

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 321  
3188139

BETWEEN

JENNIFER RICKARDS  
Applicant

AND

NIGHT PEARL (2021) LIMITED  
TRADING AS 5 STAGS  
PIRONGIA  
Respondent

Member of Authority: Nicola Craig

Representatives: Paul Mathews, advocate for the applicant  
Yafei (Alex) Bao for the respondent

Investigation Meeting: 20 April 2023 in Hamilton

Submissions [and further Information] Received: At the investigation meeting for the applicant  
At the investigation meeting for the respondent

Date of Determination: 19 June 2023

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**DETERMINATION OF THE AUTHORITY**

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**What is the Employment Relationship Problem?**

[1] Jennifer Rickards was a front of house server at the 5 Stags Bar and Restaurant Pirongia for about 10 weeks in 2022. Night Pearl (2021) Limited (Night Pearl or the company) traded as 5 Stags although the operation of the business has since been contracted to another company.

[2] Ms Rickards' employment came to an abrupt end when she was notified she was no longer needed via a message on the 5 Stags staff group chat. Night Pearl acted in reliance on a 90-day trial period but Ms Rickards disputes that she is prevented from bringing an unjustified dismissal personal grievance.

### **How did the Authority investigate?**

[3] Night Pearl had no involvement in this proceeding until the investigation meeting.

[4] The investigation meeting was held on 20 April 2023 in Hamilton. Ms Rickards attended in person with her representative appearing by audio-visual link. Night Pearl's director Yafei (Alex) Bao and manager Nora Fu also attended in person.

[5] At the meeting evidence was heard under oath or affirmation from Ms Rickards, her sister, Mr Bao and Ms Fu. The Authority was assisted by interpreters of the Mandarin language via the government's telephone interpreting service.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

### **What are the issues?**

[7] The issues for investigation are:

- (a) Is Ms Rickards prevented from bringing a grievance due to a valid trial period?
- (b) If she is able to pursue grievances, was Ms Rickards dismissed by Night Pearl and if so, was it unjustified?
- (c) Alternatively, was she disadvantaged by unjustifiable actions of Night Pearl in not sufficiently investigating and then announcing her dismissal via group chat?
- (d) If a grievance is established, what remedies (if any) should Ms Rickards receive, including consideration of contribution?

### **What happened during Ms Rickards' time at 5 Stags?**

[8] The role was advertised on Trade Me. Ms Rickards applied, sending in her CV which covered her extensive hospitality experience.

[9] On Sunday 20 March 2022 Ms Fu phoned Ms Rickards about the job and to see if she could come in that day. Ms Rickards' car was out of action so Ms Fu offered to pick her up. Ms Fu described it as an interview and training day but acknowledged that Ms Rickards did work and was paid for the day. Ms Rickards was picked up around 10 am and worked with

Ms Fu as the only two people covering front of house including the bar. She left around 7pm that night.

[10] Ms Fu worked on an employment agreement on Monday, when 5 Stags was closed. An agreement containing a trial period was emailed through to Ms Rickards. She recollects signing the agreement and taking it in on her next shift.

[11] During Ms Rickards' time at 5 Stags there were occasional language difficulties with her generally finding it more successful to communicate with Ms Fu by text message.

[12] Ms Fu was initially conscious of Ms Rickards' situation as a single mother with a mortgage. She wanted to ensure Ms Rickards had the hours she needed and did offer to lend Ms Rickards money. On one occasion Ms Rickards borrowed some money from Ms Fu. Ms Rickards was trying to get some advance notice of her shifts as she needed to borrow a car to get to work or make arrangements for someone to drive her.

[13] There appears to have been a difference in working styles. Ms Fu gave evidence of two managers at 5 Stags raising concerns about Ms Rickards' performance, such as spending too long talking to customers. There was a suggestion by a manager they should let her go during the trial period. The managers' views on her performance were not passed on to Ms Rickards. Ms Fu felt that she needed to observe Ms Rickards herself but did tell the managers to give Ms Rickards less shifts.

[14] Ms Rickards occasionally worked as acting duty manager. She expressed that her current pay was not sufficient for that role. The response from Ms Fu was to remind Ms Rickards that she was in a trial and she would need to improve her skills if she wanted more work hours.

**What other concerns did Ms Fu have?**

[15] It was not evident to Ms Rickards that over the weeks Ms Fu developed a number of concerns about her work and conduct. This was despite Ms Rickards wanting to check Ms Fu was happy with her work as she was in the process of selling her house and looking for another one. At the Authority's investigation meeting Ms Rickards discovered for the first time about the other managers' views on her performance.

[16] Ms Rickards took or borrowed \$10 or \$15 from the staff tip jar to get home one night because of her car situation and having little money due to the reduced work hours. She did not leave a note but reports returning the money later when she got paid. Ms Fu discovered money had been taken and raised it with Ms Rickards. Ms Rickards tried to explain that she needed the money to get home because of her car situation but was not sure that the message got through because of language barriers. There was no warning given. This was when Ms Fu offered to lend Ms Rickards some money.

[17] On a second occasion Ms Rickards did leave a note in the tip jar when she took a similar amount of money again for petrol. She was intending to replace it on her next shift but because she was not allowed to go back into work she could not do so. After she was dismissed she put the money into the business's bank account.

[18] Another issue arose, with Ms Fu noticing that the till was not balancing. Ms Fu did not raise this with Ms Rickards whilst she was at 5 Stags. Ms Rickards was not shown how to cash up at the end of the night and did not do that. She did check the cash float in the morning.

[19] Ms Rickards suggested an explanation for the till not balancing. Accommodation was provided for truck drivers and the sale for that was not always fully processed or cashed off on the till.

[20] Ms Fu accepts that she was not in a position to blame Ms Rickards for till problems, she just did not know or have any evidence. Another staff member left around the same time as Ms Rickards and the problem stopped after they left.

[21] In addition Ms Fu heard what I describe as gossip from customers that Ms Rickards had taken drugs. Ms Fu did not raise this with Ms Rickards during employment and does not mention seeing any behaviour which Ms Fu attributed to drug use. Ms Rickards strongly denies she was using drugs. On questioning Ms Fu, it appears that the concerns related to some ten or more years previously.

[22] Submissions for Night Pearl described it as the victim on this situation. Ms Fu refers to feeling her place was not safe anymore and being concerned about damage to her business. She did not want to raise her concerns with Ms Rickards and thought she could use the trial period to make her finish.

### **How was Ms Rickards' employment terminated?**

[23] On 11 May 2022, Ms Rickards and her colleagues on the 5 Stags Pirongia group chat received a message from Ms Fu:

Jen, please leave Five Stags. We don't need you to work here. Thanks.

[24] Ms Rickards did not return to work. There was no letter informing her that she was dismissed.

[25] Ms Rickards messaged asking for her holiday pay to be paid. Ms Fu replied to the group that she would ring 111 to trespass Ms Rickards if she came back again. Quite why this strong a reaction occurred was not evident. Ms Rickards' message did not indicate she was going to come in.

[26] There were later messages between Ms Fu and Ms Rickards sent on a one to one basis. Ms Fu raised the till money question. Ms Rickards denied having anything to do with it and said she did not do drugs when Ms Fu mentioned that.

### **Does the trial period prevent Ms Rickards bringing a grievance?**

[27] The employment agreement between Night Pearl and Ms Rickards contained a 90 day trial period which purports to prevent the bringing of a personal grievance regarding a dismissal. Night Pearl says that it was entitled to dismiss Ms Rickards under that provision and she should not be able to bring a claim. Alternatively, it argues it dismissed her for serious misconduct.

[28] Under sections 67A and 67B of the Act trial periods may prevent employees from bringing personal grievance claims based on their dismissal.

[29] Ms Rickards' dismissal did occur within 90 days of her appointment but was the trial period valid? She argues it was not because she had already started working at the time she received the employment agreement.

[30] Trial periods remove what is otherwise an employee protection to challenge a dismissal by bringing a personal grievance claim. Thus strict compliance with the requirements of the sections is needed.<sup>1</sup>

[31] The agreement refers to Ms Rickards' "first day of work (start date)" being on 20 March 2021 (should be 2022). The signature provision has the prepopulated date of the 21<sup>st</sup> day of March 2022.

[32] The plan may have been for Sunday 20 March to be an interview and training day but due to the business being short staffed that was not what Ms Rickards' activities were restricted to. She was an experienced hospitality worker and was called upon to work alongside Ms Fu who would otherwise have been the only front of house staff member. Ms Rickards worked for at least seven hours on Sunday 20 March, serving customers, taking payments and the like.

[33] I do not accept the suggestion for Night Pearl that this was a temporary casual working day, not a real workday. There was no evidence of such an arrangement being made between the two women.

[34] The employment agreement was provided on the day following Ms Rickards' first day of work. She had worked and been paid for a full day. She was therefore an existing employee at the time the employment agreement was provided to her. There was no discussion about the existence of a trial period prior to Ms Rickards starting work. Under s 67A(1) of the Act trial periods only apply to those who have not previously been employed by the employer. Night Pearl's trial period is therefore not valid and Ms Rickards can pursue her personal grievance claim.

### **Was Ms Rickards dismissed?**

[35] The group chat message from Night Pearl to Ms Rickards was clear. She was told to leave and they did not need her to work (at 5 Stags). Night Pearl sent Ms Rickards away. A fair and reasonable observer would see the employer dismissing the employee via the text message. I conclude Ms Rickards was dismissed by Night Pearl.

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<sup>1</sup> *Smith v Stokes Pharmacy Limited* [2010] NZEmpC 111, *Senate Investment Trust through Crown Lease Trustees Limited v Cooper* [2021] NZEmpC 45 and *Farrand Orchards Limited v Tane* [2022] NZEmpC 131.

## **Was that dismissal unjustified?**

[36] Night Pearl argued that it was justified in dismissing Ms Rickards on the basis of serious misconduct although Ms Fu's evidence suggested the performance question was also a factor.

[37] Did Night Pearl act as a fair and reasonable employer could have done in the circumstances?<sup>2</sup> This assessment includes considering whether a sufficient investigation was carried out, with the employer raising its concerns with the employee, giving them a chance to comment and considering any response.<sup>3</sup>

[38] There was little evidence of Ms Fu confirming herself that there was poor performance as suggested by the managers. She became focused on the money issues. However, she accepts that she could not have a sound basis on which to decide Ms Rickards was the person responsible for any till imbalances.

[39] Other than regarding the first tip jar incident, which Ms Fu had already dealt with, as far as Ms Rickards was aware there had been no investigation into any concerns Night Pearl had about her before it rather publicly announced her dismissal. Ms Fu was worried about the till balance but did not tell Ms Rickards about this.

[40] After her dismissal Mr Rickards received a number of messages where Ms Fu made allegations. But the dismissal had already occurred. It was too late.

[41] The employment agreement contained a comprehensive provision about disciplinary processes, which Night Pearl entirely failed to comply with. Elements included calling a meeting with the employee, giving them a chance to be heard and taking into account mitigating circumstances.

[42] Was dismissal by sending a text to an employee on a group chat that they were not needed, with no other process, what a fair and reasonable employer could do? The answer must be no.

[43] I have considered whether the defects in Night Pearl's process could be considered minor and not causing any unfairness to Ms Rickards. They were not, there being minimal investigation, no attempt before dismissing to raise concerns relied on with her, no warning

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

<sup>3</sup> The Act, s 103A(3).

given when the first tip jar incident was discussed earlier nor indication that her employment was in any way in jeopardy.

[44] Ms Rickards was unjustifiably dismissed by Night Pearl.

### **What remedies should Ms Rickards receive?**

#### *Lost wages*

[45] Ms Rickards seeks 13 weeks' lost wages at her average weekly hours of 29.86, or alternatively at the minimum guaranteed rate of 12 hours per week. Her pay rate was \$23.00 an hour. It was accepted in submissions for Ms Rickards that there was insufficient evidence of mitigation attempts to warrant the seeking of lost wages beyond the three month point.

[46] There was some evidence of mitigation attempts. Ms Rickards tried to find other hospitality work in nearby towns but found it difficult. She believes this was because she had been bad mouthed around town by Night Pearl. There was no direct evidence to support however, given that several other staff on the group chat had been informed that Ms Rickards was summarily dismissed and would be trespassed, I accept word spread in the locale. Ms Rickards refers to being approached in the street by people asking what happened.

[47] In the absence of better records, I accept that Ms Rickards worked an average of 29.86 hours a week and her lost remuneration should be calculated on that basis. That amounts to \$8,928.14 for a 13 week period.

[48] Before assessing contribution an award of \$8,928.14 gross would be appropriate.

#### *Compensation*

[49] Ms Rickards also seeks \$15,000 compensation for humiliation, loss of dignity and injury to feelings. It was suggested in submissions that this amount may have taken into account an expected deduction for contribution however, there was no evidence on that topic.

[50] Unsurprisingly Ms Rickards found a dismissal by message on a group chat of her colleagues humiliating and embarrassing. She had hoped that the Five Stags' job would continue. She was contacted by a few co-workers to ask what was going on. Ms Rickards was approached on the street of her hometown by people who knew she had been dismissed and referred to the allegation she had stolen money and done drugs.

[51] Ms Rickards had been in the process of selling her house and buying another when she was dismissed. The loss of income meant she could not satisfy the bank's requirements for a new mortgage. She lost the opportunity to purchase a new property. Her circumstances are now described as diminished. She found it difficult to get rental accommodation. Eventually the family moved to live with her sister on a rural property some distance away. Due to the number of residents, Ms Rickards is staying in a sleepout and had to hire a cabin for her son.

[52] Ms Rickards describes herself as becoming severely depressed by her situation and seeing her son struggling with the move to an isolated area. She sought medical assistance.

[53] Subject to the consideration of contribution below, the \$15,000 sum of compensation sought is not unreasonable.

#### *Contribution and outcome*

[54] I consider whether under s 124 of the Act a deduction from what remedies might otherwise be ordered is needed. This takes into account whether Ms Rickards acted in a blameworthy way which contributed to the situation which gave rise to her dismissal.

[55] Submissions for Ms Rickards accepted that a 25% deduction for contribution regarding the tips jar is warranted.

[56] Ms Rickards referred to her experience that tip jars were for staff. I accept that but usually the jar is equally distributed amongst staff in an organised manner. It is unusual for there to be an arrangement that staff could take money as they needed it particularly, as Ms Rickards did the first time, without making any note or promptly letting a manager know what she had done. A seeming lack of policy on the tip jar does little to assist Ms Rickards' position.

[57] I accept that Ms Rickards' action in taking money from the jar the first time without informing anyone that she had taken some money to be blameworthy and contributory to Ms Fu's concerns which lead to dismissal. For it to occur again is particularly problematic although I accept on this occasion she deserves some credit for leaving a note and reimbursing Night Pearl afterwards for the amount taken. On the other hand Ms Fu had offered to lend money.

[58] I now turn to other matters. I am not satisfied that there is sufficient evidence regarding the till to find improper action by Ms Rickards. Ms Fu accepts she did not have such evidence

and there was the other staff member. The gossip about drugs seems to have related to much earlier suspicions.

[59] Ms Fu provided little evidence of her own observations of Ms Rickards' performance after she had not been prepared to rely on the managers' views.

[60] I conclude that the only elements which can found a deduction for contribution are Ms Rickards' conduct with the tip jar as there is insufficient basis to find Ms Rickards responsible for other concerns. I make a 25% deduction from what would otherwise have been awarded to her.

[61] After deduction for contribution, Night Pearl is ordered to pay Ms Rickards within 28 days of the date of this determination \$6,696.11 gross lost wages and \$11,250.00 as compensation under s 123(1)(c)(i) of the Act.

#### **What about the other claims?**

[62] As the dismissal grievance is established there is no need to consider the alternative disadvantage grievance.

[63] Ms Rickards initially also seeks payment for the contractual notice period of four weeks. However, she was summarily dismissed and that is a factor taken into account in assessing her dismissal to be unjustified.

#### **What about costs?**

[64] Ms Rickards agreed to the inclusion of the costs outcome in this determination. There was no objection from Night Pearl.

[65] The Authority's operates on a notional daily tariff costs regime with increases and decreases able to be made.<sup>4</sup> The starting point for a one-day investigation meeting is \$4,500. This investigation meeting did not last a full day. Submissions for Ms Rickards accepted that \$3,000 costs would be appropriate. No reasons were advanced for any change to the tariff rate.

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<sup>4</sup> Employment Relations Authority, Practice Note 2, Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi.

[66] I accept the amount sought is a fair assessment of the tariff rate, considering the length of this investigation meeting. Night Pearl is ordered to pay Ms Rickards within 28 days of the date of this determination \$3,000 as a contribution towards her costs.

[67] The company should also pay Ms Rickards for the Authority's filing fee of \$71.56 and is ordered to do so within the same period.

### **Summary of orders**

[68] Within 28 days of the date of this determination Night Pearl (2021) Limited is ordered to pay Jennifer Rickards the following:

- (a) \$6,696.11 gross lost wages;
- (b) \$11,250.00 as compensation under s 123(1)(c)(i) of the Act;
- (c) \$3,000 as a contribution to her costs; and
- (d) \$71.56 for the Authority's filing fee.

Nicola Craig  
Member of the Employment Relations Authority