

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 80
3105312

BETWEEN LOGYNN ANDREW-BISHOP
Applicant

AND ELITE HOSPITALITY
MANAGEMENT LIMITED t/a
Picnic Café Rotorua
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Jianxun Liu, director of Respondent

Investigation Meeting: On the papers

Submissions received: 26 January 2021 from the Applicant
17 February 2021 from the Respondent

Determination: 02 March 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Logynn Andrew-Bishop, claims that her employer, Elite Hospitality Management Limited (EHML), unjustifiably disadvantaged her by failing to pay the last week of her contractual notice period.

[2] EHML denies that it unjustifiably dismissed Ms Andrew-Bishop and claims that it acted justifiably in reliance on a *force majeure* clause in the individual employment agreement.

Note

[3] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Application for leave, the Statement in Reply, documents submitted by the parties, and submissions from the parties.

Issues

[4] The issues requiring investigation are whether or not Ms Andrew-Bishop was unjustifiably disadvantaged by the non-payment of her final week of notice period.

Background

[5] EHML operates the Picnic Café Rotorua. Mr Jianxun Liu is the sole director and shareholder.

[6] Ms Andrew-Bishop commenced employment at Picnic Café Rotorua (Picnic Café) on 25 March 2019. Ms Andrew-Bishop was a full time student and consequently worked at Picnic Café on Saturday and Sunday each week which was agreed by Mr Liu.

[7] Ms Andrew-Bishop was provided with an individual employment agreement which she signed on 25 March 2019 (the Employment Agreement). The Employment Agreement set out that Ms Andrew-Bishop was employed in the position of Barista/Front of House, on an hourly rate of \$17.88 per hour working two days per week. The notice period was 4 weeks.

[8] The Employment Agreement also contained a *force majeure* clause which stated:

The employee understands and agrees that their job may end without notice or payment of notice, if a natural disaster, workplace fire, flood or other major event beyond the employer's control makes it impossible for the employment to continue. Where practicable the employer will consult with the employee before exercising this clause.

[9] On 4 March 2020 Ms Andrew-Bishop provided her resignation in writing to Mr Liu, providing four weeks contractual notice with her final day of employment to be 1 April 2020.

[10] Ms Andrew-Bishop worked the first three weeks of her notice period, however for the last week Mr Liu informed her in a text message conversation that he was unable to provide her with rosters on the Saturday and Sunday as agreed, but might be able to offer her shifts on the Wednesday and Thursday instead.

[11] On 3 April 2020 Ms Andrew-Bishop texted Mr Liu stating:

Hi Jason,
My employment agreement states that I can only work weekends as I am a full-time student. It also states that an employee must give a 4 week notice period which I have given on the 4th March. My last day would have been the 1st April. I did not agree to any change of our agreed days. Therefore you have violated your employment obligations. Please pay me for the 28 and 29 March which I should have been paid for.

[12] Mr Liu replied that same day stating: "I am not able to pay two working days because of the lockdown and no income since that."

Was Ms Andrew-Bishop unjustifiably disadvantaged by the non-payment of the notice period by EHML?

[13] The object of the Employment Relations Act 2000 (the Act) is set out in s 3 which is entitled: ‘Key Provisions’ and states:

3 Object of this Act

The object of this Act is

- (a) To build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship-
 - (i) By recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence but also on a legislative requirement for good faith behaviour; and
 - (ii) By acknowledging and addressing the inherent inequality of power in employment relationships ...

[14] Section 4 of the Act is also relevant and sets out the requirement that parties are to deal with each other in good faith. In particular s4(1A)(b):

Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among, other things, responsive and communicative ; ...

[15] As set out in s 4(1A)(c) this requires the employer who is proposing to make a decision: “that will, or is likely to have, an adverse effect on the continuation of employment” to provide the employee with sufficient information on the proposal and to give the employee an opportunity to comment.

[16] In this case, Mr Liu was proposing a decision, initially to change without consultation Ms Andrew-Bishop’s agreed days of work, and subsequently to refuse to pay her for the two contractual days. This was done without consultation with Ms Andrew-Bishop,

[17] I appreciate that EHML was facing financial difficulties in light of a Covid-19 lockdown, however I do not find that this negated its obligation to consult with Ms Andrew-Bishop and obtain her agreement to the proposed changes in her contractual entitlement.

[18] I have considered the effect of the *force majeure* clause. *Force Majeure* is an economic tort most commonly found in commercial contracts. However it can sometimes appear in employment agreements.

[19] I note the requirement in the clause for the employer to consult: “where practicable” with the employee before exercising it. I do not accept that it was not possible in the circumstances for EHML to consult with Ms Andrew-Bishop regarding the change in her rostered days and in particular in regard to its intention to not pay her for her last week of the notice period.

[20] Ms Andrew-Bishop did not agree to the proposed change to her terms and conditions of employment, and the change was made without her input or agreement which adversely affected her terms and conditions of employment.

[21] I determine that Ms Andrew-Bishop has been unjustifiably disadvantaged by EHML.

Remedies

[22] Ms Andrew-Bishop has been unjustifiably disadvantaged by EHML and she is entitled to remedies.

Reimbursement of Lost Wages

[23] Ms Andrew-Bishop had resigned from her employment with EHML, however she was not paid for the last week of the notice period.

[24] **I order that EHML pay to Ms Andrew-Bishop the sum of \$232.44 gross (calculated as \$17.88 per hour x 13 hours) pursuant to s 128 of the Act.**

[25] Ms Andrew-Bishop is also entitled to holiday pay entitlement on the unpaid notice period.

[26] **I order that EHML pay to Ms Andrew-Bishop the sum of \$18.60 gross (calculated as \$232.44 x 8%) pursuant to s24 of the Holidays Act 2003.**

Compensation for Hurt and Humiliation under s 123(1)(c)(i).

[27] Ms Andrew-Bishop is also entitled to compensation for humiliation and distress. Ms Andrew-Bishop was a full-time student working weekends only at Picnic café. She provided her full contractual notice period to EHML.

[28] I accept that she experienced distress at the non-payment of her notice period by EHML.

[29] **I order EHML to pay Ms Andrew-Bishop the sum of \$1,500.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1)(c)(i) of the Act.**

Contribution

[30] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Andrew-Bishop did not contribute to the situation which resulted in her dismissal and there is to be no reduction in the remedies awarded.

Filing Fee

[31] **Ms Andrew-Bishop is to be reimbursed the filing fee of \$71.56 by EHML.**

Costs

[32] Ms Andrew-Bishop represented herself during the Authority's Investigation process and therefore she is unlikely to have any costs awarded to her unless she had legal advice during the process.

[33] If however Ms Andrew-Bishop does seek costs and an Authority determination on costs is needed, the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[34] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority