

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 296  
3020836

BETWEEN                      SHAYLENE McCORMACK  
   Applicant  
  
A N D                              SAMEDY THAI trading as  
   THE BAKEHOUSE & CAFÉ  
   OPOTIKI  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:              R Morgan advocate for Applicant  
   No appearance for Respondent  
  
Investigation Meeting:      20 September 2018 at Whakatane  
  
Submissions Received:      20 September 2018 from Applicant  
  
Record of Oral  
Determination:                21 September 2018

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**ORAL DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment Relationship Problem**

[1]      Shaylene McCormack alleges she was unjustifiably dismissed by her employer Samedy Thai on 28 August 2017.

**Relevant Facts**

[2]      Ms McCormack was employed as a shop assistant at the Bakehouse & Café Opotiki in February 2016. She worked without incident until August 2017.

[3] On 22 August 2017 Ms McCormack suffered a personal bereavement. She was granted time off for the funeral and to sort out the deceased's affairs. She was granted five days bereavement leave.

[4] However by the following Sunday (27 August 2017) Ms McCormack felt she was unable to return to work. She was due to start the following day but wanted to deal with other issues relating to the deceased's estate.

[5] She sent a text message that Sunday seeking further time off until 4 September 2017. She wanted to use her annual leave to cover her absence.

[6] She received a reply text that same day from the owner of the business where she worked, Samedy Thai. Mr Thai directed her to return to work the following day. However Ms McCormack felt she was not in a position to return to work and did not do so. She took no steps to inform Mr Thai of her reasons for not returning to work. She simply did not turn up.

[7] At some stage on the following Monday (28 August 2017) her sister-in-law saw a message on Ms McCormack's cellphone. This advised that she had been sacked. Ms McCormack was distressed by that message and rang Mr Thai, asking him what this all meant. She was told to "stay home from now on." When she asked again what he meant by that, she was told she had been dismissed.

[8] Ms McCormack sought legal advice and raised a personal grievance by way of her advocate on or about 5 September 2017.

### **Issues**

[9] The issues for determination today are:

- a) Who was Ms McCormacks employer?
- b) Was Ms McCormack unjustifiably dismissed?
- c) If so, what remedies should be granted?

**Law**

[10] This personal grievance of unjustified dismissal requires Ms McCormack to prove the identity of her employer and that she was dismissed by this person. The employer must then prove the dismissal was justified.

[11] The requirements for justification of a dismissal are set out in s.103A(3) of the Employment Relations Act 2000 (“the Act”). This section requires the employer to demonstrate that it raised concerns with the affected employee, gave that employee an opportunity to be heard and then genuinely considered the employee’s replies before any dismissal occurred. A dismissal may still be justified if any defects in this process are minor and do not cause an employee unfairness.<sup>1</sup>

**Non-appearance of respondent**

[12] Today’s hearing has continued without any appearance by the respondent Samedy Thai. Mr Thai was served with the amended statement of problem and investigation notice by courier post. I am advised by the Authority Officer that Mr Thai appears to have signed for both packages.

[13] The Authority has attempted to contact Mr Thai personally for an earlier telephone conference.<sup>2</sup> At the start of that telephone conference Mr Thai confirmed his identity but refused to participate in the call and hung up.

[14] No steps have been taken by Mr Thai to defend this matter. I am satisfied he has shown no good cause for his failure to appear today. I intend continuing to determine this matter in his absence.

**No briefs hearing**

[15] The hearing has proceeded on the basis I have not required parties to file any briefs. I have taken her evidence as being that contained and attached to her amended statement of problem. I was also assisted by Ms McCormack’s oral evidence she gave today.

**Who was Ms McCormacks employer?**

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<sup>1</sup> Section 103A(5) of the Act.

<sup>2</sup> Minute of the Authority dated 13 July 2018.

[16] The first issue is who was Ms McCormack's employer? There is no written employment agreement naming an employer. This has become an issue because the original statement of problem dated 5 October 2017 filed in the Authority named Samedy Thai Childrens Trust Limited as the respondent. This entity bore no relationship to Ms McCormack's employment. It happened to be an entity owned by her manager Mr Thai.

[17] A subsequent amended statement of problem was filed on 5 June 2018. This named The Bakehouse & Café Opotiki as her employer. This was not a legal entity or corporate body that could be sued.

[18] Ms McCormack through her advocate was directed to file a further amended statement of problem. An amended statement of problem was filed on or about 20 July 2018 naming Samedy Thai personally as Ms McCormack's employer.

[19] Ms McCormack told me that she believed Samedy Thai was her employer because he made most of the major decisions at the business and about her employment. He was the one who originally offered her the job and together with his partner directed what she would do on a daily basis. Mr Thai was the person named as paying her wages into her bank account. At other times Mr Thai or his partner paid her in cash. As far as she was concerned Mr Thai controlled and owned the business where she worked.

[20] Mr Thai was also the person who told Ms McCormack she was dismissed on 28 August 2017. Given the above evidence I am satisfied Samedy Thai was Ms McCormack's employer.

### **Was Ms McCormack unjustifiably dismissed?**

[21] There is no doubt her employment ended on 28 August 2017 because she did not return to work after that date. In absence of evidence to the contrary, I accept Ms McCormack's evidence that she was told in a phone call to Mr Thai that she had been dismissed.

[22] It is clear there was no process followed prior to the dismissal. There was certainly no evidence of any compliance with the statutory process before dismissal occurred. This was not a minor defect and it is clearly unfair to Ms McCormack. This is because she lost the opportunity to explain her circumstances.

[23] I find Ms McCormack was unjustifiably dismissed by Samedy Thai.

**What remedies should be granted?**

[24] Because Ms McCormack has a proven grievance of unjustified dismissal, she is entitled to remedies of lost remuneration and compensation.

[25] I am satisfied from the evidence I have heard from Ms McCormack that she took steps to mitigate her losses. She is required to look for jobs to mitigate her losses of income. She told me on a weekly basis she scanned Job Seekers and the Trade Me advertisements for work in Opotiki. Due to her personal circumstances she is unable to work outside of Opotiki. She has a young son and is required to be available to him before 8:30 am and after 2:30 pm Monday to Friday and on weekends. She has however secured work with a local business after months of searching.

[26] The starting point of an award of the statutory minimum of three months or 12 weeks lost remuneration is appropriate.<sup>3</sup>

[27] Ms McCormack also told me she received five days additional pay with her final pay. By my calculations she is therefore entitled to eleven weeks lost remuneration. From her bank account details she was paid \$278 per week net wages. Therefore 11 weeks net wages are \$3,058. This may be reduced for contributory conduct (see below).

[28] Compensation of \$14,000 is sought. After some discussions with Ms McCormack's representative I have come to the view that only \$10,000 is justified. This is on the following bases:

- a) This is not employment of long duration. It was for a period of 18 months.
- b) There is also no evidence of long-lasting effects from the dismissal or need for medical intervention or otherwise.
- c) I accept Ms McCormack was affected giving evidence of social isolation and shame that requires compensation. However the effects may have been exacerbated by the death of her close relative that had occurred at the same time.

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<sup>3</sup> Section 128 of the Act.

- d) In my view an amount of \$10,000 is appropriate subject to any reduction for contributory conduct.

### **Contributory Conduct**

[29] Remedies must be reduced where contributory conduct is found.<sup>4</sup> This is conduct that is both causative of the dismissal and blameworthy.

[30] Ms McCormack accepted under examination by the Authority that she did not intend complying with the instruction from Mr Thai to attend work on Monday 28 August 2017 and would not be returning to work until 4 September.

[31] However under examination by her representative she accepted she usually took up to four days leave at most for a tangi including those of close relatives. It would have been reasonable for Mr Thai to assume she would only need that amount of leave and no more. Although Ms McCormack stated Mr Thai had told her to take as much leave as she needed, I do not accept he would have expected that this would be longer than what she had taken in the past. Ms McCormack needed to provide Mr Thai with more information about her circumstances. She did not.

[32] Ms McCormack did not contact her employer to explain her situation or even arrange for someone else to do that on her behalf. She had a sister-in-law who was also employed at the same place who may have assisted.

[33] Ms McCormack should have presented for work or at the very least contacted her employer to explain her situation including other alternatives. She had a duty of good faith to be communicative and responsive.

[34] I heard today her reason for taking more time off, was due to her emotional state following several deaths in her family. It is a pity those matters were not addressed at the time, as opposed to hearing this over a year later.

[35] In my view there was contributing conduct that was both causative of the dismissal and blameworthy. The conduct does justify a reduction in the remedies but only 25 percent reduction is appropriate.

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<sup>4</sup> Section 124 of the Act.

**Orders**

[36] Accordingly the following orders are now made.

- (a) I order Samedy Thai to pay Shaylene McCormack lost remuneration of \$2,293.50 net including a 25 percent reduction for contributing behaviour pursuant to ss.123(1)(b), 124 and 128 of the Employment Relations Act 2000.
- (b) I also order Samedy Thai to pay Shaylene McCormack compensation of \$7,500 including a reduction of 25 percent for contributing behaviour and that is pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

**Costs**

[37] After hearing from the representative Mr Morgan, I am not inclined to give \$1,500 for today's hearing. This matter started late at 9.45 am. Evidence and submissions took until 10.30 am. The applicant was not required to file briefs of evidence. There was only one witness the applicant herself. The majority of examination was undertaken by the Authority. I adjourned to 11.00 am and delivered my decision by 11.25 am. In my view a quarter of the daily tariff of \$4,500 or \$1,125 is appropriate.

[38] I also order Samedy Thai to pay Shaylene McCormack the sum of \$1,125 as a contribution to her legal costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**