

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 381/08
5111960

BETWEEN KRYSTAL DOWNEY
 Applicant

AND TEG ENTERPRISES LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Melanie Swarbrick for Applicant
 Christine Pidduck for Respondent

Investigation Meeting: 19 August 2008 at Hamilton

Submissions received: 12 September 2008 from Applicant
 2 October 2008 from Respondent

Determination: 6 November 2008

DETERMINATION OF THE AUTHORITY

[1] Until 31 October 2007 Ms Krystal Downey was employed in two part-time positions. She left one of those positions to take up what she considered to be permanent part-time work for TEG Enterprises Limited (TEG). Shortly after she commenced employment Ms Downey says she was dismissed. She claims the dismissal is unjustified and seeks remedies.

[2] TEG claims Ms Downey was employed at all times as a casual employee and denies she was dismissed.

[3] The issues for this determination:

- What was the true nature of the employment relationship – casual or permanent part-time?
- Was Ms Downey unjustifiably dismissed?

- If Ms Downey was unjustifiably dismissed what if any remedies should be awarded?

What was the true nature of the employment relationship – casual or permanent part-time?

[4] Some time near the end of August or the beginning of October 2007 Ms Downey's friend, Mr Jarred Morgan, advised Ms Downey that TEG was looking for additional employees. It was common ground at the investigation meeting that while he did not work at the restaurant regularly, all decisions regarding the employment of staff were made by Mr Harjeet Singh, the owner of the Restaurant.

[5] Ms Downey made enquiries and was invited to attend a one day training session with the then Manager, Ms Amanda Jefferson. No offer of employment was made at that stage. Not longer after Ms Downey's trial Ms Jefferson resigned from her position and left her employment at TEG. On or about 17 October the newly appointed restaurant supervisor, Mr LeRoy Hiram contacted Ms Downey and asked her if she was still interested in working for the Restaurant.

[6] Ms Downey had to give two weeks notice from her part-time supermarket position, which she did, and commenced work at the Restaurant on 31 October. Mr Hiram says in his written evidence that he was aware Ms Downey had resigned from her part-time position at the supermarket, but that he did not guarantee a minimum or a maximum number of hours of work.

[7] Ms Downey was paid cash for the hours she worked for the entire time she was employed by TEG. She was paid the rate of \$10.00 per hour. Ms Downey says she provided TEG with her bank account details on the second day of her employment, however, she continued to be paid by cash directly from the till on each day she worked.

[8] Ms Downey says she was employed to work from Wednesday until Sunday each week. She says she sat down with Mr Hiram and discussed the roster soon after she started working. Mr Harjeet Singh, managing director, denies Ms Downey was employed to work anything other than on a casual basis. He produced documents which purported to be the rosters in place during Ms Downey's employment.

[9] However, at the investigation meeting Mr Singh acknowledged that the rosters he produced to the Authority were not the rosters used in the restaurant during Ms Downey's employment. Instead they were rosters he himself had put together for the purpose of the investigation meeting.

[10] In his oral evidence at the investigation meeting Mr Hirama confirmed that he had a discussion with Ms Downey about her going on the permanent roster, however she was dismissed before the roster was put in place.

[11] During a recorded telephone conversation with Mr Hirama after Ms Downey's dismissal, Mr Hirama confirmed to Ms Downey that he believed she was rostered on an ongoing basis each week from Wednesday to Sunday inclusive.

[12] I find, on the balance of probabilities, that Ms Downey was employed with the intention that she be a permanent employee and was on a permanent roster to work from Wednesday to Sunday each week. There was no evidence to show that Ms Downey was free to accept or reject work each day, indeed the evidence shows that when she was sick on 10 and 11 November, Mr Singh was unhappy that she wasn't at work.

[13] Further, I am satisfied there was an expectation on the part of both Mr Hirama and Ms Downey, that Ms Downey had ongoing employment at TEG, and that her days of work were set for each week Wednesday to Sunday inclusive. The evidence shows Ms Downey worked Wednesday 31 October to Saturday 3 November inclusive. She then worked on the three days Wednesday 7, Thursday 8, and Friday 9 November. She was supposed to have worked Saturday and Sunday 10 and 11 November, but was sick on those days. She then returned to work on her next rostered day, which was Wednesday 14 November.

Was Ms Downey unjustifiably dismissed?

[14] I am required to examine the actions of TEG in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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.

[15] I must scrutinise TEG's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[16] On Sunday 10 November Ms Downey was feeling ill and called in sick. The next day, although she was still feeling unwell, she went into work to commence her shift, but was sent home.

[17] During her absence a number of complaints were made about the service received at the restaurant. Mr Singh was unhappy about the number of complaints and put it down to Ms Downey's absence.

[18] Mr Robin Singh (Mr Harjeet Singh's son and the overseer of the Restaurant), in his oral evidence, told me Mr Singian and Mr Hirama had advised him that Ms Downey had been unable to attend work as a result of her part-time work in a bar. In Ms Downey's absence, Mr Robin Singh had to work during the lunch trade. At the end of that shift he says he advised Mr Singian to tell Ms Downey that her services were no longer needed at that time and she would receive a call when she was needed.

[19] Ms Downey's next rostered shift was Wednesday 14 November. When she arrived at work Mr Hirama and Mr Singian advised Ms Downey that she was no longer required as she was unreliable.

[20] TEG had an obligation to seek Ms Downey's response to the reasons why it thought she should be dismissed before dismissing her. That opportunity should have followed, at the very least, notice as to the allegations against her and possible consequences if the allegations were proven. Those steps were never followed by TEG. It has therefore, failed to undertake a full and fair investigation.

[21] No fair or reasonable employer would have acted in the way TEG acted toward Ms Downey. Ms Downey's dismissal was unjustified.

If Ms Downey was unjustifiably dismissed what if any remedies should be awarded?

[22] In her statement of problem Ms Downey sought payment of lost wages and \$15,000 for hurt and humiliation.

[23] In her submissions on behalf of the applicant, Ms Swarbrick sought the payment of penalties for failures by the respondent to provide a written employment agreement or to keep accurate wage and time records, and for breaches of the Minimum Wage Act. None of these claims were set out in the statement of problem and are therefore not properly before the Authority. Submissions are not the appropriate place to raise new claims.

Lost wages

[24] On behalf of TEG, Ms Pidduck submitted that Ms Downey was paid at the minimum wage rate for the hours that she worked being \$11.25 plus \$0.90 holiday pay less PAYE tax and that this equated to her receiving \$10.00 cash per hour for each hour worked. I do not accept that as being an accurate summary of how Ms Downey's pay was calculated.

[25] At the investigation meeting original copies of slips of paper were produced which show that Ms Downey was paid \$10.00 per hour for each hour she worked, in cash. Ms Downey worked 12 hours in the week before she was dismissed, being 7-9 November inclusive. If she was paid as submitted by the respondent, at the rate of \$11.25 per hour plus holiday pay of 0.90 per hour (being \$12.15 per hour) she ought to have been paid \$145.80 gross.

[26] Using the IRD PAYE calculator, Ms Downey's net take home pay would have been \$122.17 for the three days. She was in fact paid \$120.00. On the basis of the calculations I have made, I have concluded that Ms Downey was underpaid by 0.97 cents for each hour she worked.

[27] Ms Downey gave evidence that she worked on 1 and 2 November, although there is no record of this. Mr Hirama, who signed each of the slips of paper produced to the authority, acknowledged at the investigation meeting that he added the dates and signed the papers after Ms Downey had been dismissed. There was no proper wage and time record kept of Ms Downey's hours of work. On that basis I have concluded that Ms Downey's evidence as to the days she worked is more credible than that of TEG.

[28] Ms Downey worked on average, 4.5 hours per day. I have concluded that Ms Downey worked 31 hours during her employment at TEG. TEG is ordered to pay to Ms Downey \$30.70 nett being wages due to her. TEG is also reminded of its obligation to remit the PAYE tax component of Ms Downey's wages for the entire period of her employment with TEC to the IRD.

[29] Ms Downey gave evidence of the attempts she had made to find alternative employment following her dismissal. I am satisfied that Ms Downey made suitable attempts to mitigate her loss. TEG was entering its busy period. Ms Downey was rostered to work each week a total of 5 days per week. Based on her two weeks of employment I have calculated that Ms Downey would have worked on average 4.5 hours each day. Ms Downey is to receive 12 weeks lost wages based on 22.5 hours per week calculated on the all inclusive rate of \$12.15 per hour being \$3,280.50 gross.

Compensation

[30] Ms Downey is entitled to compensation for hurt and humiliation for the manner of the dismissal. I set that at \$2,000. TEG is to pay this sum to Ms Downey pursuant to section 123 (1) (c) (i) of the Act.

Contribution

There is no question of contribution on Ms Downey's part.

Costs

[31] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to

costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Summary of orders

[32] TEG Enterprises Limited is ordered to pay to Ms Downey the following amounts within 28 days of the date of this determination:

- \$30.70 nett as arrears of wages;
- \$3,280.50 gross for lost wages as a result of the dismissal;
- \$2,000 compensation for hurt and humiliation.

Vicki Campbell
Member of Employment Relations Authority