

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 66/09
5110751**

BETWEEN RAEWYN MERCER
 Applicant

AND EVENT HOLDINGS LIMITED T/A
 GRACEHILL VINEYARD
 RESTAURANT
 Respondent

Member of Authority: Leon Robinson

Representatives: Clive Bennett for Applicant
 Ken Nicolson for Respondent

Investigation Meeting: 17 February 2009

Further Evidence: 18 February 2009

Determination: 27 February 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Raewyn Mercer (“Ms Mercer”) claims she was unjustifiably dismissed. She also says she was not provided with a written individual employment agreement.

[2] Event Holdings Limited (Event Holdings) says that Ms Mercer was a casual employee and was not dismissed. It also says Ms Mercer was provided with an employment agreement but she did not return a signed copy to it.

[3] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[4] Event Holdings operates the Gracehill Vineyard Restaurant in Kumeu. It operates by booked events.

[5] Ms Mercer attended a meeting with Event Holdings director Mr Robin Roodt ("Mr Roodt") in late July 2006. Ms Mercer says Mr Roodt offered her work as kitchen hand/chef for a minimum 30 hours per week increasing to 40 hours per week "in a short time". She says she accepted this offer. At that time, Ms Mercer was also working at the Huapai tavern on Wednesday evenings, Thursday lunchtime and flexible hours on Sundays.

[6] Mr Roodt tells the Authority he offered Ms Mercer casual work as a dish washer at \$18.00 per hour. He says Ms Mercer was not offered any minimum hours of work. He is adamant he could offer only casual work because of the nature of the business.

[7] Ms Mercer says she became aggrieved because she was not given 30 hours of work or an increase to 40 hours subsequently. It is clear that there were only two weeks in 2006 when Ms Mercer worked 30+ hours. She says in her prepared statement that she "questioned Robin about [her] hours at Gracehill several times, but didn't get real answers". In fact, I find that Ms Mercer did not at any stage raise the matter of her hours with Mr Roodt. She says in her oral evidence she never actually got to speak to Mr Roodt about the matter because Mr Roodt was always busy or he would ask her to make an appointment to see him.

[8] I find that employees including Ms Mercer would indicate when they were available to work and would then be confirmed for work at coinciding particular scheduled functions.

[9] I find that in December 2006 Ms Mercer was repeatedly asked to indicate her availability for work but despite her agreement to do so, she did not. I find Ms Mercer informed Event Holdings director Mr Antony Vicelich ("Mr Vicelich") before Christmas that she was going away with family. She could not commit to a return date. She said she did not know how long the trip was.

[10] I find that Mr Roodt and Mr Vicelich resolved that Ms Mercer had failed to keep them informed of her availability for work and as a result they resolved they would not re-engage her.

[11] In response to recent enquiries by Ms Mercer, Mr Roodt left a telephone message for Ms Mercer on or about 20 January 2007. He essentially advised that Ms Mercer was not required.

[12] It is most regrettable and extremely unfortunate that Ms Mercer had misdirected her text messages intended for Mr Roodt. Ms Mercer maintains she suffered considerable anxiety because Mr Roodt did not contact her and ignored her text messages. At the Authority's investigation meeting, Ms Mercer announced she accepted she had sent her messages to the wrong number.

[13] Ms Mercer says that she chose not to go on holiday but one of the misdirected text messages intended to advise Mr Roodt that Ms Mercer was "still away back 11 Jan".

[14] Ms Mercer says that she went into the restaurant to retrieve her shoes after she received Mr Roodt's telephone message. She says in her prepared evidence that Mr Roodt became "quite violent" but I find that was not so. I find that Ms Mercer was asked to leave because there was a wedding in progress and it was not convenient to receive her at the time.

The merits

[15] Ms Mercer claims she was unjustifiably dismissed.

[16] While Ms Mercer complains that she was not given the minimum hours of work or subsequent increase promised to her by Mr Roodt. I find it implausible that she was unable to raise her discontent with Mr Roodt at any time during the many months of her engagement.

[17] I find that Ms Mercer was not a permanent part-time employee. She chose when she was available to work and her holiday at Christmas 2006 was not annual leave from her employment. Ms Mercer did not seek approval and nor was approval required for such an absence. I am not persuaded that there were features of regularity or permanence in the arrangement such that Ms Mercer was not a casual employee.

[18] I find that Ms Mercer was engaged by Event Holdings as a casual employee. I find that Ms Mercer failed to indicate her availability to work and as a result she was not re-engaged after 20 January 2007. But that was not a dismissal.

[19] Ms Mercer seeks a penalty against Event Holdings for failing to provide her with a written individual employment agreement. I agree with the learned authors of *Brookers Employment Law* at paragraph 65.07¹:-

There is an express statutory obligation on an employer to provide an employee with a copy of an intended individual employment agreement for bargaining purposes: s 63A(2)(a). However, there is no express obligation in s 65 or elsewhere in the Act for an employer to provide a copy of an individual agreement to an employee once the employment relationship is formed.

[20] I am not convinced that there is a penalty for a failure to provide a copy of an individual employment agreement once the relationship is formed. I decline to impose a penalty as sought by Ms Mercer.

The determination

[21] I find that Ms Mercer was not dismissed, either unjustifiably or otherwise.

The resolution

[22] There will be no formal orders by the Authority.

¹ See also my comment at paragraph [34] in *Wilson & Classic Manufacturing Ltd*, unreported, AA220/06, 26 June 2006, L Robinson

Costs

[23] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Nicolson is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Bennett is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority