

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 81  
3016251

BETWEEN                      SAMANTHA CARTER  
Applicant

AND                              GRAVITY TRAMPOLINE NZ  
LIMITED (*In liquidation*)  
previously Dialled IP Limited  
First Respondent

AND                              DIALLED TGA (2015)  
LIMITED  
Second Respondent

Member of Authority:      Vicki Campbell

Representatives:            Craig Horsley for Applicant  
Kelvin Travers for Respondent

Investigation Meeting:     1 March 2018

Further information  
Received:                      1 March 2018

Determination:              7 March 2018

**DETERMINATION OF THE AUTHORITY**

- A. Ms Carter was unjustifiably dismissed.**
- B. Dialled TGA (2015) Limited is ordered to pay to Ms Carter the following amounts within 28 days of the date of this determination:**
- a) \$2,365.77 gross under s 123(1)(b) of the Employment Relations Act; and**
- b) \$3,750 under s 123(1)(c)(i) of the Employment Relations Act.**

**C. Dialled TGA (2015) Limited is ordered to pay to Ms Carter arrears of wages amounting to \$468.18 gross under s 131 of the Employment Relations Act within 28 days of the date of this determination.**

**D. Costs are reserved.**

**Employment relationship problem**

[1] On 16 October 2017 the company name for Dialled IP Limited was changed on the companies register to Gravity Trampoline NZ Limited. The company was put into liquidation on 27 November 2017.

[2] Mr Kelvin Travers is the sole director and shareholder of both Gravity and Dialled TGA. Dialled TGA operates an indoor trampoline park in Tauranga.

[3] Ms Carter was employed by Gravity as an office assistant to work 30 hours a week in the office at the trampoline park. She usually worked Monday to Friday inclusive from about 9 – 3 although the pay slips provided by Gravity show Ms Carter regularly worked in excess of the 30 hours each week.

[4] In October 2016 Ms Carter agreed to reduce her hours of work for Gravity to 16 hours a week on the basis that she would work at least 14 hours each week undertaking duties as a tramp monitor and doing counter sales for Dialled TGA. This arrangement worked until 21 December 2016 when Dialled TGA stopped rostering Ms Carter to work in the trampoline park.

[5] On about 16 January 2017 Ms Carter received written notification from Mr Travers advising her that her role with Gravity was ending by reason of redundancy. She worked the following two weeks in the office as usual.

[6] Ms Carter says that removing her from the roster in the trampoline park and then dismissing her in January from her office work were unjustified actions of the employer. She challenges these actions and claims remedies. Ms Carter also claims she is owed arrears of wages.

[7] During a case management call on 7 February 2018 Ms Carter confirmed she did not have the permission of the liquidator to continue her action against Gravity and acknowledged that her claim could not proceed. Since then Ms Carter has withdrawn her claims against Gravity but wishes to continue her claims against Dialled TGA.

### **Issues**

[8] In order to resolve Ms Carter's employment relationship problems I must determine the following questions:

- a) Was Ms Carter unjustifiably dismissed from her employment with Dialled TGA and if so, what if any remedies should be awarded?
- b) What if any outstanding wages are owed to Ms Carter from her employment with Dialled TGA?

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence received from Ms Carter and Dialled TGA but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

### **Change in employment relationship**

[10] I have been provided with copies of three different employment agreements purporting to set out the terms and conditions of Ms Carter's employment. One agreement was attached to Ms Carter's statement of problem and was signed by Ms Carter on 2 March 2016 but has not been signed by Gravity. This agreement was written by Ms Carter. The hourly rate of pay set out in this agreement bears no resemblance to the actual hourly rate paid to Ms Carter.

[11] Two other agreements were provided by Mr Travers. Mr Travers has signed both agreements. There is also a signature on the two documents purporting to be that of Ms Carter. Ms Carter denies the signatures are hers. I am not a handwriting expert and have not been able to discern whether either or both of the signatures belong to Ms Carter. I have not had to reach any conclusions on this issue because my

determination of Ms Carter's claim does not rely on the wording of either of the agreements.

[12] It was common ground that the business of Gravity was not financially viable during 2016 to 2017. Two other employees employed to work in the office with Ms Carter left in or about May and/or June 2016 and from that time on Ms Carter was working in the office on her own. During the period from July until she left in January 2017 Ms Carter fielded numerous calls from creditors wanting payment of overdue accounts which she told me was embarrassing.

[13] By October 2016 Mr Travers decided he needed to take action to reduce his costs. As a result of discussions he had with Ms Carter it was agreed she would reduce the hours she worked in the office to 16 per week and she would pick up additional hours by working for Dialled TGA in the trampoline park. The Park Manager was responsible for rostering employees to work in the park. Mr Travers instructed the Park Manager to add Ms Carter to the roster because she needed additional hours because of a reduction in her hours in the office. The Park Manager confirmed to me that she had to make sure Ms Carter had enough hours which is why she rostered her at least two days every week.

[14] When working in the park Ms Carter was responsible for dealing with emails from customers, making coffee and monitoring the customers using the trampolines to ensure they did so safely. Ms Carter also did some event work for children's birthday parties.

[15] The Park Manager told me she rostered Ms Carter to work in the park on two days of the week between Monday and Friday and one day over a weekend. Prior to putting her on the roster the Park Manager spoke with Ms Carter and discussed Ms Carter's preferred working days. Ms Carter had the full care of her children on alternate weeks. She asked that she not be rostered to work on the weekends on which she had the children. The Park Manager was unable to accommodate Ms Carter's preferences because she had to ensure other staff were rostered to work their guaranteed hours.

[16] I have concluded Ms Carter expected to be available for work at the Park for at least 14 hours each week and that it was intended that these hours replace the hours

she dropped from her work in the office for Gravity giving her a total of 30 hours work each week.

### **Ending of the employment relationship**

[17] The Park Manager told me she stopped putting Ms Carter on the roster for the Park because she did not turn up for a week. In answer to questions at the investigation meeting the Park Manager acknowledged that she did not attempt to contact Ms Carter to discuss why she had not turned up even though this is something she would do for other employees under her control.

[18] The Park Manager also told me she stopped putting Ms Carter on the rosters because she was not happy with the way Ms Carter carried out her duties. No performance issues were ever raised with Ms Carter. The Park Manager explained that she had spoken to Mr Travers about her concerns and he instructed her to talk to Ms Carter. Despite that instruction the Park Manager did not raise her concerns with Ms Carter. It would be fair to say that until the investigation meeting Ms Carter did not know the Park Manager had concerns about the way she carried out her duties.

[19] Mr Travers told me Ms Carter was difficult to put into the roster because she undertook cleaning duties for clients outside her hours of work. Ms Carter emphatically denied she had a cleaning business and when pushed Mr Travers could provide no evidence to support his contention. Mr Travers did provide the Authority with copies of text messages which show he himself was offering Ms Carter cleaning work for his home as a way for her to increase her hours. At the investigation meeting Mr Travers told me it was not uncommon for him to have staff clean his house to help make up their hours when the park was quiet.

[20] On 21 December Ms Carter sent a text message to Mr Travers advising him she hadn't been rostered to work at the Park for two weeks. In response Mr Travers promised to "sort it out".

[21] That did not happen and Ms Carter was not rostered to work at the Park again. I find Ms Carter's employment with Dialled TGA effectively ended on 21 December when the Park Manager failed to provide rostered hours for her. This was a dismissal at the initiative of Dialled TGA.

## **Unjustified dismissal**

[22] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Dialled TGA's actions, 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.

[23] 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, Dialled TGA sufficiently investigated allegations, raised the concerns with Ms Carter, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[24] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms Carter being treated unfairly.<sup>1</sup> A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[25] Ms Carter entered into an employment relationship with Dialled TGA to make up the hours she lost through the restructuring of her role with Gravity.

[26] I have found the failure to provide rostered hours to Ms Carter after 21 December constituted a dismissal. The process leading to Ms Carter's dismissal was defective. There is no evidence Dialled TGA met any of the mandatory considerations set out in s 103A(3). Dialled TGA had not raised its concerns about Ms Carter's performance prior to taking her off the roster. There was no opportunity for Ms Carter to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. These defects were not minor and resulted in Ms Carter being treated unfairly.<sup>2</sup>

[27] The actions of Dialled TGA and how it acted were not the actions an employer acting fairly and reasonably could take. Ms Carter's dismissal was unjustified and she is entitled to a consideration of remedies.

## **Remedies**

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<sup>1</sup> Employment Relations Act 2000 (the Act), s 103A(5).

<sup>2</sup> The Act at s 103A(5).

[28] Ms Carter seeks reimbursement of lost wages and payment of compensation for her personal grievance.

[29] Ms Carter has now obtained alternative employment which she started in April 2017. I have been provided with a list of the jobs Ms Carter applied for together with the evidence of the applications. I am satisfied Ms Carter has taken steps to mitigate her loss. She is entitled to three months lost wages which I have calculated on the basis of 14 hours per week for 13 weeks at \$17 per hour starting from 21 December.

[30] Between 21 December and commencing her new employment Ms Carter undertook temporary work for which she was paid \$728.23. I have taken that into account when calculating her lost remuneration.

[31] Dialled TGA (2015) Limited is ordered to pay to Ms Carter the sum of \$2,365.77 gross under s 123(1)(b) of the Act within 28 days of the date of this determination.

[32] Ms Carter seeks \$7,500 compensation for humiliation, loss of dignity and injury to feelings. Ms Carter believed she did a good job for Dialled TGA. She told me she struggled financially and had to use her children's savings while she applied for jobs.

[33] It is difficult to discern between the distress Ms Carter felt as a result of her dismissal from Gravity and the distress arising from her dismissal from Dialled TGA. Ms Carter told me she felt trashed when she received the letter on 16 January giving her notice of dismissal from Gravity by reason of redundancy.

[34] In all the circumstances of this case and taking into account that a portion of Ms Carter's distress arose directly from the ending of her employment with Gravity an award of \$3,750 is appropriate.

[35] Dialled TGA (2015) Limited is ordered to pay Ms Carter the sum of \$3,750 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

#### **Arrears of wages**

[36] Ms Carter claims she was not paid for 14 hours each week from 26 October 2016 until she was removed from the roster on 21 December. I have reviewed the pay

slips provided by Dialled TGA for this period. The pay slips confirm Ms Carter was not rostered and paid a minimum of 14 hours for the weeks ending 31 October, 8 and 28 November, and 13 and 20 December 2016. Ms Carter was underpaid a total of \$433.50 plus holiday pay of \$34.68.

[37] Dialled TGA (2015) Limited is ordered to pay to Ms Carter the sum of \$468.18 gross under s 131 of the Act within 28 days of the date of this determination.

### **Costs**

[38] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Carter will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Dialled TGA will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[39] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority