

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 107/10
5165327**

BETWEEN DENISE ANDREA FIDDEO
BUSTAMENTE
Applicant

AND L&W LIMITED T/A CANTEEN CAFE
Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
Kevin Li, Advocate for Respondent

Investigation Meeting: 23 February 2010

Determination: 9 March 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Denise Bustamente ("Ms Bustamente") says she was unjustifiably dismissed from her employment with the respondent L&W NZ Limited t/a Canteen Café ("the Café").

[2] The parties were unable to resolve the problem between them by mediation.

The facts

[3] Ms Bustamente commenced employment with the café in March 2008 as a junior chef/baker. She worked preparing sandwiches, salads, cookies and cakes. She worked Monday to Friday each week commencing between 5.00 and 6.00am until 2.00 or 3.00pm. The terms of the employment were recorded in a written individual employment agreement ("the IEA").

[4] At a social occasion sometime around Christmas 2008, Ms Bustamente informed her manager Mr Kevin Li ("Mr Li") that she wished to travel to her native Brazil in April 2009 for a period of five weeks. At the time however, Ms Bustamente was not entitled to take annual leave. Ms Bustamente and her partner who also

worked at the café undertook to find a temporary chef/baker to cover her duties while she was away and on that basis Mr Li agreed to permit Ms Bustamente to take leave.

[5] Ms Bustamente travelled to Brazil on 16 April 2009 and was due to return to her employment on the morning of Monday 25 May 2009.

[6] While she was in Brazil Ms Bustamente sent an email to the café confirming her return to work on 25 May 2009. Her advice was acknowledged in a return email from Mr Li.

[7] On Saturday 23 May 2009, the café's manager Mr David Yu Wang ("Mr Wang") visited at Ms Bustamente's residence. Mr Li had instructed Mr Wang to visit Ms Bustamente's home to leave a message for her in her absence. Mr Wang informed Ms Bustamente's flatmate Iris to tell Ms Bustamente that business was quiet and she was to take extra unpaid leave "for the next few weeks" and if the business "could get better she would return to her position".

[8] Ms Bustamente returned to New Zealand on Sunday 26 May 2009 and was informed of the advice left for her by Mr Wang. She did not attend the workplace for work on Monday 25 May 2009 or Tuesday 26 May 2009.

[9] On Wednesday 27 May 2009 Ms Bustamente attended at the café and spoke to Mr Li. Mr Li told Ms Bustamente that business was not going well and they didn't have enough money to pay her salary so they would keep her position there for her when they had money to pay her again. Ms Bustamente said that she understood their situation and the world recession and she felt sorry for them. She said keeping her position open for her was not enough for her because she needed a job and they should give her a redundancy letter and two weeks notice or pay her for the amount of the notice period instead. There was no resolution on those matters. Ms Bustamente asked for a copy of the IEA and Mr Li said he would give it to her the next day.

[10] When she returned the next day, Mr Li asked Ms Bustamente to see her passport. She showed him her passport to prove that she had a work visa. Mr Li said he needed to talk to his lawyer before he could provide the IEA and asked her for a copy of her passport. He said that he could write a letter to Immigration New Zealand

advising that Ms Bustamente was no longer employed at the café and she would be sent back to Brazil. Ms Bustamente refused to give Mr Li a copy of her passport.

[11] Ms Bustamente returned again to talk to Mr Li but he would not provide the IEA to her and again asked for her passport. He said that if she was not happy she could leave. Ms Bustamente left and matters remained unresolved.

[12] On Monday 3 June 2009 Mr Li asked Ms Bustamente to call at the café and he would give her a redundancy letter. Ms Bustamente returned to the café with her partner. The letter said:-

Dear Denise

I refer to our discussion 27th May, 2009 and advise that unfortunately your position has become redundant due to commercial reasons. As a result your redundancy will be effective from the 18th June, 2009.

I have looked at the possibility of alternative work for which you may be suitable however there are no positions at this time. We will pay for you during notice period.

I would like to thank you for your hard work during this difficult period. Your redundancy is no reflection on you personally. It reflects the current adverse trading conditions that Canteen is experiencing. I would like provide you with a reference on request.

Yours faithfully

Kevin Li

Director Manager

I, Denise Bustamente, accept that my position as Baker has become redundant.

Denise Bustamente

[13] Ms Bustamente did not agree and refused to sign the letter as Mr Li wished. She asked if she could take the letter to the Labour Department and would sign if she was advised to. Mr Li became agitated and kept asking her to sign it. Mr Li eventually snatched the letter off Ms Bustamente and withdrew to his office. Ms Bustamente followed him and put her foot in his door asking for the letter. Mr Li refused. Ms Bustamente's partner told Mr Li not to touch Ms Bustamente or he would call the Police. Mr Li challenged him to call the police and said he would not give the letter. Ms Bustamente's partner called the police.

[14] The police arrived but did not take any action. Ms Bustamente and her partner then left.

[15] Later that same day Mr Li sent SMS text messages to Ms Bustamente "Hi Denis, start your work at 9am tomorrow". Ms Bustamente did not respond.

[16] Ms Bustamente did not return to her work but she did attend to retrieve her recipes, knives and personal effects. Not all her property was returned to her.

[17] Mr Li wrote to Ms Bustamente by letter dated 5 June 2009 as follows:-

Dear Denise

I am writing this letter to inform you that you have been unexcused absence from work on 04/06/2009, 05/06/2009 for two days. In the morning on 03/06/2009 when you came to see me at shop, I told you come back to work on 04/06/2009, And later of the day I sent a txt to you start you work next day morning. The fact, however, was that you were absence. If you couldn't have a reasonable explanation, we will take further action against your absence.

Yours sincerely

Kevin Li

Owner of Canteen Café

The merits

[18] Ms Bustamente claims she was unjustifiably dismissed. 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.

[19] I find that Ms Bustamente was dismissed. Mr Wang had visited Ms Bustamente's home on Saturday 23 May 2009 and left a message that business was quiet and she was to take extra unpaid leave "for the next few weeks" and if the business "could get better she would return to her position". That message amounted to a sending away that I find constitutes a dismissal. It is particularly concerning that this message was left for Mr Bustamente in her absence while she was out of New Zealand.

[20] Ms Bustamente had an election to make once the sending away was "visited" on her. I find that she affirmed her employer's repudiatory conduct. She visited at the

café and at her own initiative engaged with her employer. On Wednesday 27 May 2009 Mr Li told her that business was not going well and they didn't have enough money to pay her salary so they would keep her position there for her when they had money to pay her again. But Ms Bustamente did not accept that situation. She said that she understood their situation and the world recession and she felt sorry for them. But she objected that her position being kept open was not enough for her because she needed a job. In affirming the café's decision she asked for a redundancy letter and notice. These actions constitute an affirmation of the employer's repudiatory action. Ms Bustamente quite correctly regarded her employment as having been terminated at her employer's instigation.

[21] The other events that followed the dismissal are irrelevant. The café sent a text message to Ms Bustamente that she start work and it wrote a letter alleging that she had abandoned her employment. But both those events were contrived and artificial because Ms Bustamente had already been dismissed. And as I have found, she affirmed the repudiation of the contract by her employer. These actions by the employer were desperate and not genuine.

[22] The dismissal occurred on 23 May 2009 when Ms Bustamente was left a message that she was not to return to work. The dismissal was not preceded by any consultation or engagement with Ms Bustamente. The parties owed each other a duty of good faith. It was not good faith to communicate the decision to Ms Bustamente in her absence. It was not good faith to make such a decision without any prior engagement with Ms Bustamente. There was no information relevant to the decision provided to Ms Bustamente in advance of the decision being taken. The decision to end Ms Bustamente's employment in these circumstances was not fair or just. I find that a fair and reasonable employer would not have made such a decision or acted in this way towards Ms Bustamente.

The determination

[23] **I determine that the café's decision and how it acted were not what a fair and reasonable employer would have done. I therefore find that Ms Bustamente has a personal grievance for unjustifiable dismissal. She is entitled to remedies in settlement of that personal grievance.**

The resolution

[24] Having made those findings and 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 Bustamente'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. I find that Ms Bustamente did not contribute to the situation that led to her personal grievance and there is no basis to reduce either the nature or extent of any remedies to be provided to her.

Reimbursement

[25] Ms Bustamente claims two weeks wages as the notice period under the IEA. She is entitled to those two weeks wages. I award her two weeks wages being 80 hours at \$17.50 per hour in the gross sum of \$1,400.00. **L&W Limited t/a Canteen café is ordered to pay to Denise Bustamente the gross sum of \$1,400.00 as two weeks wages in lieu of notice.**

Compensation

[26] Ms Bustamente says that she always tried to help Mr Li and Mr Wang and she often worked extra hours to help the café. She says she is disappointed and never thought Mr Li and Mr Wang would treat her in such a way. I accept that Ms Bustamente has suffered hurt & humiliation as a result of the unjustifiable dismissal. Having regard to her evidence, her length of service and the nature of the personal grievance, I make a modest award of compensation in the sum of \$3,000.00. **L&W Limited t/a Canteen café is ordered to pay to Denise Bustamente the sum of \$3,000.00 as compensation.**

The costs

[27] There will be no order on costs.