

**IN THE MATTER OF A DISPUTE BEFORE THE EMPLOYMENT & LABOUR  
RELATIONS TRIBUNAL PURSUANT TO PART VA SECTION 44B EMPLOYMENT  
ACT 2000**

**KIM CAISEY**

**COMPLAINANT**

**And**

**RESPONDENT**

**Tribunal Members**

John Payne, Chairman

Valerie Young, Deputy Chairman

Jocene Wade, Tribunal Member

**Complainant**

Kim Caisey

**Respondent**

Co-owner

Co-owner

Sara Blair for Conyers representing Fresh Ltd

**Issue: Employment Act 2000 Section 18 Unfair Dismissal**

**Direction Hearing**

The Direction Hearing was held on 4<sup>th</sup> July 2023 and facilitated by the Deputy Chairman Valerie Young, in the absence of the Chairman and Panel member Ms. Wade.

## **Substantiative Hearing**

Date: 13<sup>th</sup> October 2023

1. It was agreed that the witness statements would be taken as evidence in chief and the witnesses would elaborate on points believed important.

## **Respondent's Case**

### **Testimony of SW**

2. The first witness was \_\_\_\_\_, (SW) Owner, President of Fresh Ltd. His witness statement is listed as tab1 of the Respondent's package.
3. He evidenced that Ms. Caisey was employed by the Respondent from 1<sup>st</sup> August 2022 to 21<sup>st</sup> March 2023, as General Manager.
4. The store located on Queen Street, in the City of Hamilton was in disarray in particular the back storage area. He shared it was an organizational nightmare and this impacted sales.
5. The Complainant was responsible for the layout of the store and there had been several conversations with her regarding the state of the store.
6. When he arrived at the store on Thursday morning, he was advised that the Complainant was on vacation. He stated that he was surprised and disgusted, partly due to him doing work that should be done by paid staff, meaning Ms. Caisey.
7. The Complainant had not put in a vacation request and she did not use the standard vacation form.
8. He felt disrespected by her absence as he required her input.
9. The decision to terminate was based on him being frustrated.

10. In regards to the message in the WhatsApp screen shot (shown on page 8 of the Respondent's package) he stated that his response "Got it" was related to the last point in the message and that he was driving at the time. He had not noticed the reference to being off on Thursday.
11. SW stated that there had been several conversations regarding the use of WhatsApp to relay important messages and that he had instructed staff not to use it, that he preferred phone calls.
12. He shared that the Statement of Employment clause 6 was quite clear regarding how vacations are to be requested. 30 days in advance and approval by the President of the Company.
13. He did agree that at times vacations were approved at short notice.
14. The Respondent stated that the Complainant was not entitled to overtime, was never paid overtime and the topic never formally came up.
15. Upon cross examination, the Respondent agreed that he and the Complainant had a good working relationship, but he did not consider her a friend.
16. When asked why he did not phone the Complainant when he noticed her absence, he replied that he felt disrespected and that she should have known not to take vacation at that time.
17. He further stated that the relationship "was beyond repair and there was no turning back."

#### **Testimony by JW Co-Owner**

18. Her witness statement is listed in tab 4 of the Respondent's bundle.

19. JW stated that she is the co-owner of the business with her husband and primarily handles the administration of the business.
20. She confirmed her presence in the store from Monday 20<sup>th</sup> March 2023 that she was helping to assess storage.
21. Nothing related to the Complainant's vacation was posted on the whiteboard from Monday to Wednesday. She did see it on Thursday morning.
22. JW stated, that staff are paid bi-monthly, and that the Complainant was not paid overtime.
23. The Complainant was demanding 494 hours of overtime, which is not correct. Using the spreadsheet, she would only be entitled to 54 hours of overtime, if indeed she had been entitled to such.
24. The company was up to date with its governmental obligations or had made some arrangement with the relevant body.

### **Case of the Complainant**

25. The Complainant's case is set out in a document titled "**Background**" labelled as tab 1 in the Complainant's package.
26. She asserts that she was unfairly dismissed.
27. That she had worked for the Respondent from July, but officially from August 2023.
28. She had not had any vacation and was busy organizing the storage space and the planned departure of an employee.
29. As General Manager, she felt that her job was to delegate, so she ensured that staff were trained to be able to do most tasks.

30. She believes that if her actions of taking vacation were so serious, then the Respondent should have called her.
31. She does not believe that she did anything wrong.
32. As set out in her Background document, she stated, that she made an “executive decision” to take vacation after discussing with the management team. She knew what the Respondent would have said if she had asked him.
33. She stated that she advised her team that, she planned to take leave in April but with the sudden news of                   s departure she knew she would not be able to get time off in April.
34. She stated that on Thursday 23<sup>rd</sup> March while on vacation, she received a WhatsApp at 6.22pm requesting that she call him.
35. During the conversation he is alleged to have said *“Hi honey just wanted to let you know you are no longer needed and where can I pick up my keys”*.
36. She further documented that having gone over the conversation again, she questioned *“why would he just fire me like that? No notice and nothing in writing.”*
37. In regards to overtime, the Complainant claimed that she, with the Assistant Manager, used to tease the Respondent regarding overtime. Overtime had not been recorded officially.

#### **Testimony of LM**

38. LM was the cashier during August, she had been offered the assistant manager position after the Complainant was terminated but declined.
39. She arrived at work at 8.45 a.m. on Thursday 30<sup>th</sup> March; the Respondent asked for the Complainant and appeared confused regarding her absence.

40. The staff were advised by the Respondent that the Complainant would possibly be released.

41. She indicated that training was provided to all staff, some offsite.

### **Deliberation**

42. On having heard the representation from the Parties, the Tribunal considered the evidence as it reflected the requirements of sections 24 Disciplinary action and section 25 Summary dismissal for serious misconduct under The Employment Act 2000

43. In presenting their case, the Respondent did not provide evidence that the behaviour of the Complainant satisfied section 25 (b) where and employee conduct *has a detrimental effect on the employer's business*.

44. When assessing the behaviour of the Complainant, the Tribunal had to determine whether her conduct was so serious that it went to the root of the contract and destroyed the relationship between the Complainant and the Respondent.

45. A case could have been made that the employment relation was damaged. However, the law requires that making a decision under section 25 both (a) and (b) must be fulfilled.

46. The Tribunal is of the view that like most small businesses there was a bit of a casual approach to management/employee relationship.

47. Reviewing the copy of the text sent on WhatsApp by the Complainant to the Respondent (Respondent brief page 8) the Tribunal could see the possible issues and the Respondent's reply of "Got it".

48. However, to send the reply would have taken some care on the part of the Respondent. He stated that he was driving when he

received the text but did not indicate what he was doing when he replied.

49. Sending a WhatsApp text with 3 separate topics could cause a reader at first glance to misunderstand or not observe all messages. However, the Tribunal believes that the Respondent did at some other time properly read the message.
50. The Tribunal is satisfied that all leave should have been requested through the established route using the Vacation form presented on page 7 of the Respondent's bundle.
51. Discussing with the staff her upcoming vacation and ensuring that they were capable of managing her duties demonstrated a forethought and provided sufficient time and the opportunity to discuss the matter with the Respondent.
52. The failure by the Complainant to use the form and to make an "executive decision" was inappropriate. The Tribunal believes that the Complainant was deliberate in her actions for not properly informing/requesting leave.
53. The Tribunal took note of the statement by the Respondent that he felt highly disrespected. This he repeated several times. Even during his evidence, the Respondent was adamant that he was treated with disrespect.
54. This may have accounted for the Complainant's witness when giving evidence recalling the Respondent advised staff that the Complainant was possibly going to be released.
55. The Respondent was strong in his position that he had instructed that any important matter is not sent via email. However, he did terminate the Complainant using that medium.
56. He had already determined his course of action during the Thursday but did not follow the requirements as set out in **section**

**24 (3) (g and h) Disciplinary action.** Section 24(3) states: *In deciding what is reasonable for the purposes of subsection (1), regard shall be had to –*

*(g) the penalty imposed by the employer;*

*(h) the procedure followed by the employer.*

57. It was noted that no meeting or investigation was carried out.

58. The Respondent also did not follow the provisions contained in Clause 10 of the Company's Statement of Employment to the Complainant. Article 10.5 states *"your employment is subject to the notice and probationary periods in clause 10 and to general rights of termination under law"*.

59. The Tribunal contended that the Respondent should have followed the provisions of **section 20 Notice periods**.

60. Deliberating the matter of the overtime the Tribunal is not persuaded that the Complainant is entitled to overtime. It was agreed by both parties that the entitlement to overtime was raised several times but was not done in a formal manner. It is opined that the Complainant is sufficiently knowledgeable regarding her rights and would have formally requested overtime and not "raise it as a tease" should she have been sure of her entitlement.

61. The Tribunal took note that there was no employee handbook and was advised that the Complainant had drafted one, but it had not been accepted or implemented by the Respondent. Therefore, any reference to an Employee Handbook was disregarded.

### **Determination**

62. The Tribunal, in reaching its determination, considered the process used by the Respondent when reaching a final decision. There was no evidence that the Respondent followed the below steps:



- i. Properly investigate the matter.
- ii. Inform the Complainant of the issues.
- iii. Gave the Complainant the opportunity to respond.
- iv. Conduct a disciplinary hearing or meet with the Complainant.
- v. Informed the Complainant of the decision in writing; and provided a right of appeal.

63. The Tribunal determined that the above process was not followed.

64. The Tribunal having heard the representations from the Parties have determined that:

- a. The Respondent is in violation of the Employment Act 2000 section 18 (1) Termination of Employment, *an employee's contract of employment shall not be terminated by an employer unless there is a valid reason for the termination connected with- (a) the ability, performance or conduct of the employee;*
- b. The actions of the Respondent did not satisfy section 24 (1) and (3) (a) and (h) of the Act.
  - i. *24(1) an employer shall be entitled to take disciplinary action, including giving an employee a written warning or suspending an employee, when it is reasonable to do so in all the circumstances.*
  - ii. *24(3) in deciding what is reasonable for the purposes of subsection (1), regard shall be had to – (a) the nature of the conduct in question;*
  - iii. *(h) the procedure followed by the employer;*
- c. The actions of the Complainant did not meet the requirements of **section 25 Summary dismissal for serious misconduct.**
- d. The Tribunal also determined that the conduct of the Complainant did contribute to the actions of the Respondent.

- e. The Complainant having been employed from 1 August 2022 to 30 March 2023 has not completed a year of service and is not entitled to compensation under section 40 (5).

**Order**

**The Tribunal therefore order that:**

- 1. The Respondent compensate the Complainant :**
  - a. 2 weeks wages for the period 15<sup>th</sup> March to 30 March 2023**
  - b. To be paid by 20<sup>th</sup> November 2023.**
  - c. 2 weeks' pay in lieu of notice by 20<sup>th</sup> November 2023.**
  
- 2. There is no entitlement to overtime pay.**
  
- 3. Any outstanding government obligations with respect to the Complainant be satisfied.**

**The Determination and Order of this Tribunal are binding and if a Party was aggrieved by the Determination and Order they may appeal to the Supreme Court on a point of Law within 21 days of receipt of this Determination and Order.**

**John Payne Chairman** \_\_\_\_\_  


**Valerie Young, Deputy Chairman** \_\_\_\_\_  


**Jocene Wade, Tribunal Member** \_\_\_\_\_  


**Date:    day of November 2023**