

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 627
3067612

BETWEEN

MAY SNELL
Applicant

AND

AMANDA CARMODY T/A
WOODCOTE FARMS
BOARDING KENNELS AND
CATTERY
Respondent

Member of Authority: Robin Arthur

Representatives: Andrea Kelleher, advocate for the applicant
No appearance for the respondent

Investigation Meeting: 1 November 2019

Oral determination: 1 November 2019

Written record issued: 1 November 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] May Snell sought orders requiring Amanda Carmody to pay arrears of wages, penalties for breaches of employment standards and remedies for unjustified dismissal.

[2] Ms Snell had worked at the Woodcote Farms Kennels and Cattery since 2004. Ms Carmody took over the business in 2016, trading on her own account. Ms Snell's employment continued but without a written employment agreement. After some months Ms Carmody had given Ms Snell, and she had signed, what was called an Employee Handbook. The Handbook had clauses on matters such as leave and work

policies but did not include all items required in an employment agreement, particularly the wages or salary payable.¹

[3] Ms Snell worked 40 hours a week and, from early 2019, was paid at the rate of \$25 an hour.

[4] From November 2018 onwards there had been shortfalls or delays in Ms Snell's pay. At 6.55pm on 2 July 2019 Ms Carmody sent Ms Snell this text message:

May I am very sorry, i am in a very very had position. I can not afford to pay you anymore. I will pay you out the full amount including holiday pay etc and 3 weeks notice as soon as i can but i literally will lose the business and all hope of paying anyone if I cant get [the property owner] paid. He is here meeting with me now and i will call you in a hour or so when he goes.

[5] Ms Snell did not see the text till the next morning and, on arriving at work, told Ms Carmody's partner that she wanted to talk to Ms Carmody about it. An hour or so later Ms Carmody and Ms Snell discussed the situation and whether they could come up with a plan that was financially viable for Ms Carmody and would enable Ms Snell to keep working in some capacity for the business. However later that evening Ms Carmody rang Ms Snell because she had found out that a dog, called Ruby, which had previously stayed at the kennels, was staying at Ms Snell's house.

[6] Ms Carmody called Ms Snell to a meeting the next day and gave her a letter. Her letter said Ms Carmody was forced to restructure the business as she was having significant financial trouble and needed to "slip into" the role of manager held by Ms Snell, who was the only full time employee. However the letter also referred to the "incident" of discovering that Ruby was staying at Ms Snell's house. Ms Carmody's letter then referred to two previous instances on which she said Ms Snell had offered her home as an alternative to the kennels. She said Ms Snell had apologised on those occasions and agreed not to do so again without consulting Ms Carmody beforehand. She described Ms Snell's actions as taking work from her and "essentially theft". Ms Carmody's letter then advised Ms Snell that she was suspended from work and said "an official meeting" was needed once Ms Carmody had time to "gather the facts" and Ms Snell had time to "gather [her] own thoughts". The letter said Ms Snell could bring a support person to that meeting.

¹ Employment Relations Act 2000, s 65.

[7] Ms Snell responded by having her advocate raise a personal grievance on 5 July saying she was dismissed by text on 2 July with “no reason” and “no process”. The grievance letter also asked for the time and wage records for Ms Snell. It made no reference to Ms Carmody’s letter of 4 July containing the allegations about Ms Snell privately housing dogs that were previously housed at the kennels.

[8] On 15 July Ms Snell’s advocate delivered a further copy of the grievance letter to the kennel premises and talked with Ms Carmody about attending mediation. Ms Carmody responded by email the next day saying she would be in touch after talking with her lawyer later that week.

[9] In an email on 18 July Ms Carmody advised Ms Snell’s advocate that her meeting with her lawyer was postponed to 22 July and the lawyer would contact the advocate after then. Her email included the following comments about Ms Snell:

Do you realize that the reason she is no longer here is due to the fact that she poached another customer after being warning that to do so again would be dismissal? Even still, I was amenable to a resolution but she handed her keys back and refused to speak to me.

[10] Ms Snell’s advocate lodged her application to the Authority the next day. Ms Carmody did not lodge a statement in reply within the required period or seek leave to do so at any time since. Authority records show a copy of the application, with information about lodging a reply, was sent to Ms Carmody at her business email address, to a personal email address she had asked Ms Snell’s advocate to use in communications on the matter and was delivered by courier to the physical address of the business.

The Authority’s investigation

[11] In the absence of any reply or other contact by Ms Carmody with the Authority, arrangements were made for an investigation meeting as further information was needed from Ms Snell about her wage arrears claim and the circumstances of the end of her employment.

[12] The notice of investigation meeting was sent to Ms Carmody at her business and personal email addresses and, again delivered by courier, to the physical address

of the business. The accompanying email advised Ms Carmody she would need leave to reply to or respond to Ms Snell's application.²

[13] The investigation meeting was postponed a week when the Authority's central city meeting rooms were not available due to the effects of a fire at a construction site. Notice of the postponed investigation meeting was delivered by email to all the relevant addresses.

[14] Neither Ms Carmody nor any other representative for her attended the investigation meeting on the notified date and time. No good cause was shown for her absence. The meeting proceeded after waiting ten minutes in case Ms Carmody was running late.³

[15] Ms Snell, under oath, gave oral evidence confirming the details of her wage arrears claim and the circumstances around the end of her employment, including on the topic of allegations made by Ms Carmody on 4 July 2019 about Ms Snell's conduct.

[16] As permitted by s 174A and s 174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It has not recorded all evidence and submissions received.

The issues

[17] The issues requiring investigation and determination were:

- (i) Was Ms Snell owed wage arrears, comprising wages for one day and for holiday pay for an annual leave entitlement that she became entitled to on 24 June 2019?
- (ii) Was Ms Carmody liable for penalties for failure to provide a written employment agreement, for failing to produce time and wage records when requested and for failure to pay holiday pay at the termination of the employment?
- (iii) If Ms Carmody was liable to penalties, what amount should be ordered and should any portion of any penalty imposed be paid to Ms Snell?

² Employment Relations Authority Regulations 2000 r 8 (3) and (4).

³ Employment Relations Act 2000, s 73(2) and Schedule 2 clause 12.

- (iv) Did Ms Snell's employment as a result of unjustified actions by Ms Carmody?
- (v) If so, what remedies are due to Ms Snell, considering:
 - (a) lost wages (subject to reasonable endeavours by her to mitigate her loss) and
 - (b) compensation for humiliation, loss of dignity and injury to her feelings?
- (vi) Should any remedies awarded to Ms Snell be reduced due to blameworthy conduct by her that contributed to the situation giving rise to her grievance?
- (vii) Should either party contribute to the costs of representation of the other party?

Wages arrears

[18] Ms Snell sought payment of one day's pay for work on 3 July 2019 and her annual leave entitlement that had fallen due on 24 June 2019. Ms Snell mistakenly thought that entitlement was for three weeks' leave but her statutory entitlement was to four week's leave, that is 20 days pay.⁴ Both amounts should have been paid in full at the end of her employment.

[19] Ms Carmody had not provided the wage and time records requested by Ms Snell's advocate. In the absence of evidence to the contrary, Ms Snell's account of amounts owed to her has been accepted.

[20] Ms Carmody must pay Ms Snell \$200 for her normal eight hours for 3 July 2019 and a further sum of \$4,000 for holiday pay due to her at the end of her employment.

[21] Ms Carmody must also pay interest on those wage arrears, totalling \$4,200, for the period from 15 July 2019, when Ms Snell's personal grievance was formally raised, until the date payment is made in full. The amount of interest due for that period should be calculated using the Civil Interest Debt Calculator.⁵

Penalties

⁴ Holidays Act 2003, s 16.

⁵ See www.justice.govt.nz/fines/civil-debt-interest-calculator and Employment Relations Act 2000 Schedule 2 clause 11(1).

[22] Ms Snell sought penalties be imposed on Ms Carmody on three counts. Each has been established.

[23] By letters of 5 July and 15 July 2019 Ms Snell's advocate sought copies of the time and wage records that Ms Carmody was obliged under s 132 of the Act to keep for Ms Snell's employment. They were not provided, rendering Ms Carmody liable to a penalty under s 132(2) of the Act for failure to comply with the request.

[24] Ms Carmody had not provided Ms Snell with an employment agreement setting out all the terms and conditions required under s 65 of the Act so could not have complied with the requirements of s 64 of the Act to keep a copy of such an agreement and to produce it when requested to do so. She was asked by Ms Snell's advocate to provide a copy of Ms Snell's employment agreement and had not done so. Accordingly, Ms Carmody was liable to a penalty under s 64(4) of the Act.

[25] Ms Snell was not paid her holiday pay entitlements in her final pay at the end of her employment. A payment of \$820.34 was made to Ms Snell on 18 July but that was wages owed to her for the week ending 30 June and did not cover her holiday pay entitlements. Consequently Ms Carmody had breached s 27 of the Holidays Act 2003 and was liable to a penalty under s 75 and s 76 of that Act.

[26] Ms Carmody's total provisional liability to penalties was up to \$10,000 for each of the three breaches, totalling \$30,000. Determining the appropriate level of penalty in each case is guided by the factors set in s 133A of the Act applied through the methodology developed by the Employment Court.⁶

[27] Penalties were required in this case because Ms Carmody's actions had breached provisions of the employment standards defined in the Act. Those breaches caused loss to Ms Snell because she was not paid money due to her on time and was, in the absence of time and wage records and a written employment agreement, not able to readily check her entitlements had been paid in full. Because she had not responded to Ms Snell's application to the Authority or taken part in the ensuing investigation, Ms Carmody had not shown she had made any attempts to mitigate the effects of those breaches. Neither has she provided any information that could

⁶ See *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

properly be taken into account in assessing her financial ability to pay any penalties imposed. There was no evidence of similar previous conduct but Ms Carmody was culpable for the breaches. Penalties were necessary to deter her from similar practice in the future and to discourage other employers behaving in the same way. Considering consistency with penalties imposed in similar cases and the proportionality of outcome to the effect and extent of the breaches in this case, the penalty for each breach could fairly be set at \$1,500.

[28] The total penalty imposed is \$4,500. This is the amount Ms Carmody must pay to the Authority for the identified breaches of the Act and the Holidays Act 2003. It must be paid to the Authority within 28 days of the date of this determination.

[29] Ms Snell's request that some of any penalties awarded be paid to her is declined. The effects on her of the associated breaches are addressed and compensated for in other orders made. Once the penalty is paid to the Authority, the amount recovered must then be paid to the Crown account.

The end of the employment – a result of unjustified actions by Ms Carmody

[30] Although casual conversations with Ms Carmody and her daily work in the business gave Ms Snell some inkling that its finances were fragile, the text of 2 July was sudden and unexpected notice of the imminent termination of her employment. Ms Snell did not get a fair opportunity to discuss what was happening and what it meant for her job before that decision was made and announced by Ms Carmody. In that way Ms Carmody failed to meet the basic legal obligation to advise Ms Snell that she was looking at making a decision that would have an adverse effect on the continuation of her employment, information about the reasons for that situation and an opportunity to comment before the decision was made.⁷ As a result Ms Carmody had acted unjustifiably in failing to engage in prior consultation about why, when and how Ms Snell's position might be declared surplus to the needs of the business and therefore redundant. Although they had talked on 3 July about whether some alternative arrangement might be able to be made for Ms Snell to have some ongoing work, this did not change the essential unjustified nature of Ms Snell's dismissal from her full-role as communicated to her on 2 July by text.

⁷ Employment Relations Act 2000, s 4(1A)(c).

[31] The unjustified nature of Ms Carmody's actions was compounded by how she then dealt with her discovery later on 3 July of a possible instance of misconduct by Ms Snell. Although Ms Carmody's letter of 4 July said she wanted "an official meeting after enough time has past for me to gather the facts", she made the decision to suspend Ms Snell from her duties without first hearing from her about doing so. Without a written employment agreement there was no contractual term allowing for suspension, with or without pay. A fair and reasonable employer could not have proceeded in the way Ms Carmody did so the suspension was a further unjustified disadvantage to Ms Snell. Having occurred during the three-week notice period already advised to Ms Snell earlier that week, the discovery of an instance of possible misconduct did not change the unjustified nature of her dismissal from her full-time job that had already occurred. And if Ms Carmody considered the allegation of 'poaching' a customer was sufficient to further justify the decision she had already made to dismiss Ms Snell for business reasons, then she had reached that conclusion without first conducting a fair investigation.

[32] For those reasons Ms Snell had established her personal grievance for unjustified dismissal and an assessment of remedies was needed.

Remedies

Lost wages

[33] Ms Snell lost wages as a result of her grievance. Even if she had later been able to persuade Ms Carmody to continue to employ her on some ongoing part-time basis, she had still lost the value of her full-time role. She gave evidence of her attempts to mitigate the extent of that loss by diligently applying for a wide range of jobs suitable to her experience and skills. Those applications have not yet proved successful.

[34] As a remedy for the resulting loss of income, under s 123(1)(b) and s 128(2) of the Act, the Authority must order Ms Carmody to pay Ms Snell "the lesser of a sum equal to the lost remuneration or to 3 months' ordinary time remuneration". In the circumstances of this case, the lesser sum that must be awarded is for the three month period. On her ordinary annual income of \$52,000 (based on her hourly rate of \$25 for a 40 hour week), the award to Ms Snell for lost remuneration is \$13,000 less any applicable tax.

Compensation for humiliation, loss of dignity and injury to feelings

[35] Ms Snell was shocked by the suddenness of her dismissal. She was upset to be removed from it abruptly without an opportunity to say farewell to clients, having known many of them and their pets over the period of almost 15 years she had worked there. She experienced sleeplessness and on-going distress both about what happened and her resulting straightened financial circumstances. Her sense of humiliation, loss of dignity and injury to her feelings warranted an award of \$10,000 compensation under s 123(1)(c)(i) of the Act.

Reduction of remedies for contributory conduct

[36] Under s 124 of the Act the Authority must consider whether any remedies awarded to an employee for a personal grievance should be reduced because of “the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance”.

[37] In Ms Snell’s case this could include consideration of whether her actions in having kept some dogs at her own house, who might otherwise have been fee-generating residents in Ms Carmody’s business, was blameworthy conduct that contributed to the situation giving rise to her grievance. However two factors hindered firm conclusions being drawn in answer to that question that would then be sufficient to warrant a reduction of the remedies awarded.⁸

[38] Firstly, on the account she gave in her own 4 July letter, Ms Carmody had already made and communicated the decision to end Ms Snell’s full-time employment before the most recent dog-sitting incident came to her attention. In that way, the later-discovered incident made no difference to the redundancy decision, and the way it had been made and announced, that led to the grievance. Put in the language of s 124, it had not contributed to the situation giving rise to the substantive grievance.

[39] Secondly, and again on the account given in her 4 July letter, Ms Carmody had not yet had time to “gather the facts” about the allegation that Ms Snell had acted improperly in whatever arrangements she had made to care for that dog. In the absence of any further investigation by, and information from, Ms Carmody, it was

⁸ *Xtreme Dining Limited t/a Think Steel v Dewar* [2016] NZEmpC 136 at [175].

not possible to fairly conclude Ms Snell's conduct had been sufficiently blameworthy to warrant a reduction of the remedies she would otherwise receive.

[40] Ms Snell had an explanation for three instances in which she had cared for clients' pets at her home. In each case she said she had not solicited those arrangements but had agreed to their requests for particular reasons relating to that client's needs.

Costs

[41] Having succeeded in her application Ms Snell was entitled to an order requiring Ms Carmody to contribute to her costs of representation. No settlement offers were made that might have required an upward or downward adjustment of the costs awarded. On the Authority's usual tariff for an investigation meeting, requiring less than a half day of investigation meeting time, the appropriate order of costs was \$2,250.

Orders

[42] For the reasons given in this determination, Ms Carmody must pay the following sums to Ms Snell within 28 days of the date of this determination:

- (i) \$4,200 as arrears of wages and holiday pay, less any applicable tax; and
- (ii) Interest on the arrears amount from 15 July 2019 to the date of payment, calculated using the Civil Debt Interest Calculator; and
- (iii) \$13,000 as reimbursement of lost remuneration, less any applicable tax, as a result of her grievance for unjustified dismissal; and
- (iv) \$10,000 as compensation for humiliation, loss of dignity and injury to feelings, to be paid without deduction; and
- (v) \$2,250 as a contribution to costs of representation Ms Snell incurred in pursuing her grievance; and
- (vi) \$71.56 in reimbursement of the expense of the filing fee paid to lodge her application in the Authority.

[43] In the event the sums awarded are not paid, Ms Snell may enforce the orders for payments to be made to her by use of the procedures of the District Court under s 141(1) of the Act. If requested, a certificate of determination is to be issued for that purpose.

[44] Ms Carmody must also pay the penalty of \$4,500 imposed for breaches of three statutory provisions to the Authority within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority