

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 139
3022755

BETWEEN SUSAN HARROD
Applicant

AND HOKITIKA RIMU TREE TOP
WALK LIMITED
PARTNERSHIP trading as West
Coast Treetop Walk
Respondent

Member of Authority: Christine Hickey

Representatives: Paul Brown, Advocate for the Applicant
Shane Abel, Managing Director of the Respondent

Investigation meeting: 8 June 2018

Submissions received: At the investigation meeting and further evidence
received 11 and 15 June, and 21 September 2018

Determination: 24 September 2018

DETERMINATION OF THE AUTHORITY

- A. Hokitika Rimu Tree Top Walk Limited Partnership unjustifiably dismissed Susan Harrod.**
- B. Hokitika Rimu Tree Top Walk Limited Partnership must pay Susan Harrod \$20,639.10 being made up of:**
- (i) Lost wages of \$15,200 gross;**
 - (ii) Compensation of \$8,000 gross;**
 - (iii) Set off against an overpayment of \$30.93 and unauthorised credit card spending of \$2,529.97.**
- C. I have reserved the issue of costs.**

Employment relationship problem

[1] I have issued this reserved determination outside of the three-month period after receiving the last of the submissions. Under s 174C(4) of the Employment Relations Act (the Act) the Chief of the Authority has decided that special circumstances exist and has allowed me to provide the determination outside of the usual three-month period.

Employment relationship problem

[2] Susan Harrod claims that she was unjustifiably dismissed from her role of manager of the Treetop Walk (TTW) business¹ on 1 November 2017. She claims lost remuneration up to the date of the investigation meeting, pay for an eight-week notice period and compensation of \$15,000 for humiliation, loss of dignity and injury to her feelings.

[3] Mr Abel says that TTW terminated Ms Harrod's position as the result of serious misconduct. TTW counter-claims that Ms Harrod owes it 50% of her salary because she worked from home and not its office about 50% of the time. It claims that she paid herself unapproved overtime payments. It also claims she spent amounts on the TTW credit card that were for her personal use and wrongly claimed and paid herself \$600 for use of an office at her home.

Background facts

[4] I need to provide a brief outline of the facts. TTW's two Australian-based directors, Neil Wade and Shane Abel, employed Ms Harrod at a distance.

[5] Ms Harrod's contact was initially through Mr Neame who resigned from the role just before she took it over.

[6] Ms Harrod entered into a written individual employment agreement (IEA) on 25 January 2017. Her contact with the directors while her employment was being negotiated was through Mr Wade. Mr Neame signed the IEA on behalf of TTW, not Mr Wade or Mr Abel.

¹ The respondent is registered as a limited partnership in New Zealand. A New Zealand registered company, Fly West Pty Ltd, is a general partner in the respondent. Shane Abel and Neil Wade are Fly West Pty Ltd's directors.

[7] Ms Harrod says that Mr Wade was aware Mr Neame had regularly worked from home and she did the same. She prepared the weekly staff rosters that showed the days on which she would work from home. She usually did so for two days a week. She says that Mr Wade was aware of that.

[8] Ms Harrod had a TTW credit card that she understood she had permission to use, particularly when TTW did not have an agreement with suppliers. She used it to pay for things such as fuel, travel, accommodation and lunches. The card limit was \$5,000.

[9] Ms Harrod says as manager she had the authority to approve expenditure up to \$5,000 as well as staff wages, and her own salary payments. All expense payments were “batched” in Xero and imported in to the TTW bank account. Wages were paid fortnightly and supplier expenses were paid monthly. Ms Harrod says she would email Mr Wade and ask him to authorise payments through the bank account.

[10] On 20 October 2017, Mr Wade emailed Ms Harrod the following:

Expenditure limit: Following the surprise invoice for the tree lopping we need to have more accountability and fewer shocks. Prior to authorising work to proceed and commitment to expenditure future work in excess of \$2,500 ... requires the written approval of either Director Shane Abel or Neil Wade. A full quote of work is also a necessary prerequisite to authorisation.

[11] By late October 2017, Ms Harrod was aware that TTW’s financial position had worsened. Ms Harrod emailed Mr Wade about wage payments advising him it was OK with her if TTW needed to defer her salary payment that was due to be paid on 3 November 2017, as it appeared there were insufficient funds.

[12] On 26 October 2017, by email Mr Abel directed Ms Harrod to work from TTW’s premises and not from home. Ms Harrod agrees that she received that instruction. She says that before that she was not aware that Mr Abel disapproved of her working from home. She says that she had always conducted conference calls with Mr Wade and his wife from her home because he cell

phone coverage was poor at TTW's site and the landline clarity was also poor there.

The conference call

[13] Ms Harrod arranged a teleconference with Mr Wade and Mr Abel for 1 November 2017. She conducted that call at home, not at TTW's premises. She says she arranged the call so they could discuss Mr Abel's objection to her working from home, which she wished to continue, and other issues.

[14] It is common ground that TTW had not raised any issues of concern with Ms Harrod that it intended to deal with as disciplinary concerns in advance of the call. Ms Harrod says she told both men she had taken annual leave for the day and was conducting the call from home.

[15] Ms Harrod says Mr Abel told her that he and Mr Wade had received unfavourable feedback from TTW staff about Ms Harrod's performance and her attendance at work. She says that was the first time she heard about any staff feedback.

[16] She says she tried to read out notes that she had prepared but that Mr Abel interrupted her a number of times. He sounded angry and accused her of stealing from TTW.

[17] Ms Harrod says that until that call she had never spoken to Mr Abel or heard his voice. Mr Abel agrees they had not previously spoken and that TTW's contact with Ms Harrod had been through Mr Wade and his wife, Wendy.

[18] Ms Harrod listened to the call on a speaker-phone. Mr Neame arrived home during the call. At one stage Mr Neame told Mr Abel he needed to be careful about what he was saying to Ms Harrod. Mr Abel responded that he had taken legal advice.

The dismissal

[19] By the end of the telephone call, Ms Harrod believed that Mr Abel had dismissed her. Later that same day Mr Abel emailed Ms Harrod a letter of dismissal signed by him:

In accordance with the terms of your contract Clause 13.1 General Termination we have now terminated your contract. You are not to return to site over the 8 week period except to return items ...

13.1 General Termination

The Employer may terminate this agreement for cause, by providing **8 weeks** notice in writing to the Employee. Likewise the Employee is required to give **8 weeks** notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

Termination is based on the fact that you have failed to perform your duties as stated in the signed contract which includes working on site five days per week 40 hours per [week]. You have been given two previous warnings in regards to these issues and have failed to comply. You clearly stated today through your attitude that you would not comply with these requirements.

Other aspects of your failure

- Allocation of rent from the Tree Top walk for home office rental without authority
- Sale of [personal] camera to the WCTT without authority
- Engagement of contractors without seeking quotes
- Failure to respond to numerous email request[s] from Directors
- Failure to attend to marketing
- Failure to manage staff effectively and with respect
- Increased ticket pricing without authority
- Failure to manage social media despite numerous requests
- Failure to liaise with Mahinapua Boat people when instructed to do so
- Failure to attend to Chinese potential buyers despite being directed to do so

After the dismissal

[20] The letter refers to the eight-week notice period and led Ms Harrod to understand that TTW exercised its right to pay her rather than requiring her to serve the notice period. However, it did not pay Ms Harrod for the notice period. I deal with Ms Harrod's claim for eight weeks' pay in lieu of notice at [113] – [115].

[21] On 9 November 2017, Mr Brown raised a personal grievance of unjustified dismissal by way of letter to Mr Abel.

The Authority's proceedings

[22] Ms Harrod's statement of problem was lodged on 21 November 2017. As part of it, Ms Harrod asked for a direction to mediation.

[23] Mr Abel responded to the statement of problem by way of letter, which I accepted as a statement in reply. In it he stated that TTW was “more than happy” to attend mediation but only if Ms Harrod provided:

... in writing a detailed explanation of all credit card expenses, a copy of the Director’s Instruction which allows expenditure without Director approval of up to \$5,000, justification for charging the business \$600 for home office rent, justification for charging the business \$1,000 to purchase her [personal] camera evidence of the valuation of the camera and evidence of the photos taken and used by the business and the numbers of hours each week she did not attend site as required under her contract.

... Susan’s failure to comply with the Employment Agreement and direction by the Directors to perform in accordance with her contract, the misuse of the work credit card along with the charging of home office rent and purchase of camera resulted in her termination. **This termination was in accordance with Termination for Serious Misconduct Clause 13.2.**

[emphasis added]

[24] In TTW’s statement in reply, Mr Abel also wrote that TTW sought that Ms Harrod repay 50% of her salary because of the amount of time she worked off site in an amount of \$23,798.

[25] On 12 January 2018, I directed the parties to mediation, but Mr Abel refused to attend mediation in the absence of documentation from Ms Harrod. I can only assume that the documents he wanted were as set out above.

[26] On 22 March 2018, the Authority officer recorded in the Authority’s case management system that Mr Abel refused to make a date for mediation until all documents he wanted had been provided. Mr Brown had already provided some documents to him. The Authority officer asked, more than once, what Mr Abel considered to be still outstanding. He would not tell the Authority officer, instead referring him to ask Mr Brown.

[27] The parties did not attend mediation.

[28] On 30 April 2018, I held a case management conference call. The Notice of Direction I issued after the call records:

Several emails were exchanged between the Authority officer and Mr Shane Abel, ... prior to the teleconference concerning the date and time for the call exploring Mr Abel’s availability and willingness to

participate. In an email dated 28 April 2018, Mr Abel confirmed he did not wish to be connected to the call and so it proceeded in his absence.

[29] During that call, I set a date for the investigation meeting and a timetable for the provision and exchange of evidence. I directed TTW to include the credit card documents including the purchases made by Ms Harrod on the work credit card that Mr Abel queried. I also asked Mr Abel to provide evidence of payment of the other amounts he disputed were genuine work-related costs.

[30] In particular, I noted that TTW had not made any counter-claim.

[31] On 28 May 2018, Mr Abel sent in a letter outlining that TTW wanted refunds from Ms Harrod of 50% of her salary as well as overpaid salary, for amounts spent on the credit card and from a Bidvest Food order. He also supplied the credit card statements. I considered these to be counter-claims by TTW.

At the investigation meeting

[32] I heard affirmed evidence from Ms Harrod and Mr Abel who participated by way of telephone from Tasmania. TTW's immediate former manager, Robert Neame, who is Ms Harrod's husband, attended the investigation meeting as her support person.

[33] I had no evidence from Neil Wade, the other partner in/director of TTW.

[34] By the investigation meeting date, TTW sought reimbursement of salary in an amount of \$27,357.37 made up of 50% of Ms Harrod's salary (\$22,670.80), an unapproved payment for overtime of \$4,459.86 and one day of what TTW says was overpaid leave at \$226.71. It still sought payment of personal expenses on the credit card and reimbursement for a Bidvest order.

[35] At the investigation meeting, Mr Abel and Ms Harrod gave oral evidence in response to questions from me. Mr Brown asked Mr Abel questions and Mr Abel asked questions of Ms Harrod, some of which I directed him to ask through me.

Did TTW unjustifiably dismiss Ms Harrod?

[36] Section 103A of the Employment Relations Act 2000 (the Act) sets out the test the Authority needs to apply to assess whether the dismissal was justified. The onus is

on an employer to prove that it acted as a fair and reasonable employer could have acted in both the way it dealt with its concerns about Ms Harrod's employment and the decision it made.

[37] TTW did not act as a fair and reasonable employer could have acted when it dismissed Ms Harrod, making the dismissal unjustified, for the following reasons.

[38] Section 103A(3) of the Act sets out the minimum procedural requirements that I must consider in determining whether the dismissal was justified. Factors include whether TTW:

- Sufficiently investigated the allegations against Ms Harrod, having regard to its available resources;
- Raised its concerns with Ms Harrod before dismissal;
- Gave Ms Harrod a reasonable opportunity to respond to its concerns before dismissal; and
- Whether TTW genuinely considered Ms Harrod's responses before making the decision to dismiss her.

[39] I can also consider any other factors I consider relevant. However, I must not decide that a dismissal was unjustified if there were minor defects in the process that did not result in the employee being treated unfairly.

[40] The Employment Court has made it clear that if all four parts of the process set out in s 103A(3) are absent from the employer's process the decision to dismiss is not one that a fair and reasonable employer could make.

[41] Unfortunately, that was the case with TTW's process. First, TTW did not sufficiently investigate its allegations against Ms Harrod. Perhaps it considered that it was doing that in its telephone call with her on 1 November 2017. However, during these proceedings Mr Abel insisted on seeking explanations from Ms Harrod to allegations TTW relied on in its decision to dismiss her. That makes it clear that TTW did not adequately investigate its allegations before dismissing Ms Harrod.

[42] Secondly, TTW had not put all the allegations in its dismissal letter to Ms Harrod in advance of the telephone call. And, it had not put any of them in the form of allegations that it told her could attract a disciplinary outcome.

[43] Therefore, Ms Harrod was not able to give considered responses to the allegations. That means that TTW did not give her a reasonable opportunity to respond to its allegations before it made its decision to dismiss her.

[44] It follows, that TTW could not take Ms Harrod's responses into account when making its decision to dismiss her.

[45] In addition, TTW did not give Ms Harrod the opportunity to be represented during the telephone meeting, or to take legal advice before it, because she had not been told in advance that it was to be a disciplinary meeting.

[46] All of the procedural defects were significant and resulted in Ms Harrod being treated unfairly.

Was there substantive justification for the dismissal?

[47] Mr Abel is insistent that, nonetheless, TTW was justified in dismissing Ms Harrod on substantive grounds, including her failure to comply with clause 5.1 of her employment agreement, which is headed "Flexible location":

The parties agree that the Employee shall perform their duties at **1128 Woodstock Rimu Road, RD 3, Hokitika**, and at any other reasonable location to which they may be directed from time to time by the Employer.

[48] However, the lack of fair process, including the lack of a proper investigation, means that it did not have sufficient evidence to prove its allegations gave it substantive justification to dismiss Ms Harrod.

[49] The prime allegation TTW relied on to dismiss Ms Harrod was that she failed to work from TTW's site in breach of her employment agreement.

[50] However, Ms Harrod says that Mr Wade was well aware that she often worked from home and had not raised earlier concerns about that. TTW could have called Mr Wade as a witness, but did not do so. Therefore, TTW has not proved that Mr Wade

did not approve Ms Harrod working from home for some days a week prior to the email of 26 October 2017.

[51] I accept that Ms Harrod was resistant to working in the TTW site on all days of the week. However, it appears that for the majority of her employment that was known about and at least tacitly approved by Mr Wade.

[52] Ms Harrod says that working from home two days a week saved at least three hours of travel time and saved TTW fuel expenditure. She says that meant she could devote up to three extra hours a week to administrative tasks for TTW.

[53] I have not seen any objective evidence of prior directions to Ms Harrod to stop working from home. For example, there are no earlier emails telling Ms Harrod to work at the TTW site. Although Mr Abel made assertions to the effect Ms Harrod had been told a number of times before, he provided no specifics of apparent earlier directions, such as dates and/or modes of instruction – were these telephone or written directions?

[54] I also accept that the issue of Ms Harrod's workplace was a live cause of disagreement between the parties during the telephone call. However, Ms Harrod had not been warned that if she did not agree to work at the TTW site for five days a week she risked disciplinary action against her, including the possibility of dismissal.

[55] In any event, if Ms Harrod is correct about the telecommunications difficulty inherent in working from TTW's site it may be she had some justification for working from home from time to time.

[56] TTW has not been able to prove to me that a fair and reasonable employer could have used Ms Harrod's failure to work at TTW's site as the prime reason to dismiss her in all the circumstances at the time it made its decision.

[57] For the above reasons, TTW did not act as a fair and reasonable employer could have acted. Therefore, TTW unjustifiably dismissed Ms Harrod.

Other allegations relied on for dismissal but not put to Ms Harrod before her dismissal

[58] Mr Abel's evidence was that at the time he dismissed Ms Harrod TTW had started to do an audit of credit card and other expenses. It had not completed that assessment when it dismissed her.

[59] These allegations could not fairly be taken into account as part of the decision to dismiss Ms Harrod. However, since they have been raised as part of these proceedings I record that Ms Harrod gave the following responses in her evidence.

[60] **Failure to respond to emails from directors** – she did her best to respond to emails in a timely manner.

[61] **Failure to attend to marketing** – she kept the directors and Mr Wade's wife up to date with marketing information. In addition, she ensured the TTW Facebook page was regularly updated with calendar events, videos and photos.

[62] **Failure to manage social media** – she gave the same response as in relation to marketing. She also says that a new employee had been hired in late October whose job it would have been to monitor the Facebook/Wechat marketing and keep it up to date.

[63] I note that in an email dated 20 October 2017 Mr Wade wrote that he was happy with how an employee was managing the Facebook posts. He asked Ms Harrod to get that employee and another to get going on WeChat. He offered his wife's assistance with this.

[64] **Failure to manage staff effectively and with respect** – she dealt with negative staff feedback when it was given to her. She remains unaware of what this allegation is based on.

[65] **Increasing ticket pricing without authority** – this decision was made by Mr Neame when he was the manager. Ms Harrod included the increased ticket price in the TTW forecast budget she provided to the directors. She did so because she was aware the industry needed to know about any increased prices 12-24 months in advance.

[66] **Failure to liaise with Mahinapua boat people** – another employee was doing this.

[67] **Failure to attend to potential Chinese buyers** – in her absence another employee was doing that.

[68] **Engagement of contractors without seeking quotes** – she did have a quote for removal of the fallen trees.

TTW's counter-claims

TTW's purchase of Ms Harrod's camera

[69] As manager, Ms Harrod must have had some financial and managerial discretion. I accept her explanation that she had used her own camera to take photographs for TTW's social media and publicity purposes. I accept her evidence that it was a better camera than the one TTW owned. I also accept her evidence that she asked the TTW IT specialist to work out an objectively fair price for her to sell the camera to TTW. He assessed its worth as \$1,000, which is what TTW paid her. TTW retains the camera.

[70] This was not a dishonest transaction and Ms Harrod does not need to pay this money back.

Credit card expenses

[71] During questioning at the investigation meeting, it became apparent that despite Ms Harrod's written evidence denying all the allegations and monetary claims TTW made that the parties did not have the same understanding of what Ms Harrod was entitled to put on the credit card and/or claim as expenses.

[72] The following are relevant clauses for my consideration of the counter-claims:

7.4 Allowance Clause (1)

The Employee shall be entitled to a meal allowance sourced from the on-site daily menu of a maximum of \$20 per day (retail cost) in addition to three non-alcoholic beverages.

7.6 Reimbursement of Expenses

The Employee shall be entitled to reimbursement by the Employer of all expenses reasonably and properly incurred by the Employee in the performance of their duties, provided the employee produces appropriate receipts to the Employer when requesting reimbursement.

Clause 7.7 Reimbursement of Travel and Accommodation Expenses

The Employee may be required to travel from time to time as part of their duties. The Employer shall reimburse the Employee for their reasonable work related travel and accommodation costs upon production of appropriate receipts.

[73] We went through the credit card statements together at the investigation meeting.

[74] I asked Ms Harrod about the number of lunches she had put on the credit card and she answered that she thought that TTW had agreed to pay for her lunches in her employment agreement.

[75] The employment agreement only allows Ms Harrod to have lunch at TTW's expense if she is at work and eats from TTW's café up to a maximum value of \$20 per day, or impliedly if the lunch was off-site but otherwise a legitimate TTW expense.

[76] During the investigation meeting, and after it, Ms Harrod conceded there were some expenses she should not have put on the credit card, including some lunches, and that she was not authorised to charge for a home office.

[77] She has also offered to pay the balance of the Bidvest amount she should have paid at the time. She has offered to pay back \$1,986.34, including the \$600 home office expenses and the Bidvest amount.

[78] After the investigation meeting, Mr Abel responded to Ms Harrod's offer by writing that TTW would not accept anything less than its claim of \$2,913 and reimbursement of paid overtime, the camera amount, the home office rental and 50% of her salary.

[79] I note that Mr Abel has asked Ms Harrod to provide a policy stating that she was able to approve expenditure under \$5,000. She has not done so but neither has TTW proved that she was not authorised to approve legitimate work-related expenditure up to the credit card limit.

[80] Up until 26 October 2017 there appears not to have been any policy on an upper limit on the amount Ms Harrod as manager could have authorised. It is only on

that date Mr Wade instructed her to get quotes for any work to be done and to obtain prior approval for any expenditure over \$2,500.

Claim for 50% of Ms Harrod's salary

[81] At the investigation meeting, I indicated to Mr Abel that I was unable to order that Ms Harrod repay 50% of her salary to TTW. I do not have evidence in front of me that would make that appropriate. TTW has not proved that Ms Harrod was not working for 40 hours a week. In any event, I do not have any jurisdiction to make such an order.

[82] Nevertheless, in Mr Abel's submissions at the end of the meeting and in writing on 15 June 2018, he insists on claiming that.

[83] I dismiss this part of TTW's claim.

Unauthorised credit card and other expenses

[84] Ms Harrod agrees she owes \$600 she claimed for home office expenses that TTW had not agreed to pay, and that, despite thinking she had already paid what she needed to pay, she will pay the full amount for the food she bought via TTW from Bidvest, being \$109.93. However, TTW is only seeking \$36.63 for the Bidfood order. That is the figure I will use. Those two amounts make a total of \$636.63.

[85] The other amounts she agrees to pay include lunch expenses, for her and sometimes her husband, that she wrongly considered her employment agreement allowed her to charge to TTW, purchases of ink for her home computer and some food and accommodation expenses she could not satisfactorily explain as properly being TTW expenses. In her calculation, those expenses total \$1,276.41.

[86] However, when I checked Ms Harrod's list there were a few mathematical errors. In addition, I have found other expenses that I questioned her about at the investigation meeting that she has not agreed to pay. Having considered all the evidence, those that I consider she must pay in addition are:

- | | |
|--|----------|
| 1. 8/5/17 Gap Café | \$ 22.80 |
| 2. New World Ilam | \$ 75.21 |
| 3. Cotswold accommodation in Mr Neame's name | \$155.25 |
| 4. Hell Pizza Shirely | \$ 37.00 |

5. 21/4/17 Robert Harris Greymouth

\$ 24.00

\$314.26

[87] Overall, the credit card expenses I consider not legitimately proved to be work related total \$1,570.83.

[88] In addition, I consider that Ms Harrod has not satisfactorily explained the use of a \$400 gift card apparently purchased to use on work-related fuel costs. There was no satisfactory explanation for why a gift card needed to be used to purchase fuel when Ms Harrod had a credit card for purchasing fuel. Only one receipt of \$77.49 for expenditure on the gift card was supplied to TTW. Therefore, Ms Harrod owes \$322.51.

[89] Overall, my calculations come out lower than Mr Abel's calculations and claim but higher than Ms Harrod's calculations. In total, all of the amounts above come to \$2,529.97 that Ms Harrod must repay TTW. I will set this amount off against any remedies I order TTW to pay for unjustified dismissal.

Monetary claims by Ms Harrod

[90] Ms Harrod has claimed:

- eight weeks' pay in lieu of notice;
- twelve weeks lost wages;
- further lost wages until the date of the investigation meeting;
- unpaid last 3 days;
- payment of 16 accrued alternative hours for working public holidays (2 working days); and
- holiday pay of \$2,630.77.

TTW's counter-claim for unauthorised overtime pay

[91] The relevant clauses in Ms Harrod's employment agreement are:

6.1 Full Time Hours

The Employee's normal hours of work shall be 40 hours per week, between the hours of 6 am and 6 pm from Monday to Friday as directed by the Employer. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties.

7.1 Annual salary

The Employee's salary shall be \$76,000 per annum, which shall be paid fortnightly on Thursdays ...

[92] Ms Harrod was on a salary of \$76,000 per year. She was not on an hourly wage. Although clause 6.1 mentions the word "overtime" there is no mention in the agreement of any additional pay over and above \$76,000 per year for any hours over 40 per week worked. There was no contractual right for Ms Harrod to be paid for any overtime hours worked over and above her \$76,000 annual salary.

[93] I am satisfied that Mr Wade approved some higher than usual salary payments Ms Harrod made to herself for overtime. However, I am also satisfied that Ms Harrod did not specifically seek prior agreement to pay those extra amounts or draw them to TTW's attention at the time.

[94] Ms Harrod did not address this issue in her written evidence. At the investigation meeting, she said she understood she was entitled to be paid overtime and agrees she did pay herself overtime. However, she was not entitled to be paid extra for working more than 40 hours per week.

[95] Mr Brown said in his closing submissions that the issue of overpaid salary was not previously included in a list of counter-claims. That is not correct as on page three of the document Mr Abel provided on 25 May 2018, outlining TTW's counter claims, it refers to TTW claiming that Ms Harrod overpaid herself an amount of \$4,459.86.

[96] I am satisfied that Ms Harrod had a chance to respond to this claim both in evidence and in submissions from her advocate. I proceed to determine it.

[97] I have obtained the relevant IRD summaries of earnings. I have compared the IRD records to the payroll information that I have. Those records show that TTW paid Ms Harrod a total of \$59,118.00 gross in her role as manager.

[98] In order to determine how much, if any, Ms Harrod was overpaid I need to take into account her claims for unpaid wages, unpaid holiday pay and unpaid pay for alternative days owed.

Unpaid last three days

[99] Ms Harrod claims she is also entitled to pay for her last three days of employment, being 30 and 31 October and 1 November 2017. I agree that Ms Harrod should be reimbursed for those days. However, I bear in mind Ms Harrod's written evidence says she was on annual leave on 1 November 2017.

[100] I calculate the amount Ms Harrod should be paid for unpaid wages and holiday pay below.

Holiday pay and days in lieu

[101] Ms Harrod also claims \$3215.39 gross being made up of 16 hours for accrued alternative leave for working on public holidays (\$584.62) and 72 annual leave hours being \$2,630.77.

[102] Mr Abel calculates that Ms Harrod had been paid for one more day of annual leave than she was entitled to when she was dismissed, for which he (counter) claims \$226.71.

[103] I was not given the holiday records from which Mr Abel made his calculation.

[104] Generally, when an employee has worked less than 12 months they are due to be paid 8% of their gross pay to date for annual leave, less any leave already taken, and paid for any alternative days leave not already taken.

[105] Ms Harrod's employment lasted for 37 weeks and three days. There were 5 statutory holidays during that time, which I will assume she worked. That gives her eligibility for 5 further days of pay at .5 over and above her usual pay, and to 5 alternative days off, which if she had not taken them before her dismissal she must be paid for.

[106] At \$76,000 per annum, she should have been paid \$292.31 per day. For 37 weeks (\$54,076.92) and three days (\$876.93) she was due \$54,953.85.

[107] For her statutory holiday work she was due a further \$146.15 per day x 5 = \$730.77. She was also due to 5 alternative days at her usual rate of pay being \$292.31 per day x 5 = \$1,461.55. She had clearly already taken 3 days as her last pay slip shows only 2 days owed.

[108] $\$54,953.85$ salary + $\$730.77$ (for T1.5 for public holidays worked) + $\$1,461.55$ (alternate days) = $\$57,146.17$ gross pay.

[109] Holiday pay on that amount at 8% is $\$4,571.69$ gross. However, I need to deduct the number of days paid leave Ms Harrod took over her employment at her usual daily rate.

[110] I rely on Mr Abel's figures that Ms Harrod took 8 days paid leave, and Ms Harrod's evidence she took a further day of leave on 1 November, making it 9 days. $9 \times$ daily rate of $\$292.31 = \$2,630.79$.

[111] $\$4,571.69 - \$2,360.79 = \$1,940.90$ annual leave due at the end of her employment. When you add that to $\$57,146.17$ the overall amount Ms Harrod should have been paid was $\$59,087.07$.

[112] However, Ms Harrod was actually paid $\$59,118$ gross during her employment. Therefore, TTW does not owe her any amount for unpaid wages, holiday pay or alternate days. In fact, Ms Harrod was overpaid by $\$30.93$, which I will offset against what TTW must pay Ms Harrod.

Is Ms Harrod entitled to eight weeks pay in lieu of notice as well as three months lost wages?

[113] Mr Abel quoted clause 13.1 of Ms Harrod's employment agreement in her dismissal letter. However, in his statement in reply he wrote that TTW dismissed Ms Harrod for serious misconduct.

[114] This claim is one of unjustified dismissal and my investigation and determination of it as an unjustified dismissal mean that I consider TTW intended to and actually did dismiss Ms Harrod for serious misconduct. It was a summary dismissal and not a dismissal with paid notice.

[115] Therefore, I must consider Ms Harrod's claim of lost remuneration under ss 123 and 128 of the Act instead. She is not entitled as well to payment for eight weeks' notice.

Remedies for unjustified dismissal

Wages lost as a result of the dismissal

[116] By way of remedy for the unjustified dismissal, s 123(1)(b) of the Act allows me to order TTW to reimburse Ms Harrod for the whole or any part of wages or other money she lost as a result of her grievance. Section 128(2) of the Act provides that I must order TTW to pay Ms Harrod the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration.

[117] Ms Harrod did not obtain any work for more than 3 months after her dismissal. Indeed, she did not have any replacement work as at the date of the investigation meeting.

[118] Mr Brown has claimed 12 weeks lost wages. However, under s 128(2) I am bound to order three months' lost wages, which is 13 weeks.

[119] Ms Harrod's weekly pay was \$1,461.54. She did not have any earnings in the three months after her dismissal. Subject to my consideration of contribution, TTW must pay Ms Harrod \$19,000 in lost wages.

Should TTW also pay Ms Harrod her lost wages up to the date of the investigation meeting

[120] I have discretion to order lost wages for a longer period than three months. However, in considering whether to do so I need to ask whether, had she not been dismissed on 1 November 2017, Ms Harrod would have remained in TTW's employment for longer than three months. I consider that very unlikely.

[121] I consider that even had Ms Harrod not been unjustifiably dismissed when she was the issues the business was facing, as well as Mr Abel's communication with Ms Harrod, mean that it is likely the necessary relationship of trust and confidence the parties needed to have in one another would not have lasted beyond three months.

Compensation

[122] Ms Harrod claims \$15,000 for humiliation, loss of dignity and injury to her feelings. She says she remains vulnerable and still endures pain from her dismissal. She feels aggrieved, distressed and humiliated. She says she was wrongly accused of

stealing, which has caused her anxiety, depression and stress. She says that a medical certificate from her GP backs this up. Part of the hurt and anxiety was because Mr Abel accused her of dishonesty and threatened to call the police.

[123] Ms Harrod also says her confidence was decreased by the dismissal, so much so that she had enrolled in an online course to obtain a new qualification and build up her confidence.

[124] Ms Harrod's medical certificate was written on 10 November 2017. It says that the doctor saw Ms Harrod "recently" and that Ms Harrod had been through recent events that caused her significant anxiety.

[125] Considering the evidence about the effect on Ms Harrod of the dismissal, the range of awards in cases of this kind, and subject to contribution, TTW must pay Ms Harrod \$10,000 compensation.

Contribution

[126] Having determined that Ms Harrod has a personal grievance, s 124 of the Act requires me to consider the extent to which Ms Harrod's actions contributed to the situation giving rise to her personal grievance. If there was a causal connection between those actions and the situation that gave rise to the dismissal and if those actions so require, I must reduce the remedy that would otherwise be awarded.

[127] In relation to the unjustified dismissal, I have found that Ms Harrod's behaviour in relation to working at home part-time was not sufficient cause to dismiss her. I find her refusal to do so communicated during the 1 November 2017 phone call only in part give rise to the situation contributing to her dismissal. However, it was not such a serious issue that a fair and reasonable employer could not have sorted it out short of dismissal. Ms Harrod's behaviour in explaining her reasons for wishing to remain working at home was not so blameworthy that her remedies should be reduced on this basis.

[128] The other issues raised in the dismissal letter were so insufficiently investigated that TTW has not been able to prove to me that Ms Harrod's behaviour in relation to any of them separately or combined should reduce the remedies I have awarded.

[129] Mr Abel also raised what he referred to as Ms Harrod stealing from TTW during the 1 November 2017 telephone call. I am satisfied that in part he was referring to illegitimate credit card expenses. Only part of that issue was known by the time the decision to dismiss was made. However, I consider that Ms Harrod's behaviour in relation to her credit card use contributed to the situation leading to her personal grievance, albeit TTW not discovering the extent of it until after her dismissal.

[130] Ms Harrod's payment to herself of unauthorised overtime was discovered subsequent to her dismissal. Therefore, I do not consider this contributed to the situation leading to her personal grievance.

[131] Overall, I consider Ms Harrod's actions in relation to the credit card expenses and overtime to be blameworthy enough to reduce the remedies by 20%.

Costs

[132] Ordinarily, the unsuccessful party is expected to make a reasonable contribution to the other party's costs for representation in the Authority.

[133] TTW was not separately represented and generally would not be eligible for an award of costs in the Authority.

[134] Ms Harrod was represented by Mr Brown. He claims \$4,500, the Authority's daily tariff.

[135] Ms Harrod was fully successful in her personal grievance claim, although her remedies were reduced by way of a partial set-off and for contribution.

[136] TTW has 14 days after the date of this determination to respond to Mr Brown's application for costs.

Christine Hickey
Member of the Employment Relations Authority