

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 61  
5362285

BETWEEN                      JESSICA CHAND  
   Applicant  
  
AND                                OTAKU HOLDINGS  
   LIMITED  
   Respondent

Member of Authority:      P R Stapp  
  
Representatives:              Lars Hansen and Sara Frey for the Applicant  
   No appearance for the respondent  
  
Investigation Meeting:      15 May 2012 at New Plymouth  
  
Determination:                1 June 2012

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**DETERMINATION OF THE AUTHORITY**

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**Non appearance of the respondent**

[1]      No good cause has been provided as to the reasons for the respondent's failure to attend the Authority's investigation meeting. I am satisfied that service was achieved. All reasonable steps were taken to make contact with the respondent, albeit to no avail before the investigation meeting. Under clause 12 Schedule 2 of the Employment Relations Act 2000 I proceeded to fully hear the matter as if the respondent had duly attended or been represented.

**Employment Relationship Problem**

[2]      Jessica Chand's first day working as a waitress at the Japanese Steak House in New Plymouth was on 31 August 2011.

[3]      She was employed by Otaku Holdings Limited and she had a signed individual employment agreement dated 5 August 2011. The agreement contained a "12 week"

“Probation Clause” and she was paid \$13.50 per hour for a minimum of 35 hours per week.

[4] She thought her work was going very well, until the evening of 16 September 2011 when Thomas Buckthought, a director of the business, arrived at the restaurant for a late meal. There were difficulties with the service at his table that initially involved another waitress. Ms Chand took over the responsibility for completing the service at the table.

[5] Later the same night Ms Chand was informed by Mr Niquay Langton, manager that he had to dismiss two people, or he would be fired too. One of the two people he had to fire was Ms Chand.

[6] Despite this information Ms Chand worked the next day, and later that night after service, Mr Langton dismissed her. She says she asked for the reason and was told by Mr Langton that it was because she served Mr Buckthought the wrong drink. She asked for the reasons to be put in writing.

[7] In a letter dated 28 September 2011 the employer relied upon the “12 weeks” “Probation Clause” for the three days notice for termination of Ms Chand’s employment. Ms Chand says when she received the letter she was confused because of the reference to the 90 trial. She says the letter did not contain any reasons for her dismissal.

[8] A personal grievance was raised on 19 October 2011. The matter has not been to mediation because the respondent did not reply to the statement of problem. Mediation was considered by me under s.159 of the Act and I decided that mediation would not contribute constructively to resolving the matter.

### **The Issues**

[9] The issues in this matter are:

- (i) What was the reason for the termination of employment?
- (ii) Was the probation clause an effective and proper trial clause under s.67A of the Employment Relations Act 2000, and/or a Probation Clause?

***What was the reason for the termination of employment?***

[10] Ms Chand was dismissed because she poured the wrong drink to the owner Mr Thomas Buckthought during a late meal in the restaurant. I accept Ms Chand's evidence that this was the case because:

- (i) the employer has not filed a statement in rely required under the Employment Relations Act;
- (ii) the employer has not appeared at the Authority's investigation meeting in New Plymouth;
- (iii) Ms Chand's evidence has not been contradicted by any other witness;
- (iv) Ms Chand produced the employer's letter of termination;
- (v) Ms Chand's written evidence was consistent with her statement of problem and answers to questions at the Authority's investigation meeting.
- (vi) I believe Ms Chand that the reason she was given was that she had poured the wrong drink at Mr Buckthought's table.

***Was the "Probation Clause" an effective and proper trial clause?***

[11] The probation clause purports to be a trial clause under s.67A of the Act because the letter with reasons for the dismissal relied on a 90 day trial clause, and inferred that such a clause applied. In addition there was a "yes" and "no" operative provision for the "probation clause" contained in the schedule to the employment agreement. Neither had been ticked.

[12] The "probation clause" in the employment agreement provided for "12 weeks" probation. The agreement was signed off before the work commenced. However, the clause did not provide a statement to the effect that explained the provisions of the Act as required. Therefore the clause is defective and cannot be relied upon by the employer as a 90 day trial clause.

[13] In any case the details as to whether or not the "probation clause" applied or not had not been completed to give effect to it, I hold.

[14] Finally, the three days notice in the letter does not appear to comply with the “termination of employment clause” in the employment agreement and the “probation clause” in the same agreement, which both required two weeks notice to be given by either party.

[15] As the “probation clause” does not meet the requirements of s.67A the employer may attempt to rely on s.67 which makes provision for probationary arrangements since the employment agreement made provision for probation and performance arrangements. However it was not operative under the schedule to the employment agreement.

[16] Therefore the employer was required to act reasonably and fairly and with cause if there was a problem in the employment.

***Section 103A of the Employment Relations Act test***

[17] As the dismissal occurred after 1 April 2011 the test is what a fair and reasonable employer could do in all the circumstances. The employer has not justified the dismissal and the grounds relied upon in regard to Ms Chand pouring the wrong drink. Also, the employer failed to follow any process in regard to the dismissal.

[18] Having regard to the resources available to the employer there was no investigation in regard to the complaint before the dismissal. This does appear to be a small employer, but given the nature of the complaint involving a director of the business and a manager, this was a matter that should have involved an investigation at least by the manager. It seems that the owner made the decision without any process, and imposed a decision on the manager to carry out dismissing somebody. That was grossly unfair. The employer did not raise the allegation of pouring the wrong drink with Ms Chand before dismissing her. There was no reasonable opportunity given to Ms Chand to respond to the employer’s concerns before she was dismissed and no discussion on any penalty. There was no consideration of any explanation from Ms Chand in relation to any allegations against her before the dismissal.

[19] Since the employment agreement did provide a process to be followed in regard to performance and any misconduct, the employer could have exercised this and other options than dismissal for any penalty in this instance. This could have

involved a process of warnings first. Since the process was so badly flawed the defects of the employer cannot be considered minor. They also resulted Ms Chand was treated unfairly.

[20] I hold that the dismissal was unfair and therefore Ms Chand has a personal grievance. Ms Chand's lawyer requested the employer to provide wage and time records. There is no evidence that these were ever provided by the employer. Thus the payment of wages after the dismissal is not able to be reconciled.

[21] Ms Chand's last day of employment was 17 September 2011. She has claimed three months lost wages, and I accept her claim of \$6,142.50. She has given evidence of mitigating her loss and attempted to find alternative work in the period that she has claimed the loss for. I am satisfied she did as much as she could to mitigate her loss.

[22] Also Ms Chand is entitled to \$4,000 compensation for hurt and humiliation because of the dismissal. I accept her evidence that she was upset, that it caused her to cry and that it de-motivated her. She was supported by her mother in respect of this claim, and her mother verified the impact of the dismissal on Ms Chand.

[23] Ms Chand did not contribute to her personal grievance with any blameworthy conduct from the evidence before me, I hold.

[24] Costs of \$71.56 were incurred by Ms Chand for the filing fee. Otaku Holdings Limited will also be required to pay this sum to Ms Chand.

### **Summary of Authority orders**

[25] Otaku Holdings Limited is to pay Jessica Chand:

- (a) \$6,142.50 lost wages;
- (b) \$4,000 compensation;
- (c) \$71.56 costs for the filing fee.