

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 402
5377551

BETWEEN PREMA D'SOUZA
 Applicant

AND TALENT BEAN LIMITED t/a
 Roasted Addiqtion Cafe
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, Advocate for the Applicant
 Veronica Ceponis and Yvonne Mak, Representatives for
 the Respondent

Investigation Meeting: 24 October 2012 at Auckland

Determination: 3 December 2012

DETERMINATION OF THE AUTHORITY

- A. Ms D'Souza was unjustifiably dismissed by Talent Bean Limited t/a Roasted Addiqtion Cafe (Talent Bean) on 11 April 2012;**
- B. Talent Bean is ordered to pay the sum of \$10,000 compensation to Ms D'Souza pursuant to s.123(1)(a) of the Act for humiliation, loss of dignity and injury to feelings suffered by her as a result of her unjustified dismissal;**
- C. Talent Bean is ordered to pay Ms D'Souza the sum of \$1,848 gross being reimbursement of wages lost by Ms D'Souza as a result of the dismissal pursuant to s.123(1)(b) of the Employment Relations Act 2000 (the Act);**
- D. Talent Bean is ordered to pay the sum of \$3,500 costs to Ms D'Souza being the notional tariff for a full day investigation meeting in the Authority plus reimbursement of the cost of the filing fee totalling \$71.56.**

Employment relationship problem

[1] The Applicant, Ms Prema D'Souza claims she was unjustifiably dismissed by the respondent, Talent Bean Limited trading as Roasted Addiqtion Cafe (Talent Bean) on 11 April 2012. Ms D'Souza claims she was dismissed after raising some matters concerning her job with Mr Yonglin (Vincent) Shan, the sole director and shareholder of Talent Bean.

[2] Mr Shan accepts Ms D'Souza was summarily dismissed by Talent Bean on 11 April 2012 but says the dismissal was justified following two written warnings concerning her unsatisfactory performance and poor attitude, and for serious misconduct.

Issues

[3] The issues to be determined by the Authority are:

- (a) Was Ms D'Souza's dismissal by Talent Bean justified?; and
- (b) Does Ms D'Souza have a wage arrears claim against Talent Bean for allegedly failing to pay her for hours worked in excess of her agreed hours of employment?

Background

[4] Ms D'Souza is an Indian citizen. She came to New Zealand in October 2010 with her husband, Mr Lucas D'Souza, and their young son in the hope of securing a better future for the family in New Zealand.

[5] Ms D'Souza undertook studies in professional cookery at the North Shore International Academy and on 27 September 2011 completed a Level 5, Diploma in Professional Cookery.

[6] While studying, Ms D'Souza gained practical experience in cookery by working firstly at Lone Star Restaurant for six months and subsequently by training under the head chef at Roasted Addiqtion cafe (the café). After training at the cafe for some months, she was offered employment by the then owner of the cafe as a sous chef. In this role, Ms D'Souza undertook food preparation, baking, stock taking and,

if the head chef was away for any reason, running the kitchen. Ms D'Souza was paid an hourly rate of \$16 gross.

[7] On 28 November 2011, the cafe was sold to Talent Bean and Mr Shan and his family took over the running of the café. Mr Shan's father, Minji (Jimmy) Shan, and his wife work at the café as does Mr Shan's brother, Oliver, and sister-in-law, Lei (Sunny) Yiang. Mr Jimmy Shan and his wife perform largely menial tasks such as washing dishes and ordering food from suppliers. Mr Shan's sister-in-law, Sunny, up until the recent arrival of her baby, did basic food preparation and assisted the head chef. Sunny is also responsible for Talent Bean's accounts including processing the wages and holiday pay. Mr Shan works front-of-house in the café and is in charge of the overall running of the business.

[8] Mr Shan has limited experience in the hospitality industry. Prior to purchasing the café, Mr Shan helped friends at the Robert Harris café in St Lukes Mall and prior to that worked in a butchery shop. Mr Shan's relevant experience before purchasing the café was limited to washing dishes, filleting fish and chopping meat.

[9] Shortly after the purchase of the café by Talent Bean, a number of staff including the head chef, the kitchen hand and head waiter left. The head chef left almost immediately when his hours of work were reduced. Ms D'Souza was offered and accepted the role of head chef at the rate of \$16 per hour and signed an individual employment agreement to that effect.

[10] Ms D'Souza performed the role of head chef for just over 4 months before being summarily dismissed by Mr Shan on 11 April 2012. Ms D'Souza says her dismissal occurred soon after she raised a number of employment related matters with Mr Shan following an incident involving his father, Jimmy on 8 April 2012.

First Issue

Was Ms D'Souza's dismissal by Talent Bean on 11 April 2012 justified?

[11] Mr Shan says he did dismiss Ms D'Souza but only after repeatedly speaking to her about her poor performance and attitude.

[12] The main facts are not in dispute. Ms D'Souza received 2 written warning letters from Mr Shan in one email from him on 11 April 2012 relating to matters

which allegedly occurred on 17 March and 10 April 2012 respectively. Ms D'Souza replied to the warning letters by email on the same day and shortly afterwards received a letter containing a third warning and notification of immediate dismissal.

[13] The immediate events which led to the issuing of the warnings and the dismissal began on 8 April 2012, Easter Sunday. Ms D'Souza says she had just finished baking some cookies and was taking the cookie trays out of the oven when Mr Shan's father, Jimmy, arrived. Jimmy has limited English. He told one of the waitresses in the café to translate an instruction to Ms D'Souza that she must ice the cookies that she had baked. Ms D'Souza says she explained to him that she was unable to ice the cookies because they were too hot and as she was about to finish her shift and would ice the cookies first thing the next morning. Ms D'Souza says Jimmy became angry and suddenly shoved the hot baking tray at her. Ms D'Souza says she got a real shock and became concerned for her safety because of the intimidating way in which Jimmy had approached her and thrust the baking tray. Jimmy denies thrusting the tray, saying he simply tapped it as he wanted the cookies iced as those cookies were one of the best selling products in the café.

[14] The incident with Jimmy was very unsettling for Ms D'Souza who says she went home that night and wrote up a list of matters, including the incident, which she wished to discuss with Mr Shan about her job and to resolve.

[15] The next morning, 9 April 2012, Ms D'Souza was due to start work at 7am but following a text message from Mr Shan that she start later, began at 9am. Ms D'Souza requested a meeting with Mr Shan to talk about a number of issues she had with her job and she told Mr Shan she would be bringing her husband.

[16] A meeting was arranged with Mr Shan at the end of her shift. Ms D'Souza, says she and her husband and their 5 year old son were kept waiting for over an hour before the meeting started.

[17] Ms D'Souza had listed a number of issues that she wanted to talk to Mr Shan about including what had happened in the kitchen the day before with Jimmy. Mr Shan, his sister in law, Sunny and brother Oliver all attended the meeting. Ms D'Souza says she handed the note listing the matters she wanted to talk about to Mr Shan who took the note, laughed and threw it on the table. Ms D'Souza says Mr Shan

refused to discuss her concerns, threatened to dismiss her and to ruin her application for permanent residence.

[18] Mr Shan and Sunny say Ms D'Souza resigned at the start of the meeting, read out a letter of issues and threatened to lay a complaint with the Department of Labour. However, Mr Shan accepts he emailed Ms D' Souza on 11 April 2012 terminating her employment with immediate effect and Sunny accepts that she knew Mr Shan had dismissed Ms D'Souza because "*she failed to follow instructions*". This is one example of many in which the evidence given on behalf of Talent Bean was inconsistent and contradictory.

[19] After the meeting on 9 April 2012, Mr Shan says he and other family members discussed Ms D'Souza's employment. Jimmy says he had by this time concluded Ms D'Souza's "*ability was limited*" and her hours of work should be reduced. Sunny says the family agreed Ms D'Souza's hours were to reduce but this was because they believed Ms D'Souza was working too many hours and they wanted to relieve the pressure she was under. This is another example of inconsistent and contradictory evidence on behalf of Talent Bean. What is clear is that Mr Shan, Jimmy and Sunny discussed Ms D'Souza after the meeting on 9 April 2012 and decided to take steps to reduce her hours of work without discussing this with her first.

[20] Ms D'Souza had her normal day off on the Wednesday, 11 April 2012 and says she received a text message from the part time chef, Jessica. Jessica told her Mr Shan was accusing Ms D'Souza of stealing food from the café and that a bag of prawns and a pack of bacon were missing. Ms D'Souza says she was humiliated by the accusations which were untrue.

[21] Later in the day Ms D'Souza received in one email, two warning letters, one dated 17 March 2012 and headed ***Written Warning – Unsatisfactory Performance***. The letter listed 3 matters of concern for which Ms D'Souza was warned. Food stock control, arguing with Mr Shan and failing to order the bread on one occasion. The second warning letter dated 10 April 2012 is headed ***Second/LAST Chance written Warning – Unsatisfactory Performance AGAIN***. The warning listed a number of items including arguing with Mr Shan's father Jimmy, food stock control, missing

stock, arguing with management, unrelated chatting, refusal to follow instructions and relationship with suppliers.

[22] At the end of the second written warning, the letter says:

Final written warning letter will be given and the employment contract with us will be terminated immediately.

[23] The letter was signed by Mr Shan. Ms D'Souza says she had not seen or been spoken to about either of the warning letters before they were emailed to her on 11 April 2012. Mr Shan accepts that he sent the two written warnings to Ms D'Souza by email on 11 April 2012 without speaking to her about them first. Mr Shan and Sunny say it was intended that the warnings be presented to Ms D'Souza at the meeting on 9 April 2012 but that she had left the meeting before they could do so.

[24] Sunny told the Authority that she discussed the warning letters with Mr Shan before he sent them to Ms D'Souza on 11 April 2012. Sunny and Mr Shan were of the view that Ms D'Souza was *"testing the shop, she had an ulterior motive and wanted to see the business collapse."* It was after this discussion Sunny says Mr Shan emailed the warnings to Ms D'Souza. Sunny said they did not know the process that should have been followed in issuing Ms D'Souza with the warnings, and that she now knows they did not follow the proper procedure.

[25] Ms D'Souza was on her day off when she received the warnings and says she responded by email to Mr Shan on the same day. Ms D'Souza says she did not accept Mr Shan's accusations which she says were false and asked him for an apology or else she would ask the Department of Labour to handle the matter. Approximately two hours later Mr Shan sent a further email to Ms D'Souza informing her he was issuing her with a third warning and that her employment was *"TERMINATED"*. The email referred to Ms D'Souza's attitude and ended by saying *"hope you have a nice future"*.

[26] Ms D'Souza says she was shocked by her immediate dismissal. She went into the café on Friday, 12 April 2012 to hand back her keys to Mr Shan who took them without acknowledging her.

[27] The witnesses for the respondent were not credible. Their evidence was self serving, inconsistent and contradictory. I have given some examples, more examples follow.

[28] When questioned about the warning letters during the investigation meeting, Mr Shan stated that following Christmas 2011, Ms D'Souza's poor performance began affecting the business and he had to speak regularly to her about it. He made no notes of any meetings nor did he issue any warnings.

[29] Mr Shan, his father Jimmy and sister in law, Sunny referred during the investigation meeting to a whole host of matters about which they were very concerned. Examples given were that Ms D'Souza:

- Wasted food;
- Did not know the different types of tofu and how to store it;
- Used food which had expired;
- Had major defects in her work ability;
- Was unable to make basic dishes such as hash browns, pancakes, brownies;
- Insisted on listening to Indian music and speaking Hindi which affected his customers;
- Did not have the abilities that a head chef should have and was costing the business money.

[30] Almost none of these issues and others raised at the investigation meeting by Mr Shan, Jimmy and Sunny about Ms D'Souza's performance had ever been raised with Ms D'Souza before and most were not contained in the witness statements.

[31] Mr Shan says he was aware that Ms D'Souza was on a 90 day trial period which was due to come to an end on about 28 February 2012 but he did not think to see if he could rely on the clause because he wished to retain Ms D'Souza in the business.

[32] If Ms D'Souza's performance was as bad as Mr Shan made out at the investigation meeting and he was aware that the employment agreement included a 90 day trial period, I am surprised Mr Shan took no steps to see if he could rely on the clause or to raise issues about Ms D'Souza's employment with her.

[33] I do not accept the evidence of the witnesses for Talent Bean that Ms D'Souza was a poor performer, had a bad attitude and whose employment was terminated justifiably following a number of verbal warnings and written warnings.

Determination

[34] It is for Talent Bean to establish that Ms D'Souza's dismissal was justified pursuant to s.103A of the Employment Relations Act 2000 (the Act). Section 103A(2) states –

103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is 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 or action occurred.

[35] Section 103A was considered by a Full Court of the Employment Court in *Angus v. Ports of Auckland*¹. The following findings of the Full Court are relevant:

[36] The most important change to former section 103A is that by use of the word "could" in substitute for the former "would" Parliament has indicated that there may be more than justified sanction available to an employer in any given situation in employment which might result in the employee's dismissal or in disadvantage to the employee in his or her employment.

[37] The effect of new section 103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.

[38] The test requires the Authority in this matter, to determine whether on an objective basis dismissal was within the range of responses open to a fair and reasonable employer. If dismissal is within the range then it will be justified.

[36] It is my finding that Ms D'Souza did not conduct herself in a manner which warranted any disciplinary action whatsoever, let alone the receipt of warnings or a dismissal. Ms D'Souza requested a meeting with her employer to discuss matters of concern to her, following an unsettling incident. This was the appropriate way in

¹ [2011] NZEmpC 160

which to approach her concerns. The response by Mr Shan on behalf of Talent Bean was harsh and unjustifiable.

[37] Issuing warnings and a dismissal then delivering them by email without discussion were not the responses open to a fair and reasonable employer in the circumstances. The warnings and the dismissal are unjustified.

[38] Section 103A(3) of the Act requires consideration by the Authority of a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. Factors include whether the employer:

- sufficiently investigated the allegations, having regard to available resources;
- raised its concerns with the employee before dismissal;
- gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal; and
- whether the employer genuinely considered the employee's explanation before dismissal.

[39] Talent Bean complied with none of these obligations.

[40] Accordingly, Ms D'Souza's dismissal was unjustified.

Remedies

[41] Ms D'Souza is entitled to reimbursement of loss of wages as a result of her dismissal. Ms D'Souza's gross hourly rate under her employment agreement was \$16 and her hours of work were 38.5 a week. Ms D'Souza was unable to obtain further employment for 3 weeks following her dismissal. Ms D'Souza is entitled to reimbursement of 3 weeks wages totalling \$1,848 gross.

[42] Ms D'Souza suffered humiliation, loss of dignity and injury to her feelings as a result of her unjustifiable dismissal. She and her husband both gave evidence about the financial hardship they suffered and the need to obtain a loan to pay living expenses as a result of the dismissal. They also gave evidence of the significant stress the dismissal had on their relationship and family.

[43] I order Talent Bean to pay Ms D'Souza compensation in the sum of \$10,000 pursuant to s.123(1)(c) of the Act. I am required under s124 of the Act to consider whether Ms D'Souza's actions contributed towards the situation that gave rise to the personal grievance. I find that Ms D'Souza's actions did not contribute to the situation and the award of remedies will therefore not be reduced.

Second Issue

[44] *Does Ms D'Souza have a wage arrears claim against Talent Bean for allegedly failing to pay her for hours worked in excess of her agreed hours of employment?*

[45] Ms D'Souza was employed pursuant to a written employment agreement which stated Ms D'Souza's hourly rate to be \$16 per hour and her hours of work 38.5 over 6 days a week. Ms D'Souza says she regularly worked more than 38.5 hours a week but was not paid for those hours. Ms D'Souza's employment agreement does not make provision for overtime. Mr Shan was informed by the previous owner of the café that Ms D'Souza would work extra hours and would not seek extra payment and this is what Ms D'Souza did.

[46] If Ms D'Souza believed she was working more than her contracted hours and was not being paid for such hours, this should have been raised by her with Mr Shan. Ms D'Souza did not do so and continued to work the extra hours. It is not appropriate for her to now raise a belated wage arrears claim.

[47] I find that Ms D'Souza does not have a wage arrears claim.

Costs

[48] Talent Bean is ordered to pay Ms D'Souza the sum of \$3,500 being the notional charge for a full day investigation meeting in the Authority together with reimbursement of the filing fee of \$71.56.

Anna Fitzgibbon
Member of the Employment Relations Authority