

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 75
5328579

BETWEEN

XAVIA JORDYN-EDSER
Applicant

A N D

AMATRAC ENTERPRISES
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Small, Counsel for Applicant
Tracy Durham, Advocate for Respondent

Investigation Meeting: 26 May 2011 at Christchurch

Submissions Received: On the day

Further Information: 26 and 27 May 2011

Date of Determination: 31 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Xavia Jordyn-Edser commenced her employment with Amatrac Enterprises Limited (Amatrac Enterprises) in July 2010 as a waitress/cashier with Nandos restaurant in Beckenham Christchurch. She usually worked eight shifts a fortnight or about 19 hours a week outside of the hours she attended high school.

[2] The director of Amatrac Enterprises is Tracy Durham. At the material time, Nando's Restaurant was managed by Roger Ameriks.

[3] Ms Jordyn-Edser was dismissed from her employment for the reasons set out in a letter from Mr Ameriks dated 16 September 2010 as follows:

1. *That you gave away 10 meals to patrons that were unhappy with the level of service. This amounts to a considerable loss to Nandos. You didn't advise your manager of any issue until after the patrons had left the store and you had no authority to make the decision to waive payment of meals. To date no moneys have been recovered to cover Nandos' loss.*
2. *That you have been giving directions to kitchen staff and causing some confusion with orders. A complaint was made by a customer regarding your attitude.*
3. *It is alleged that on Thursday 9th September you took chicken without payment claiming that it was going to be thrown out. The taking of any food or property without authorisation of the manager amounts to theft. You stated that the food was not taken by you after Mallory told you that you were not permitted to take food items without payment. You mentioned that on Thursday 9th September other staff members took food from the premises. I have interviewed staff and they deny your allegation.*
4. *That you have taken cooked chips from the kitchen without payment.*

[4] Ms Jordyn-Edser says that her dismissal was unjustified substantively and procedurally. She seeks payment of wages for work performed before she was suspended without pay and then dismissed in the sum of \$475.00 and for hours she was rostered to work after she was suspended and then dismissed in the sum of \$475.00. She also seeks holiday pay, compensation and costs.

[5] Amatrak Enterprises says the dismissal was justified and the correct procedures followed.

The Authority's investigation meeting

[6] Mr Durham attended at the investigation meeting on behalf of the respondent company and was expecting Mr Ameriks to also attend as a witness. Mr Durham explained that the Nando's business had been sold and therefore Mr Ameriks was no longer employed by the company. The investigation meeting was delayed for a short time but there was still no appearance by Mr Ameriks. In the absence of any good reason for his non-appearance, I proceeded with the investigation meeting. I heard evidence from Ms Jordyn-Edser. Mr Durham also gave some brief evidence of matters that were within his knowledge about the issues before the Authority.

The test in s.103A of the Employment Relations Act 2000

[7] This dismissal occurred before 1 April 2011 and before the new s.103A was substituted on 1 April 2011.

[8] In determining the question of whether the dismissal was justifiable, the Authority is required to apply the test of justification in the former s.103A of the Employment Relations Act 2000 and determine, on an objective basis, whether Amatrac Enterprises' actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

Issues

[9] The issues for the Authority to determine are:

- Was there a full and fair investigation undertaken by Amatrac Enterprises at the conclusion of which it would be found by a fair and reasonable employer that there was serious misconduct on the part of Ms Jordyn-Edser;
- Was the decision to summarily dismiss Ms Jordyn-Edser what a fair and reasonable employer would have done in all the circumstances;
- If dismissal was unjustified, what remedies should be awarded to Ms Jordyn-Edser and are there issues of contribution?

Was there a full and fair investigation undertaken by Amatrac Enterprises at the conclusion of which it would be found by a fair and reasonable employer that there was serious misconduct on the part of Ms Jordyn-Edser?

10 chicken meals

[10] Ms Jordyn-Edser said that towards the end of August 2010, she was working at the restaurant in the front of house. She described it as a very busy night with the restaurant being understaffed and the atmosphere stressful. Further, the oven seal was broken and this had caused a number of customers' orders to be returned as they were undercooked. Ms Jordyn-Edser said that approximately half of meals were returned by unhappy customers that night to be re-cooked.

[11] At about 7.30pm when the restaurant was full, a family group of 10 people approached Ms Jordyn-Edser and were very unhappy with their meals. The meals had arrived at different times and some chicken was uncooked in the middle. Ms Jordyn-Edser said that at the counter on the way out the father with the group contested the bill. Ms Jordyn-Edser said that she advised the group that she could not reduce or

waive the bill and that they would have to speak to the manager. She went into the kitchen to ask Mr Ameriks to come out to the counter to deal with the situation, but he indicated that he was busy and simply carried on with what he was doing.

[12] Ms Jordyn-Edser went back to the customers who were refusing to pay and they became upset that they could not talk to the manager. They said something along the lines *if we have to pay we will but not without speaking to the manager*. Ms Jordyn-Edser said that she did not consider it appropriate, given that the restaurant was so busy, to keep them standing there until Mr Ameriks was available. They offered their name and telephone number and advised Ms Jordyn-Edser that the manager could contact them if he wanted payment for what they felt were substandard meals and service. Ms Jordyn-Edser wrote the details in the diary beside the booking and at about 9pm showed Mr Ameriks the details in the diary and explained what had happened. Ms Jordyn-Edser said that he responded with words to the effect *well, we'll see about that*. A few days later, Mr Ameriks advised Ms Jordyn-Edser that he had tried the telephone numbers but could not get through to anyone. Ms Jordyn-Edser told Mr Ameriks that she thought they would pay because she believed they were a family group of respectable people. Mr Ameriks indicated to Ms Jordyn-Edser that she would have to pay for the meals.

[13] Ms Jordyn-Edser was worried about the situation and she telephoned Mr Durham to talk to him about it. Mr Durham when he gave his evidence said Ms Jordyn-Edser had told him she would not telephone the customers herself. Ms Jordyn-Edser denied that. I prefer her evidence about that because Ms Jordyn-Edser was adamant that she would, if asked, have followed up with the customers but was never given that opportunity. That is in fact one of the explanations that she said she gave at the disciplinary meeting.

[14] There is a letter attached to the statement in reply dated 30 August 2010 from Mr Ameriks to Ms Jordyn-Edser. That letter asks Ms Jordyn-Edser to attend a meeting on 31 August to discuss some concerns that she may not be performing her role to an acceptable standard. The concerns referred to in the letter are:

- (a) The giving away of 10 meals;
- (b) The giving of directions to kitchen staff and causing some confusion with others.

[15] Ms Jordyn-Edser says that she never received that letter and that there was no disciplinary meeting held on 31 August 2010. I accept her evidence about that. The letter, unlike other letters sent by Mr Ameriks, is not on letterhead and there is no reference in the dismissal letter dated 16 September 2010 to an earlier disciplinary meeting. One possible reason for the letter having been attached is that it was drafted but never sent.

[16] Mr Durham said the loss to the business as a result of those 10 customers not paying for their meals was \$250.

[17] The next event occurred on 9 September 2010. Ms Jordyn-Edser said she was working in the back of the restaurant that evening rather than her usual position out in front. Later in the evening she said a co-worker gave her a bag with four pieces of chicken in it to take home. She said that she was unsure about the situation and left the bag under the heating light where everyone could see it. She said that then another staff member told her she was not allowed to take it home and that removed any uncertainty for her and she just got on with her work. She said that when she went to go home the chicken was no longer there and she thought that it had been taken by someone else or thrown out. Further, she said she had arrived that evening to work without a bag and was simply in her uniform carrying a cellphone. There are security cameras at the store and she said, given that, she could not have concealed the chicken as she was leaving and that would be clear from viewing footage.

[18] On 10 September 2010, Ms Jordyn-Edser received a text advising that she was not to come back to work until further notice and requesting her address. Ms Jordyn-Edser said that she responded by sending a text and advised Mr Ameriks of her address. Mr Ameriks then advised that a letter would be sent to her. On Sunday, 12 September, Mr Ameriks sent a text message to Ms Jordyn-Edser advising of a disciplinary meeting to be held on the afternoon of Tuesday, 14 September 2010.

[19] Ms Jordyn-Edser duly attended at a meeting on 14 September 2010 by herself. Mr Ameriks also attended. It was established at the meeting that Ms Jordyn-Edser had not received a letter dated 11 September from Mr Ameriks. A copy of that letter was given to Ms Jordyn-Edser at the meeting and it outlined four concerns. The first concern was the issue of the 10 meals; the second concern was the directions to kitchen staff causing some confusion and that a complaint had been made by a customer regarding Ms Jordyn-Edser's attitude; the third was that Ms Jordyn-Edser

had taken chicken without payment claiming it was to be thrown out; and the final concern was regarding her attitude with regard to following reasonable instructions. The letter advised Ms Jordyn-Edser of her right to bring a support person to the meeting. Obviously, however, having not received that letter, she did not have a support person with her.

[20] Ms Jordyn-Edser proceeded to give explanations to the concerns raised. I find she gave the explanation about the 10 meals as I have set out above. I have found it likely that she offered to pursue the matter herself if necessary to try and obtain payment. Ms Jordyn-Edser said that she asked for specifics about the directions to kitchen staff and any complaint made by a customer but there was nothing said to her about any particular concern and the issues were more general. She said that she was trying hard to be appropriate when she had to ask kitchen staff to re-cook meals and that she apologised to Mr Ameriks if offence had been taken.

[21] Ms Jordyn-Edser denied taking the chicken and explained the circumstances set out above. She told Mr Ameriks' to view the film from the surveillance camera which would show that she did not leave the store with the chicken. Ms Jordyn-Edser was unsure as to whether there was even a discussion about the eating of chips. She said that it was not uncommon for employees to occasionally eat chips at Nando's that were overcooked or would otherwise not have been eaten by customers. She said that Mr Ameriks did say that that was no longer to take place and after that she stopped eating the chips.

[22] Ms Jordyn-Edser thought that the meeting took about five minutes and at the end of the meeting Mr Ameriks advised that he would be in touch with her. She recalled receiving a text advising her that she was dismissed which she thought she got before the letter of 16 September.

[23] After her dismissal, Ms Jordyn-Edser said that she was very upset. Just before her dismissal and because things were not going well for her at home, Ms Jordyn-Edser had made the decision to move into a flat around 25 August 2010. As a result of her dismissal, she was unable to remain in the flat and after borrowing money from her parents to pay the rent, had to move back in with them.

Conclusion

[24] I accept that a fair and reasonable employer would have wanted to talk to Ms Jordyn-Edser about the events leading to a group of ten customers leaving the restaurant without paying. I do not find objectively assessed that a fair and reasonable employer would conclude that the conduct on that evening was described in the dismissal letter as the *giving away of ten meals*. Ms Jordyn-Edser having tried unsuccessfully once to get Mr Ameriks to come to the counter had, in the belief that the group would pay, taken down their phone numbers so that they could have a discussion with the manager at a later time about payment rather than waiting in the restaurant for the manager to come free.

[25] Ideally Ms Jordyn-Edser should have returned to the kitchen a second time and assertively insisted Mr Ameriks come to the counter to deal with the situation having given him a brief summary of the situation she was facing. Viewed objectively though it appeared Ms Jordyn-Edser was put off from such a second attempt by Mr Ameriks response the first time because she clearly felt that he wanted to be left to deal with kitchen matters. Ms Jordyn-Edser was a very young employee and did not have the confidence of a more experienced employee in getting a manager to leave what he was doing.

[26] A fair and reasonable employer would take into account in considering what had happened that it was a particularly busy evening with many complaints about the standard of meals. A fair and reasonable employer would also take into account that Ms Jordyn-Edser wrote down the details for Mr Ameriks to contact the customers and drew these to Mr Ameriks attention later that evening and that rightly or wrongly she had formed a genuine view that they would pay for their meals and were honest people. I accept Mr Small's submission that Ms Jordyn-Edser did her best in what were clearly difficult circumstances. I am not satisfied that, viewed objectively, her conduct with respect to the meals could be considered serious misconduct.

[27] The complaints from kitchen staff were short on specifics and if there were complaints then at most they were performance issues and fall short of serious misconduct.

[28] Theft of goods can be serious misconduct. A theft is a serious allegation and there has to be sufficient evidence to substantiate an allegation of this nature. There is

one matter that I wish to deal with at the outset. In the statement in reply, it is written that Mr Ameriks observed the taking of the chicken. I accept Mr Small's submission that the actions would not have been described in the way that they were in the letter of dismissal had that been the case. I do not find that it was put to Ms Jordyn-Edser that she was observed by Mr Ameriks to take chicken.

[29] Ms Jordyn-Edser denied the allegation of theft and explained the events leading up to her placing a bag of chicken under the heat lamp. She explained that the meat then disappeared. It is unclear, and was certainly not reported back to Ms Jordyn-Edser, the nature of any further investigations that Mr Ameriks undertook in light of the denial. At some stage I accept it does appear likely that Ms Jordyn-Edser told Mr Ameriks of her view as to who had taken the chicken. She said that she was told who took the chicken by another employee.

[30] The fact that those staff denied taking the chicken appears to have been the extent of any investigation. In this situation, a fair and reasonable employer would have viewed the security footage. Ms Jordyn-Edser said that that would have confirmed that she did not leave the restaurant with any chicken. There is nothing in front of the Authority to support that that action was undertaken.

[31] That there was no proper investigation undertaken is also supported in my view by the wording in the dismissal letter. The letter does not in any place clearly state a conclusion that Ms Jordyn-Edser stole chicken. The letter refers to an allegation only.

[32] Objectively assessed, I am not satisfied that there was a full and fair investigation that enabled a fair and reasonable employer to conclude that Ms Jordyn-Edser stole the chicken from the restaurant.

[33] In relation to the chips, I am not satisfied that a fair and reasonable employer would have concluded that that matter, which did not even appear in the list of concerns and Ms Jordyn-Edser could not recall discussing at the disciplinary meeting, would amount to serious misconduct.

[34] There was no evidence that Ms Jordyn-Edser had been given formal warnings about her employment during her employment at Nando's. Further, at the meeting, Ms Jordyn-Edser, had no support and was not given advance notice of the allegations against her. Mr Ameriks did not suggest when it became clear that she had not seen

the letter that the meeting be adjourned so that Ms Jordyn-Edser could bring a representative with her. These were significant procedural deficiencies given the seriousness of the allegation of theft. Mr Durham provided the Authority and Mr Small after the investigation meeting with standard employment agreements. I accept Ms Jordyn-Edser's evidence that she was never given an employment agreement and had no idea about the house rules referred to in the letter of dismissal. These were not discussed during the disciplinary meeting.

[35] In conclusion, I am not satisfied that there was a full and fair investigation undertaken by Amatrac Enterprises in respect of the concerns that were raised about conduct on the part of Ms Jordyn-Edser at the conclusion of which a fair and reasonable employer would have found that there was serious misconduct.

Was the decision to summarily dismiss Ms Jordyn-Edser what a fair and reasonable employer would have done in all the circumstances?

[36] Given my findings that a fair and reasonable employer would not have found serious misconduct on the part of Ms Jordyn-Edser I am not satisfied that the decision to summarily dismiss Ms Jordyn-Edser was what a fair and reasonable employer would have done in all the circumstances. I find that the dismissal was unjustified. Ms Jordyn-Edser has a personal grievance that she was unjustifiably dismissed from her employment at Amatrac Enterprises. She is entitled to remedies.

Remedies

Payment of wages for final shifts worked

[37] After the investigation meeting, Mr Durham asked the accountants who organised the payroll for staff at Nando's to confirm the wage schedule for the pay period ending 19 September 2010. The information provided supports that, for that pay period, Ms Jordyn-Edser worked 8.5 hours but the accountants were instructed to hold her pay including holiday pay until her uniform was returned. It also seemed to be that payment was to be held until Ms Jordyn-Edser had paid for the 10 meals.

[38] I accept Mr Small's response to this matter provided after he had received the documents from the accountants that withholding the final pay was in breach of the provisions in the Wages Protection Act 1983. He also advised that if this document had been presented in evidence then Ms Jordyn-Edser would have had the opportunity to give evidence that she did in fact return her uniform.

[39] I find, therefore, that by way of final pay, Ms Jordyn-Edser was owed \$106.25 gross for hours worked but not paid and \$151.98 gross holiday pay. The applicant also seeks a further two weeks payment of wages which includes the period for which she was stood down in the sum of \$475 gross. I accept that is reasonable in the circumstances.

[40] In terms of wages and holiday pay I order Amatrac Enterprises Limited to pay to Xavia Jordyn-Edser the following:

- \$106.25 gross being hours worked but not paid;
- \$151.98 gross being holiday pay;
- \$475 gross being two weeks payment of wages for period after suspension and dismissal.

Compensation

[41] I accept that the dismissal caused Ms Jordyn-Edser humiliation and loss of dignity, particularly in relation to the allegation of theft. Ms Jordyn-Edser also had recently moved out of her parents home and had financial commitments in terms of rent that she could not meet after she lost her role. She was forced to initially borrow money from her parents' and then move back to their home after the loss of her role at Nando's. Ms Jordyn-Edser explained that her position at Nando's was her first proper job and she was excited about it and did her best to perform well.

[42] In all the circumstances and subject to any findings I may make about contribution I am of the view that an appropriate award for compensation is the sum of \$4,000.

Contribution

[43] The Authority must if it determines that an employee has a personal grievance consider whether the action of the employee contributed towards the situation that gave rise to the grievance and if the actions require reduce the remedies that would otherwise have been granted. I am not satisfied on the balance of probabilities from the evidence I heard that Ms Jordyn-Edser stole any chicken. Ms Jordyn-Edser could have handled the customer situation with the meals in a different way but I am not satisfied that by not doing so she contributed in a blameworthy way to her

personal grievance so as to find contribution. I do not find that Ms Jordyn-Edser's actions require a reduction to the remedy of compensation set out above.

Compensation

[44] I order Amatrac Enterprises Limited to pay to Xavia Jordyn-Edser the sum of \$4000 without deduction for compensation under s.123 (1)(c)(i) of the Employment Relations Act 2000

Costs

[45] Mr Small provided to the Authority a copy of his itemised account for costs in the sum of \$2,668. This was a fairly straightforward matter and occupied less than half a day for an investigation meeting. There was one statement of evidence for the applicant and there were no statements of evidence provided by the respondent..

[46] Given that this was a relatively straightforward matter and that the investigation meeting took about two hours, I am of the view that an appropriate award of costs would be the sum of \$1,500 together with the filing fee of \$71.56.

[47] I order Amatrac Enterprises Limited to pay to Xavia Jordyn-Edser the sum of \$1,571.56 being costs and disbursements.

Summary of findings and orders made:

- I have found that Ms Jordyn-Edser was unjustifiably dismissed from her employment.
- I have ordered Amatrac Enterprises Limited to pay to Ms Jordyn-Edser:
 - \$106.25 gross being payment for hours worked but not paid;
 - \$151.98 gross being holiday pay;
 - \$475 gross being two weeks payment of wages for period after suspension and dismissal;
 - \$4000 without deduction being compensation under s.123 (1) (c)(i) of the Employment Relations Act 2000;
 - \$1571.56 being costs and disbursements