

**THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 161/08
5112387**

BETWEEN YUN YAN TIAN
 Applicant

AND HOLLYWOOD BAKERY
 (HOLDINGS) LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Li Qiang, Advocate for Applicant
 David Liu, Counsel for Respondent

Investigation Meeting: 17 April 2008

Determination: 30 April 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Yun Tan Tian (“Ms Tian”) by an application lodged on 4 January 2008 claims a written warning given to her by her employer Hollywood Bakery (Holdings) Limited (“Hollywood Bakery”) is unjustifiable. She wishes the warning be withdrawn and that Hollywood Bakery apologise to her. She also claims compensation.

[2] By its statement in reply, Hollywood Bakery says that Ms Tian has not been unjustifiably disadvantaged. It says that following an investigation and having sought Ms Tian's input, it issued her a written warning dated 3 December 2007. Subsequently, it further invited her to provide her explanation at a disciplinary meeting on 21 December 2007 but Ms Tian failed to attend and has not provided any explanation for her non-attendance.

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

[4] I granted urgency to this investigation because of the continuing employment relationship problem between the parties.

The facts

[5] Ms Tian commenced employment with Hollywood Bakery in or about April 2007, I find, as a Kitchen Hand. The terms of the employment were not recorded in a written individual employment agreement.

[6] Ms Tian worked Monday to Friday 9.00am to 3.00pm.

[7] The Authority finds that Ms Tian's duties as Kitchen Hand included general cleaning, cleaning equipment, clearing dishes, washing dishes, loading the dishwasher, removing rubbish, moving supplies from storage to the kitchen, preparing vegetables and meat, and clearing tables.

[8] Initially Ms Tian was supervised by Ms Yi Lin ("Ms Lin") until Ms Lin left to go to China in November 2007. From that time, Ms Tian was supervised by Ms Yani Zhu ("Ms Zhu").

[9] In early November 2007, Ms Zhu encountered Ms Tian mopping the kitchen floor and her (Ms Tian's) ex-husband Mr Qiang Li ("Mr Li") shouting aggressively at Ms Tian. I accept Ms Zhu's evidence that Mr Li was swearing and yelling at Ms Tian. I find that Mr Li was communicating his displeasure and disagreement with the duties that Ms Tian had been performing.

[10] Ms Zhu demanded that Mr Li leave the premises and advised him that if he did not leave she would call the Police. I accept Ms Crawford's evidence and that of others that Mr Li had on previous occasions attended at the premises on Ms Tian and behaved in a similar abusive fashion causing offence to staff and customers.

[11] I accept Ms Zhu's evidence and it is confirmed by Ms Tian, that the following day Ms Tian advised Ms Zhu she would only attend to clearing dishes and taking out rubbish. She refused to perform any of the other duties she had since the commencement of her employment carried out. In particular, she refused to carry out general cleaning tasks.

[12] Ms Zhu tells the Authority she was unhappy but there was nothing she could do about the situation because she was busy preparing for the city council's inspection of the premises on 7 November 2007.

[13] The city council issued a First Notice of Non Compliance of Food Premises to Hollywood Bakery dated 20 November 2007.

[14] Ms Zhu informed a director of Hollywood Bakery Mr Cho Kin Wong ("Mr Wong") of Ms Tian's refusal to perform her full duties. On 30 November 2007 Ms Zhu advised Ms Tian that Mr Wong would be arriving at 4.00pm and that she (Ms Tian) should have Mr Li attend with her to meet with Mr Wong.

[15] Mr Wong, Ms Tian and Mr Li met at 4.00pm that day. Mr Wong asked Ms Tian why she was refusing to perform her other duties. Ms Tian said she was still attending to some cleaning tasks but continued to maintain her refusal to do any duties other than clearing dishes and removing rubbish.

[16] Mr Wong subsequently issued this letter to Ms Tian which he signed on 3 December 2007 (English is not Mr Wong's first language):-

Dear Yun Yan Tian

I have informed you that your behavior or performance has not been meeting the standards we set at Hollywood Bakery (Holdings) Limited.

I have collected relevant information detailing incidents and conversations which have taken place over the last few days.

The issues that I concern about are:

- First of all, your work and working area are not maintained to the food safety standards setup by New Zealand Federal Government.

- Secondly, you are not following the instructions of your superior.

I wish to reassure you that I will deal with this matter seriously, fairly and confidentially. I hope that you would be able to improve as soon as possible, and that I will not need to take this matter any further. Otherwise, you would be advised to leave within 2 weeks if no performance has been improved.

*Sincerely,
For and on behalf of
Hollywood Bakery (Holdings) Ltd*

[17] Mr Wong made enquiries and established that Ms Tian was continuing to refuse to perform duties other than clearing dishes and removing rubbish. On 14 December 2007 he wrote to her by letter instructing her to attend a disciplinary meeting on 21 December 2007. He wrote :-

At the meeting, I would like to discuss with you and to hear your version of events in relation to a number of serious allegations, in particular the allegation that you have failed to follow the reasonable instructions of your manager and that you have deliberately refused to carry out your employment duties as the Kitchen Hand.

At the meeting you will be given the opportunity to address the issues raised and to give an explanation.

I must emphasise that the situation is extremely serious and unless you are able to provide an acceptable explanation the company will take disciplinary action, including dismissal. You are entitled to bring a support person or representative to the meeting, and I would encourage you to do so.

[18] Ms Tian did not attend to meet with Mr Wong on 21 December 2007. She lodged her employment relationship problem in the Authority on 4 January 2008.

The merits

[19] Ms Tian is aggrieved by the written warning given to her in writing of 3 December 2007. I concentrate on resolving that problem.

[20] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[21] Ms Tian's duties were no business of her ex-husband's Mr Li. He had no place behaving inappropriately at Hollywood Bakery's premises.

[22] Ms Tian maintains she was employed as a dishwasher employed to wash dishes, clear tables and dump rubbish. Hollywood Bakery says she was employed as a Kitchen Hand with a fuller range of duties than Ms Tian maintains.

[23] Hollywood Bakery ought to have recorded the terms of Ms Tian's employment in writing. If it had done so there could be no argument now about what Ms Tian was employed to do.

[24] I find Ms Tian was employed to perform the full range of duties performed by a kitchen hand and her duties were more than just the three tasks she now maintains. Indeed Ms Tian concedes to the Authority that she stopped performing any other tasks than the three she maintains now were her job. I find that it was because of Mr Li's influence she declared she would perform a reduced range of tasks.

[25] I find that the statement in the written warning that Ms Tian's work and working area "are not maintained to the food safety standards setup by New Zealand Federal Government" was not explained to Ms Tian. I find there was no communication to her of the "food safety standards" she failed to maintain. Nor was there any discussion with her about her alleged failure.

[26] On the second stated issue of concern, I do not understand that Ms Tian was actually given an "instruction". Ms Zhu tells the Authority that Ms Tian advised she would only attend to clearing dishes and taking out rubbish. But she does not give evidence of giving any actual instruction to Ms Tian. Rather, Ms Zhu says she "was

unhappy but there was nothing she could do about the situation". I therefore conclude there never was an actual instruction to Ms Tian.

[27] The final sentence in the warning letter says after expressing a hope for improvement "as soon as possible" that "otherwise, you would be advised to leave within 2 weeks if no performance has been improved". It indicates an intention to give two weeks notice of termination in the event there was no improvement. That statement was unfortunate. I find that a fair and reasonable employer would not have made it.

The determination

[28] The warning issued to Ms Tian on 3 December 2007 for the reasons set out at paragraphs 25 - 27 above was unfair. I find that Hollywood Bakery's actions and how it acted were not what a fair and reasonable employer would have done. **The warning is unjustifiable and Ms Tian has a personal grievance.** She is entitled to remedies to settle the personal grievance.

The resolution

[29] The Authority is not empowered to order apologies.

[30] In considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Ms Tian's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[31] Ms Tian's actions were blameworthy. When she declared she would only wash dishes, clear tables and dump rubbish I find she was refusing to perform other duties she was employed to do. It was wrong of her and blameworthy to adopt such a position without consultation and discussion with her employer first. The duty of good faith required her to do so. If she had a dispute, she ought to have pursued appropriate mechanisms to resolve the matter. She did not and instead simply refused. In those circumstances I find Ms Tian's actions blameworthy and therefore

contributory. I reduce the extent of the remedies to be awarded to her.

Compensation

[32] Ms Tian claims compensation of \$2,000.00 due to emotional and psychological influence on her health and her family life. She also "demands" that Hollywood Bakery sign a formal written employment agreement. I agree that the employer ought to attend to formalising the arrangement as a matter of priority.

[33] Ms Tian wrote a letter to Hollywood Bakery on 16 December 2007. She said she disagreed with the complaints made about her and said they "[were] nothing but insulting remarks, defamation and frame-up to [her] character".

[34] I accept that she has suffered hurt and humiliation, loss of dignity and injury to her feelings. However, her evidence does not warrant an award of compensation of \$2,000.00. I award her compensation recognising the anguish her employer's unlawful actions have caused her. Having regard to her evidence and the nature of the personal grievance, I award her \$1,000.00 compensation but reduced by 20% for contribution. **I order Hollywood Bakery (Holdings) Limited to pay to Yun Yan Tian \$800.00 compensation.**

Costs

[35] As Ms Tian was not represented by professional advocate, there will be no orders for costs.

Leon Robinson
Member of Employment Relations Authority