

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 573
3120712

BETWEEN MICHELLE ANNAND
Applicant
AND AFFORDABLE UK CARAVANS
AND PARTS LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Chrissy Gordon, advocate for the Applicant
Graham Hollobon, advocate for the Respondent
Investigation Meeting: 2 November 2021 at Christchurch
Submissions Received: On the day from the Applicant
On the day from the Respondent
Date of Determination: 21 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michelle Annand was employed by Affordable UK Caravans and Parts Limited as a cleaner from January 2018 until 18 May 2020 when she says that she was unjustifiably dismissed from her employment.

[2] Ms Annand says that she never received an individual employment agreement and was not provided with time and wage records after a request was made for them by Ms Gordon following the ending of the employment relationship. Ms Annand seeks compensation, payment of notice, three months loss of wages, penalties for breaches of sections 64 and 130 of the Employment Relations Act 2000 (the Act) and costs.

[3] Affordable UK Caravans and Parts Limited is a duly incorporated company having its registered office in Christchurch and carrying on business as a supplier of caravans and parts.

It does not accept that Ms Annand was unjustifiably dismissed and says in its statement in reply that her conduct destroyed or undermined the trust and confidence it was required to have in her and breached her good faith obligations. It says that it was left with no choice but to end the employment relationship and was justified in doing so. I shall refer to the company from hereon as Affordable UK Caravans or the company.

[4] The failure to provide an individual employment agreement was not addressed in the statement in reply. The sole director of the company, Graham Hollobon, said that Affordable UK Caravans has a general employment agreement. He also said that once a grievance was raised he left matters for his then lawyer to deal with including supplying time and wage records.

The Issues

[5] The Authority needs to resolve the following issues in this case:

- (a) How did the employment relationship between Ms Annand and Affordable UK Caravans end?
- (b) If it ended by way of dismissal then was that dismissal unjustified?
- (c) Was there a failure to provide a written employment agreement as required in the Act?
- (d) Was there a failure to provide wage and time records,
- (e) If breaches of the requirements of the Act are made out in either or both of these respects then should a penalty be awarded?
- (f) If Ms Annand was unjustifiably dismissed then what remedies is she entitled to and are there issues of contribution and mitigation?

How did the relationship end between the parties?

[6] Ms Annand applied for a cleaning job at Affordable UK Caravans as she left a role at a High School where she had been working for four years in the lunchroom. She was interviewed and was hired by Mr Hollobon and worked 30 hours per week at \$23 per hour. Ms Annand said there were aspects of the employment relationship that she found challenging however she carried on working hard and was professional.

[7] Ms Annand considered both Mr Hollobon and Jenny who worked in the office to be her “bosses.” Mr Hollobon did not accept that Jenny was Ms Annand’s boss at the material time. He said in his evidence that Jenny was an employee on a wage and that all employees are instructed to contact him only on his cell phone or personal email address about any employment issues.

Events of 11 May 2020

[8] On 11 May 2020, Ms Annand had an appointment with a hospital surgeon to be conducted by telephone due to Covid. The appointment was in the morning so Ms Annand had let Mr Hollobon know that she would be in to work after lunch. The appointment was then changed to the early afternoon with short notice. Ms Annand sent a text message to Jenny at Affordable UK Caravans at 1.11pm to explain that the surgeon was now ringing her at 2pm as there was an issue with the hospital scanner and he needed all the information. She asked Jenny to tell Mr Hollobon that she would be in the next day.

[9] Jenny sent a text to the effect that she did not know Ms Annand was having an operation until Mr Hollobon just told her.

[10] Ms Annand sent a further text to say that Mr Hollobon had known for a while and that:

...I spose I assumed he would tell you everything I have told him since you’re both my bosses.

[11] Jenny responded by text message and said that she would let Mr Hollobon know. She did not state that she was not Ms Annand’s superior.

Telephone call on 15 May 2020

[12] On 15 May 2020 Ms Annand looked at her pay and realised that she had not been paid for the day that she had had a telephone consultation with the surgeon on 15 May 2020.

[13] Ms Annand spoke to Mr Hollobon by telephone and raised her concerns. Having considered the evidence there is no dispute about most of the matters discussed but there is dispute about whether there were parts of the conversation that were unreasonable or abusive. I will set out the different accounts.

[14] Ms Annand said that in raising her concerns the conversation quickly became unreasonable and Mr Hollobon started yelling and said that he had changed the pay system and

it was the system's fault. Ms Annand said she asked how there could be a system fault when he didn't have timesheets and for the previous two years she had been automatically paid for 30 hours a week without filling in a timesheet. Ms Annand said Mr Hollobon got "mad" and said that she owed him two days' pay because she didn't come back to work whilst in level 3 before the level 4 lockdown. Ms Annand said that she told him to take it from her annual leave if it bothered him. She denied that she yelled or became abusive at any time during the telephone call or used the word "shit."

[15] Afterward she sent a series of text message to Jenny stating that she had had an argument with Mr Hollobon and set out matters discussed. These were consistent with the evidence she had given at the Authority investigation. Jenny responded that she would talk to Mr Hollobon in one text and noted that he dealt with all the wages in another.

[16] Mr Hollobon said that Ms Annand complained about her pay and said that she had "put up with the shit that you give me but I will not put up with this." Mr Hollobon did recall something being said about level 3. He said that he advised Ms Annand there had been a change in pay systems from the one that the company was using in MYOB to another package. Mr Hollobon said that Ms Annand was abusive during the telephone call.

How did the relationship end on 18 May 2020?

[17] There is some dispute as to what occurred on 18 May 2020 which was the day the relationship ended.

Ms Annand's account

[18] Ms Annand said that she did not hear from either Mr Hollobon or Jenny over the weekend and went to work on Monday. She said that both Mr Hollobon and Jenny were waiting for her in the office and she greeted them and said she would "really like to work this out."

[19] She said that Mr Hollobon asked her to come outside and she asked if Jenny could come too but was told no. Ms Annand said that whilst outside Mr Hollobon talked again about the two days leave taken from level 3 and said that he had acted in good faith. Ms Annand said that she was nervous and stopped talking. She said that Mr Hollobon asked her "look, do you want to stay or go?" She said that she replied that she wanted to stay and he say "okay, but I

am reducing your hours to part-time.” Ms Annand said she agreed to that but wanted it in writing.” Mr Hollobon then yelled “no way” and asked to her to get off the yard and he walked away.

[20] Ms Annand said that she went back to the office to tell Jenny what had happened but that Jenny did not seem surprised and referred to the financial pressure facing the company. Ms Annand responded that they could not “just fire her.” Ms Annand said that Mr Hollobon then stormed into the office and yelled “get out, you are dismissed for hassling my staff.”

[21] Ms Annand said that she walked out of the office and Mr Hollobon walking away. She asked for one day’s sick pay and 4 weeks annual leave and that Mr Hollobon said “you are kidding me. You get nothing.” Ms Annand responded that he had to pay her entitlements and he replied that he would because he wanted to get rid of her and not because she was entitled to them.

[22] Ms Annand then left the yard and did not return to work.

Mr Hollobon’s account

[23] Mr Hollobon said in his oral evidence that Ms Annand came to work and he asked her what she was doing there and she was “really smart.” He said that she told him that she needed someone to talk to and spoke to Jenny. Mr Hollobon said that he asked her to go outside because he does not discuss work issues in front of other staff. He said that he asked why she had abused him and said she would not answer. He denied asking if she wanted “to stay or go” and said that discussion about reducing working days as a cleaner was at an earlier time and was initiated by Ms Annand. He said that he could see matters were not going anywhere and told her to “go get out.”

[24] Mr Hollobon said that Ms Annand went inside the office and began to talk to the staff and he asked her to leave again and she did. He said that she asked for holiday pay that he paid but that Ms Annand asked for more than she was owed.

[25] In his oral evidence Mr Hollobon said that Ms Annand abused him on 15 May 2020 and that he was “amazed that she turned up.” He said that she “terminated her own employment.”

Conclusions about how the relationship ended

[26] I conclude it is more likely than not that Ms Annand went to the work site on 18 May 2020 to talk about the telephone call on 15 May and try to clear the air. I prefer her evidence that she was asked and told Mr Hollobon that she wanted to remain an employee. Although Mr Hollobon said that the conversation about a reduction of hours occurred at an earlier time and was initiated by Ms Annand I consider it more likely that there was a discussion about reducing hours on 18 May 2020.

[27] I prefer Ms Annand's evidence that she said little to Mr Hollobon during the exchange as she was nervous because she considered he was angry. It was my observation of Ms Annand and Mr Hollobon as they gave their evidence that Mr Hollobon was the more assertive of the two.

[28] After being ordered to leave the yard the first time Ms Annand went to the office. I conclude it is likely that she expressed concern to Jenny that she had been dismissed but was not supported. I accept that Ms Annand went to see Jenny because she was of the view rightly or wrongly that she was her superior. Mr Hollobon said there was one and perhaps two employees in the office in addition to Jenny at that time. Mr Hollobon ordered Ms Annand off the yard a second time, upset that she was discussing matters with staff. Ms Annand then left but before doing so asked for her statutory entitlements.

[29] Objectively assessed it was reasonable for Ms Annand to conclude that her employment had been terminated by being asked to leave the yard on two separate occasions by Mr Hollobon. In line with her view that she had been dismissed Ms Annand asked for assistance from Jenny and then after being ordered to leave the yard a second time her statutory entitlements. Ms Annand was sent away in the nature of a dismissal by her employer.¹

Was the dismissal justified?

[30] The Authority applies the test in s 103A of the Act in determining justification and considers on an objective basis whether the actions of Affordable UK Caravans and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[31] The Authority in applying the test must have regard to the procedural fairness factors set out in s 103A(3)(a) to (d). These factors include whether the concerns were raised with

¹ *Wellington Clerical Industrial Union of Workers v Greenwich* (1983) Sel Cas 95 at 103.

Ms Annand and whether she had an opportunity to respond to them and have her response taken into account. A fair and reasonable employer is expected to act in accordance with the statutory obligations of good faith.

[32] Ms Annand wanted to discuss the telephone conversation of 15 May 2020 and resolve any issues with her employer. Such an approach is in line with the obligations of good faith in an employment relationship to be communicative and responsive.

[33] It is likely from Mr Hollobon's evidence that he considered the relationship was essentially over following the 15 May conversation and was surprised to see Ms Annand on 18 May 2020. After a short discussion on 18 May 2020 he ordered Ms Annand off the site because he felt that the conversation was not productive. He ordered Ms Annand off site again after she tried to discuss her concerns with other staff in the office. There was no further attempt Mr Hollobon to get in touch with Ms Annand to see if the relationship could be restored.

[34] There was no procedural fairness before dismissal and accordingly the requirements of procedural fairness in s 103A(3)(a) to (d) are not satisfied. Ms Annand's dismissal was unjustified.

Substantive justification

[35] The procedural deficiencies are such that they overlap any substantive justification for the dismissal.

[36] Ms Annand had made out her personal grievance of unjustified dismissal and is entitled to an assessment of remedies.

Remedies

Lost wages

[37] Ms Annand claims three months lost wages. There is also a claim in final submissions for a four week notice period. I find that a notice period is effectively absorbed in the claim for lost wages.

[38] Ms Annand said that after her dismissal she became depressed to the extent that she could not look for work. In her oral evidence she said that her dismissal had really affected her and she became very sad.

[39] Ms Annand said in her evidence that she internalised the stress and depression and tried not to display it outwardly to her husband and family. She said that caused more serious issues that I will set out when I turn to the issue of compensation. Given the significant impact of the dismissal on Ms Annand and the resulting depression I do not consider it unreasonable that she did not take steps to look for other work in the three month period. She was simply too unwell.

[40] Subject to any issues of contribution Ms Annand is entitled to an award for three months lost wages. That is the sum of \$8,970 calculated on the basis of 30 hours per week at \$23 per hour multiplied by 13 weeks.

Compensation

[41] The impact on Ms Annand as a result of her dismissal was serious. Ms Annand worked in a variety of positions over her 45 years in the workforce but in the main worked in hospitality and 15 years in management and has also worked as a cleaner. She set out in her evidence that she had never been reprimanded or dismissed from any job before she was dismissed from Affordable UK Caravans. Ms Annand said that she had never been treated in the way that she had been by Mr Hollobon during her working life. She had worked very hard for the company and had previously got on well with Mr Hollobon. She said that she had always tried to be cheerful, kind and positive at work but after her dismissal she lost her trust and spark. Her marriage suffered as she was the sole earner and there was financial stress. She became withdrawn and sad.

[42] In March 2021 Ms Annand was admitted to hospital for five days with Takotsubo Cardiomyopathy which presents in a similar way to a heart attack. Ms Annand presented a medical certificate that these types of events are preceded by emotional stress and Ms Annand said that it was the dismissal and trying to hide her stress that caused the event.

[43] I do weigh that I did not hear medical evidence about a causal connection between the heart event and the dismissal. I do however accept that the dismissal did caused Ms Annand a great deal of stress and sadness that she internalised. It was humiliating for her to be dismissed by being ordered off site with no process at the end of a long and unblemished working career. Ms Annand has not returned to work and is in receipt of a pension. In line with similar cases where the impact of dismissal is serious I consider an award of \$22,000 for compensation is appropriate subject to issues of contribution.

Contribution

[44] The Authority is required under s 124 of the Act when it determines that an employee has a personal grievance to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the person grievance and, if the actions so require, reduce the remedies that would otherwise have been awarded.

[45] There was reference in the statement in reply that Ms Annand behaved in an abusive or smart manner toward Mr Hollobon on the day she was dismissed. Ms Annand went into work and wanted to talk through any issues from the 15 May telephone call. I conclude that she was nervous talking alone to Mr Hollobon and she remained mainly silent. She went into the office after being told to leave the first time not to provoke Mr Hollobon but to obtain some support. I do not consider the actions of Ms Annand on 18 May 2020 amounted to blameworthy conduct.

[46] It is the telephone call on 15 May that appears to have been the significant concern for Mr Hollobon. Ms Annand was concerned that she had not been paid when she had available sick leave. She was entitled to raise her concerns with Mr Hollobon. There was an argument however Ms Annand denies being abusive during that call. Having heard the evidence I conclude that Ms Annand did not agree with and challenged Mr Hollobon at times during that call. This was in all likelihood about her leave during level 3 and the reasons for the non-payment for her leave on 11 May. I could not be satisfied that she used offensive language. It would be out of character for Ms Annand to have done that and therefore less likely. Rather she put her view about matters which may not have accorded with Mr Hollobon's.

[47] The evidence does not satisfy me that Ms Annand was abusive but rather that she questioned some matters raised by Mr Hollobon as she recorded in her text messages the same day to Jenny. Ms Annand understood from a text message that Jenny would talk to Mr Hollobon but heard nothing from that so Ms Annand wanted to resolve the matter when she attended at work the next working day.

[48] I do not conclude that Ms Annand contributed towards her personal grievance in a blameworthy manner and she is entitled to her remedies in full.

Was there a failure to provide an individual employment agreement?

[49] There is no dispute that there was no written individual employment agreement. Ms Annand said that she asked for one when she started but was told that there was not one and that she accepted that was how it was.

[50] Although the breach alleged was under s 64 of the Act the failure to provide an individual employment agreement in writing is a breach of s 65 of the Act. The nature of the alleged breach was always clear however and there is no resulting prejudice. Section 65(4) provides that an employer who fails to comply with the s 65 is liable to a penalty imposed by the Authority. The general agreement that Mr Hollobon refers to does not comply with the legal requirements in s 65. I find that there was a breach of s 65 by the company.

Was there a failure to provide wage and time records?

[51] In a letter dated 10 July 2020 raising a personal grievance Ms Gordon asked for the wage and time records from the company. The statement of problem was then lodged on 2 October 2020 and claimed a breach of s 130(2) of the Act but did not elaborate further about the basis for this. The statement in reply did not address the issue.

[52] Section 130(2) provides that an employer must, upon request by an employee or person authorised by the employee, immediately provide the requested wage and time records. Section 130(4) provides that every employer who fails to comply with any requirement of s 130 is liable to a penalty.

[53] There was a breach of s 130(2) of the Act.

Penalties

[54] There has been a longstanding legal requirement to provide a written employment agreement and to supply wage and time records on request.

[55] I consider it appropriate to consider the imposition of a penalty in this matter.

[56] In so doing I have had regard to the matters that I must under s 133A in determining an appropriate penalty.

[57] There are two different types of breaches. The maximum penalty for each breach is \$20,000 in the case of a company. I have had regard to the object stated in the Act to build productive employment relationship through the promotion of good faith in all aspects of the

employment environment and relationship. I do not consider the failure to provide an employment agreement was inadvertent. Even though Ms Annand accepted that one was not going to be provided and did not ask again the failure to provide an employment agreement does not accord with the legal requirements. The failure to provide time and wage records could have been inadvertent with the focus on the alleged dismissal at that time. I weigh that Mr Hollobon did place the matter in his lawyers hands however there had been an earlier request for the records. There was no evidence to support significant loss or damage suffered by Ms Annand as a result of not having an employment agreement or wage and time records. I asked Ms Gordon about the impact of the failure to provide records and she considered the provision of the records may have clarified whether Ms Annand had been overpaid holiday pay. I am not satisfied that necessarily caused loss to Ms Annand. There is no evidence that Affordable UK Caravans have engaged in similar conduct.

[58] I conclude an appropriate penalty for the failure to provide a written employment agreement is \$1500 and an appropriate penalty for the failure to provide wage and time records is \$1000. That is a combined penalty of \$2,500.

[59] Although Ms Gordon asked that the penalty or part of it be ordered payable to Ms Annand I do not consider the basis for that has been established.

[60] The penalty is to be ordered payable to the Crown.

Orders made

[61] I order Affordable UK Caravans and Parts Limited pay to Michelle Annand the sum of \$8,970 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[62] I order Affordable UK Caravans and Parts Limited pay to Michelle Annand the sum of \$22,000 without deduction being compensation under s 123(1)(c)(1) of the Act.

[63] I order that Affordable UK Caravans and Parts Limited pay to the Crown a penalty in the sum of \$2,500 within 30 days of the date of this determination.

Costs

[64] The meeting took half a day. The daily tariff is \$4,500 for the first day. I consider it appropriate to make a cost award for half of the daily tariff together with reimbursement of the filing fee.

[65] I order Affordable UK Caravan and Parts Limited pay to Michelle Annand costs in the sum of \$2,250 together with reimbursement of the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority