

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 39  
5461969

BETWEEN            ERICIA DURNING  
                                 Applicant  
  
AND                    EVERGREEN FOOD COMPANY  
                                 LIMITED  
                                 Respondent

Member of Authority:     G J Wood  
  
Representatives:            A Mihailoff for Applicant  
                                 L Liu for Respondent  
  
Investigation Meeting:     10 February 2015 at New Plymouth  
  
Submissions Received:     11 February 2015  
  
Determination:             10 April 2015

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     The applicant, Ms Erica Durning, claims that she was unjustifiably dismissed from her position as a shop assistant by the respondent, Evergreen Food Company Ltd (Evergreen). Her dismissal for alleged theft was claimed to be both substantively and procedurally unfair. Evergreen denies Ms Durning's claims.

**Credibility**

[2]     I have preferred the evidence of the applicant, Ms Durning, over that of the representatives of the respondents, Mr Paul and Mrs Li Liu. In general this is because Ms Durning was prepared to make concessions that did not assist her case, such as that she had not sought permission from the Lius to take the magazine in question,

whereas Mr and Mrs Liu were adamant and uncompromising in all their evidence even where there appeared to be more than one possible explanation for events.

[3] In particular I have concluded that Ms Durning was, contrary to the evidence of Mr and Mrs Liu, only provided with a written employment agreement a few hours before she was dismissed. The agreement that Ms Durning supplied had been with her lawyer throughout (even although it was not provided to the Authority until the day of the investigation meeting) and Ms Durning's statements from the date she was dismissed were consistent with her claim that she had only received the agreement on the same day she was dismissed. The agreement provided by Ms Durning to the Authority showed that she had originally written in the date 17 March 2014, but that had been crossed out and initialled by her, with the date 14 January 2014 subsequently inserted. The copy provided by the Lius was dated 14 January 2014 by both parties. I accept that Ms Durning later provided a copy, at Mrs Liu's insistence, with the date of 17 March 2014 removed.

[4] I found Mrs Liu's explanation that Ms Durning had pocketed a practice copy of the employment agreement that did not have a date on it and later changed the date in contemplation of this investigation inherently unlikely. Similarly Mr Liu's explanation that only he could sign employment agreements was contradicted by the undisputed signature of his wife on the employment agreement provided by Ms Durning.

[5] I therefore also prefer the evidence of Ms Durning on the other major issue of credibility about whether or not there was a meeting on 15 March 2014 about the magazine.

[6] I note that the sole independent witness, a former staff member at Evergreen, had no direct knowledge of the key matters in issue.

### **The facts**

[7] The following are the facts as determined on the balance of probabilities. This is what is more likely to have occurred than not, given that there can be no certainty about disputed events.

[8] Ms Durning was employed by the respondent Evergreen, also trading as Seven Up, a retail store, on about 14 January 2014, following an interview with the

respondent's principals Mr and Mrs Liu. English is the Liu's second language, which did result in some communication issues over the course of the employment.

[9] Ms Durning was employed to work part-time until another full-time student worker was to go to Polytechnic. At that point in early March Ms Durning's hours increased from approximately 20 hours per week to around 40 hours per week. There was no written employment agreement at the time Ms Durning commenced employment. The key oral terms related to Ms Durning's hours and her pay rate. This was to be \$14.00 per hour, to be potentially raised to \$15 per hour once she became full-time if her performance warranted it.

[10] While the employment went without incident as far as Ms Durning was concerned, Mr and Mrs Liu came to the view that stock was going missing and, although without any evidence, that Ms Durning was involved. This view was never raised with Ms Durning.

[11] There was an arrangement for staff to take home magazines from which Evergreen had received a refund from the distributor and had had the front cover ripped off accordingly, as proof of non-sale. This did however require approval on a case by case basis from Mr and/or Mrs Liu.

[12] On Thursday 13 March 2014 Ms Durning asked Mrs Liu whether she could have a particular car magazine and was denied it. Later that afternoon the magazine was placed under the counter by the till, which was one of two places, available only to staff, that such magazines were kept.

[13] It appears from the surveillance cameras, the existence of which Ms Durning was aware, that the next day she took what later turned out to be that magazine (and most likely several more as she claims) from under the counter next to the till. She then put them in her bag and took them when she left for the day. She accepts she did so without getting permission, but she did know that they could not be on-sold and that such magazines were either kept under the counter or in the back room. Clearly Ms Durning and Mr and Mrs Liu were all aware that the magazines could not be on-sold.

[14] Mrs Liu later approached Ms Durning to ask her if she had taken the car magazine and Ms Durning denied doing so. This was because she was not aware that

the car magazine she had been denied permission to take home the day before was one of those magazines she had removed from beneath the counter earlier that day.

[15] On Monday 17 March, Mrs Liu checked the security footage, which showed Ms Durning removing the magazines on 14 March. She asked Ms Durning if she had taken the car magazine but she denied doing so, again not being aware where the particular magazine had been placed.

[16] Mrs Liu then provided Ms Durning with an employment agreement, which Ms Durning had been asking for since she had commenced full-time work. She then signed the agreement and dated it 17 March. However she was then asked to change the date to that of the commencement of her employment in January. Ms Durning did so, on instructions from Mrs Liu, because she thought that might be proper given that was when she had started her employment. The employment agreement provided for what was expressed as a probation period of three months.

[17] Mrs Liu then had another discussion with Ms Durning about the car magazine, and Ms Durning again denied taking it, until she was told by Mrs Liu that it had been under the counter and not out the back. She then accepted that she had taken a car magazine along with others. Mrs Liu then showed Mrs Durning the security footage showing her taking a number of magazines. Mrs Liu was not satisfied with Ms Durning's response and decided to dismiss her there and then.

[18] The same morning she gave Ms Durning a letter titled *The probation period unqualified notice*. It stated, as written:

*I'm sorry to inform you, you didn't pass the probation period, because we require very clearly in the recruitment, staff must be honest, you are not an honest person.*

*We thank you for your work here during the help, you are a hard working people, and we hope you can find a more suitable work for you.*

*Your salary will be settled to 17/03/14pm 15.30.*

[19] Ms Durning, having no choice, accepted the letter and countersigned it and left immediately.

[20] Mr and Mrs Liu then made a complaint to the Police about Ms Durning taking the magazines without permission, together with stock allegedly missing. The Police

interviewed Mr and Mrs Liu and Ms Durning and found no direct evidence to link Ms Durning with any missing goods. While the Police had originally decided to prosecute Ms Durning for theft of the car magazine, they later decided not to do so when they discovered that the magazine could not be on-sold and was therefore of no monetary value.

[21] In the meantime the staff at Seven Up told anyone who inquired about Ms Durning's whereabouts that she had been dismissed, and if they inquired any further, that it was for dishonesty.

[22] Due to language difficulties mediation was not in fact commenced. During the investigation meeting an interpreter was used.

### **The law**

[23] Section 103A of the Employment Relations Act 2000 (the Act) deals with unjustified dismissal. It states:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether 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.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
  - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
  - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
  - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the*

*allegations against the employee before dismissing or taking action against the employee.*

- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
  - (a) *minor; and*
  - (b) *did not result in the employee being treated unfairly.*

[24] In determining justification for dismissal, the Authority must have regard to the principle that the evidence in support of a dismissal must be as convincing as the charge is grave (*Honda New Zealand Ltd v New Zealand Boilermakers etc. Union* [1991] 1 NZLR 392 (CA)). Dismissal for alleged theft is a very grave allegation and therefore the evidence must be convincing in this case.

### **Determination**

[25] This was clearly an unjustified dismissal. As Mrs Liu accepted in evidence, Ms Durning was dismissed for theft of stock and of the magazine. There was no investigation of the alleged theft of stock by Ms Durning and the Police found no evidence of it. The magazine was in effect worth nothing, as it could not be sold, although it could have been given to a customer who wanted it. The only thing that Ms Durning failed to do, which she freely accepted, was to ask for permission to take the magazines. She assumed she had permission because they were under the counter where such magazines were kept and could be taken.

[26] Given the seriousness of the allegation of theft, there was simply insufficient evidence for any fair and reasonable employer to rely on. The magazine had no monetary value and an error in not asking permission to take an item of no monetary value home could never be considered as serious misconduct justifying dismissal, particularly without any formal warnings. Furthermore there was a complete absence of the procedural aspects required under s.103A(3). Instead Mr and Mrs Liu drew their conclusions and dismissed Ms Durning immediately, without any real opportunity for her to put her side of the story.

[27] Such errors by Evergreen are fundamental and cannot in any way be described as minor or technical.

[28] Ms Durning subsequently had difficulty finding work and she was not able to do so for almost nine months, despite extensive efforts of her behalf. She was upset about the way she was dismissed and she and her family have been placed under huge financial stress as a result. Ms Durning is also struggling to deal with the accusation that she was being accused of theft and losing her job as a result of what she sees as false allegations.

[29] Ms Durning claims for 12 weeks loss of remuneration, namely \$6,720.00 gross and \$2,500.00 for hurt and humiliation. Given the fact that she was out of work for much longer than 12 weeks, that Evergreen told customers that she had been dismissed for theft, and that she has had financial difficulties, her claims are entirely reasonable. They could indeed have been much higher.

[30] I find that there has been no blameworthy behaviour by Ms Durning, other than failing to ask for permission for what was the property of zero monetary value, which is minimal compared to the ultimate sanction of summary dismissal. Ms Durning's actions were effectively made in the open and under camera surveillance, which tends to support her claim that she was not doing anything wrong. I thus conclude that there can be no deduction for contributory conduct.

[31] I therefore order the respondent, Evergreen Food Company Limited, to pay to the applicant, Ms Erica Durning the following sums:

- \$6,720.00 gross in lost remuneration; and
- \$2,500.00 without deduction under s.123(1)(c)(i).

### **Costs**

[32] Costs are reserved.