

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 591  
3123354

BETWEEN ANGELINE GUYOMARD  
Applicant

AND KATIE MORTENSEN and  
ALASTAIR MORTENSEN  
Respondents

Member of Authority: Andrew Gane

Representatives: Applicant in person  
Respondents in person

Investigation Meeting: On the papers

Determination: 11 October 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] On 3 August 2020, Angeline Guyomard began a three-month fixed term arrangement working as an au pair for Katie and Alastair Mortensen (the Mortensens). The arrangement ended 3 weeks later on 24 August 2020.

[2] Ms Guyomard claims that she was an employee of the Mortensens. She has raised a personal grievance claiming she was unjustifiably dismissed. Ms Guyomard seeks compensation for her personal grievance, reimbursement of wages, holiday pay and reimbursement of the Authority's lodging fee.

[3] The Mortensens say Ms Guyomard was not an employee but was an independent contractor and resigned from her role by mutual agreement. The Mortensens do not agree that Ms Guyomard was unjustifiably dismissed.

[4] Ms Guyomard is now based in France.

## **The Authority's Investigation**

[5] This matter was allocated to me under clause 16 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[6] The Authority received written statements of evidence and supporting documents from Ms Guyomard and the Mortensens. It was agreed with the parties that this matter would be considered 'on the papers' and I would give a brief overview of my assessment of Ms Guyomard's claims. The parties had previously affirmed their written statements for this purpose.

[7] On 27 September 2023, via audio-visual link, I provided the parties with a brief overview of my assessment of Ms Guyomard's claims. As the parties have subsequently been unable to resolve the matter between themselves, I now determine the Ms Guyomard's application "on the papers".

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before it, including all the evidence by the parties.

## **Issues**

[9] The issues for determination are:

- (a) Was Ms Guyomard employed by the Mortensens or was she an independent contractor?
- (b) If Ms Guyomard was an employee, was she dismissed from her employment with the Mortensens and if so;
- (c) Was that dismissal what a fair and reasonable employer could have done in all the circumstances as prescribed by the test of justification set out at section 103A of the Act?
- (d) If the Mortensens are found to have acted unjustifiably, what remedies should be provided to Ms Guyomard:
  - i. reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate loss); and

- ii. compensation under s123(1)(c)(i) of the Act?
- (e) Was there blameworthy conduct on the part of Ms Guyomard that requires a reduction in both the nature and extent of any remedies to be awarded to Ms Guyomard?
- (f) Should either party contribute to the costs of representation of the other party?

## **Background**

[10] The Mortensens had young twins and were looking for an au pair to assist them with childcare. After placing an advertisement for an au pair on social media the Mortensen's were contacted by Nurture Me Education Limited, a childcare support agency who suggested Ms Guyomard for the role. The Mortensens met with Ms Guyomard and offered her an au pair role for their children.

[11] Ms Guyomard started to work for the Mortensens on 3 August 2020. Ms Guyomard was provided a written agreement that was headed up "employment agreement" (EA) for a fixed term ending in mid-October 2020. The EA stated that Ms Guyomard was "self-employed" and was not an employee of the Mortensens. The EA also provided that Ms Guyomard would be paid \$250 each week and be provided with full board, living in an attached studio at the Mortensen's home.

[12] Ms Guyomard started work on 3 August 2020. She worked from 7am to 5.30pm Monday, Tuesday and Thursday, on Wednesdays she started at 8.30 am. She then would have a three-day weekend.

## **What happened**

[13] After three weeks the working relationship between Ms Guyomard and the Mortensens began to breakdown. Both Ms Guyomard and the Mortensens seemed to have different expectations of what the au pair role entailed. On 18 August 2020 the Mortensens told Ms Guyomard that due to the COVID lockdown they were going to move into Ms Mortensen's parents' house sooner than expected and that they would no longer need her assistance. The Mortensens stated that they gave Ms Guyomard three weeks' notice as provided for in the EA. On the Mortensens' account the parties agreed on 6 September 2020 as being Ms Guyomard's final day.

[14] On 23 August 2020 Ms Guyomard met with Ms Mortensen. She said she wanted to understand why the Mortensens wanted her to finish. In contrast, the Mortensens claimed Ms Guyomard told them she no longer wanted to be an au pair, did not want to work anymore and that she wanted to leave.

[15] Ms Guyomard stated she had nowhere to go, and it was the Mortensens who wanted her to leave. In the end Ms Guyomard left the Mortensen's residence on 24 August 2020.

[16] On 25 August 2020, Ms Guyomard sent an email to the Mortensens seeking an explanation as to why her role had finished. She was also wanting to be paid the three weeks' notice period.

[17] Mr Mortensen responded saying there was no provision in the EA to pay her in lieu of notice. As a result, Ms Guyomard was only paid one week's notice.

[18] On 30 August 2020, Ms Guyomard sent the Mortensens a follow up email but received no response. Ms Guyomard then got advice and sought assistance from the mediation service on 9 September 2020.

[19] After several attempts the parties eventually attended mediation but failed to resolve the matter.

**Was Ms Guyomard employed by the Mortensens, or was she an independent contractor?**

*The law*

[20] Section 6 of the Act provides:

6 Meaning of employee.

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

- (3) For the purposes of subsection (2), the court or the Authority—
- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
  - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[21] Accordingly, my inquiry must focus on determining the real nature of the relationship between the parties. Also, at issue is what was the intention of the parties when they entered into the relationship.<sup>1</sup>

[22] Whatever the relationship was, it was very short lived. Ms Guyomard started work on 3 August 2020 and it ended on 24 August 2020.

#### *The employment agreement*

[23] The first issue to determine was the real nature of the relationship between the parties when it started.

[24] The EA the parties signed was inconsistent in regard to the real nature of the relationship. Although the document refers to Ms Guyomard not being an employee of the Mortensens, it is headed up “employment agreement” and references “personal grievances” and “disputes”. The Mortensens in their combined statement also refer to Ms Guyomard not having completed her 90-day trial period.<sup>2</sup>

[25] Ms Guyomard understood herself to be an employee of the Mortensens and was paid weekly and provided with full board.

[26] The employment agreement is not clear on its face as to the nature of the relationship. I must consider the way the relationship operated in practice by having regard to factors including of control and integration, and to the fundamental test of whether, or not, Ms Guyomard was working on her own account.

#### *Control and Integration*

[27] Ms Guyomard was engaged to look after and care for the twins as required. The Mortensens provided her with an “au pair manual” setting out the duties to be undertaken

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<sup>1</sup> *Bryson v Three Foot Six Ltd*, [2005] NZSC 34.

<sup>2</sup> Employment Relations Act 2000, ss 67A & 67B.

and the set feeding times for the children. Ms Mortensen also directed Ms Guyomard on the day-to-day care of the children.

[28] Although she was free to do as she pleased on her three-day weekends, Ms Guyomard was required to remain at the house during her hours of work and required to do night feeds.

[29] I find these factors to indicate that Ms Guyomard was subject to a degree of control by the Mortensens and integrated into the role of caregiving for the Mortensens' children.

*The Fundamental Test*

[30] The Mortensens did not calculate, deduct or pay PAYE on behalf of Ms Guyomard.

[31] I note that Ms Guyomard only provided her IRD number to the Mortensens when she was leaving. However, the fact of non-payment of the PAYE in respect of Ms Guyomard is not determinative of the issue of whether she was an employee whilst working for Mortensens.

[32] In considering the fundamental question of whether Ms Guyomard was an employee or contractor, the following facts are significant:

- (a) Ms Guyomard received an agreed weekly payment in respect of hours to be worked to complete the allocated tasks during Monday to Thursday each week;
- (b) she was required to be present on the property during her working hours;
- (c) she was provided with full board;
- (d) she was provided with the means necessary to perform her duties;
- (e) Mr Mortensen originally provided her with three weeks' notice, which is a feature of an employment relationship. He later retracted the 3 weeks' notice and paid only one weeks' notice.

[33] I find no evidence indicating that Ms Guyomard was in business on her own account. I determine that Ms Guyomard was an employee rather than an independent contractor during the period she worked for the Mortensens.

### **Was Ms Guyomard unjustifiably dismissed by the Mortensens?**

[34] Ms Guyomard denied voluntarily resigning from her employment with the Mortensen. She expected to work for the duration of the EA. She claims the Mortensens unjustifiably dismissed her.

[35] The test of justification in s103A of the Act states:

#### **S103A Test of Justification**

- i.* For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- ii.* The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[36] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. The Mortensens must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[37] The evidence from the Mortensens was that they had verbally raised with Ms Guyomard issues of some aspects of her behaviour not being satisfactory, however, they had not taken any formal disciplinary action or advised her that her employment was in jeopardy as a result. Mrs Guyomard was not dismissed for disciplinary or performance reasons.

[38] The Mortensens decision to move the family into Ms Mortensen's parents' house at an earlier date was the stated reason for Ms Guyomard's dismissal. The Mortensens had determined they needed to move into Ms Mortensen's parents' home to have the support they needed for the family. The Mortensens stated that on 18 August 2020 they gave Ms Guyomard her notice. On 18 August 2020 Ms Guyomard's au pair role was effectively made redundant by the Mortensens.

[39] The Mortensens dismissed Ms Guyomard by giving her three weeks' notice on 18 August 2020 (later reduced to one week). I find that the dismissal of Ms Guyomard fell far short of the requirements of procedural fairness and the concept of natural justice.<sup>3</sup>

[40] I determine that Ms Guyomard was unjustifiably dismissed by Mortensens.

### **Remedies**

[41] Ms Guyomard has been unjustifiably dismissed by the Mortensens and is entitled to remedies.

#### *Reimbursement of Lost Wages*

[42] Employees are under a duty to mitigate their loss following the unjustifiable termination of their employment. Ms Guyomard has provided evidence that she worked at a pizza restaurant from 29 September 2020 for 4 weeks after which she felt that she had no other option than to return to France.

[43] I order that Mr and Ms Mortensen pay Ms Guyomard the sum of \$1,250.00 gross, calculated as five weeks at \$250.00 per week, being the amount of time, she was out of work pursuant to s 128(2) of the Act and including the two week notice period that was not paid.<sup>4</sup>

#### *Holiday Pay*

[44] Ms Guyomard is also entitled to holiday pay in respect of her period of employment with the Mortensens.

[45] I order that Mr and Ms Mortensen pay Ms Guyomard the sum of \$100.00 gross pursuant to s 28 of the Holidays Act 2000.<sup>5</sup>

#### *Compensation for Hurt and Humiliation*

[46] Ms Guyomard is also entitled to compensation for humiliation and distress. I accept that Ms Guyomard experienced distress at the loss of her employment with the

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<sup>3</sup> Employment Relations Act, ss 4 & 103A.

<sup>4</sup> Employment Relations Act, s 123(1)(b).

<sup>5</sup> Holidays Act 2003, s 23.

Mortensen's and the abrupt manner in which it was communicated compounded this distress.

[47] However, I take into consideration the fact that Ms Guyomard, whilst not expecting to be dismissed, was aware that her relationship with the Mortensens was variable and that it was known to her that they would eventually be moving into Ms Mortensen's parents' house. In that respect I consider that the termination of her employment was not completely a shock.

[48] I order the Mr and Ms Mortensen to pay Ms Guyomard the sum of \$4,000.00 (gross) for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1)(c)(i) of the Act.

#### *Interest*

[49] Ms Guyomard can recover interest on her contractual entitlement as set out in paragraphs [43] and [45] above, from the date of dismissal, being 24 August 2020, until the date of payment. The order for payment of interest is made under clause 11(1) of Schedule 2 of the Act. Interest is to be calculated by the Mortensens using the Civil Debt Interest Calculator.<sup>6</sup>

#### *Contribution*

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

#### **Summary of orders**

[51] Ms Guyomard was unjustifiably dismissed by Mr and Ms Mortensen, for which remedies have been awarded. Her claims for wage arrears have been upheld. I make the following orders:

- (a) Within 28 days of the this of determination Mr and Ms Mortensen are ordered to pay Ms Guyomard the following sum:
  - (i) Reimbursement of lost wages being \$1,500; and

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<sup>6</sup> <http://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

- (ii) Holiday pay of \$100; and
- (iii) Compensation for humiliation, loss of dignity and injury to feelings of \$4,000.

(b) Interest to Ms Guyomard as awarded in paragraph [49] above.

**Costs**

[52] Ms Guyomard was unrepresented and therefore has no claim for costs. However, Mr and Ms Mortensen are ordered to pay Ms Guyomard the filing fee of \$71.56.

**Andrew Gane**  
**Member of the Employment Relations Authority**

