

Attention is drawn to the order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 773
3269679

BETWEEN BRIANA HYLKEMA
Applicant

AND TASMAN LIFESTYLE &
SPORTS LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Keshila Fayen, advocate for the Applicant
Luke Acland and Lucy Ingham, counsel for the
Respondent

Investigation Meeting: 19 September 2024 in Nelson

Submissions received: On the day

Confirmed last information received: 23 September 2024

Determination: 23 December 2024

DETERMINATION OF THE AUTHORITY

Nonpublication

[1] I made an interim non-publication order on 17 July 2023¹ and it is not in dispute that this should be extended. The Authority has the discretion to prohibit publication of matters before it.² The exercise of that discretion is based on a principled basis with a starting point of

¹ Directions of the Authority, 17 July 2024.

² Employment Relations Act 2000, schedule 2, clause 10 (1).

open justice.³ Having heard from the parties at the commencement of the investigation meeting, I find it appropriate and no impediment to the starting point of open justice to extend the orders previously granted by also including any reference to the type of leave Ms Hylkema took just before this employment relationship problem arose and reference to any third party individual that may have been associated with that leave.

[2] Accordingly, there are to be non-publication orders prohibiting from publication any reference in documentation lodged in this matter with the Authority and one to the other party that references the type of leave Ms Hylkema took just before this employment relationship problem arose and any reference to persons associated with that leave who are not involved in these proceedings.

Employment Relationship Problem

[3] Ms Hylkema was employed by the respondent (TL) from March 2022 to manage its two clothing retail stores. The co-directors of TL are Mr and Ms Crockett. TL dismissed Ms Hylkema on 5 September 2023 on stated reasons that she had abandoned her employment and also because of her inability to do her role for mental or physical incapability.

[4] Ms Hylkema claims she was unjustifiably dismissed. Ms Hylkema says she did not abandon her employment and no process for medical incapacity had been followed.

[5] Ms Hylkema also claims she was unfairly disadvantaged in her employment when, after she had returned from leave to deal with difficult personal issues, the following alleged actions of the employer caused her more unnecessary stress and humiliation in the workplace:

- a. That she was not being treated with support by the directors of TL upon her return to work from her leave;
- b. She had managerial duties taken from her including access to systems to enable her to do her managerial role;

³ *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney- General* [2022] NZEmpC 27.

- c. That despite agreeing not to do so, TL had exposed her to the stress of another employee's disciplinary matters, an employee closely connected to her;
- d. That she was further stressed by the way the other employee's support person (also closely connected to her) caused alleged difficulties for TL and without talking to her first, TL took steps to trespass that person from the vicinity of TL's work premises.

[6] Ms Hylkema claims remedies for the grievances, compensation, and lost wages. She claims costs.

[7] TL denies it dismissed Ms Hylkema unjustifiably. It says Ms Hylkema sent a medical certificate without any further explanation of why she was deemed by a doctor to be unfit for work for the following two weeks with only three days of sick leave entitlement left and after having just returned from paid leave. It says it was reasonable for it to ask for an explanation about this so it could manage its business ongoing and when Ms Hylkema did not in its view constructively communicate about this it was justified to dismiss her on the basis she had abandoned her employment. Alternatively, TL relies on case law⁴ that it says supports that the Authority should accept that in reality TL was justified to dismiss for 'misconduct' (albeit not summarily), the misconduct being for breach of her duty of good faith to communicate 'actively and constructively'⁵ about the above when the business needed to plan its forward operations.

[8] In response to the disadvantage claims, TL says that it had alleviated Ms Hylkema of some duties when she had started back to work to give her a chance to ease back into the workplace after difficulties in her personal life, and that this was to support her. It denies through Mr Crockett's actions that he exposed her to the issues relating to the other employee's disciplinary matters and issues with the support person. The directors of TL say they were very supportive and sympathetic towards Ms Hylkema but in the end she stopped being constructively communicative through her representative.

⁴ *Watson v Ryjack Holdings Limited* [2009] 5136141 AA 181/09 (Member Dumbleton).

⁵ Employment Relations Act 2000, s4 (1A).

The Authority's Investigation

[9] Parties lodged and served briefs of evidence and documents. I then held an investigation meeting over a day. I heard evidence on oath or affirmation and asked questions of Ms Hylkema and the two directors of TL. Both representatives had the opportunity to question witnesses and then present submissions on the day.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

Issues

[11] The issues to determine are:

- a. Was TL justified to terminate Ms Hylkema's employment?
- b. What if any of the actions claimed to have occurred after Ms Hylkema returned from her leave unjustifiably disadvantaged her in her employment?
- c. What if any remedies are to be awarded for compensation and lost earnings?
- d. Are any remedies to be reduced by virtue of s 24 of the Act?
- e. What if any costs are to be awarded one to the other party?

Was TL justified to terminate Ms Hylkema's employment?

[12] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified within the scope of what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This is an objective test and does not involve the Authority replacing what it thinks the outcome

should have been. A range of responses by the employer could be found as justified under the test.⁶

[13] I do not find TL was justified to dismiss Ms Hylkema. I give reasons for this as follows below.

TL's stated reasons for dismissal and whether these should be considered as in reality something different now?

[14] As noted above TL submits in the alternative that I should consider in reality that Ms Hylkema was dismissed for misconduct albeit not serious misconduct. This relies on a case that for Ms Hylkema it is submitted can be distinguished on its facts and that TL is not entitled, sometime after the dismissal, to 'select' a different reason for dismissing Ms Hylkema. I agree with the submission for Ms Hylkema.

[15] *Watson v Ryjack*⁷ is heavily relied on by the respondent to support this defence and to that end I will outline why I consider this is not applicable in this case.

[16] The case involved an employer who ran a workplace with only himself, an office person and the employee applicant. They had just resolved issues about breaks and getting in place a belated written employment agreement which the employer had given the employee to take away to consider over a weekend. The employee was unhappy about things in the employment agreement and became distressed about this over the weekend. He did not raise these things with the employer but provided him with a 'medical note written by a doctor'. Later in evidence, the doctor explained they left out the details of the employee saying they were stressed due to the employment agreement because she thought this would inflame the situation. The Member in that case made note that what was supplied was not actually a medical certificate but a note saying the doctor considered the employee was unfit for work 'indefinitely' without explaining the medical reasons for this. The employer received this

⁶ *Cowen v Idea Services Ltd* [2020] ERNZ 252 at [39]; and recently referenced and explained in *Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2024] NZEmpC 133 at [14].

⁷ Above at note [4].

‘note’ on the Monday morning after not having any indication from the employee about any issues that it could even guess at and was concerned something medically serious had occurred.

[17] When the employer tried ringing the employee several attempts were unsuccessful before the employee picked up and said to the employer to read the ‘note’ and then hung up on him. The employer then visited the employee’s home, identified he was there but only his wife talked to him and he received no further information to assist with what being ‘unfit for work indefinitely’ meant.

[18] The continued non-communication was accepted by the Authority in the circumstances of that case to have been misconduct due to a breach of good faith albeit not serious enough for summary dismissal and ordered the notice period be paid. The Authority noted that the employee’s breach had ‘undermined the employment relationship’ and the dismissal was justified because of the ‘extent to which performance of the employment would be affected by’ the employee’s absence from the workplace.

[19] The employer dismissed on the basis of ‘redundancy’. I take the Member’s acceptance that this was not the reason in reality, because it was obviously not a redundancy dismissal.

[20] I find this case does not assist me here. It is quite a different situation to what occurred for Ms Hylkema.

[21] Firstly, I find it was well known to the directors here that there were a number of stressors operating for Ms Hylkema in the workplace unlike the employer in the above case, who had no idea of any potential context to the employee effectively saying they were going to be ‘indefinitely’ unfit to work.

[22] Secondly, Ms Hylkema provided a medical certificate and not a ‘note’ which did not say she would be ‘indefinitely’ off work. At that stage it was for two weeks.

[23] Thirdly, the above case in my view significantly turns on its facts because it was an employer not only seeking some form of understanding about what ‘indefinite’ absence meant but this was in a situation where he was at least (at first) the only person available in the business to do any work and then then only with one other person in the office. The very nature of the business continuance was challenged. Here I have nothing to show me anything other than understanding that Mr Crockett had commitments outside of the workplace that were being impacted by Ms Hylkema not working and while I accept problematic, there was more than just himself in the workplace. There were other employees.

[24] Notwithstanding the Authority cases are not technically of precedent value, I do not find this case supports that I should consider Ms Hylkema was in fact dismissed for misconduct when this was never explained in her notice of termination.

[25] In the other case that the respondent refers me to, *Smith v Drillforce*⁸, I am also not satisfied this justifies changing a consideration here to Ms Hylkema being dismissed for the reason of misconduct. That case involved a number of disciplinary issues, mostly serious allegations, which had not all been put to the employee before dismissing him for reasons that included all of those allegations. That was not the case here.

[26] Mr Crockett’s termination letter was clearly stated for the reasons of abandonment and medical impairment after a series of emails between himself and by then Ms Fayen, representing Ms Hylkema, who Mr Crockett challenged as to her involvement.⁹ A personal grievance had been raised and Ms Hylkema herself emailed, albeit not providing her medical information for either privacy reasons or because she said she was uncomfortable talking with Mr Crockett. This was because of him previously questioning her reasons for taking a sick leave day off when she had a migraine. Again, *Smith* stands on its facts as Authority decisions tend to do.

⁸ *Smith v Drillforce NZ Ltd* [2016] NZERA Auckland 254 (Member Tetitaha).

⁹ Letter

[27] It should be evident that I do not accept that this is a case where I should consider Ms Hylkema was dismissed for misconduct and that the employer was justified to dismiss for that reason.

Was TL justified to dismiss Ms Hylkema for abandonment of employment?

[28] In the alternative to the above, it is submitted that TL was justified to dismiss Ms Hylkema for abandoning her employment. I do not accept Ms Hylkema abandoned her employment in the sense of how this can justify a dismissal. She did not walk out and never return, she did not fail to appear at work without a reason given. There was a live dispute about the degree to which Ms Hylkema had explained why she was certified 'not fit for work'. TL was not a workplace that was without employees to have covered those on sick leave, albeit inconvenient. The directors were well aware of the challenging parallel disciplinary process and fall out from that. This had occurred around this time and at a time when Ms Hylkema had returned from her leave and needed to ease back into work. This is not at all like *Rylock* where the employer had no one else to work in the business to keep it going and that employer was told the leave was to be 'indefinite'. Here there was a time based medical certificate albeit the parties were disputing the need for Ms Hylkema to explain herself further with medical information. TL was not unreasonably asked to consider how it should be doing this yet the responses were to challenge Ms Hylkema's representation and to say that if she did not provide information TL would dismiss on the basis of abandonment.

[29] It is then the next part of this series of communications that satisfies me that the termination was not justified on the basis of abandonment. A personal grievance was raised for disadvantage in employment on 31 August 2023. It listed a number of things that put TL on notice that Ms Hylkema was distressed in her employment including the claims about her needing to provide further medical information for the live medical certificate issue, and about claims in relation to the extent of her absences from work that was part of that which TL in my finding conflated to include concerns about prior leave already approved. Whether the things in Ms Hylkema's grievance had happened as she claimed, there was now clearly a grievance on foot for the employer to respond to and it became not unsurprising that Ms Hylkema was then off work still. She raised the grievance and TL had an opportunity to

respond which Mr Crockett did by cordially replying on 4 September 2023 that he would provide the information requested in the grievance letter. The next day TL without further notice terminated Ms Hylkema's employment summarily for reasons of abandonment and medical incapacity. I accept this was at odds with having received confirmation prior to this that Ms Hylkema had not abandoned her employment and the above cordial response to the live grievance.

[30] Even if I consider that the directors for TL may not have received advice, the approach of suddenly terminating Ms Hylkema's employment due to abandonment in the above circumstances was far from what a fair and reasonable employer could have done.

[31] Accordingly, based on the above, I do not accept TL was justified to dismiss Ms Hylkema for abandonment of employment. The reason given for medical incapacity was also not justified although there appears to be a concession now that this is correct. If not, then my comment would be that no process at all was followed that would have justified this serious reason for dismissal. I will consider remedies for the unjustified dismissal after first considering Ms Hylkema's disadvantage grievance claims.

What, if any, of the actions claimed to have occurred after Ms Hylkema returned from her leave unjustifiably disadvantaged her in her employment?

[32] Ms Hylkema claims she was unjustifiably disadvantaged in her employment in a number of ways. I will consider these under headings below.

Not being treated with support by the directors of TL upon her return to work from her leave

[33] I find this claim appears to have a very human element to it. Ms Hylkema started back to her employment after leave she had to take to deal with what I accept were challenging personal circumstances. Emails from the time that these circumstances occurred show me there was nothing but support from both directors of TL. Ms Hylkema in cross examination accepted there had been this support. At until what appears to have been incidents coinciding with the parallel disciplinary process involving people close to Ms Hylkema, her return to

work from her leave had been cordial to the point where she had responded with a positive comment and emoji to Mr Wyatt when he summarised their first meeting upon her return to work.

[34] I find that up until matters occurred relating to the lead up to the dismissal and the way TL through its director Mr Crockett dealt with her taking further unpaid sick leave, I am not satisfied that the directors were in some way intentionally making that return anything other than supportive. She had managerial duties taken from her including access to systems to enable her to do her managerial role. There were circumstances unfortunately happening around Ms Hylkema's employment that I find likely influenced her later attitude towards the motivations of the directors of the employer which I will consider below.

Her rosters were changed and access to her management systems including roster duties were removed

[35] I am not satisfied that Ms Hylkema's access to systems was deliberately removed. I found Ms Crockett's explanations and emails where she responded to this supports that this was likely inadvertent. I do not accept then that this was somehow a deliberate attempt to undermine Ms Hylkema in the workplace in front of other staff.

[36] Ms Hylkema says that her hours were reduced as were her management duties (mainly focused on her doing the rosters for both stores). I am again persuaded that the Crockett's wanted Ms Hylkema to ease back into the workplace. There is no evidence that they did not value her as a senior employee. I accept Mr Crockett's explanation that there had been a decision to put someone in the role to manage both stores and they had been very happy with Ms Hylkema's performance.

[37] What however appears to have also occurred is that upon returning to the workplace a likely decision had been made already that Ms Crockett would continue to do the rosters as she had been doing while Ms Hylkema was on leave. The Crockett's say this was to ease Ms Hylkema back in. This was clearly discussed according to Mr Crockett's notes from the

meeting he had with Ms Hylkema on her first day back. Ms Hylkema responded positively to these notes but then with days and at around the same time that things were unravelling for her close connection in the workplace in their disciplinary process, and then the support person had to be trespassed, Ms Hylkema's oral evidence was that 'things became personal'. I took it that those events, which I find she likely found out about from the people involved given their close connection to her, affronted her. I am satisfied then that her apparent about turn about the roster access not being returned to her as something she objected to was likely motivated by these other events having occurred. I am not satisfied based on the above that this supports that there was a disadvantageous action.

The parallel disciplinary process and fall out from that involving Mr Crockett

[38] For the same reasons as immediately above I do not find this supports actions that disadvantaged Ms Hylkema. I further do not accept the evidence shows me that Mr Crockett intentionally talked about the disciplinary process in front of Ms Hylkema when he was in the store around the time this was all happening. I find it unlikely she heard these conversations but accept she may well have been aware of what was going on, timewise. I accept the difficult position TL was in here. Mr Crockett gave me a straightforward and plausible explanation that TL was juggling with the other disciplinary process and fall out from that with a support person and a perceived safety issue with another staff member, as well as looking after Ms Hylkema who had a close connection to those involved and trying to honour not involving her. On balance, I find in favour of TL here that its directors did not have a motivation to make Ms Hylkema's work life more difficult. I also find a somewhat inconsistent position from Ms Hylkema in that while she did not want TL to involve her in the disciplinary process she says Mr Crockett should have talked to her about the support person before calling the police. Again, I accept Mr Crockett's evidence above that his intentions were not directed at making things difficult for Ms Hylkema.

[39] Based on the above I do not find Ms Hylkema has shown she was disadvantaged in her employment.

What if any remedies are to be awarded for compensation and lost earnings?

Compensation

[40] It can always be difficult to assess compensation under s 123(1)(c)(i) of the Act for employees who have been unjustifiably dismissed from their employment when some of the things impacting on the effects they refer to may also be attributed to difficult circumstances in their lives. I find that is the case here.

[41] However, I accept that Ms Hylkema returned to her workplace and there was acknowledgement by TL's directors about supporting her and there was a context of matters outside her control that also impacted on this as referred to above. This at least was until what I have traversed above were emails from Mr Crockett in the lead up to her termination, and then the termination itself, all had a tone that likely added to the human affect the termination had on Mr Hylkema.

[42] I find in the above circumstances that suitable compensation for the unjustified dismissal is \$12,000.00.

Lost wages

[43] The statement of problem lodged for Ms Hylkema claims \$8,000.00 lost wages. Further information and or calculation explaining this has not been provided. The employer provided final payslips after the investigation meeting at my request. Ms Hylkema provided oral explanation to me that after her employment ended she went on a job seeker benefit with a week stand down. That an employee has obtained a benefit is not calculated into any lost earnings. I find a reasonable award for the wages lost is close to what was claimed in the statement of problem based on the unpaid two weeks' notice (if it has yet to be paid) and one month of lost wages as a result of the unjustified dismissal.

[44] I find the above calculates as follows based on payslips and what an 8 hour day was paid to Ms Hylkema for the special leave of 72 hours for 9 days in August 2023:

- a. Two weeks x 8 hour days' notice period @\$28.00 per hour = \$3,584.00 gross;
- b. A further one month of lost wages @\$28.00 per hour = \$4,480.00 gross.

Are any remedies to be reduced by virtue of s 24 of the Act?

[45] I have considered whether Ms Hylkema's remedies should be reduced as a result of any contribution she has made to the circumstances of her unjustified dismissal. The respondent directors in their evidence criticise what they say was the 'combative' way that Ms Hylkema chose to respond through her representative to requests to understand better her medical certificate. I could equally however observe that Mr Crockett's emails also became combative. At the heart this was a young woman who lost her employment in unfortunate circumstances and where I still consider TL did not act as a fair and reasonable employer could have done in all the circumstances at the time undoing likely a genuine approach to Ms Hylkema but for the other disciplinary process and her connections to this, that likely caused emotions on both sides.

[46] I decline to reduce Ms Hylkema's remedies for contribution.

Costs

[47] While the statement of problem seeks \$3,000.00 in costs there is nothing to support this in front of me and I find it likely I need to reserve costs. Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If the parties are unable to resolve costs, Ms Hylkema may lodge and serve a memorandum on costs by 30 January 2025. From the date of service of that memorandum TL will then have 14 days to lodge any reply to memorandum. On request by either party, an extension may be granted.

[49] The Authority will determine costs on its usual tariff based practice.¹⁰

¹⁰ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

Summary of outcome

[50] Tasman Lifestyle & Sports Limited is to pay the following to Briana Hylkema:

- a. \$12,000.00 compensation under s123(1)(c)(i) of the Act for unjustified dismissal;
- b. \$3,584.00 gross for a two week notice period (if not already paid);
- c. One month of lost wages @\$28.00 per hour = \$4,480.00 gross under s123(1)(b) of the Act.

[51] The claims by Ms Hylkema that Tasman Lifestyle & Sports Limited disadvantaged her in her employment do not succeed.

Antoinette Baker
Member of the Employment Relations Authority