IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 51
5575463

	BETWEEN	JULIE HILLS Applicant
	AND	TRIPLE SSS LIMITED First Respondent
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	AND	JAY & BEE (2006) LIMITED Second Respondent
Member of Authority:	M B Loftus	
Representatives:	Jenny Murphy, Advocate for Applicant Tim Hesketh, Counsel for Respondents	
Investigation Meeting:	29 January 2016 at Palmerston North	
Submissions Received:	At the investigation meeting	
Determination:	29 April 2016	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Julie Hills, claims she was unjustifiably dismissed by the respondent on or about 3 August 2015. She also claims she was unjustifiably disadvantaged as she did not receive an individual employment agreement when she asked for one. Finally there is an allegation Ms Hills was underpaid and had unauthorised deductions taken from her wages. She seeks the unpaid wages and reimbursement of the moneys improperly deducted.

[2] The respondent(s) accept Ms Hills was dismissed but say it was justified. They deny the other claims have any merit.

[3] There is then the issue of which of the respondents employed Ms Hills – Triple SSS Limited (Triple SSS) or Jay & Bee (2006) Limited (Jay & Bee). Both have the same person, Glenn Warren, as its sole director and shareholder. Their registered offices share the same address and both companies operate licensed premises in Palmerston North and Taupo.

[4] Ms Hills states she worked in all the premises either owned or operated in Palmerston North. The respondents say Ms Hills was paid by Jay & Bee and are of the view it was her employer.

Background

[5] Ms Hills had previously worked for Mr Warren in both Palmerston North and Taupo at various times in the past. In 2013 the two met again in Taupo and a personal relationship developed. From that ensued an offer of what Ms Hills says was full time employment at licensed premises Mr Warren's companies operated in Palmerston North. Ms Hills commenced in February 2014 having by then relocated. She initially resided at a hotel owned and operated by Jay & Bee (the Café de Paris Hotel (the Café)) which had accommodation occupied by both casual and long term guests.

[6] She says notwithstanding the offer of full time work her hours were variable and could range from less than 20 per week to more than 40. Given the personal relationship she did not, however, challenge this.

[7] The relationship came to an end in November 2014 and Ms Hills then stopped living at the Café.

[8] Around this time the issue of deficiencies in gaming machine floats also gained prominence. For example on 15 October 2014 Ms Hills, along with other staff, acknowledged understanding a document that advised the employers concerns in this regard and that if losses continued the matter could become disciplinary. Ms Hills was also present at a meeting on 30 October 2014 where the issue was discussed and signed a subsequent memorandum dated 3 November 2014 which outlined various procedures and notified staff that failure to follow them would result in disciplinary action. It also contains advice that:

> *Any downfalls incurred during a shift will be fully deducted from the wages of the person on shift at the time of the downfall (hence why it*

> *is important to count the float before you sign on). The staff member involved will receive a letter of deduction.*

[9] That was followed by a shortfall of $44 while Ms Hills was on duty on 21 November 2014. As a result she was required to pay that amount by 27 November and told *all further shortfalls in the near future will lead to formal disciplinary action*.

[10] On 18 January 2015, the Café was partially damaged by fire and the hotel ceased trading. Ms Hills continued working at other premises operated by Mr Warren's businesses though claims her hours decreased further.

[11] On 13 February 2015, Ms Hills was asked to attend a disciplinary meeting with Mr Warren. It was held on 18 February and was called to discuss an alleged shortfall of $1,000 in the gaming machine float. It was made clear the accusation was one of causing loss by failing to follow correct procedures and Ms Hills was not being accused of theft.

[12] Notes of the meeting record Ms Hills admitted a failure to follow the required procedures and considered the outcome *completely fair and justified*. It also records she said the outcome was *Completely fair and justified. Has been a huge wake-up call of why procedure are in place*.

[13] The meeting ended with a warning and what Mr Warren claims was an agreement (albeit reluctant on Ms Hills' part) that she repay the $1,000. This was to be achieved by cashing up seven days' outstanding leave and paying the balance from her wages. Ms Hills signed a document acknowledging the outcome but claims she did so under duress.

[14] Ms Hills says she only signed the agreement as she felt the money would be deducted anyway and a failure to sign would place her employment in jeopardy. This incident and what Ms Hills says was the fear it generated led to her requesting a written employment agreement. She says she made at least three such requests but an agreement was not provided.

[15] Ms Hills claims it became common knowledge the Café was to be demolished around the middle of 2015. She says items located at the hotel were available for sale and she went to the hotel, often in her own time, in order to sell property on behalf of Mr Warren. Mr Warren accepts Ms Hills performed this work but says she was paid.

[16] Demolition was due to commence on 18 July 2015 and Ms Hills says that as a cupboard she owned was still there she asked her partner, Tony Stewart, to get it. She gave him her keys so he could access the premises. Mr Stewart took a car and trailer and went to do so with the assistance of another person. It is Mr Warren's position that while they were there they loaded other items onto the trailer. He saw this and challenged them. He says they then returned some but not all of the property in question.

[17] Ms Hills understanding, albeit hearsay via Mr Stewart, is his friend saw the items and asked about the possibility of purchase. Mr Stewart told him he'd have to ask to which the friend is alleged to have replied lets load it and then find out how much Mr Warren wants. She says she understands that as they loaded the goods Mr Warren intervened, advised the items were not for sale and were to be returned. Ms Hills understands they were.

[18] Six days later Ms Hills received a letter signed by Sharon Parker (Jay & Bee's operations manager). It asked that she attend a formal meeting to discuss:

> *… your involvement with regards to the removal of items from the Café de Paris on Saturday the 18th of July 2015, without permission from management.*
>
> *Tony Stewart was found on the premises removing items he had no permission to remove (Photos, signage, speakers, boxed glasses, bar stools etc).*

[19] The meeting occurred on 29 July 2015 as scheduled. Notes taken by Ms Parker record Ms Hills advised she had given her keys to Mr Stewart so he could pick up the cupboard but she had no part in his removal of other property. The notes record Ms Hills acknowledged the keys were given without management permission.

[20] The meeting adjourned while the responses were considered. It resumed on 3 August 2015 at which time Ms Hills was advised she was being dismissed for having given her Café keys to Mr Stewart without management's permission. It was proposed she be given three weeks' notice but this was not paid as Ms Hills chose to leave forthwith.

Determination

[21] The first issue is who employed Ms Hills - Triple SSS or Jay & Bee?

[22] Ms Hills was unable to answer when asked who she thought she worked for and it became apparent she had never really thought about the issue. Opposing that uncertainty there was the respondent's assertion Jay & Bee was the employer. To that I add the fact it was Jay & Bee who paid Ms Hills and forwarded PAYE to the Inland Revenue. It was premises operated by Jay & Bee (the Café) in which Ms Hills predominantly worked until that became impossible due to the fire. There is then the fact Ms Parker, the manager who supervised Ms Hills and who participated in the disciplinary action, worked for Jay & Bee.

[23] Having considered the evidence I conclude Ms Hills was employed by Jay & Bee.

[24] Turning next to Ms Hill's prime claim – the dismissal. Mr Warren accepts Ms Hills was dismissed. In doing so he accepts, on Jay & Bee's behalf, that it is therefore required to justify the dismissal. Section 103A of the Act states the question of whether a dismissal is justifiable:

> *… must be determined, on an objective basis,* [by considering] *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 … occurred.*

[25] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and procedural perspective. While issues of substance and process overlap and there is no firm delineation separation provides a useful means of analysis especially as some of the requirements of s.103A have a procedural focus.

[26] Section 103A requires the Authority consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[27] Notes of the disciplinary process attribute the dismissal to Ms Hills having given her keys to Mr Stewart without managements / directors / owner permission.

[28] However when questioned about the rationale Mr Warren gave various conflicting answers. When initially asked why Ms Hills was dismissed he said it was because of both the keys and discrepancies with the gaming floats. He then tried to

resile from that and say the dismissal was wholly attributable to the keys but later added issues of trust.

[29] While there is now evidence the gaming floats and questions of trust were in Mr Warren's mind when he decided to dismiss there is absolutely no evidence the floats were raised or discussed during the disciplinary meeting. Similarly there is no evidence trust was discussed with Mr Warren conceding he *can't answer* when asked whether it was.

[30] These failures mean Jay & Bee cannot comply with procedural requirements of s103A and its resources and knowledge do not, in my view, excuse these deficiencies. Mr Warren gave evidence he has, over time, employed a considerable number of staff and the business is large enough to warrant the employment of an Operations Manager. There is also evidence it has access to professional advice through Hospitality New Zealand and has access to, and uses, various aids provided by that organisation such as its *Record of Disciplinary Meeting* form.

[31] There are then problems with substance. It became clear from various answers he gave that Mr Warren has an extremely poor opinion of Mr Stewart and he accepted Mr Stewart's attempts to remove goods was in his mind and influenced his views. There is also evidence Mr Warren thinks Mr Stewart made more than one visit to the Café that day and is responsible for the removal of goods and fittings which can no longer be accounted for.

[32] It is, in my view, very difficult to visit the actions of Mr Stewart, a third party, on Ms Hills as has occurred here. If, as Mr Warren believes, Mr Stewart is guilty of a criminal act this should be taken up with the Police (which it has) and Ms Hills should not be held wholly accountable. Finally I note the evidence shows security at the Café was weak in any event with the gate to the premises having been left unsecured and open at the time Mr Stewart arrived.

[33] Mr Warren now also suggests Ms Hills might be guilty of theft and pocketed money when the gaming floats were in credit. There is absolutely no evidence to support this conjecture.

[34] Finally Mr Warren added he had qualms about what might be next and that also influenced his decision. It is difficult to see how some possible future event that has not, and may not, occur can provide a substantive justification for a dismissal.

[35] For the above reasons I conclude Jay & Bee has failed to discharge the onus it carries of justifying Ms Hills dismissal. There are too many factors which influenced this decision which were either not put to Ms Hills or for which there is no evidence she was accountable.

[36] Ms Hills also claims to have been disadvantaged as a result of Jay & Bee's failure to provide an employment agreement. While I accept she asked and her requests went unanswered I take the claim no further. That is because she could provide no evidence about the harm that resulted or the hurt this caused. In other words no remedies would accrue even if the claim were to succeed.

[37] Ms Hills wage claim appears to be based on her view she was employed to work full time hours but this did not occur. She seeks the difference between what was paid and what she would have received had she worked 40 hours a week. This is not a claim which will succeed.

[38] It is well established terms and conditions may change by agreement. Agreement can be either express or tacit (i.e. by conduct). That such changes may apply to an employee's status and/or the hours offered is also established.[1] Here I note Ms Hills accepts variable hours were the norm from commencement. She accepts she worked the hours offered and did not challenge the arrangement until after the Café fire. Even then her challenge was muted and more a request for additional hours to replace those the fire had taken from her. In such circumstances I can only conclude she agreed to this arrangement and by her conduct accepted her hours would vary.

[39] There was also an unquantified claim in respect to holiday pay. This took two parts. The first related to a claim for holiday pay on the arrears discussed in [37] and [38] above. The fact the arrears claim has failed means this will also fail.

[40] The second part of this claim relates to Ms Hills view she may be owed wages in respect to public holidays, alternate holidays and sick leave. Unfortunately these claims are not quantified with Ms Hills attributing this to two factors. First Jay & Bee failed to respond to a number of requests for time and wage records and, second, Ms Hills has no real idea as to whether or not her claim has validity – as was said in the statement of problem she *may not have received her minimum entitlements*.

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[1] *Barnes v Whangarei Returned Services Association (Inc)* [1997] ERNZ 626

[41] Given her inability to quantify her claim Ms Hills seeks a penalty with half payable to her.

[42] Jay & Bee accepts its records are deficient but denies any monies are owing. Documents provided to the Authority by Ms Murphy would suggest the denial is warranted. They show the taking of alternate holidays and payment of a 50% loading for working public holidays.

[43] Penalties are normally imposed where there is wilful and egregious behaviour which warrants condemnation. While there are documentary failures here there is no evidence they were caused by wilful and egregious behaviour. When I add the fact Ms Hills cannot even assert she has a claim I see no reason to contemplate a penalty let alone one where a portion is payable to Ms Hills.

[44] The final claim relates to the deductions from Ms Hills wages to cover deficiencies in the gaming float. Ms Hills seeks $998.55 with $719.55 being attributable to the cashing up of leave and the rest to cash deductions. The claim has documentary support and there is nothing to suggest it is wildly inaccurate.

[45] The claim will succeed for the following reasons. First I accept Ms Hills evidence she only signed the acknowledgment money could be removed under duress and that she feared for her continuing employment should she not do so. Second I have concerns about the way annual leave was cashed and its legality. A cashing of annual leave must be initiated by an employee's request.[2] This was not a request - it was imposed.

[46] I also note that notwithstanding Mr Warren's belated comments about possible theft ([33] above) Jay & Bee has been careful to say these deductions resulted from a failure to perform adequately by not following procedures. The Court has taken a dim view of such impositions and questioned the propriety of holding employees responsible for risks the business should shoulder.[3]

[47] This was not, in my view, a deduction properly authorised. It was obtained by duress and given the lack of an employment agreement has no contractual foundation.

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[2] Section 28A(1) of the Holidays Act 2003

[3] *George v Auckland Council* [2013] NZEmpC 179 and *Rainbow Falls Organic Farm Limited v Rockell* [2014] NZEmpC 136

In saying that I note deductions require consent.[4] The document Ms Hills signed does not actually say *I consent to the deductions* or words to that effect. It says I acknowledge the employer has decreed it is going to take the money. That is not consent and I conclude the money deducted is repayable.

[48] The conclusion Ms Hills was unjustifiably dismissed leads to a consideration of remedies. Ms Hills seeks lost wages along and compensation for hurt and humiliation.

[49] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Ms Hills took steps to mitigate her loss and acquired a full time replacement three weeks after her dismissal. She is claiming three weeks wages (assuming a 40 hour week) along with the difference between what she would have earned at Jay & Bee (again assuming a 40 hour week) and her new job for the remained of the three months.

[50] While I conclude there is a loss of wages it is not as great as claimed. This is because I do not accept Ms Hills was employed to work a 40 hour week at Jay & Bee ([38] above). Documents provided to the Authority by Ms Murphy suggest Ms Hills averaged 37.18 hours a week. That, multiplied by her hourly rate for three weeks, means a loss of $1,868.40. That is payable.

[51] The claim for the balance between what she would have got at Jay & Bee and what she received from her new job is also payable given the provision of s128(2). It is a loss suffered over the three months provided for in the Act. That said, and given my conclusions about Ms Hills not being guaranteed a 40 hour week the amount is less than claimed. I calculate $328 to be appropriate.

[52] Turning to compensation. Ms Hills seeks $10,000. She supported her claim with evidence about the hurt she suffered and pain caused by having what she saw as a fresh start in Palmerston North severely disrupted and unpalatable options the dismissal caused her to consider. She talked of feeling incapable of returning to the industry and the effect of financial pressures. The evidence was relatively strong and went undisturbed by cross examination. That said Ms Hills recovered relatively quickly and that is exhibited by her attainment of replacement employment.

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[4] Section 5(1) of the Wages Protection Act 1983

[53] Having considered the evidence I conclude $6,000 to be appropriate.

[54] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Ms Hills contributed to her dismissal in a significant way. While she transgressed in giving her keys to Mr Stewart and accepts, with the benefit of hindsight, she should not have done so I do not accept there should be a reduction for contribution. This is because the degree to which this transgression actually contributed to the decision to dismiss is now both diluted and uncertain. There are too many other factors which influenced the decision to dismiss and about which there is no evidence of wrongdoing which would justify a finding of contribution.

Conclusion and orders

[55] For the above reasons I conclude Ms Hills has a personal grievance in that she was unjustifiably dismissed. She has also established she should be repaid moneys improperly deducted from her wages. As a result I order the second respondent, Jay & Bee (2006) Limited, make the following payments to the applicant, Julie Hills:

i. $2196.40 (two thousand, one hundred and ninety six dollars and forty cents) gross as recompense for wages lost as a result of the dismissal; and

ii. $6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

iii. $998.55 being repayment of moneys improperly deducted.

[56] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority