

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 319/08  
5121411

BETWEEN

DEEPTI REDDY  
Applicant

AND

MEGA MAGS LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: David Collins, Advocate for Applicant  
Michael Smyth, Counsel for Respondent

Investigation Meeting: 2 September 2008

Determination: 9 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Authority has investigated the Applicant's claim she was unjustifiably dismissed from her a job as a barista in a store run by the Respondent.

[2] The Respondent asserts its dismissal of the Applicant on 28 October 2006, with two weeks notice, was fair in all the circumstances due to what it deemed to be serious misconduct by the Applicant.

[3] The dismissal followed a disciplinary meeting on 22 October 2006 about which the Applicant says she had inadequate notice and no opportunity to bring a representative or support person.

[4] The Respondent says the Applicant knew of the meeting in advance and did not properly answer concerns about her work raised with her during the meeting.

## Issues

[5] The primary issue for this investigation is whether the Respondent's decision to dismiss the Applicant, as communicated in its letter of 28 October 2006, and how it went about making that decision and advising the Applicant of it, were what a fair and reasonable employer would have done in all the circumstances at the time. That is, it is an inquiry as to whether the Respondent met the test of justification set in s103A of the Employment Relations Act 2000 ("the Act").

[6] If some or all of the Respondent's actions, or how it acted, are found to be unjustified and the Applicant has a personal grievance, remedies will need to be assessed. This will include considering whether the Applicant did what she reasonably could to mitigate any losses and whether she contributed to the situation giving rise to the grievance. If any blameworthy action by the Applicant contributed to the situation, remedies may be reduced accordingly.

## Investigation

[7] During a half-day long investigation meeting each of the following witnesses attended and answered questions based on written witness statements they had provided in advance: the Applicant, the Respondent's director Ravi Pathare, and two other present employees of the Respondent, Peggy Zhong and Elias Asefa. The representatives provided oral closing submissions.

[8] I have given no weight to other written statements lodged by the parties for the following reasons:

- a. The Applicant's mother, who was living in Australia at the time of the Applicant's dismissal, provided a statement purporting to provide a diagnosis of the Applicant's subsequent ill-health and attributing it to the dismissal. There was nothing to suggest she was professionally qualified to do so. She did not attend the investigation meeting.
- b. Statements lodged by the Applicant and said to be from another employee and a former supervisor provided general statements of support to the Applicant but contained no direct information about

the actions of the Respondent or the Applicant at the relevant times. Neither person attended the investigation meeting.

- c. A statement from a third present employee of the Respondent, Lilia Xu, echoed the allegations of Ms Zhong and Mr Asefa. The repetition added nothing. She did not attend the investigation meeting.

### **Credibility**

[9] I accept the Respondent's submission that issues of fact in this matter turn on credibility.

[10] The relevant events occurred almost two years ago. While I accept that all witnesses sought to recall details as best they could after such an extended period of time, there were elements in the evidence of both the Applicant and Mr Pathare where the answers appeared more convenient to present requirements than to be what was most likely to have occurred at the time.

[11] In respect of the process of making arrangements for a disciplinary meeting and how the meeting was conducted, I found the evidence of Mr Pathare less than convincing. That affects determination of the Respondent's justification of its actions.

[12] In respect of aspects of the Applicant's conduct which the Respondent considered unsatisfactory, I found the evidence of the Applicant similarly unconvincing. That affects determination of the Applicant's contribution to the situation.

### **Justification**

[13] The Applicant was employed by the Respondent in February 2006. By September 2006 a recently-appointed store manager Jag Reddy had become dissatisfied with what Mr Pathare called the Applicant's "*work ethic*".

[14] Mr Reddy complained to Mr Pathare that the Applicant took extended breaks, gave drinks to friends without paying for them, failed to meet the store's uniform code

by not wearing her name badge, read books at the counter, wore an iPod while serving customers, and had made drinks for friends while not rostered on or dressed for duty.

[15] The store had surveillance cameras installed and Mr Reddy told Mr Pathare that he had video evidence of these events.

[16] Mr Pathare directed Mr Reddy to arrange a meeting with the Applicant to put these concerns to her.

[17] His evidence was that he directed Mr Reddy to prepare a letter advising the Applicant of a disciplinary meeting, the reasons for it and the right to bring a support person or representative.

[18] Mr Reddy no longer works for the Respondent and is understood to be overseas. He was not available to give direct evidence on whether he had or had not carried out the directions that Mr Pathare claims were given to him.

[19] Mr Pathare says that Mr Reddy told him one week in advance of a time that he had arranged for a meeting with the Applicant.

[20] Mr Pathare accepts that he does not know and cannot prove that Mr Reddy set up the meeting with the Applicant in the way that he says he requested. There is no evidence that any such letter was prepared or given to the Applicant. The Applicant is adamant that she never got one. The Respondent has no copy of any such letter said to have been given to her. Neither is there anything to confirm that she was aware of the meeting in advance or the reason for it.

[21] Rather I accept as more likely the Applicant's evidence that she learnt of the meeting only on the morning of 22 October when Mr Reddy told her that she was to meet with Mr Pathare that day. Also more likely than not is that Mr Reddy did not prepare a letter to the Applicant about the disciplinary meeting or its intended agenda and that her employment was in jeopardy.

[22] This explains what Mr Pathare describes as the “*immediately defensive*” attitude of the Applicant when she was taken into an office with him and Mr Reddy. She was reluctant to sit down.

[23] Mr Pathare told her that she had been “*caught on video*” giving drinks to friends. The Applicant promptly admitted she had done that and said that other staff also did so. When the Applicant asked if there was anything else that Mr Pathare wanted to talk to her about, Mr Pathare referred to her not wearing her name badge, reading at the counter, using her iPod and taking unscheduled breaks. When the Applicant referred to other staff not wearing name badges, Mr Pathare became impatient and said the Applicant had “*an attitude problem*”. She then said: “*Is that all*” and walked out of the office and returned to work. The meeting lasted less than five minutes.

[24] Mr Pathare asked Mr Reddy to check more video footage to identify whether other staff gave away free drinks. Mr Reddy reported the following day that there was no video evidence of such activity.

[25] By 28 October Mr Pathare had prepared a letter of dismissal for the Applicant. He had Mr Reddy hand deliver that letter to her while she was working behind the store counter.

[26] The letter identified seven instances of actions by the Applicant which were said to be breaches of company policy. Two of the instances involved giving free drinks to friends and were described as serious breaches directly affecting the store’s profitability.

[27] The Applicant was said to have accepted each of the seven allegations and failed to offer an apology. She was told that the seriousness of the allegations and her attitude to those allegations had led Mr Pathare to “*the inescapable conclusion*” of an irretrievable breakdown of trust and confidence. She was dismissed with 12 days notice. She was also told that “*in the meantime, if you wish to address any matters with me with regards to the allegations or the termination of your employment then you are welcome to do so*”.

[28] While I accept the Respondent's submission that its procedure should not be subject to minute or pedantic scrutiny, I find that, in the particular circumstances at the time, the following actions were not what a fair and reasonable employer would have done and are therefore unjustified:

- a. it did not provide the Applicant with proper notice of the disciplinary meeting or the opportunity to arrange a support person or a representative; and
- b. it surprised the Applicant with its list of concerns on 22 October – she called it “*an ambush*” – and then used her failure to provide considered responses as additional reasons to reach an unfavourable conclusion about her actions; and
- c. it decided to dismiss her before giving her a proper opportunity to respond to those concerns, including in light of Mr Reddy's information that his review of video footage identified no other staff giving free drinks; and
- d. Mr Pathare did not consider information that the Applicant says she gave Mr Reddy that she had a receipt showing payment made by her for one of two instances in which she was said to have given friends free drinks. He appears to have been unaware of that information until the Authority hearing.

[29] The Applicant has a personal grievance. Remedies are to be assessed.

### **Contribution**

[30] Some of the Respondent's concerns on which it founded its decision to dismiss the Applicant were matters of performance which would normally be the subject of counselling and warnings with an opportunity to improve provided before the serious consequence of dismissal was imposed in circumstances of persistent offending or inadequate progress.

[31] However some of those concerns may properly be considered as actions of the Applicant as contributing to the situation giving rise to the grievance.

[32] While the Applicant denies the allegations that she took unscheduled breaks, listened to her iPod while serving customers, and read books or magazines at the counter, this was contrary to the evidence of Ms Zhong and Mr Asefa and I accept their evidence as more likely than not to be true on those points.

[33] The allegation regarding giving free drinks to friends visiting the store is the most serious. The Applicant accepts it was a breach of a company policy of which she was aware. Staff were allowed one free hot drink on each four hour shift but were not permitted to give that drink or other free drinks to friends. However the Applicant admitted in answer to questions from the Authority that she did give free drinks to “mates” on more than the two occasions identified in the Respondent’s letter of dismissal.

[34] Mr Asefa, in answer to a question, candidly accepted that he had also given free drinks to friends at the store and knew that it was wrong to do so. His frankness gave weight to his other evidence. Ms Zhong asserted she had never done so because she did not use the hot drink entitlement when working at the store.

[35] Whatever incidents there may have been of other staff breaching the policy does not excuse such actions by the Applicant.

[36] To give away her employer’s product without charge is a taking to which she was not entitled. Her actions in doing so contributed to the situation giving rise to her grievance. It was blameworthy conduct.

[37] In combination with the other concerning conduct identified, remedies awarded are to be reduced by one third.

[38] I have not accepted the Respondent’s submission that contributing conduct of the Applicant included not participating more fully in the 22 October meeting or challenging the Respondent’s dismissal of her while working out her notice period.

[39] I have accepted that she was not properly notified of the disciplinary meeting, so the element of surprise negates her curtness and unwillingness to continue the meeting. Her reticence in those circumstances was not blameworthy conduct.

**Remedies**

[40] The Applicant has provided little evidence of lost wages.

[41] She worked her usual shifts for the Respondent during the 12 days notice period. In the fortnight following that time she was preparing for exams in her nursing degree and was not available to work. She did attend a job interview for a healthcare 'temp' agency. Shortly after her exams she went to Australia and did not return to New Zealand until January 2007. While staying with family in Australia for two months she did not work or seek work. On her return she began working occasional shifts for the healthcare agency. In April 2007 she began another part-time job in a shoe store before resuming her nursing studies in the second semester of 2007.

[42] From this evidence I cannot identify an amount of remuneration lost as a result of the grievance and accordingly cannot make an award for reimbursing any such amount.

[43] The Applicant's evidence was that she was humiliated by the circumstances of her dismissal. She alleged that other staff overheard Mr Pathare shouting at her at the end of the meeting. She was also concerned that on returning to the store with a friend after her employment ended she was spoken to in a rude and embarrassing manner by a supervisor. That latter incident, accepting that it did occur as the Applicant describes, falls outside the employment relationship.

[44] There is limited evidence on what other humiliation, loss of dignity and injury to feelings of the Applicant may have resulted from the circumstances of her dismissal.

[45] She described failing some of her nursing exams and feeling depressed, problems for which her lecturers encouraged her to seek counselling. However she accepts that those problems were not solely due to her dismissal. They did however add financial pressures that made her studies more difficult.

[46] On the basis of the evidence available to me, including the Applicant's direct evidence of her sense of humiliation at how Mr Pathare spoke to her during the disciplinary meeting, compensation under s123(1)(c)(i) of the Act is set at \$2000.

### **Holiday pay**

[47] The Applicant alleges that her final pay comprised only wages for the hours worked in the last fortnight but did not include payment for her accrued annual leave entitlement.

[48] A copy of a pay slip for the Applicant provided by Mr Pathare showed a "holiday entitlement" of 55.34 hours to 5 November 2006. However the Respondent did not produce or provide any wage and leave records confirming that this entitlement had been paid to the Applicant with her last pay after she finished work on 10 November 2006.

[49] Mr Pathare's written witness statement said that the Applicant had been paid "all her statutory entitlements" in her final pay and referred to this being confirmed by "our payroll records". However when questioned on this he was not sure about that statement and said he would have to check with the Respondent's accountant.

[50] Within 14 days of the date of this determination the Respondent is to (i) provide to the Applicant true copies of her wage and leave records for 2006, (ii) confirm whether she has or has not been paid her full statutory entitlement to holiday pay, and (iii) pay any outstanding holiday pay to the Applicant. Leave is reserved to the Applicant to apply for further orders regarding her holiday pay.

### **Costs**

[51] The Applicant had applied for legal aid at the time of the investigation meeting and her representative has since submitted a copy of a Legal Service Agency letter confirming legal aid had been granted.

[52] If there are any costs issues to address, leave is reserved for the parties to lodge memoranda within 28 days of the date of this determination.

**Summary of determination**

[53] The way in which the Respondent carried out its investigation of allegations of misconduct by the Applicant, and its subsequent decision to dismiss her, was unjustified.

[54] Conduct of the Applicant contributed to the situation giving rise to the grievance and remedies awarded to her are required to be reduced by one third.

[55] There was inadequate evidence of lost wages. None are awarded.

[56] The Applicant is awarded \$2000 (reduced to \$1333 for contribution) in compensation for hurt and humiliation under s123(1)(c)(i) of the Act.

[57] The Respondent is to rectify any shortfall in holiday pay due to the Applicant within 14 days of the date of this determination.

[58] But for the grant of legal aid, the Applicant would have been awarded \$500 in costs.

Robin Arthur  
Member of the Employment Relations Authority