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Allen v Yang (Auckland) [2007] NZERA 167 (19 June 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 182/07 5052650

BETWEEN TEGAN ALLEN

Applicant

AND LYDIA YANG

Respondent

Member of Authority: Vicki Campbell

Representatives: Rohan Bignall for Applicant

Lydia Yang for Respondent

Investigation Meeting: 24 May 2007 at Tauranga

Determination: 19 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Tegan Allen commenced employment at Necta Café in July 2003. The café was owned by Ms Terri Ewart until July 2006, when the business was sold to Ms Lydia Yang. Ms Allen says after the change of ownership her employment continued on the same terms and conditions as previously.

[2] Ms Yang says that when she took over the business there was no written employment agreement between herself and Ms Allen and therefore there was no permanent relationship in place. Ms Yang says that after July 2006 the relationship was a casual employment relationship.

[3] Ms Yang told me that after she took over the café business and during the handover period she became dissatisfied with Ms Allen's performance to such an extent that while she signed employment agreements with two other staff members she would not sign the one she had previously provided to Ms Allen. Ms Yang is under the misapprehension that simply because there was no written document signed by both parties that she could require Ms Allen to leave at any time.

[4] The features of true casual employment include a genuine freedom between employer and employee to offer and accept employment. While there is no legal definition of casual employment, generally speaking it involves an employer offering work if and when it is

available. The employee has the right to accept or reject that employment and each period of work is usually treated as a separate engagement. Notice provisions and trial periods are not consistent with casual employment.

[5] There was no evidence to suggest or sustain an argument that Ms Allen was free to accept or reject the work at the café. I have concluded Ms Allen's hours of work continued as if nothing changed following the change of ownership. Ms Yang acknowledged at the investigation meeting that she had not had any conversations with Ms Allen prior to her taking over the business about how the employment relationship would work.

[6] I find Ms Allen was employed by Ms Yang on an ongoing permanent arrangement.

[7] On 3 August 2006 Ms Allen was dismissed without warning by Ms Yang. Ms Allen claims that dismissal was unjustified. Ms Allen also claims she is owed holiday pay which was not paid at the end of her employment.

[8] There is no dispute that Ms Allen was dismissed. Ms Yang says she dismissed Ms Allen following an incident in which Ms Allen totally destroyed the till tape for the shop. Ms Yang considered this to be serious misconduct.

[9] In relation to the holiday pay claim, during the conference call convened for the purpose of setting up the investigation meeting into Ms Allen's application, Ms Yang accepted that she had not paid holiday pay to Ms Allen at the end of her employment. The only dispute outstanding is the amount of holiday pay due.

The issues

[10] In coming to my conclusions in this matter I must consider on an objective basis whether what Ms Yang did in dismissing Ms Allen, and how Ms Yang carried out the dismissal, were what a fair and reasonable employer would have done in the circumstances.

Events leading to the dismissal

[11] Ms Yang told me that she told Ms Allen on several occasions, including on the first day she took over the business that she was not satisfied with the work Ms Allen did for her, in particular, that Ms Allen did not follow her instructions.

[12] Ms Yang told me that she talked to her several times, on the first day and the last day and may be a couple of times, maybe two or three times, in between when she asked Ms Allen to improve her performance. She said on the first day she talked to her quite a lot and raised some points with her, but Ms Allen did not make any improvement.

[13] Although Ms Allen denied having any conversations with Ms Yang about her performance, she conceded at the investigation meeting that Ms Yang did speak to her about making coffee. She told me Ms Yang complained that Ms Allen had put too much coffee in a customer's cup, however, Ms Allen says she explained to Ms Yang at the time, that the customer had paid to have a double shot of coffee in the drink. Ms Allen also conceded that Ms Yang spoke to her about using the probe to test the temperature when steaming the milk for hot drinks. Ms Allen says that after this was raised with her she used the temperature probe at all times to test the temperature when she was making coffee.

[14] Ms Allen told me that the only other conversation she recalls having with Ms Yang was that when Ms Yang told her that if she [Ms Allen] was not happy to work there she should go. Ms Yang acknowledges this conversation but says every time she raised an issue with Ms Allen she became very unhappy. She would close doors loudly and put things down heavily on the benches. Eventually this led to a cup being broken by Ms Allen. Ms Allen acknowledged at the investigation meeting that she had closed doors loudly, but that was usually when the café was busy. Ms Allen denies displaying any disgruntlement in front of Ms Yang or the customers.

The dismissal

[15] On 2 August 2006 Ms Yang became suspicious that Ms Allen had not taken money from her mother and some friends who had purchased food and drinks at the café. She said she went to check the till roll to check if money had been received for the purchases, but never finished because the café became very busy.

[16] Later that day, Ms Yang returned to the till to continue her investigation from earlier that day. Unfortunately the till roll was not in the till, it had been replaced with a new one. Ms Yang asked Ms Allen where the old till roll was. Ms Allen told Ms Yang that she did not know where it was.

[17] After the café closed that evening Ms Yang was cleaning out the rubbish from that day and discovered the missing till roll. The roll had been completely destroyed as it had been sitting in water in the bottom of the rubbish bin and was wet and unreadable.

[18] The following morning, on 3 August 2006, Ms Yang enquired of another employee, Ms Emma Robinson, if she knew who had thrown the till roll in the bin. Ms Robinson advised Ms Yang that Ms Allen had put the roll in the rubbish.

[19] Ms Yang invited Ms Allen to talk with her and asked her about the till roll. Ms Allen explained that the roll had jammed in the machine and so she had thrown it away.

[20] Ms Yang dismissed Ms Allen without notice.

[21] Ms Yang was unrepresented at the investigation meeting. During the meeting I discussed with her the law relating to procedural fairness and natural justice. Ms Yang accepted at the investigation meeting that she had not followed the minimum steps required of an employer when undertaking a disciplinary process.

Determination

[22] Ms Yang says Ms Allen was dismissed for destroying the till roll. I accept that the till roll was an important business document for Ms Yang. It was the sole record of her daily sales. Ms Allen acknowledged as much at the investigation meeting and, in particular, accepted that it was an important document for Ms Yang. The destruction of the till roll prevented Ms Yang from completing her enquiries into whether Ms Allen had provide free food and drinks to her mother and friends.

[23] I have concluded that it is more likely than not that Ms Yang had in her mind that Ms Allen had given away free food and drink and that this formed part of her decision to dismiss. This allegation was never put to Ms Allen for her explanation.

[24] Evaluating Ms Yang's actions against the objective standard of what a fair and reasonable employer would have done in the circumstances leads me to a conclusion that the way Ms Yang acted and her actions in dismissing Ms Allen fell well short of the obligation on employers to follow minimum steps of procedural fairness.

I find Ms Allen's dismissal to be unjustified. She is entitled to remedies.

Remedies

Lost wages

[25] Ms Allen is entitled to lost wages as a result of her dismissal. Ms Allen seeks payment of 4 weeks lost wages. I am satisfied Ms Allen took adequate steps to mitigate her loss of wages. She commenced new employment on 18 September 2006.

[26] Ms Allen is entitled to receive the four weeks wages amounting to \$1,576.00 nett subject to a reduction for contribution.

Compensation

[27] The evidence of hurt and humiliation presented to the Authority was remarkable for its paucity. Any award under this heading will be at the lower end of the scale and I have concluded \$1,500.00 is reasonable compensation.

[28] I am bound by section 124 of the Act to consider the extent to which Ms Allen's actions contributed towards the situation that gave rise to her personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[29] Ms Allen had worked at the café for 3 years before her dismissal. She acknowledged at the investigation meeting the importance of the till roll as a business document. She also acknowledged that she had never thrown a till roll away previously, during her employment. There was evidence from Ms Yang, which I have accepted, that Ms Allen initially denied knowledge of where the till roll was and that she had been responsible for throwing it away. I find Ms Allen's actions have contributed 25% to the actions giving rise to her personal grievance. Ms Allen's remedies shall be reduced accordingly.

Ms Lydia Yang is ordered to pay to Ms Allen the sum of \$1,182.00 (nett) pursuant to section 123(1)(b) within 28 days of the date of this determination.

Ms Lydia Yang is ordered to pay to Ms Allen the sum of \$1,125.00 pursuant to section 123(1)(c) within 28 days of the date of this determination.

Holiday pay

[30] During the course of the investigation meeting it was agreed that the outstanding holiday pay was \$36.87.

Ms Yang is ordered to pay outstanding holiday pay in the amount of \$36.67 (nett) within 28 days of the date of this determination.

Costs

[31] Ms Allen has incurred costs and seeks a contribution to those costs. There is nothing in this case to derogate from the principle that costs follow the event and that the successful applicant should receive a contribution to reasonably incurred costs. **Ms Yang is ordered to pay to Ms Allen the sum of \$750.00 as a reasonable contribution to costs.**

Summary of orders

[32] Ms Lydia Yang is ordered to pay the following amounts to Ms Allen within 28 days of the date of this determination:

- • \$1,182.00 (nett) pursuant to section 123(1)(b);
- • \$1,125.00 pursuant to section 123(1)(c);

- • \$36.67 (nett) being unpaid holiday pay;
- • \$750.00 as a reasonable contribution to costs.

Vicki Campbell

Member of the Employment Relations Authority

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