IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 333
3083852
3083872

	BETWEEN	BRIANNA HURST First Applicant
	AND	DEBORAH CRAIG Second Applicant
	AND	FONZ FRANCHISING PTY LTD Respondent
Member of Authority:	Michele Ryan	
Representatives:	Graeme Ogilvy for the Applicants No representative for the Respondent	
Investigation Meeting:	14 August 2020	
Date of Determination:	28 July 2021	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants, Brianna Hurst and Deborah Craig, have both lodged applications against their former employer, Fonz Franchising Pty Ltd (FF). With consent their matters have been consolidated and investigated together.

[2] The circumstances that gave rise to each applicant's claim is different to the other, but both allege she was unjustifiably and summarily dismissed by FF. They each seek one week's notice and associated holiday pay, as well as lost wages and compensation for the dismissals. Penalties are also sought for FF's failure to provide each with an employment agreement.

[3] Upon receiving notice of the grievances, FF advised the applicants' representative that neither Ms Hurst nor Ms Craig had been employed by it. FF has not, however, engaged with

the applicants or the Authority in respect of the claims despite all material documents having been properly served on it including a Notice of Investigation.[1]

The Authority's investigation

[4] Ms Hurst and Ms Craig both attended the Authority's investigation and provided written and oral evidence to the Authority. FF however did not attend. FF must be taken to have known of the fixture and there appeared to be no good reason as to why the applicants' claim should not be heard in its absence. The investigation meeting therefore proceeded pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[5] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist.[2] As permitted under s 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the applicant's claims.

The issues

[6] The issues that require determination in this matter are as follows:

(a) Were either of the applicants employed by FF?

(b) If so, was either applicant dismissed by FF?

(c) If one or both of the applicants was dismissed, was the dismissal justifiable under the Act?

(d) If the applicants' claims are established, what remedies should be awarded?

(e) Is either applicant owed wages?

Were either of the applicants employed by FF?

[7] Prior to the material events recorded in this determination, both Ms Craig and Ms Hurst were employed in leadership positions with another company. That company was a franchisee of FF. For the remainder of this determination I have referred to it as "the franchisee".

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1 Service was effected on FF's registered office and address for service as recorded on the New Zealand Companies Register.

2 Pursuant to s 174C(4)

[8] On or about 1 August 2019 the franchise agreement between FF and the franchisee was terminated, and FF took control of the business operated by the franchisee.

[9] The following day, FF's operations manager, Sue Stone, met with the applicants alongside other employees of the franchisee.

[10] Both Ms Craig and Ms Hurst say they were verbally asked by Ms Stone to continue on in their roles as before, to which they both agreed. I shall return to this matter.

[11] As already noted, FF denies either applicant had been an employee. The basis for that denial is recorded in two separate emails dated 22 November 2019. At its essence, FF says neither applicant attended training, nor all of the work place trials, and neither was given an employment agreement.

[12] The evidence does not support FF position on this issue however.

[13] First, FF appears to assume that in the absence of a signed employment agreement an employment relationship cannot have been formulated with either applicant. If that is FF's view, it is mistaken. A failure to provide a written employment agreement does not preclude the existence of an employment relationship between parties.

[14] FF further says in its correspondence of 22 November 2019 that "*We decided to give each employee a chance to undergo the trial period*". FF suggests this was for the purpose for assessing suitability for employment with it.

[15] Under New Zealand law (and subject to several conditions) an employer may require an employee to undertake a 90 day trial period at the beginning of their employment as a means to assess an individual's suitability. The short point here is that an agreement between an employer and an individual to a 90 day trial period requires the individual to be an employee of the employer over the course of the trial period.

[16] As it transpires Ms Hurst and Ms Craig deny a trial period was ever mentioned by FF. Both, however, were able to provide evidence that corroborates their testimony that each provided labour to FF in exchange for wages, which tends to strongly support their claims of employment with FF.

[17] Ms Hurst produced copies of text messages sent between herself and FF on 7 August 2019. In this exchange FF seeks confirmation of Ms Hurst's bank details and a contact number. Ms Hurst queries why the information was needed. The response from FF is: "*so we can pay you".* It remains unclear why FF would pay Ms Hurst if she was not an employee.

[18] As regards Ms Craig, there is evidence of monies, $1,647.73 in total, being deposited into Ms Craig's bank account on three separate occasions between 2 and 21 August 2019 by FFL. Each payment was characterised as "wages" by FF. It is simply not credible that FF would place money into Ms Craig's account with the corresponding descriptor, if Ms Craig was not an employee.

[19] I am satisfied both applicants were employed by FF.

Were either of the applicants dismissed?

Ms Hurst

[20] Ms Hurst worked for the franchisee for 18 months or thereabouts. I am satisfied her employment began with FF on 2 August 2019, and she worked an extended shift of 10 hours that day. She also worked a full 8.5 hour shift on the following Monday 2 August 2019.

[21] On Tuesday 6 August Ms Hurst worked for 5½ hours before she was approached by Ms Stone. Ms Stone is said to have become aware that Ms Hurst had recently communicated with the franchisee and approached Ms Hurst saying she was "*untrustworthy*", that she was now "*fired*", and would be "*trespassed*" if she did not leave.

[22] A dismissal is defined as a termination of employment – a sending away - at the initiative of the employer.[3]

[23] That Ms Hurst was, at the employers initiative, sent away, is confirmed by FF's own correspondence, albeit it says Ms Hurst agreed to that approach, which states:

> She broke all trust as she disclosed private and confidential information to her previous employer and agreed that she should leave the premises immediately on this basis.
> …

[3] *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965

[24] Ms Hurst says having been informed she would be trespassed she was advised she must remain on the premises until another staff member returned from a rest break. She left immediately after the staff member' returned to the floor.

[25] On the evidence provided I am satisfied Ms Hurst was dismissed from her employment with FF. She was paid out her wages the following day after the text message exchange referred to earlier in this determination at [16].

Ms Craig

[26] The evidence has established Ms Craig worked for FF from 2 August 2019 onwards.[4] Ms Craig says on 21 August 2019 she received a text message from Ms Hurst who advised she was sorry to hear what was happening [at the arena]. She says she immediately rang Ms Stone who informed her the business had closed. Ms Craig say Ms Stone told her she hoped to have the business back up and running in the near future and asked Ms Craig to "*hang in*" for that event. Ms Craig says there was no discussion or consultation about the arena closing.

[27] Ms Craig provided a copy of a message subsequently sent on 21 August by FF to staff, advising of the legal dispute between it and the franchisee and that equipment have been repossessed. The message goes on to say;

> …the arena is in an unfit state for the public. Because of this, we have been forced to close the arena for the foreseeable future. … We did all we could to keep the area open to keep all of you employed. We are sorry it was not enough. …

[28] I find on this evidence also that Ms Craig was dismissed from her employment with FF.

Were the dismissals justified?

[29] If an employer seeks to justify a dismissal, s 103A(2) of the Act sets out a test by which the Authority must determine that matter. In doing so the Authority is required to assess whether the employer's actions and the way it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In practical terms, the Authority must examine whether there were genuine grounds on which to dismiss the employee, and whether the process in reaching that decision was fair.

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4 Above at [17]

[30] Provisions at s 103A(3) list a range of procedural standards that must form part of the Authority's considerations when assessing the employer's process. At a minimum, an employer is expected to inform an employee of its concerns and allow the employee an opportunity to respond before it takes action. The Court has observed that "*a failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified*"[5].

[31] Particularly relevant to Ms Craig's circumstances, an employer's obligation to act in good faith requires it to provide to potentially affected employees access to relevant information about any proposal it has to make the employee redundant, and an opportunity for the affected employee to comment on it, before the decision is made.

[32] The onus falls on FF to prove its actions in dismissing Ms Hurst and Ms Craig were justified. Its absence from the Authority's investigation has largely impeded the possibility of it doing so.

[33] Even if FF had attended the investigation I find it likely it would have struggled to dissuade a finding that both dismissals were unjustified, for the reasons recorded below.

[34] Starting with the ostensible cause as to why FF sent Ms Hurst away, I am unwilling to accept there was a mutual agreement between the parties that Ms Hurst's employment would end. I consider it more likely Ms Hurst was told she would be trespassed if she remained on site and she simply agreed to leave so as to avoid a trespass order.

[35] Next, if FF's concerns regarding Ms Hurst's communication with the franchisee was conduct capable of being regarded as serious, it did not advise Ms Hurst of that matter or allow her an opportunity to respond. An employer who omits to provide an employee an opportunity to be heard on an issue that results in subsequent disciplinary consequences cannot be regarded as having acted fairly or reasonably. There can be no certainty as to whether there were reasonable grounds to dismiss an employee where an employer has not sought an account from the employee involved. Ms Hurst's dismissal cannot be justified in these circumstances.

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5 *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

[36] Turning next to Ms Craig. On the evidence provided I am satisfied there was no consultation about the disestablishment of her positon before her employment was terminated. Her dismissal also is not justified.

Remedies

[37] Amongst a range of remedies available to an employee who has been unjustifiably dismissed, the Authority may reimburse wages or other money lost by the employee *"as a result of the grievance".*

[38] The Authority may also order payment of compensation where an applicant establishes non-economic losses as a consequence of the dismissal.

Ms Hurst

[39] Ms Hurst found alternative employment in early September 2019 albeit her new role was part time. Several months later she obtained full-time employment. She seeks, as lost wages, the difference between what she earnt following her dismissal and what she would have earnt had she remained at FF.

[40] There is an impediment to Ms Hurst's obtaining an order for lost wages for the 3 month time frame over which she claims. This is because the FF ceased to trade on 21 August 2019 and closed permanently. It follows Ms Hurst employment would have ended at this juncture in any event and her losses are limited to those that occurred as a *"as a result of the grievance".* Ms Hurst is, however, entitled to lost wages for the two week period in which the business continued to operate after her dismissal.

[41] Ms Hurst's average earnings per week were $654.50 (gross). It follows she is entitled to $1209.00 in lost wages, and to a further 8% on that sum as holiday pay. I calculate this to be $96.72.

[42] Ms Hurst reports she was shocked at the speed at which she was dismissed particularly where she was given no right of reply or ability to obtain support. She says she was further humiliated by having to tell her colleague returning from her break that she was about to be trespassed from the premises if she did not leave. I am satisfied she was distressed by her dismissal.

[43] I have balanced her evidence as to her distress alongside the evidence that she obtained work within a relatively short period of time. I find $14,000 is an appropriate award to compensate her distress. There is no evidence that Ms Hurst contributed to her dismissal in a causative and blameworthy way. There is no reason to reduce remedies associated with her dismissal.

[44] Ms Hurst's employment agreement provided both parties would provide the other with one week's notice of the termination of employment. Ms Hurst was prevented from working out her notice period but is entitled to payment in lieu.

[45] Ms Hurst seeks a penalty for FF's failure to provide her with an employment agreement. Given however that I have found the offer of employment by FF, and accepted by Ms Hurst, was on the basis that the employment would simply continue as it had before, including all terms and conditions recorded in the written agreement with the franchisee, I am unwilling to conclude that there was no written employment agreement between them. The claim for a penalty is denied.

Ms Craig

[46] I have already found Ms Craig's dismissal was unjustified where FF did not consult with her on the matter at all. But there is nothing to indicate the reason for closure of the arena was anything other than genuine.

[47] I find Ms Craig' dismissal would, more than likely, have occurred notwithstanding the procedural deficiency. This means there is no loss of wages and any remedies that might be awarded are limited to compensation for the way in which FF dismissed her.

[48] I am satisfied that Ms Craig was humiliated by the way her dismissal unfolded. She says she had to contact Ms Stone herself to find out what was happening with her position, and having done so was given no explanation as to why the business was closing. I further accept her evidence that Ms Stone implied Ms Craig would be returned to her role. Ms Craig views Ms Stone's statement was disingenuous and used to avoid any discussion about the closure of the business and the impact on her positon. She notes Ms Stone did not call her after this phone call, to either let her know where she stood going forward or to discuss payment of wages owed. I consider an award of $13,000 to compensate Ms Craig for the way in which she was

dismissed is appropriate. It is clear Ms Craig did not contribute to the situation leading to her dismissal and there is no basis to reduce this sum.

[49] As with Ms Hurst, Ms Craig was prevented from working out her notice period, and is entitled to payment in lieu. Based on a 40 hour week at $19 per hour I calculate one week's wages in lieu of notice equates to $760 (gross). Ms Craig further advises she is owed 10 hours of overtime which was not paid. I accept her claim and she is entitled $190 in wage arrears.

[50] The reasons for which I rejected Ms Hurst's claim for a penalty regarding the provision of an employment agreement apply equally to Ms Craig, and her application for a penalty is also declined.

Summary of Orders

[51] Fonz Franchising Pty Ltd is ordered to pay Brianna Hurst;

(i) $1209 (gross) in lost wages and $96.72 (gross) as holiday pay associated with the lost wages pursuant to s 123(1)(b) of the Act;

(ii) $14,000 as compensation pursuant to s 123(1)(c)(i) of the Act;

(iii) $6654.50 (gross) in lieu of notice.

[52] Fonz Franchising Pty Ltd is ordered to pay Deborah Craig;

(i) $13,000 as compensation pursuant to s 123(1)(c)(i) of the Act;

(ii) $760 (gross) in lieu of notice;

(iii) $190 in wage arrears.

Costs

[53] The Authority's meeting lasted just over half a day. Applying the Authority daily tariff, Fonz Franchising Pty Ltd must pay $1,500 plus $71.56 to each applicant as a contribution to her costs and to reimburse monies paid to file her application with the Authority.

Michele Ryan
Member of the Employment Relations Authority