remedies.

### **Issue Three: Remedies**

#### *Lost Wages*

[18] Section 123 of the Act provides that where the Authority determines that an employee has a personal grievance it may award a remedy. Remedies include the reimbursement to the employee of a sum equal to the whole or any part of wages or other money lost by the employee as a result of the grievance.<sup>6</sup>

[19] Ms Cazabat-Alliod claims 2 weeks' wages. I am satisfied that 2 weeks' wages were lost as a result of the grievance. Indeed, 2 weeks' wages reflect no more than Ms Cazabat-Alliod's contractual entitlement had notice been provided.

[20] The IEA provides that Ms Cazabat-Alliod would be paid a sum of \$16.00 per hour for the work that she performed. Her hours of work were flexible depending on the requirements of the business. I have viewed her timesheets for the period she worked for Empire. These show, on average, she worked 35 hours per week.

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<sup>5</sup> Section 103A(5) of the Employment Relations Act 2000

<sup>6</sup> Section 123(1)(b) of the Employment Relations Act 2000

Multiplying these hours by her hourly rate of \$16.00 I reach an average weekly wage of \$560.00 gross. Two weeks' wages totals \$1,120.00 gross.

[21] Empire is ordered to pay to Ms Cazabat-Alliod the sum of \$1,120.00 gross together with the sum of \$89.60 gross for holiday pay. Payment of these sums must be made within 14 days of the date of this determination.

#### *Interest*

[22] In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion of interest on the amount awarded.<sup>7</sup>

[23] Ms Cazabat-Alliod has been without her wages for a considerable period of time through no fault of her own. During this period Empire has had the benefit of utilizing these monies. I consider it appropriate in these circumstances to order interest is payable by Empire. Empire is ordered to pay interest on the sum of \$1,209.60 gross from 8 November 2015, continuing until payment, at the applicable rate of 5% per annum<sup>8</sup>. This must be paid within 14 days of the date of this determination.

#### **Issue Four: Contribution**

[24] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.<sup>9</sup>

[25] I am satisfied that Ms Cazabat-Alliod did not act in a way that was causative of, or contributed to, her grievance. Her actions were in no way culpable or blameworthy. I therefore do not find that there is any contribution.

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<sup>7</sup> Clause 11, Schedule 2, Employment Relations Act 2000

<sup>8</sup> Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4

<sup>9</sup> Section 124 of the of the Employment Relations Act 2000

### **Issue Five: Costs**

[26] Ms Cazabat-Alliod was not represented and therefore does not claim legal costs. However, she is entitled to be reimbursed the fee of \$71.56 which she paid to lodge her application in the Authority.

[27] I order Empire to pay the sum of \$71.56 within 14 days of the date of this determination.

### **Certificate of Determination**

[28] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 that Ms Cazabat-Alliod be provided with a certificate of determination, sealed with the seal of the Authority, recording that within 14 days of the date of this determination, Empire Enterprises Limited is to pay Ms Cazabat-Alliod:

- a) The sum of \$1,209.60 gross for wages lost as a result of her personal grievance;
- b) Interest on the sum of \$1,209.60 from 8 November 2015 at the applicable rate of 5% per annum continuing until payment.
- c) The sum of \$71.56 for costs.

Jenni Trotman

Member of the Employment Relations Authority